
**SOLVING AMERICA’S LONG-TERM CARE
FINANCING CRISIS: FINANCING
UNIVERSAL LONG-TERM CARE
INSURANCE WITH A MANDATORY
FEDERAL INCOME TAX SURCHARGE THAT
INCREASES WITH AGE**

Zachary Anderson

As America’s elderly population rapidly grows, the number of elders that will require Long-Term Care (“LTC”) will correspondingly increase. Many elders lack the financial resources to pay for such care, and existing government programs that currently pay for LTC are underfinanced. While solutions have been proposed, no proposed solution has solved the core issue: how will millions of elders pay for LTC? It is imperative that a viable LTC financing reform solution be introduced and implemented. This Note analyzes a few of the many proposed solutions, establishes a framework that a viable solution should satisfy, and finally proposes a financing solution that could solve the LTC financing crisis.

I. Introduction

At times irrational and other times pragmatic, the American baby-boomer generation—a societal group currently consisting of approximately seventy-five million individuals¹—has undeniably altered the world’s cultural, social, and economic landscape in a positive

Zachary T. Anderson is the Internet Editor 2017-2018, Member 2016-2017, *The Elder Law Journal*; J.D. 2018, University of Illinois, Urbana-Champaign; Bachelor of Liberal Arts Degree, 2012, University of Illinois, Springfield.

1. See, e.g., Richard Fry, *Millennials Overtake Baby Boomers as America’s Largest Generation*, PEW RES. CTR.: FACT TANK (Apr. 25, 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>.

manner.² Those positive contributions were largely promulgated by baby-boomers during their youth, as their intensity and idealistic social activism sparked fierce societal debate.³

Today, baby-boomers largely refrain from the headline garnering social activism that defined the generation during the 1960s and 1970s.⁴ Yet even without intense social activism, the baby-boomers have indirectly sparked another fierce social debate in recent years: Who should pay for baby-boomers to receive healthcare in their elder years?

“Healthcare” is a broad term,⁵ and there is not enough space in this Note to completely dissect funding issues pertaining to or encompassing all healthcare subsets. Accordingly, this Note will focus on financial reform of one important healthcare subset: long-term care (“LTC”). LTC refers to situations wherein “a person requires someone else to help him [or her] with his [or her] physical or emotional needs over an extended period of time.”⁶ Many are likely surprised to discover that nearly 70% of baby-boomers will require assistance with their physical or emotional needs over an extended period of time

2. See Patrick Wilson, *Activism in Retirement: Boomers*, ACTIVATE MEDIA, <http://www.activatemedia.org/2016/03/24/activism-in-retirement-boomers/> (last visited Oct. 16, 2017) (“The Baby Boom Generation has contributed abundantly to social change in their lifetimes and have reason to be proud of their historical accomplishments. Civil Rights, Anti-War, LGBT, Women’s Rights and the environment are all areas they made major progress with over 5 decades.”); see also Michael Cook, *27 Amazing Things Baby Boomers Have Done For Humanity*, MERCATORNET (July 31, 2012), https://www.mercatornet.com/articles/view/27_amazing_things_baby_boomers_have_done_for_humanity/11044.

3. See generally Veronica Faison, *Activism vs Slactivism*, STETSON UNIV. TODAY (Nov. 27, 2015), <http://www.stetson.edu/today/2015/11/activism-vs-slactivism/> (“Born with fervor for social progress, [baby-boomers] were children of protest: noble activists and defenders of social justice . . .”).

4. *Id.* (“Ironically, the same Baby Boomers who dedicated their youth to social progress have transformed into the older, conservative contrarians they vowed never to become.”).

5. See, e.g., Health Atchison, *Baby Boomers—A Healthcare Crisis Nears*, EXPERIENCE: HEALTHCARE, https://www.experience.com/alumnus/article?channel_id=biotech_pharma_healthcare&source_page=editor_picks&article_id=article_1175788214988 (last visited Oct. 16, 2017) [hereinafter Atchison].

6. See e.g., *Healthcare*, BLACK’S LAW DICTIONARY (10th ed. 2014), available at Westlaw BLACKS (defining “healthcare” as “[c]ollectively, the services provided, by medical professionals, to maintain and restore health”).

7. Thomas Day, *About Long Term Care: What is Long Term Care?*, NAT’L CARE PLANNING COUNCIL, https://www.longtermcarelink.net/eldercare/long_term_care.htm (last visited Oct. 16, 2017) [hereinafter *What is Long Term Care?*].

during their elder years.⁸ But despite that statistic, a large percentage of baby-boomers are not financially prepared for the possibility of eventually requiring some form of LTC.⁹

That lack of financial preparation—aptly referred to by some as “the LTC financing crisis”—has gravely concerned American policymakers and commentators.¹⁰ In fact, one commentator has direly warned: “Our current system of [LTC] is fragmented, inadequate, and inequitable, often leaving the elderly, individuals with disabilities, and family members who care for them economically vulnerable.”¹¹

Lack of individual financial preparation and the economic vulnerability of those that may require LTC are two major reasons why many policymakers and commentators have proposed a variety of different solutions that aim to solve the LTC financing crisis.¹² Before discussing those proposed solutions, Part II of this Note explains what LTC is. To achieve that, Part II first explores the costs associated with three major types of LTC: at-home LTC and LTC provided in either an assisted living facility or nursing home. After exploring various LTC costs, Part II describes three common ways that elderly individuals currently pay for LTC: Medicare, Medicaid, and voluntary private LTC insurance.

Subsequently, Part III analyzes just a few different proposals that aim to solve the LTC financing crisis. First, expanding Medicare to cover a larger percentage of Americans will be considered. Second, private LTC insurance coverage expansion is studied. Third, the failed Community Living Assistance Services and Supports (CLASS) Act is

8. U.S. DEP'T OF HEALTH AND HUM. SERVS., *The Basics*, LONGTERMCARE.GOV, <https://longtermcare.acl.gov/the-basics/> (last visited Oct. 16, 2017) [hereinafter *The Basics*].

9. Associated Press, *Long-Term Care in America: Americans' Outlook and Planning for Future Care*, NORC AT THE UNIV. OF CHI. 1, 15 (“Most Americans age 40 and older report doing little or no long-term care planning.”) [hereinafter Associated Press].

10. See RUSSELL SAGE FOUNDATION, UNIVERSAL COVERAGE OF LONG-TERM CARE IN THE UNITED STATES: CAN WE GET THERE FROM HERE? 218 (Douglas A. Wolf & Nancy Folbre eds. 2012) (“Discussions of the impact of populating aging span the political and cultural spectrum and often deploy the word ‘crisis.’”) [hereinafter RUSSELL SAGE FOUNDATION]; Diane Calmus, *The Long-Term Care Financing Crisis*, HERITAGE FOUN. (Feb. 6, 2013), <http://www.heritage.org/health-care-reform/report/the-long-term-care-financing-crisis>; Jeffrey Lewis, *America has a Long-Term Care Crisis*, HEALTHCARE FIN. NEWS (May 1, 2015), <http://www.healthcarefinancenews.com/blog/america-has-long-term-care-crisis>; but see RUSSELL SAGE FOUNDATION, *supra* note 10, at 218 (“Yet neither the American public nor its political leaders seem to have adopted a ‘crisis’ mentality.”).

11. RUSSELL SAGE FOUNDATION, *supra* note 10, at 217.

12. See *infra* Part III.

scrutinized to determine why the Obama Administration decided to scrap the idea. Fourth, various mandatory public LTC insurance proposals are evaluated.

Based in part on desirable and undesirable characteristics of the four discussed proposals, Part IV recommends four parameters that should be incorporated into any proposal that aims to solve the LTC financing crisis. First, a proposed LTC financing crisis solution must be fair among all age demographics. This is required to avoid the perception of an “elder bailout,” while simultaneously preventing “senior revolt.” Second, the proposal must be affordable and equitable for individual Americans. This is necessary so the proposal does not needlessly overburden taxpaying Americans. Third, the proposal must include extensive education designed to teach the American public about LTC itself and LTC financing. Fourth, participation in any LTC financing solution must be mandatory for every American.

Finally, Part IV recommends adoption of an LTC financing proposal that satisfies all four of those proposed parameters: public LTC insurance funded by a mandatory federal income tax surcharge that increases with age. After discussing that recommended LTC financing crisis solution, Part V concludes this Note.

II. Background

America’s elderly population is expected to more than double from 46.2 million in 2014 to 98 million in 2060.¹³ Unfortunately, approximately 70% of those elders will likely require LTC in some form.¹⁴

Although an elderly individual is statistically more likely to require LTC than not require LTC, many Americans are not financially prepared to pay for such care.¹⁵ That lack of preparation can partially be blamed on a widespread erroneous belief that the government will pay for an elder to receive LTC.¹⁶ A misconception of that magnitude

13. ADMIN. ON AGING, *A Profile of Older Americans: 2015*, U.S. DEP’T OF HEALTH AND HUMAN SERVICES: ADMIN. FOR COMMUNITY LIVING (May 24, 2016), <https://www.acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2015-Profile.pdf>.

14. *The Basics*, *supra* note 8.

15. Associated Press, *supra* note 9, at 15 (“Most Americans age 40 and older report doing little or no long-term care planning.”).

16. Howard Gleckman, *Should Medicare Add A Long-Term Care Benefit?*, FORBES: PUBLICHEALTH (Apr. 15, 2016), <http://www.forbes.com/sites/howardgleckman/2016/04/15/should-medicare-add-a-long-term-care-benefit/#2547eb5030c8> (“Public opinion surveys show that most Americans incorrectly think Medi-

insinuates that many Americans lack a basic understanding of LTC. It is thus imperative to first discuss basic principles of LTC before discussing ways to solve the LTC financing crisis. Accordingly, Section A defines and discusses the costs associated with three basic types of LTC: at-home LTC, LTC rendered in an assisted living facility, and LTC received by a nursing home patient. Section B then describes three ways that the elderly may currently pay for those three types of LTC without being forced to solely rely on out-of-pocket resources: Medicare, Medicaid, and voluntary private LTC insurance.

A. Types of LTC

LTC is often distinguished based upon duration of the care provided,¹⁷ meaning that LTC can broadly be classified as either “temporary LTC” or “ongoing LTC.”¹⁸ “Temporary LTC” consists of care lasting only for a few weeks or months.¹⁹ Examples of temporary LTC include recovery or rehabilitation from surgery, brief hospital stays, illness, or injury.²⁰ In contrast, “ongoing LTC” generally lasts for many months or years.²¹ This type of LTC typically includes treatment for chronic medical conditions, permanent disabilities, dementia, or just a general long-term need for supervision and aid with activities of daily living.²²

Durational differences aside, both categories of LTC can often be rendered at the recipient’s home, in an assisted living facility, or in a nursing home.²³ Because those are the three most popular forms of LTC, the functionality and costs associated with each are analyzed in subsections below.

care pays for long-term supports and services (LTSS). It does not.”) [hereinafter Gleckman].

17. *What is Long Term Care?*, *supra* note 7.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (“Activities of daily living (ADL) are routine activities that people tend [to] do every day without needing assistance”); *Activities of Daily Living—ADL*, INVESTOPEDIA, <http://www.investopedia.com/terms/a/adl.asp> (last visited Oct. 16, 2017) (listing the six basic types of ADL: eating, bathing, dressing, toileting, transferring (walking) and continence).

23. See Richard L. Kaplan, *Retirement Planning’s Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 411–16 (2007) (providing a comprehensive analysis of LTC that is rendered at-home, in assisted living facilities, and in nursing homes) [hereinafter Kaplan].

1. AT-HOME LTC

At-home LTC refers to situations wherein LTC services are provided to the recipient in their primary residence.²⁴ This type of LTC is considered the least disruptive to the patient,²⁵ which likely accounts for why at-home LTC is the most common type of LTC.²⁶

At-home LTC can be rendered by informal or skilled caregivers.²⁷ Informal caregivers—often a recipient’s spouse or a child—typically receive no formal compensation from the patient.²⁸ Nonetheless, at-home LTC rendered by an informal caregiver is rarely expense-free because recipients often must purchase supplies, medications, hospital equipment, and home modifications.²⁹

Unlike informal caregivers, skilled caregivers are compensated.³⁰ This compensation is generally based on factors such as the primary caregiver’s job title, extent of care provided, and the state in which services are rendered.³¹ Often, recipients of at-home LTC that desire a skilled caregiver choose between hiring a home health aide or certified nursing assistant.³² Home health aides typically charge between \$10 and \$25 per hour, while nurses generally charge between \$70 and \$100 per hour.³³ Because many elders have not financially prepared for the prospect of requiring LTC, some elders cannot afford to pay a skilled caregiver even \$10 per hour. Thus, those elders may be forced to forego hiring a skilled at-home LTC provider even if such care is crucial to an elder’s wellbeing.³⁴

24. U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., *What’s Home Health Care?*, MEDICARE.GOV, <https://www.medicare.gov/what-medicare-covers/home-health-care/home-health-care-what-is-it-what-to-expect.html> (last visited Oct. 16, 2017).

25. Kaplan, *supra* note 23, at 410.

26. See, e.g., *What is Long Term Care?*, *supra* note 7 (estimating that at-home care accounts for 66.9% of all LTC rendered to the elderly).

27. *Id.* (referring to “private caregivers” as “formal caregivers”).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Frequently Asked Questions: What is the Difference Between “Skilled” and “Unskilled” Medical Care?*, MAXIM HEALTHCARE SERVS., <https://www.maximhomecare.com/faqs/1519/> (last visited Oct. 16, 2017). See also Ellie Williams, *Home Health Aide vs. CNA*, HOUS. CHRON., <http://work.chron.com/home-health-aide-vs-cna-13438.html> (last visited Oct. 16, 2017) (“The primary difference [between home health aides and certified nursing assistants] lies in the level of training required and the type of care they can provide without supervision from a doctor or nurse.”).

33. *Id.*

34. See, e.g., Kay Paggi, *My Parents Require 24 Hour Care, But We Can’t Afford to Hire Someone. What Should I Do?*, CARING.COM, <https://www.caring.com/>

2. ASSISTED LIVING FACILITIES

An assisted living facility is a “residential facility that provides room, board, and 24-hour personal care to individuals with [LTC] needs.”³⁵ This type of LTC is particularly suited for elders who desire to remain relatively autonomous and independent, but have needs that cannot adequately be met with at-home LTC.³⁶ Assisted living facility residents can remain relatively autonomous and independent because the LTC provided in assisted living facilities is “rather basic.”³⁷ Autonomy and independence is encouraged since assisted living residents often live in private or semi-private apartments contained within the facilities.³⁸

Depending on factors such as apartment amenities, an assisted living facility resident may pay anywhere between \$1,500 and \$3,500 per month for LTC.³⁹ Nationwide, the government has estimated a private one-bedroom apartment in an assisted living facility to average \$3,628 per month.⁴⁰ Using those government estimates, an elder that stays in a private one-bedroom apartment at an assisted living facility for two years—which is at the low end of the average length of stay⁴¹—could expect to incur charges totaling \$87,072.

questions/our-mom-and-dad-now-require-someone-being-with-them-24-7 (last visited Oct. 16, 2017).

35. *Long-Term Care Insurance: Claims Glossary*, JOHN HANCOCK, <https://www.johnhancockinsurance.com/long-term-care/claims-glossary.aspx> (last visited Oct. 16, 2017) [hereinafter *Claims Glossary*].

36. Kaplan, *supra* note 23, at 413.

37. *Id.*

38. Family Care Am., *The Basics of Assisted Living*, NAT’L CAREGIVERS LIBR., <http://www.caregiverslibrary.org/caregivers-resources/grp-care-facilities/hsgrp-assisted-living-facilities/the-basics-of-assisted-living-article.aspx> (last visited Oct. 16, 2017) [hereinafter Family Care Am.].

39. *Assisted Living Today, What is “Assisted Living” and How Much Should it Cost?*, ASSISTED LIVING TODAY (Jan. 10, 2017), <http://assistedlivingtoday.com/p/assisted-living/> (last updated May 29, 2017).

40. U.S. DEP’T OF HEALTH AND HUM. SERVS., THE COSTS OF CARE, LONGTERMCARE, <https://longtermcare.acl.gov/costs-how-to-pay/costs-of-care.html> (last visited Oct. 16, 2017) [hereinafter *Costs of Care*].

41. Family Care Am., *supra* note 38.

3. NURSING HOMES

A nursing home is “[a] licensed facility that provides 24-hour-per-day room and board, nursing care and personal services.”⁴² This type of LTC is particularly advantageous for individuals with acute illness or injury that desire to recover in a non-hospital environment.⁴³

Due to the prevalence of patients with acute illness or injury, qualified nursing personnel actively work at nursing homes twenty-four hours per day, seven days a week.⁴⁴ In addition to providing around the clock care, nursing homes must comply with regulations—“operational requirements”—that assisted living facilities are not subject to.⁴⁵ These requirements make nursing homes more expensive to operate, which of course makes nursing homes more expensive for LTC recipients to live in than assisted living facilities.⁴⁶

In fact, in 2010 the average cost, for a semi-private room in a nursing home cost \$205 per day.⁴⁷ Meanwhile, the average cost for a private nursing home room, was \$229 in 2010.⁴⁸ Consequently, an elder could expect to pay between \$6,000 and \$7,000 per month for LTC rendered in a nursing home in 2010.⁴⁹

B. Ways that Elders May Currently Pay for LTC

Section A highlighted that LTC can be very expensive for individuals depending upon the duration and type of LTC required.⁵⁰ For example, although at-home LTC provided by an informal caregiver may be relatively inexpensive, primary caregivers can quickly become expensive.⁵¹ Meanwhile, LTC rendered in an assisted living facility can cost elders upwards of \$3,500 per month.⁵² More drastically, an elder

42. *Claims Glossary*, *supra* note 35.

43. Thomas Day, *About Nursing Homes*, NAT'L CARE PLAN. COUNCIL, https://www.longtermcarelink.net/eldercare/nursing_home.htm (last visited Oct. 16, 2017).

44. Kaplan, *supra* note 23, at 415.

45. *Id.* at 416.

46. *See Costs of Care*, *supra* note 40 (providing that a private room in a nursing home averages \$7,698 per month whereas a one-bedroom unit in an assisted living facility costs \$3,628 per month on average).

47. *Id.*

48. *Id.*

49. *Id.*

50. *See generally* Elliot Raphaelson, *Long-Term Care is Expensive, so Know Your Options*, CHI. TRIB. (Dec. 31, 2013), http://articles.chicagotribune.com/2013-12-31/business/sns-201312311800--tms--savingsgctnzy-a20131231-20131231_1_care-insurance-long-term-care-ltc-benefits.

51. *See supra*, Part II, Section A.1.

52. *See id.* at Part II, Section A.2.

receiving LTC in a nursing home could expect to pay between \$6,000 and \$7,000 per month in 2010.⁵³

Fortunately for elders, there are ways to avoid paying those LTC costs out-of-pocket.⁵⁴ Three of the most common ways elders avoid paying for LTC out-of-pocket include Medicare, Medicaid, and private LTC insurance.⁵⁵ Due to the popularity of the three payment options, the following three subsections will individually examine LTC coverage provided by Medicare, Medicaid, and private LTC insurance.

1. MEDICARE'S LTC COVERAGE

Medicare is a federal insurance program that provides health insurance to qualifying members.⁵⁶ Qualifying for Medicare is simple for most elders: Americans aged sixty-five and older are eligible for Medicare if employment requirements, which are relatively easy to meet are satisfied or if the applicant is a former or current spouse of a qualified individual.⁵⁷

Perhaps because so many elderly Americans qualify for Medicare,⁵⁸ many Americans assume that Medicare covers all or most LTC

53. See *id.* at Part II, Section A.3.

54. See *e.g.*, *Paying for Long-Term Care*, NIH NAT'L INST. ON AGING, <https://nihseniorhealth.gov/longtermcare/payingforlongtermcare/01.html> (last visited Dec. 7, 2017) (containing a list of ways to pay for LTC including personal funds, Medicare, Medicaid, Veterans' benefits, Older Americans Act programs, LTC insurance, reverse mortgages, life settlements, annuities, and trusts).

55. See generally James Gau, *The 5 Ways to Pay for Long Term Care*, LAWINGO, <https://www.lawdingo.com/articles/8/the-5-ways-to-pay-for-long-term-care/> (last visited Oct. 16, 2017) (providing that the five ways to pay for long-term care are Medicare, long-term care insurance, Veteran's administration benefits, private pay, and Medicaid).

56. *What's Medicare?*, MEDICARE.GOV, <https://www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/whats-medicare/what-is-medicare.html> (last visited Oct. 16, 2017) ("Medicare is a federal health insurance program for people who are 65 or older, certain younger people with disabilities, and people with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a transplant, sometimes called ESRD).") [hereinafter *What's Medicare?*].

57. 42 U.S.C. §1395c (2018); see also *Under What Conditions Would My Spouse's Work History Qualify Me for Premium-Free Part A?*, MEDICARE INTERACTIVE, <https://www.medicareinteractive.org/get-answers/how-original-medicare-works/original-medicare-cost-overview/under-what-conditions-would-my-spouses-work-history-qualify-me-for-premium-free-part-a> (last visited Oct. 16, 2017); Patricia Barry, *Do You Qualify for Medicare?*, AARP: MEDICARE & MEDICAID (Mar. 2016), <http://www.aarp.org/health/medicare-insurance/info-04-2011/medicare-eligibility.html> [hereinafter Barry].

58. See THE BDS. OF TRS., FED. HOSP. INS. AND FED. SUPPLEMENTARY MED. INS. TR. FUNDS, 2016 ANNUAL REPORT, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/Downloads>

costs incurred by qualified elders.⁵⁹ With regards to assisting living facilities, that assumption is wrong: Medicare will never pay for LTC in an assisted living facility.⁶⁰

Although Medicare will not pay for an elder to live in an assisted living facility, Medicare will pay for at-home LTC “for a limited time when [a] doctor says [at-home LTC is] medically necessary to treat an illness or injury.”⁶¹ These benefits are not comprehensive as twenty-four-hour at-home care, homemaker services, or personal care is not included.⁶²

Whereas Medicare does pay for certain home health services, there are additional requirements—such as a need for “skilled care” and not simply “custodial care”⁶³—an applicant must satisfy before qualifying for Medicare’s nursing home LTC coverage.⁶⁴ If skilled care

/TR2016.pdf (“In 2015, Medicare covered 55.3 million people: 46.3 million aged 65 and older . . .”).

59. See Gleckman, *supra* note 16 (“Public opinion surveys show that most Americans incorrectly think Medicare pays for long-term supports and services (LTSS). It does not.”).

60. *If I Have Medicare, How Can I Get Help Paying For My Long Term Care Needs?*, MEDICARE INTERACTIVE, <https://www.medicareinteractive.org/get-answers/filling-gaps-in-medicare/understanding-long-term-care-insurance/if-i-have-medicare-how-can-i-get-help-paying-for-my-long-term-care-needs> (last visited Oct. 16, 2017).

61. 42 U.S.C. §1395 (2018); U.S. Dep’t of Health & Human Services, *Medicare*, ADMIN. ON AGING, <http://longtermcare.gov/medicare-medicaid-more/medicare/> (last visited Oct. 16, 2017) [hereinafter *Medicare*]; *Home Health Services*, MEDICARE.GOV <https://www.medicare.gov/coverage/home-health-services.html> (last visited Oct. 16, 2017) (Covered at-home services include “[i]ntermittent skilled nursing care (other than just drawing blood)” as well as “[p]hysical therapy, speech-language pathology, [and] continued occupational therapy services.”) [hereinafter *Home Health Services*].

62. *Home Health Services*, *supra* note 61.

63. See generally *id.*; see also *Medicare Doesn’t Cover Long-Term Nursing Home Care*, CTR. FOR MEDICARE ADVOC., <http://www.medicareadvocacy.org/18-medicare-doesnt-cover-long-term-nursing-home-care/> (last visited Oct. 16, 2017) (“To be covered by Medicare, the patient must need and receive daily skilled nursing and/or therapy. It’s not unusual for people to be told they don’t meet this standard, even when they do.”).

64. *Medicare*, *supra* note 61 (providing that in order to receive long-term care coverage in an assisted living facility or a nursing home, the Medicare recipient must “have had a recent hospital stay of at least three days,” must be “admitted to a Medicare-certified nursing facility within 30 days of [their] prior hospital stay,” and must require “skilled care . . .”); see also *Custodial Care vs. Skilled Care*, CTRS. FOR MEDICARE AND MEDICAID SERVS., [https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Downloads/infograph-CustodialCarevsSkilledCare-\[March-2016\].pdf](https://www.cms.gov/Medicare-Medicaid-Coordination/Fraud-Prevention/Medicaid-Integrity-Education/Downloads/infograph-CustodialCarevsSkilledCare-[March-2016].pdf) (last visited Mar. 9, 2017) (providing that skilled care refers to “medically necessary care that can only be provided by or under the supervision of skilled or licensed medical personnel” and generally includes “physical therapy, wound care, intravenous injections, catheter care, and more”) “Additionally, covered at-home services include

is indeed required and an elder otherwise qualifies for the program, Medicare will only completely pay for a recipient to receive “skilled care” for twenty days.⁶⁵ From day 21 until day 100, the individual must pay their own expenses, up to a predetermined amount, and then Medicare covers costs in excess of that predetermined amount.⁶⁶ After 100 days, Medicare stops paying any nursing home benefits.⁶⁷

Because of Medicare’s lack of assisted living benefits and otherwise limited LTC coverage—especially nursing home benefits⁶⁸—some elders may consider purchasing Medicare Supplemental Insurance (“Medigap”).⁶⁹ Medigap is essentially a form of private insurance that can occasionally be used to pay for services not covered by Medicare.⁷⁰

Since one purpose of Medigap is to cover essential services not covered by Medicare⁷¹ and because LTC is not expansively covered by Medicare,⁷² an elder may assume they can simply purchase Medigap to pay for any potential LTC needs that Medicare might not provide; however, that assumption is erroneous as even the most expansive Medigap plans refuse to provide comprehensive LTC.⁷³

Therefore, although many believe that Medicare will pay for LTC,⁷⁴ Medicare’s LTC coverage is extremely limited.⁷⁵ Furthermore,

“[i]ntermittent skilled nursing care (other than just drawing blood)” as well as “[p]hysical therapy, speech-language pathology, [and] continued occupational therapy services. In contrast, custodial care pertains to “any non-medical care that can reasonably and safely be provided by non-licensed caregivers.” Generally, custodial care “[i]nvolves help with daily activities like bathing and dressing. In some cases where care is received at home, care can also include help with household duties such as cooking and laundry.” *Id.*

65. *Medicare*, *supra* note 61.

66. *Id.*

67. *Id.*

68. See, e.g., U.S. CTRS. FOR MEDICARE AND MEDICAID SERVS., *Long-term Care*, <https://www.medicare.gov/coverage/long-term-care.html> (“Medicare doesn’t cover long-term care (also called custodial care), if that’s the only care you need. Most nursing home care is custodial care.”) [hereinafter *Long-term Care*].

69. Kaplan, *supra* note 23, at 421–22.

70. *What’s Medicare Supplemental Insurance (Medigap)?*, MEDICARE.GOV, <https://www.medicare.gov/supplement-other-insurance/medigap/whats-medigap.html> (last visited Oct. 16, 2017) (“A Medicare Supplemental Insurance (Medigap) policy, sold by private companies, can help pay some of the health care costs that Original Medicare doesn’t cover, like copayments, coinsurance, and deductibles. Some Medigap policies also offer coverage for services that Original Medicare doesn’t cover . . .”) [hereinafter *What’s Medigap?*].

71. *Id.*

72. See *Long-term Care*, *supra* note 68.

73. *What’s Medigap?*, *supra* note 70 (“Medigap policies generally don’t cover long-term care, vision or dental care, hearing aids, eyeglasses, or private-duty nursing.”).

74. Gleckman, *supra* note 16.

provision that can temporarily or permanently disqualify an applicant from receiving Medicaid if assets are disposed of or transferred below market value specifically to qualify for Medicaid.⁸⁵

If the income and asset eligibility requirements are satisfied and an elder otherwise qualifies for Medicaid, an elder must also meet functional requirements.⁸⁶ This essentially requires the applicant to undergo an assessment by a medical specialist to determine if the individual can perform “Activities of Daily Living” on their own or whether the elder requires assistance from another person.⁸⁷

If those functional, financial, and other eligibility requirements are satisfied, qualifying elders will be pleased to discover that Medicaid’s LTC coverage is generally much more expansive than Medicare.⁸⁸ In the context of at-home LTC, Medicaid will pay for “home and community-based services for people who would need to be in a nursing home if they did not receive the home care services.”⁸⁹ Moreover, unlike Medicare, Medicaid’s at-home programs typically even covers custodial care.⁹⁰

Most Medicaid plans also pay for elders to receive LTC in a Medicaid-certified nursing home.⁹¹ But despite paying for nursing

85. Deficit Reduction Act of 2005 § 6011, Pub. L. No. 109-171, 120 Stat. 4; *Medicaid’s Asset Transfer Rules*, ELDER LAW ANSWERS, <http://www.elderlawanswers.com/medicaids-asset-transfer-rules-12015> (last visited Oct. 16, 2017); see also *Dokos v. Miller*, 517 F. Supp. 1039, 1041 (N.D. Ill. 1981) (providing that Illinois—like federal law—treats involuntary and voluntary asset transfers alike when an applicant is attempting to qualify for Medicaid).

86. Marlo Sollitto, *Qualifying for Medicaid to Pay for Long-Term Care*, AGINGCARE (Jan. 6, 2017), <https://www.agingcare.com/articles/medicaid-and-long-term-care-133719.htm>.

87. *Id.* (“[Activities of Daily Living] include “bathing, dressing, using the toilet, transferring (to or from bed or chair), caring for incontinence, and eating.”).

88. See *What’s the Difference Between Medicare and Medicaid in the Context of Long-Term Care?*, ELDER LAW ANSWERS (Mar. 16, 2016), <http://www.elderlawanswers.com/whats-the-difference-between-medicare-and-medicicaid-in-the-context-of-long-term-care-14738> (providing some differences between Medicaid and Medicare’s long-term care coverage, such as “Medicaid covers nursing home care, while Medicare, for the most part, does not”) [hereinafter *What’s the Difference*].

89. U.S. Dep’t of Health and Hum. Servs., *Medicaid Long-term Care Services*, ADMIN. ON AGING, <https://longtermcare.acl.gov/medicare-medicicaid-more/medicaid/medicaid-long-term-care-services.html> (last visited Oct. 16, 2017) (providing that care permitting an elder to remain in their home includes “personal care services, case management, and help with laundry and cleaning”).

90. *Medicaid’s Home Care Benefits: Eligibility, Waivers & Application Information*, PAYING FOR SENIOR CARE, (May 2017), <https://www.payingforseniorcare.com/medicaid-waivers/home-care.html>; see *Long-term Care*, *supra* note 68.

91. *Nursing Facilities*, MEDICAID.GOV, <https://www.medicicaid.gov/medicaid/ltss/institutional/nursing/index.html> (last visited Oct. 16, 2017) (“Medicaid cov-

home care, some Medicaid plans do not pay for an individual to receive LTC in an assisted living facility.⁹² Nonetheless, many states have created strategies that “help Medicaid recipients defray the cost of assisted living.”⁹³ Those strategies theoretically save states’ money since nursing homes are generally more expensive than assisted living facilities.⁹⁴ Additionally, an elder seeking LTC might choose to bypass assisted living facilities in favor of a more expensive nursing home since Medicare will pay for the nursing home but will not cover a stay in an assisted living facility.

In sum, Medicaid’s LTC coverage is generally more expansive than Medicare’s LTC coverage.⁹⁵ However, due to strict eligibility requirements and the fact that “Medicaid . . . was never intended to cover [LTC] for everyone[,]”⁹⁶ elderly individuals, or baby-boomers that will shortly become elders, may consider an alternative to government funded LTC coverage programs: private LTC insurance.⁹⁷

3. PRIVATE LTC INSURANCE COVERAGE

Private LTC insurance is “a type of insurance developed specifically to cover the costs of nursing homes, assisted living, home health care, and other [LTC] services.”⁹⁸ Private LTC insurance is designed to cover LTC so that the policyholder does not have to rely on Medicaid, Medicare, or out-of-pocket spending to pay for LTC should the need

erage of Nursing Facility Services is available only for services provided in a nursing home licensed and certified by the state survey agency as a Medicaid Nursing Facility (NF).”).

92. *Medicaid’s Benefits for Assisted Living Facility Residents*, ELDER LAW ANSWERS (May 27, 2016), <http://www.elderlawanswers.com/medicaids-benefits-for-assisted-living-facility-residents-15627>.

93. *Id.*

94. Compare *supra* Part II, Section A.3., with *supra* Part II, Section A.2.

95. *What’s the Difference*, *supra* note 88 (providing some differences between Medicaid and Medicare’s long-term care coverage, such as “Medicaid covers nursing home care, while Medicare, for the most part, does not”).

96. Anna Gorman & Barbara Feder Ostrov, *Medicaid Safety Net Stretched to Pay for Seniors’ Long-Term Care*, NPR (Aug. 3, 2016, 9:01 AM), <http://www.npr.org/sections/health-shots/2016/08/03/488385286/medicaid-safety-net-stretched-to-pay-for-seniors-long-term-care>.

97. Teresa Mears, *9 Factors to Consider Before Buying Long-Term Care Insurance*, U.S. NEWS & WORLD REP. (Sept. 1, 2015, 12:39 PM), <http://money.usnews.com/money/personal-finance/articles/2015/09/01/9-factors-to-consider-before-buying-long-term-care-insurance>.

98. Marlo Sollito, *What is Long-Term Care Insurance*, AGINGCARE, <https://www.agingcare.com/articles/definition-of-long-term-care-insurance-143436.htm> (last visited Oct. 16, 2017).

arise.⁹⁹ Purchasing a LTC insurance policy from a qualified broker, financial planner, or insurance agent is a voluntary decision.¹⁰⁰ Qualifying for a plan is relatively simple, though some with pre-existing conditions may be disqualified or be forced to pay much higher rates than otherwise healthy individuals.¹⁰¹

Once a policy is purchased, the policyholder will receive a “daily benefit amount” if LTC is required.¹⁰² The daily benefit amount “is really a maximum benefit,” which essentially means that the policyholder does not pay any money out-of-pocket towards their LTC costs, assuming their daily LTC expenses are less than their daily benefit amount.¹⁰³

Typical maximum daily benefit amounts range from \$50 to \$250 per day,¹⁰⁴ depending on the annual pre-set premium paid by the individual.¹⁰⁵ The premium amount can differ based on various factors, such as the policyholder’s age, gender, and selected coverage.¹⁰⁶

To illustrate that point, in 2016, the American Association for LTC Insurance developed a price index based on premium rates that a Tennessee resident might expect to pay for an LTC insurance policy.¹⁰⁷ According to the price index, a fifty-five year-old single male in Tennessee could expect to pay an annual premium between \$960 and \$2,035.¹⁰⁸ Likewise, a fifty-five-year-old single female could expect to

99. *Admin. on Aging, What is Long-term Care Insurance*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance/> (last visited Oct. 16, 2017) [hereinafter *What is Long-term Care Insurance*].

100. *Where to Look for Long-term Care Insurance*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance/where-to-look-for-long-term-care-insurance/> (last visited Oct. 16, 2017).

101. *Buying Long-Term Care Insurance*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance/buying-long-term-care-insurance/> (last visited Oct. 16, 2017).

102. *Long-term Care Insurance Costs*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <http://longtermcare.gov/costs-how-to-pay/what-is-long-term-care-insurance/long-term-care-insurance-costs/> (last visited Oct. 16, 2017) [hereinafter *Long-term Care Insurance Costs*].

103. Kaplan, *supra* note 23, at 431.

104. *Long-Term Care Insurance: What You Should Know*, NAT’L ASS’N OF INS. COMM’RS, http://www.naic.org/documents/consumer_alert_ltc.htm (last visited Oct. 16, 2017).

105. *Id.*

106. *Id.*

107. AM. ASS’N FOR LONG-TERM CARE INS., 2016 NATIONAL LONG-TERM CARE INS. PRICE INDEX, <http://www.aaltci.org/news/wp-content/uploads/2016/02/2016-Price-Index-LTC.pdf> (last visited Oct. 16, 2017).

108. *Id.*

pay an annual premium between \$960 and \$2,580.¹⁰⁹ Meanwhile, a married couple both aged sixty could expect to pay between \$1,920 and \$3,560 in annual premiums.¹¹⁰

As one might imagine, the wide variation in those annual premiums correlated with the type of fictional policy taken out by the policyholder.¹¹¹ These fictional policies—aptly labeled “good,” “better,” and “best”—were based on actual insurance policies for comparison purposes.¹¹² By way of example, a fifty-five-year-old male that purchased a “good” policy would annually pay approximately \$960 for a policy that would provide a daily benefit of \$120 for one year, along with 100% at-home care benefits coverage.¹¹³ Meanwhile, the “best” policy would cost that same individual \$2,035 in annual premiums while providing a daily benefit of \$150 for three years, along with 100% at-home benefits and other considerations.¹¹⁴

Aside from illustrating how the annual premium amount impacts the elder’s daily benefit amount, the price index portrays how expensive private LTC insurance can be for individual policyholders.¹¹⁵ But for many elders, private LTC insurance is the only viable alternative to avoid paying out-of-pocket for LTC since Medicare’s LTC coverage is very limited¹¹⁶ and many elders may not qualify for Medicaid’s LTC coverage.¹¹⁷

Although private LTC insurance is often an elder’s only viable alternative to avoid paying out-of-pocket for LTC, only about “12 percent of people age sixty-five or older and five percent of people age forty-five or older have private [LTC] insurance.”¹¹⁸ Coupling that statistic with Medicare’s limited LTC coverage and Medicaid’s strict LTC qualification requirements, there is obviously a significant percentage of elders and baby-boomers without a plan to pay for LTC should the need for such care arise.¹¹⁹

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See generally supra* Part II, Section B.2.

117. *See generally supra* Part II, Section B.3.

118. Joshua M. Wiener, *After CLASS: The Long-Term Care Commission’s Search for a Solution*, 32 HEALTH AFFAIRS 831, 833 (2013) [hereinafter Wiener].

119. *Id.*; *see generally* Chris Farrell, *Can You Self-Insure for Long-Term Care*, NEXT AVE. (May 6, 2016), <http://www.nextavenue.org/can-self-insure-long-term-care/>.

Given the rapid and anticipated growth of the elderly population as baby-boomers retire, the number of elders and baby-boomers without a viable plan of paying for LTC will continue to rapidly grow.¹²⁰ Hence, Americans must take a hard look at LTC financing reform solutions to provide LTC coverage to a larger percentage of individuals. Without at least debating the merits of proposed LTC financing solutions, the LTC financing crisis will continue for the foreseeable future.

III. Analysis

Fortunately, many American policymakers and commentators have both predicted the LTC financing crisis and have proposed LTC financing solutions. Part III analyzes just a few of the many proposed solutions in individual sections.

The first individual section, Section A, begins a discussion of various proposed solutions by examining whether Medicare should be expanded to broadly provide comprehensive LTC coverage to elders. Subsequently, Section B analyzes whether private LTC insurance can be used to solve the LTC financing crisis. Section C analyzes a voluntary public LTC insurance program that was initially enacted and then subsequently repealed: the CLASS act. Last, Section D analyzes and discusses the feasibility of mandatory public LTC insurance.

The goal of ascertaining the feasibility of the proposed solutions in the following sections is not to simply illustrate why each proposed solution might fail if enacted. Instead, the goal of the subsequent analysis is to examine positive and negative attributes from each proposed solution. Those positive and negative attributes will be incorporated into a unique recommendation discussed in Part IV: The LTC financing crisis can potentially be solved by adopting universal LTC insurance funded by a mandatory federal income tax surcharge that increases with age.

A. Expanding Medicare to Solve the LTC Financing Crisis

Many Americans assume that any potential need of LTC in their elder years will be covered by Medicare.¹²¹ However, that assumption

120. Atchison, *supra* note 5.

121. See Gleckman, *supra* note 16.

is erroneous since Medicare's LTC benefits are extremely limited.¹²² But perhaps partially due to the widespread misconception, some commentators have proposed expanding Medicare to solve the LTC financing crisis.¹²³

One interesting proposal calls for an expansion of Medicare's budget to broadly cover LTC through a "surcharge on federal income taxes."¹²⁴ This proposal "includes an across-the-board increase in individual tax rates equal to one percentage point."¹²⁵ The idea being that such an increase "distributes the burden of financing the proposed expansion of the Medicare program widely across the population."¹²⁶ Essentially, the one-percent surcharge means that any income tax paying American, with the exception of low-income adults and families, would be required to fund Medicare expansion regardless of the taxpayer's age.¹²⁷

Beneficiaries under this proposal will receive coverage for all nursing home care, along with 100 hours of at-home services per month.¹²⁸ Receipt of such comprehensive benefits does not require an individual to pay monthly premiums due to the 1% federal income tax surcharge.¹²⁹ However, beneficiaries would be responsible for an annual deductible of \$500, along with 20% copayments capped at \$5,000

122. See *supra* Part II, Section B.1.

123. See Leonard E. Burman & Richard W. Johnson, *A Proposal to Finance Long-Term Care Services Through Medicare With an Income Tax Surcharge*, 1-33 (Geo. Univ. Long Term Care Fin. Project Working Paper No. 8, 2007) ("Our [new system of financing long-term care services] plan expands Medicare to cover comprehensive long-term care services, including home care and custodial nursing home care.") [hereinafter Burman & Johnson]; John Cutler et al., "*Medi-LTC*" *A New Medicare Long-Term Care Proposal* 1-19 (Geo. Univ. Long Term Care Fin. Project, Working Paper No. 1, 2007) (discussing "an approach to creating a new Medicare 'add-on' product, a voluntary, private, long-term care insurance program that is supplemental to Medicare.") [hereinafter Cutler et al.]; see also Donald Taylor, *To Increase Value in Medicare, Expand Coverage To Long-Term Care*, HEALTHAFFAIRSBLOG (June 12, 2015), <http://healthaffairs.org/blog/2015/06/12/to-increase-value-in-medicare-expand-coverage-to-long-term-care/> [hereinafter Taylor]; Karen Davis et al., *Medicare Help At Home*, HEALTHAFFAIRSBLOG (Apr. 13, 2016), <http://healthaffairs.org/blog/2016/04/13/medicare-help-at-home/> ("[A]doption of a home and community based benefit in Medicare would constitute an important first step to helping beneficiaries afford the services and support they need to continue living independently.") [hereinafter Davis et al.].

124. Burman & Johnson, *supra* note 123, at 1.

125. *Id.* at 18.

126. *Id.* at 19.

127. *Id.*

128. *Id.* at 15.

129. *Id.*

per year.¹³⁰ The purpose of these out-of-pocket expenses is, seemingly, to prevent individuals from abusing Medicare's benefits.

At first glance, expanding Medicare under the federal income tax surcharge seems like a feasible solution assuming, of course, that the financial aspects of the proposal are viable. Moreover, expanding Medicare to cover LTC theoretically makes sense given that Medicare is geared towards elderly individuals¹³¹ and LTC is disproportionately required by elders when compared to other age brackets.¹³²

Nonetheless, Medicare expansion to comprehensively cover LTC may not be popular among younger Americans. In recent years, many younger Americans have become dissatisfied and even outwardly hostile towards baby-boomers.¹³³ A large part of this dissatisfaction is a result of the extravagant amount of future money that will be allocated towards baby-boomer healthcare, instead of towards programs that benefit younger Americans.¹³⁴

Future allocation of government revenues towards baby-boomer healthcare is arguably understandable since the government has promised for quite some time to cover many healthcare costs for elderly Americans.¹³⁵ But despite promising to pay for some aspects of healthcare for elders, the government has never promised to expansively cover LTC.¹³⁶

130. *Id.* at 15–16.

131. *What's Medicare?*, *supra* note 56 ("Medicare is a federal health insurance program for people who are 65 or older . . .").

132. *See generally Long-Term Care Insurance Facts–Statistics*, AM. ASS'N FOR LONG-TERM CARE INS., <http://www.aaltci.org/long-term-care-insurance/learning-center/fast-facts.php> (last visited Oct. 16, 2017) [hereinafter *LTC Insurance Facts*].

133. *See, e.g.*, Eleanor Robertson, *Why Are the Baby Boomers Desperate to Make Millennials Hate Ourselves?*, THE GUARDIAN: OPINION (Sept. 3, 2015), <https://www.theguardian.com/commentisfree/2015/sep/04/why-are-the-baby-boomers-desperate-to-make-us-millennials-hate-ourselves> ("Back in 1999 Chris Sidoti, then-head of Australian Human Rights Commission, called the baby boomers 'the most selfish generation in history.' 'I don't think there's been a generation like this that has been so unwilling to pay a fair share of taxation,' he said.").

134. *See, e.g.*, Renee Fisher, *Baby Boomers: The Worst Generation Ever?*, THE HUFFINGTON POST (Dec. 21, 2013), http://www.huffingtonpost.com/renee-fisher/baby-boomers_b_4445742.html ("One of the major reasons our national debt is so high is because 40 percent of our government's spending goes to some type of insurance: social insurance, retirement, health benefits, Medicare, Medicaid, etc. These systems are bankrupt. But they're needed to pay for the boomers' healthcare and pension plans.").

135. *See generally* Steve Anderson, *A Brief History of Medicare in America*, MEDICARE RESOURCES.ORG (Oct. 26, 2016), <https://www.medicareresources.org/basic-medicare-information/brief-history-of-medicare/> ("On July 30, 1965 President Lyndon B. Johnson made Medicare law . . .").

136. *Id.*

Due to the lack of government promise, many elders and baby-boomers could have—and should have—been responsible enough over the course of their lives to adequately prepare for the statistical likelihood that they will require LTC. Since elders and baby-boomers arguably should have had that foresight, many younger Americans might perceive Medicare expansion as an “elder bailout” if younger Americans are forced to pay the same amount as elders to expand a program used predominately by elders.¹³⁷

Regardless of whether a negative perception of baby-boomers is warranted, avoiding additional generational divide—especially considering the current divisiveness in America¹³⁸—is an important point to keep in mind. Thus, even if Medicare expansion financed with a federal income tax surcharge would be relatively affordable for individual Americans, assuming it can truly be accomplished with only a simple 1% federal income tax surcharge, solving the LTC financing crisis by expanding Medicare may increase the generational divide. Accordingly, Medicare expansion may not be the best solution to solving the LTC financing crisis.

B. Solving the LTC Financing Crisis with Private LTC Insurance

Private LTC insurance is designed to cover LTC so that the policyholder does not have to rely on the government or out-of-pocket spending to pay for LTC should the need arise.¹³⁹ At least one commentator has suggested that the LTC financing crisis can be solved if Americans are required to purchase and maintain private LTC insurance.¹⁴⁰

Making private LTC insurance mandatory would require instituting an individual mandate similar to how the Affordable Care Act (“ACA”) instituted a health insurance mandate.¹⁴¹ But, given how difficult it was for the Obama Administration to gain judicial approval for

137. See *supra* text accompanying note 131.

138. See, e.g., Geoff Colvin, *A Divided Country, A Divisive Election: Where Do We Go From Here?*, FORTUNE: COMMENT., ELECTION 2016 (Nov. 8, 2016), <http://fortune.com/2016/11/08/divided-partisan-election-america-unify/>.

139. *What is Long-term Care Insurance*, *supra* note 99.

140. See, e.g., Alexander N. Daskalakis, *Public Options: The Need for Long-Term Care, its Costs, and Government's Attempts to Address Them*, 5 ST. LOUIS U.J. HEALTH L. & POL'Y 181, 210 (2011) (“Similar to the [Affordable Care Act, an American long-term care financing solution] could rely on private firms to provide the policies, while instituting a mandate for everyone to have long-term care insurance.”) [hereinafter Daskalakis].

141. *Id.*

the individual mandate¹⁴²—not to mention public approval¹⁴³—a private LTC insurance mandate would likely face an extremely stiff public, judicial, and governmental approval process.

Even if an individual LTC insurance mandate somehow gains approval, critics would likely insist that LTC insurance rates—which are already extremely expensive¹⁴⁴—will eventually skyrocket.¹⁴⁵ After all, an individual LTC mandate would essentially permit insurance companies to charge policyholders whatever they desire since people would be required to purchase the product.¹⁴⁶ This means that, while mandatory private LTC insurance may theoretically solve the LTC financing crisis from the government's perspective since individual Americans would no longer rely on government sources for LTC, the idea is simply not an affordable proposition for millions of Americans.

In contrast to making private LTC insurance mandatory, simply concentrating on educating the American public about LTC itself and private LTC insurance options might persuade more Americans to purchase private LTC insurance.¹⁴⁷ This sort of concentrated education

142. *Timeline: Affordable Care Act*, AFFORDABLE HEALTH CAL., <http://affordablehealthca.com/timeline-obamacare/> (last visited Oct. 16, 2017) [hereinafter *Timeline: Affordable Care Act*].

143. See, e.g., Kimberly Leonard, *Poll: Most Americans Want Obamacare to Change*, U.S. NEWS (Dec. 1, 2016, 3:01 AM), <http://www.usnews.com/news/databine/articles/2016-12-01/poll-americans-want-to-see-changes-to-obamacare> (“Most Americans say they’re opposed to the individual mandate . . .”).

144. See *supra* Part II, Section B.3.

145. See generally Brian Blaseé, *Overwhelming Evidence That Obamacare Caused Premiums to Increase Substantially*, FORBES: THE APOTHECARY (July 28, 2016, 8:43 AM), <http://www.forbes.com/sites/theapothecary/2016/07/28/overwhelmingevidence-that-obamacare-caused-premiums-to-increase-substantially/#1ef392e046e3>.

146. See generally Miles Mogulescu, *The Health Insurance and Drug Industry Profit Protection Act Sucks and Should be Killed*, THE HUFFINGTON POST: THE BLOG (Mar. 18, 2010, 5:12 AM), http://www.huffingtonpost.com/miles-mogulescu/the-health-insurance-and_b_394174.html (“The worst part is the individual mandate coupled with no price regulation and no competition to private insurance from a robust public option. The Democrats’ solution to 48 million uninsured is to use the coercive power of the Federal government to make uninsured Americans buy health insurance from private companies or be fined by the IRS, with no limits on what insurance companies can charge, and with inadequate subsidies to make such insurance affordable to many middle class and working class Americans. This may be the first time in history that the Federal government will force American citizens to buy the products of a private industry.”).

147. *Themes from Public Input Sessions in Boston, Northampton, and Shrewsbury*, MASS. HEALTH & HUM. SERVS., <http://www.mass.gov/eohhs/docs/eohhs/ltc/ltc-public-input-themes.pdf> (last visited Oct. 16, 2017) (providing that “general education about [private LTC insurance] public education about risk and [LTC] coverage through other types of insurance, [and] assistance with understanding

could decrease reliance on government programs, which may help alleviate the LTC financing crisis.¹⁴⁸ Currently, about “12 percent of people age sixty-five or older and five percent of people age forty-five or older have private [LTC] insurance.”¹⁴⁹ This low rate can partially be attributed to the availability of other LTC substitutes, especially Medicaid.¹⁵⁰ Others fail to purchase private LTC insurance because “the potential for informal care might serve as a disincentive.”¹⁵¹ But perhaps more commonly, others likely fail to purchase private LTC insurance because of a widespread misconception that the government will pay for LTC.¹⁵² Because of that widespread misconception, concentrated education may persuade individuals to purchase their own private LTC insurance policies.

Educating the American public about the benefits of private LTC insurance is not a novel concept.¹⁵³ One way to educate the American public about the benefits of private LTC insurance is by “enhanced marketing of [private LTC] policies through authorized carriers and Medicare.”¹⁵⁴ Another way to potentially educate the American public is through seminars,¹⁵⁵ though it seems extremely unlikely that Americans would be interested in attending seminars about LTC.

But while concentrated education by authorized carriers and Medicare would likely increase private LTC insurance participation rates,¹⁵⁶ enhanced participation would probably not completely solve the LTC financing crisis since Americans could still refuse to purchase private LTC insurance given the existence of Medicaid and informal caregivers. In fact, Medicaid will likely always serve as a disincentive

the choices between plans” might increase private LTC insurance participation rates).

148. See generally *id.*

149. Wiener, *supra* note 118, at 833.

150. See generally Anne Theisen Cramer & Gail A. Jensen, *Why Don't People Buy Long-Term Care Insurance?*, 61B No. 4 J. GERONTOLOGY SOC. SCI. 5185 (2006).

151. *Id.* at 5186 (“[I]ndividuals may not desire LTC insurance because its existence might decrease the amount of informal care provided by children, neighbors, or the community.”).

152. See Gleckman, *supra* note 16 (“Public opinion surveys show that most Americans incorrectly think Medicare pays for long-term supports and services (LTSS). It does not.”).

153. See, e.g., *Providers Help Educate Residents, Family Members about LTC Insurance*, ARGENTUM (Sept. 23, 2008), <https://www.argentum.org/news/providers-help-educate-residents-family-members-about-ltc-insurance/>.

154. Cutler et al., *supra* note 123, at 8.

155. See generally *LTC Bullet: Class Redux?*, CTR. FOR LONG-TERM CARE REFORM: THE MOSES LTC BLOG (Feb. 10, 2017, 10:38 AM), [http://www.centerltc.com/\[hereinafter Moses\]](http://www.centerltc.com/[hereinafter Moses]).

156. Cutler et al., *supra* note 123, at 8.

towards persuading individuals to purchase private LTC insurance since individuals with median to high incomes—exactly the people LTC insurance is marketed towards¹⁵⁷—can qualify for Medicaid by legally “spending-down.”¹⁵⁸

Since educated individuals can afford to pay financial planners that can help them legally “spend down” to qualify for Medicaid’s expansive LTC benefits, enhanced education would likely not give educated individuals any reason to purchase private LTC insurance. Therefore, while educating the American public about LTC is obviously necessary, relying on education to increase the number of individuals whom maintain private LTC insurance is not a viable way to solve the LTC financing crisis given the continued existence of Medicaid.

Accordingly, private LTC insurance serves a useful function in current LTC financing.¹⁵⁹ That said, making private LTC insurance mandatory likely will not solve the LTC financing crisis since mandatory private LTC insurance would probably be unaffordable for many Americans. Moreover, while education should be incorporated into LTC financing proposals, simply relying on education to persuade individual Americans to purchase private LTC insurance policies will likely not solve the LTC financing crisis. Therefore, finding a viable solution to the LTC financing crisis may require public alternatives to private LTC insurance proposals.

C. The Failed CLASS Act

Another potential way to solve the LTC financing crisis may be through voluntary public LTC insurance. One such proposal by late Senator Edward M. Kennedy¹⁶⁰ led to the creation of the CLASS Act, which was enacted in 2010 as part of the ACA.¹⁶¹

157. See generally *Long-Term Care*, NAT’L ASS’N OF INS. COMM’RS & CTR. FOR INS. POL’Y & RES. (Dec. 8, 2016), http://www.naic.org/cipr_topics/topic_long_term_care.htm.

158. Moses, *supra* note 155 (“[M]edian to high-income people can qualify for Medicaid if they have significant medical or LTC expenditures as most people who need long-term care do.”).

159. See *supra* Part II, Section B.3.

160. *Kennedy’s CLASS Act Would Establish National Long Term Care Insurance*, KAISER HEALTH NEWS (July 23, 2009), <http://khn.org/morning-breakout/long-term-care-8/>.

161. See, e.g., *Health Care Reform and LTC: Class Provisions*, JOHN HANCOCK, LTC NEWSLINK (Mar. 24, 2010), <https://www.quicklifecenter.com/Marketing Documents/one-capitas/long-term-care/docs/ap-standalone-pdfs/CLASS%20>

Under the CLASS Act, enrollees would pay a monthly LTC premium.¹⁶² This amount might have been as low as \$5 for low income workers and students, but premiums for most individuals depended on a variety of factors such as age.¹⁶³ After a five-year vesting period, an enrollee would be eligible for a lifetime cash benefit estimated to average about \$75 per day¹⁶⁴ if specific standards were met.¹⁶⁵

Enrolling would have been relatively straightforward: qualified employees would be auto-enrolled by their employer if their employer decided to participate in the program.¹⁶⁶ But despite that feature, a major argument against enacting the CLASS Act was that auto-enrolled employees were free to opt-out from the program if they so desired.¹⁶⁷ For that very reason, many prominent Republicans opposed the CLASS Act.¹⁶⁸ This opposition led to the repeal of the CLASS Act in 2013,¹⁶⁹ when political considerations compelled the Obama Administration to admit that they no longer saw “a viable path forward” for the program.¹⁷⁰

A contributing factor to the downfall of the CLASS Act was that, although there was an auto-enrollment function, mandatory participa-

ACT%20-%20LTC.pdf [hereinafter Hancock]; Paula Span, *Options Expand for Affordable Long-Term Care*, N.Y. TIMES (Mar. 29, 2010), <http://www.nytimes.com/2010/03/30/health/30care.html> (“The Class Act . . . sets up the first national government-run long-term care insurance program . . .”).

162. Hancock, *supra* note 161 (“[T]hat premium could be increased yearly to ensure that the CLASS fund is actuarially sound.”).

163. RUSSELL SAGE FOUNDATION, *supra* note 10, at 46.

164. Hancock, *supra* note 161.

165. Richard Kaplan, *Financing Long-Term Care After Health Care Reform*, J. RETIREMENT PLANNING, 7, 10–11 (July-Aug. 2010) (“The first standard is that the ‘individual requires substantial supervision to protect the individual from threats to health and safety due to substantial cognitive impairment. The [second] standard is that the ‘individual is unable to perform’ either two or three ‘activities of daily living . . . without substantial assistance . . . from another individual[.]’”).

166. *Id.* at 12–13.

167. *Id.*

168. John Thune et al., *CLASS’ UNTOLD STORY: Taxpayers, Employers, and States on the Hook for Flawed Entitlement Program*, U.S. CONG. REP. 1, 4 (Sept. 2011), https://www.thune.senate.gov/public/_cache/files/f03d8200-bfa4-4891-8a4c-aa78a54e2de0/C36C5CAFE5E1079F63B5508E247BC5C1.class-untold-story.pdf [hereinafter Thune].

169. Howard Gleckman, *Fiscal Cliff Deal Repeals CLASS Act, Creates Long-Term Care Commission*, FORBES: RETIREMENT (Jan. 1, 2013 3:45 PM), <http://www.forbes.com/sites/howardgleckman/2013/01/01/fiscal-cliff-deal-repeals-class-act-creates-long-term-care-commission/#30d86b1635f4>.

170. *Sebelius on the CLASS Act: ‘I Do Not See A Viable Path Forward’*, KAISER HEALTH NEWS (Oct. 15, 2011), <https://khn.org/morning-breakout/class-act-4/> (“The biggest problem, of course, is the fact that the CLASS program, which is voluntary, could wind up with only people most likely to need the benefit signing on.”).

tion was simply illusory because employees could voluntarily opt-out.¹⁷¹ Because of the opt-out, critics simply did not think that enough people would remain enrolled to keep the plan financially sustainable.¹⁷²

Support for that argument can be found in private LTC insurance enrollment statistics since only about “12 percent of people age sixty-five or older and five percent of people age forty-five or older have private [LTC] insurance.”¹⁷³ In fact, some estimates concluded that “participation rates [in CLASS] would have remained below 5 percent.”¹⁷⁴

Those statistics insinuate that despite Sen. Kennedy’s years of work,¹⁷⁵ CLASS’s voluntary enrollment features foreshadowed the program’s ultimate demise. Sen. Kennedy’s life work, however, does not have to be in vain: future LTC proposals must remain aware of the CLASS Act’s good intentions and make participation for all Americans mandatory, unless the proposal includes “the proper set of incentives to encourage enrollment at a relatively young age.”¹⁷⁶ Otherwise, possible LTC solutions will likely fall flat just like the well-intentioned, but ultimately non-functional, CLASS Act did.

D. Universal LTC Insurance

Another potential way to solve the LTC financing crisis involves mandatory public LTC insurance (“Universal LTC Insurance”), which

171. See Thune, *supra* note 168, at 4 (“[T]he voluntary CLASS plan would probably not attract many participants”); see also *The Class Act: Why A Good Idea Failed*, 21 REPERTOIRE (Jan. 2013), <http://old.repertoiremag.com/Article.asp?Id=4165> (providing that the three major design flaws were the voluntary nature of the program, the lack of an underwriting requirement, and the fact that the act “attempted to serve two incompatible purposes by creating both a new benefit program for working people with disabilities and an insurance system for those looking to hedge against the risk of long-term care in old age.” It should be noted that mandatory participation in a public LTC policy is not the same as an individual mandate for private LTC insurance since the government—not insurance companies—would set the premium amounts.).

172. See *id.*

173. Wiener, *supra* note 118, at 833.

174. RUSSELL SAGE FOUNDATION, *supra* note 10, at 48.

175. See Jennifer Evans & Jaclyn Schiff, *A Timeline of Kennedy’s Health Care Achievements and Disappointments*, KAISER HEALTH NEWS (Sept. 17, 2010), <http://khn.org/news/kennedy-health-care-timeline/>.

176. RUSSELL SAGE FOUNDATION, *supra* note 10, at 51 (“Absent either positive or negative incentives, a voluntary long-term care insurance program is likely to fail due to adverse selection issues”).

is not to be confused with private LTC insurance.¹⁷⁷ Universal LTC Insurance is not a novel idea: “Most major industrialized nations have adopted a [mandatory public LTC insurance] model to provide [LTC] to all who need it.”¹⁷⁸

Universal LTC insurance was proposed as a viable solution to the LTC financing crisis as early as 1990.¹⁷⁹ Although that proposal failed, numerous commentators have continued to insist that instituting some form of universal LTC insurance could solve the LTC financing crisis.¹⁸⁰

Most universal LTC insurance proposals provide that every American would be eligible to receive at-home LTC or LTC provided in assisted living facilities and nursing homes as long as that assistance is actually required.¹⁸¹ In addition, many proposals recommend providing preventative services “in an effort to minimize avoidable deterioration in physical and mental functioning.”¹⁸² But given those broad and comprehensive benefits, financing universal LTC would be a significant societal challenge.

177. See generally Jeffrey R. Brown & Amy Finkelstein, *The Interaction of Public and Private Insurance: Medicaid and the Long-Term Care Insurance Market*, 98 AM. ECON. REV. 1083 (Oct. 2008) (discussing various differences between public and private LTC insurance).

178. See *Long-Term Care Financing Reform: Lessons from the U.S. and Abroad*, THE COMMONWEALTH FUND, <http://www.commonwealthfund.org/publications/fund-reports/2010/feb/long-term-care-financing-reform-lessons-from-the-us-and-abroad> (last visited Oct. 16, 2017) [hereinafter *Lessons from the U.S. and Abroad*]; see also John Creighton Campbell et al., *Lessons From Public Long-Term Care Insurance in Germany and Japan*, HEALTH AFF. (Jan. 2010), <http://content.healthaffairs.org/content/29/1/87.full.pdf+html>.

179. S. REP. NO. 101-14, at 1005-07.

180. See RUSSELL SAGE FOUNDATION, *supra* note 10, at 221-229; Lawrence A. Frolik, *Private Long-Term Care Insurance: Not the Solution to the High Cost of Long-Term Care for the Elderly*, 23 ELDER L.J. 372, 413 (Jan. 11, 2016) [hereinafter Frolik]; see also U.S. Dep't of Health and Human Services, *An Analysis of Long-Term Care Reform Proposals*, ASPE (Feb. 1993), <https://aspe.hhs.gov/basic-report/analysis-long-term-care-reform-proposals> (analyzing various forms of LTC public insurance); see Howard Gleckman, *Hawaii Is About to Debate a Public Long-Term Care Insurance Program*, FORBES: PERS. FIN. (Jan. 15, 2016), <http://www.forbes.com/sites/howardgleckman/2016/01/15/hawaii-is-about-to-debate-a-public-long-term-care-insurance-program/#6d10e1d23e53>. (Hawaii is also considering implementing a universal LTC insurance program. However, this plan would likely not work on a National scale because it is financed in large part by tourism.).

181. See, e.g., Charlene Harrington et al., *A National Long-Term Care Program for the United States: A Caring Vision*, PHYSICIANS FOR A NAT'L HEALTH PROGRAM (Dec. 4, 1991), http://www.pnhp.org/publications/JAMA12_4_91.htm.

182. *Id.*

One unique universal LTC proposal—deemed “social insurance”¹⁸³—recommends financing universal LTC insurance “in part by a dedicated wage tax and subsidized by general government revenues.”¹⁸⁴ This proposal, however, recommends only mandating the LTC insurance wage tax “perhaps for everyone age fifty or older”¹⁸⁵

Only requiring individuals age fifty or older to pay for universal LTC insurance is interesting as it avoids the perception of an “elder bailout.”¹⁸⁶ Yet, instituting a tax solely on elders—even if elders would be the age demographic most benefiting from universal LTC¹⁸⁷—might cause a “senior revolt.”¹⁸⁸

As farfetched as it may sound, there is precedence for a “senior revolt.”¹⁸⁹ During the Reagan Administration, Congress passed the Medicare Catastrophic Coverage Act of 1988.¹⁹⁰ The Act was intended to expand Medicare—again, a program specifically for elders¹⁹¹—coverage.¹⁹² The increased benefits were to be financed by increasing Medicare premiums and instituting a progressive surtax on retired elders.¹⁹³

To put it mildly, many elders were not happy with the bill.¹⁹⁴ One unhappy elder named Daniel Hawley organized a grassroots elder protest against the bill.¹⁹⁵ The protest spread, with protesting elders so

183. Frolik, *supra* note 180, at 413 (“The cost of [long-term care], while falling on the individual, is better perceived as a societal problem. Growing old and needing to pay for care is a potential risk that all Americans face. Paying for LTC is a collective risk that deserves a collective response in the form of social insurance.”).

184. *Id.* at 414.

185. *Id.*

186. *See supra* Part III, Section A.

187. *See LTC Insurance Facts, supra* note 132.

188. Joan McCarter, *Remembering the Medicare Catastrophic Coverage Debacle: What Happens When You Piss Off Seniors*, DAILY KOS (Apr. 14, 2013), <http://www.dailykos.com/story/2013/4/14/1201404/-Remembering-the-Medicare-Catastrophic-Care-debacle-What-happens-when-you-piss-off-seniors> [hereinafter McCarter].

189. *Id.*

190. Medicare Catastrophic Coverage Act of 1988, H.R. 2470, 100th Cong. (2d Sess. 1988).

191. *What's Medicare?*, *supra* note 56 (“Medicare is the federal health insurance program for people who are 65 or older . . .”).

192. Mary R. Greal, *Overview of the Medicare Catastrophic Coverage Act of 1988 and its Impact on Health-Care Delivery*, 46 AM. J. HOSP. PHARMACY (July 1989).

193. McCarter, *supra* note 188.

194. *Id.* (providing that after passage of the bill “seniors revolted, both against the proposal and against AARP, which was then supporting it”).

195. Steve Daley & Rogers Worthington, *Seniors' Wrath Stings Lobby: Protest over Catastrophic-Care Law Targets AARP*, CHI. TRIB. (Sept. 3, 1989), http://articles.chicagotribune.com/1989-09-03/news/8901100068_1_catastrophic-law-

angry that a congressman advocating on behalf of the bill, Dan Rostenkowski, “was booed and chased down a Chicago street” by a group of angry elderly individuals.¹⁹⁶ As a result of that opposition, Congress repealed the act only one year after enacting it.¹⁹⁷ After the repeal, one Republican noted: “The seniors of this nation have made themselves heard in every Congressional district in the country.”¹⁹⁸

Even though LTC is disproportionately used by elders when compared to other age brackets, intense elder opposition to the repealed Medicare Catastrophic Coverage Act of 1988 shows that the LTC financing crisis should not be solved by entirely relying on funding by elders.¹⁹⁹ This is because relying solely on elders to finance LTC could cause a “senior revolt.”

An alternative way to finance universal LTC insurance coverage may be to require participation of every age demographic. In 2015, an LTC financing study proposed and analyzed multiple hypothetical LTC solutions.²⁰⁰ One such hypothetical LTC solution analyzed by the study was the feasibility of mandatory public LTC insurance funded by a payroll tax paid by all employed Americans, regardless of age.²⁰¹ The study determined that a payroll tax of 1.35% on every employed American’s taxable income, excluding low-income individuals, could fund universal LTC insurance that provides comprehensive benefits to elders.²⁰²

modern-maturity-magazine-medicare-catastrophic-coverage-act (“They thought retired people were sitting around doing their ceramics and their little aerobics classes in senior centers and wouldn’t give any fight” said Hawley. “Well, they found out differently.”).

196. William Recktenwald, *Insurance Forum Turns Catastrophic for Rostenkowski*, CHI. TRIB. (Aug. 18, 1989), https://articles.chicagotribune.com/1989-08-18/news/18901050673_1_Seniors-citizens-congressman-dan-rostenski-health-insurance (“Shouting ‘Coward,’ ‘Recall’ and ‘Impeach,’ about 50 people followed [Congressman Rostenkowski] up Milwaukee Avenue after he left a meeting . . . in the heart of his 8th Congressional District on [Chicago’s] Northwest Side. Eventually, the 6-foot-4-inch Rostenkowski cut through a gas station, broke into a sprint and escaped into his car, which minutes earlier had one of the elderly protesters, Leona Koziem, draped over the hood.”).

197. Martin Tolchin, *Congress Rescinds Long-Term Care Act Before Adjourning*, N.Y. TIMES (Nov. 22, 1989), <http://www.nytimes.com/1989/11/22/us/congress-rescinds-long-term-care-act-before-adjourning.html>.

198. *Id.*

199. *LTC Insurance Facts*, *supra* note 132.

200. Melissa M. Favreault et al., *Financing Long-Term Services and Supports: Options Reflect Trade-Offs for Older Americans and Federal Spending*, 34 HEALTH AFF. 2181, 2181–91 (Dec. 5, 2015) [hereinafter Favreault].

201. *Id.* at 4.

202. *Id.* at 4–5.

Notably, a 1.35% payroll tax is not much more expensive for individual Americans than the Medicare expansion plan financed by the 1% federal income tax surcharge that was discussed previously.²⁰³ In addition, funding universal LTC by way of a payroll tax makes logical sense given that payroll taxes already fund Social Security and Medicare.²⁰⁴

However, payroll taxes are regressive.²⁰⁵ This means that, generally speaking, low and moderate-income taxpayers pay more of their income in payroll taxes when compared to higher-income Americans.²⁰⁶ In addition, increasing federal payroll taxes may continue to contribute to stagnant wages since employers can reduce wages to offset their payroll tax share.²⁰⁷ Additionally, a payroll tax is simply a wage tax, which means that other types of income such as capital gains, business profits, and rental income are exempt from the tax.²⁰⁸

In contrast to payroll taxes, a federal income tax surcharge reaches types of incomes that payroll taxes do not.²⁰⁹ Because many higher income taxpayers earn a significant chunk of their income from non-wage sources not subject to the payroll tax,²¹⁰ a federal income tax surcharge would likely be more equitable for all Americans than a payroll tax.²¹¹ This means that, while the study's universal LTC proposal appears to be relatively inexpensive for many Americans, it is likely not equitable for individual Americans since it uses a payroll tax in lieu of a federal income tax surcharge.

In sum, proposals to solve the LTC financing crisis through universal LTC insurance are intriguing since “[a]s we age, we are all potential users of LTC; thus, we should all be required to buy insurance to pay for that care and hope we never need to collect benefits.”²¹² But

203. See *supra* Part III, Section A.

204. *Payroll Tax*, INVESTOPEEDIA.COM, <http://www.investopedia.com/terms/p/payrolltax.asp> (last visited Oct. 16, 2017).

205. *Policy Basics: Federal Payroll Taxes*, CTR. ON BUDGET AND POL'Y PRIORITIES (Mar. 23, 2016), <http://www.cbpp.org/research/federal-tax/policy-basics-federal-payroll-taxes>.

206. *Id.* (“The bottom fifth of households paid an average of 6.6 percent of their incomes in payroll tax in 2014, according to Tax Policy Center estimates, while the top fifth paid 5.9 percent and the top 1 percent of households paid just 2.3 percent.”).

207. Burman & Johnson, *supra* note 123, at 20.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Frolik, *supra* note 180, at 416.

at the same time, the universal LTC proposals discussed in this section highlight a couple important points. First, solving the LTC financing crisis requires balancing the perception of an “elder bailout” with the potential for “senior revolt.” Second, a federal income tax surcharge may be more equitable for American taxpayers than raising payroll taxes to solve the LTC financing crisis. Creating some form of LTC financing solution that incorporates both of those considerations, as well as various takeaways from Part III, will be one primary purpose of the recommendation discussed below.

IV. Recommendation

Instead of dismissing the past proposals discussed in Part III due to various undesirable characteristics, those attributes can be used to establish a viable framework that solves the LTC financing crisis. First, a potential LTC financing crisis solution must be fair among all age demographics. This balancing act requires the avoidance of an “elder bailout” perception while simultaneously preventing the possibility of a “senior revolt.” Second, the proposal must be affordable and equitable for individual Americans. Third, the proposal must include extensive education designed to teach the American public about LTC itself and LTC financing. Fourth, participation in potential LTC proposals must be mandatory.

Based on those four parameters, America may be able to solve the LTC financing crisis by adopting universal LTC insurance financed by a mandatory federal income tax surcharge that increases with age. The details of this recommendation are discussed below in section A. Meanwhile, section B discusses how this recommended solution to the LTC financing crisis satisfies the four individual parameters set forth in the LTC financing framework discussed above.

A. Universal LTC Financed by a Federal Income Tax Surcharge that Increases with Age

Solving the LTC financing crisis by instituting a federal income tax surcharge means that every American submitting a federal income tax will be assessed an additional “LTC tax.” The LTC tax will increase based on age of the taxpayer, meaning that elderly individuals will pay a larger LTC tax than younger Americans. Because the LTC

tax is assessed annually, potential beneficiaries will not pay monthly premiums or deductibles for benefits.

In return for paying the LTC tax, beneficiaries requiring at-home LTC will receive maximum daily benefits that should cover the costs of a trained, formal caregiver for a predetermined period each month. For example, if the predetermined period is established at 100 hours per month and an elderly recipient requires ninety-one hours, the coverage is completely paid for by the universal LTC. But if that same individual requires 120 hours of at-home care, the individual will have to pay out-of-pocket for the 20 hours over the predetermined 100-hour limit.

At-home benefits are designed to be the most comprehensive aspect of the plan since at-home care provided by a formal or skilled caregiver would be much cheaper than paying for beneficiaries to receive LTC at an assisted living facility or nursing home. Accordingly, much like the “social insurance” proposal discussed in Part III, maximum daily benefits for assisted living facilities and nursing homes should be set at less than their expected daily cost.²¹³ This would require an individual to pay the daily difference which, like the Medicare expansion proposal discussed in Part III,²¹⁴ is a mechanism designed to prevent overuse of the facilities.²¹⁵

Because maximum daily benefits for those facilities are set less than their expected daily cost, Medicaid will continue to exist as a source of payment to cover costs that universal LTC coverage does not. To maintain Medicaid, the LTC tax should be set high enough so that government revenues from the LTC tax can fund those anticipated Medicaid payments.

In addition, while the private LTC insurance industry would likely be extremely unhappy with the institution of this proposal, the industry would not be decimated. Instead of destroying the private LTC insurance industry, targeted marketing and education might persuade individuals to purchase private LTC policies to cover the difference between the daily benefit amount allocated by the government for assisted living facilities or nursing homes and the actual cost of those facilities.

213. *Id.* at 415–16.

214. *See supra* Part III, Section A.

215. Frolik, *supra* note 180, at 415–16.

As provided by the “social insurance” proposal, paying out these generous LTC benefits could be determined by state Medicaid agencies.²¹⁶ Essentially, the state Medicaid agencies could “act much like the claims department of an insurance company and adjudicate whether the insured’s psychological and medical needs qualif[y] them for the insurance benefits.”²¹⁷

This recommended proposal incorporates many principles discussed in Part III. But without adhering to the four essential parameters discussed at the beginning of Part IV, this recommendation is likely destined for failure. Accordingly, the subsequent section will apply those four essential parameters to this proposal to determine the true feasibility of the recommendation.

B. Application of the LTC Financing Framework’s Four Parameters

Universal LTC financed by a mandatory federal income tax surcharge that increases with age adheres to the four necessary parameters that were created based upon the analysis undertaken in Part III. The first parameter is that a potential LTC financing crisis solution must be fair among all age demographics to avoid the perception of an “elder bailout,” while simultaneously preventing the possibility of a “senior revolt.” Second, the recommendation must be affordable and equitable for individual Americans. Third, the recommendation must include extensive education designed to teach the American public about LTC itself and LTC financing. Fourth, participation in potential LTC proposals must be mandatory.

First, the recommendation is fair among all age demographics and prevents the undesirable perception of an “elder bailout” while simultaneously avoiding the undesirable proposition of a “senior revolt.” This essential balance is satisfied because every American that submits an income tax return pays into the universal fund. Because every American—regardless of age—pays into the fund, the tax cannot be construed as merely a tax on the elderly. This, of course, prevents the possibility of a “senior revolt.”

Meanwhile, the tax avoids the perception of an “elder bailout” because the tax assessment increases with age before leveling off when an individual reaches a certain age. For example, the tax could

216. *Id.*

217. *Id.* at 416.

be designed where a person age sixty-five pays an LTC tax of 2%, whereas a 25-year-old pays an LTC tax of 0.5%. While younger Americans will be paying into the LTC fund, an “elder bailout” is avoided since elders will pay a larger tax share than younger Americans. Because the perception of an “elder bailout” is avoided and since the prospect of “senior revolt” is likely avoided, the first parameter is satisfied.

Second, the recommendation is affordable and equitable for individual Americans. Because the LTC tax is a federal income tax surcharge and not a payroll tax, lower and middle class individuals will not be disproportionately affected as compared to higher income individuals. Plus, unlike the fluctuating rates contained in private LTC insurance policies, the LTC tax will be annually capped at a low percent of an individual’s income. This means that unlike health insurance spikes years after passage of the ACA, Americans’ annual LTC obligation will not suddenly increase at an exponential rate. Accordingly, financing the recommendation through a mandatory federal income tax surcharge as opposed to a payroll tax means that the recommended proposal satisfies the second parameter.

Third, the recommended proposal will focus on educating the public about LTC itself and LTC costs. Instead of simply relying on carriers and Medicare to educate the general public, a government sponsored LTC website will be created. The essential component of the website will be an LTC calculator. The calculator would permit an individual to log on to the new website and compare average LTC costs to daily benefit amounts provided by the government through universal LTC. For example, an elderly individual might look at their savings account and realize that an extended stay in an assisted living facility is unaffordable because the proposal caps maximum benefits at less than the daily cost of staying in an assisted living facility. But, that individual might be persuaded to purchase a private LTC insurance policy to prepare for the potential of an extended assisted living facility stay. In turn, that could eventually save Medicaid money since that individual alternatively could have met with a financial planner to learn about how to “spend-down” their assets to qualify for Medicaid instead of simply visiting the website.

One might think that the creation of a website is unnecessary given that some elderly individuals do not even use the internet.²¹⁸ The focus of this proposal, however, is not to simply solve the LTC financing crisis for current elders; the focus of this proposal is to solve America's LTC financing crisis for everyone, including current elders, baby-boomers, and young Americans that likely will not require LTC for decades. After all, "[i]n reforming [LTC] policy, we should be careful not to enact solutions that address yesterday's problems."²¹⁹ Thus, by creating such a website and through other targeted marketing and educational efforts, the recommended proposal satisfies the third parameter.

Fourth, participation in the recommended proposal is mandatory for individuals that pay federal income taxes. Making participation mandatory in the universal LTC recommendation is not unique or unviable: "[e]conomists and actuaries generally agree that the ideal [LTC] insurance system would be mandatory."²²⁰ Because the recommended proposal makes participation mandatory, the fourth and final parameter is satisfied.

V. Conclusion

In sum, LTC financing is in a state of crisis given the rising elderly population. Although many commentators have proposed solutions to solve the LTC financing crisis, no solution has yet been widely adopted. The failure of each individual solution to garner widespread support is largely because each solution contains at least one undesirable attribute.

By dissecting why the undesirable attributes are indeed undesirable, a framework with four necessary parameters can be established to "measure" future LTC financing solutions. First, a potential proposal to solve the LTC financing crisis must be fair among all age demographics to avoid the perception of an "elder bailout" while simultaneously avoiding the possibility of a "senior revolt." Second, the

218. Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000-2015*, PEW RES. CTR. (June 26, 2015), <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/> (providing that only 58% of elderly Americans use the internet).

219. U.S. DEPT OF HEALTH AND HUM. SERVS., *An Analysis of Long-Term Care Reform Proposals* (Feb. 1993), <https://aspe.hhs.gov/basic-report/analysis-long-term-care-reform-proposals>.

220. RUSSELL SAGE FOUNDATION, *supra* note 10, at 54.

proposal must be affordable and equitable for individual Americans. Third, the proposal must include extensive education designed to teach the American public about LTC and LTC financing. Fourth, participation in the proposal must be mandatory.

While that framework and those parameters may appear stringent, adopting universal LTC insurance financed by a mandatory federal income tax surcharge that increases with age appears to satisfy that framework. After all, “[a]s we age, we are all potential users of LTC; thus, we should all be required to buy insurance to pay for that care and hope we never need to collect benefits.”²²¹

221. Frolik, *supra* note 180, at 416.

