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Medical Malpractice And The Mind-Blowing Hypocrisy Of Obamacare Repeal

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A few years ago, General Mills tricked its customers into forfeiting their legal rights to go to court if, for example, a child were poisoned by a tainted bowl of cereal. The public outcry was immediate. “How can they do that? “Why would they do that?” “What are they hiding?” Within days, the company made a smart business decision and reversed itself, restoring everyone’s rights again.

Most people will never file a lawsuit in their life. But as the public’s reaction to this incident showed, it is a bad mistake to underestimate just how strongly Americans feel about having that right — should they ever need it. It may not surprise anyone that a big corporation like General Mills would try to pull a fast one like that. But what should shock everyone is that some elected officials — including ones just sent to Washington to “fix things” — are pursuing policies that are far more drastic.

Take some of our new national leaders, who have promised to repeal and replace the Affordable Care Act. One of those people is Rep. Tom Price (R-GA), picked to be the new Secretary of Health and Human Services. As The New York Times wrote upon his selection:

In debate on the Affordable Care Act in 2009, Mr. Price railed against “a stifling and oppressive federal government,” a theme that pervades his politics. His most frequent objection to the law is that it interferes with the ability of patients and doctors to make medical decisions — a concern he will surely take with him if he wins Senate confirmation.

While ACA repeal/replace plans currently remain “a vague list of not-always-coherent ideas” (as Dean Clancy, former senior budget official in the George W. Bush

administration, recently [wrote](#)), they all share one big idea. Each ACA replacement bill would deprive every patient in America of legal rights guaranteed by their state and local governments.

Under [these plans](#), anti-patient federal law would kick in if a doctor, hospital or nursing home negligently harmed someone (say a child were blinded or nursing home patient abused). The bills vary as to how Congress would rewrite state laws to rob these patients of their rights. One common feature, advocated by Mr. Price (H.R. 2300 in the last Congress), would empower the federal government to select and issue “one size fits all” guidelines for the treatment of every patient. Yes, the “stifling and oppressive federal government” would become the sole authority for how to treat every medical condition. Doctors would be pressured to use a guideline even if, based on their clinical judgment, it is wrong for the patient. And then, if the patient is seriously harmed, the victim would have little or no recourse. Medical industry tribunals or panels would get to decide disputes without meaningful input from patients. Families wanting to have their case heard in court would face nearly impossible obstacles.

Other common provisions in ACA replacement proposals [include](#) severe “caps” on compensation for patients injured by negligent hospitals or physicians. Laws that impose caps essentially allow politicians, who have never heard a word about a case or have any idea about the depth of someone’s loss, to substitute their judgment for that of a local jury.

“How can they do that?” “Why would they do that?” “What are they hiding?”

Well, they think they *can* do it because, while professing to care about the U.S. Constitution, they really don’t. At least not all of it. For example, these laws would undermine the 7th Amendment, which preserves the right to civil jury trial. U.S. Supreme Court Chief Justice William Rehnquist once [wrote about this right](#), noting, “[T]hose who oppose the use of juries in civil trials seem to ignore [that] the founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.” (I guess tyranny, corruption and the “whim of the sovereign” seem to be all the rage again.)

Why are they doing it? Dean Clancy [explains](#),

This is one of the half-baked ideas, and unconstitutional to boot (Congress has no authority to regulate local civil justice rules). But that won't stop Republicans from pushing it, because they firmly believe damage caps reduce health care costs and thus generate budget savings.

Indeed, check out Rep. Darrell Issa (R-CA)'s [recent TV appearance](#).

This whole discussion stems from an outdated Congressional Budget Office report, now almost a decade old, suggesting that an extreme set of tort limits [would lower health care costs](#) exactly \$54 billion between 2010 and 2019. That's \$11 billion a year, or just 0.5 percent of health care costs. In 2009, I [personally met](#) with CBO about their numbers because, low as they were, they still seemed quite exaggerated. I was shocked both by wrong assumptions CBO made and by troubling facts to which they seemed indifferent (such as studies showing that more people would die). But they assured me that they were open to learning about any new studies showing their estimate to be off. Turns out, they weren't.

Since that time, study after study has shown CBO to be completely wrong, and that limiting patients' legal rights would actually [increase](#) health care costs. Dean Clancy's [article](#) describes some of these studies, too. [This](#) Kaiser Health News/Washington Post piece talks about the views of other experts. And our 2016 [studies](#), which examine insurance industry's own data, found that state limits on patients' legal rights have no impact whatsoever on insurance rates for doctors, and that in any event, medical malpractice premiums and claims per doctor are now the lowest level in four decades. *Where exactly is the crisis?*

And what are they hiding? Maybe that fact that they have no idea what they're doing. Or maybe they don't want to address an *actual* medical malpractice crisis — that is, medical errors are the [third leading cause of death in America](#). Taking away patients' rights and reducing the accountability of negligent hospitals and incompetent doctors — who already have [more legal protections for their negligence](#) than any profession in America — seems like the last thing policymakers should be doing.

Of all the reasons voters may have sent these new politicians to Washington, eliminating constitutional rights, which have been around since our nation's founding, isn't one of

them. Clearly, our newly elected leaders haven't yet suffered the wrath of the people on this point. You saw [what happened](#) when the House tried to abolish its ethics office. Wait until the public hears about this.