THE EFFECT OF TRUMP'S ELECTION ON OBAMACARE: THE CONTROVERSY ABOUT HEALTH LAW & HEALTH REFORM IN THE U.S.

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I . How did we get from Obamacare to Trump’s election?

Former President Obama led the effort to reform the U.S. health system

- Before "Obamacare," almost 50 million people in the US had **no** health insurance (public or private).
- Obama's Affordable Care Act ("ACA") was passed in 2010, when his Democratic (left wing) Party controlled Congress and the White House.
- Now, the ACA provides health insurance for about 20 million people (out of 325 million population.)
- Therefore, the ACA is a **very** important step for health reform (but most people in the US are **not** covered by "Obamacare").

The ACA is an incremental reform that preserves existing U.S. systems

- ACA does **not** create a U.K.-style national health service **or** a Canadian-style single-payer system.
- ACA is really a limited reform (which preserves the system of employer-based health insurance).
- ACA preserves Medicare (for old and disabled people) and it expands Medicaid (for poor people).
- But most people in the U.S. are **not** covered by the expansion of Medicaid **or** by "Obamacare."
- Most people kept their employer-based plan, *etc.*

What do opponents of "Obamacare" say about that incremental reform?

- Former Republican presidential candidate Ben Carson said, **"You know Obamacare is really I think the worst thing that has happened in this nation since slavery."** https://www.washingtonpost.com/news/post-politics/wp/2013/10/11/ben-carson-obamacare-worst-thing-since-slavery/
- The new Vice President (Mike Pence) called the ACA a **"government takeover of health care."** http://www.cnn.com/2016/11/01/politics/donald-trump-mike-pence-obamacare-health-care/
- The new president called Obamacare **"a catastrophe."** http://radio.foxnews.com/2016/11/01/trump-obamacares-a-catastrophe/

Why are some people so opposed to this limited, incremental reform?

- Criticizing Obamacare is a way to get more votes.
- Also, ACA became a **symbol** of other grievances against the "*elite establishment*" in Washington.
- The ACA is a **symbol** of efforts (especially by Obama and the Democrats) to use government (the public sector) to solve problems in society.
- The ACA is a **symbol** of efforts to make the U.S. more like other wealthy countries (where people pay more taxes, and more people have insurance).

The new president campaigned on a promise to repeal and replace Obamacare

- In February 2016, he tweeted, "We will immediately repeal and replace ObamaCare - and nobody can do that like me. We will save $'s and have much better healthcare!" http://abcnews.go.com/Politics/fact-checking-trumps-repeal-replace-obamacare-timeline/story?id=46360908
- On October 25, 2016, he said, "You're going to have such great health care at a tiny fraction of the cost. And it's going to be so easy." (Id.)

Now, the president apparently understands that health policy is really complicated

- During his second month in office, the new U.S. president said **"Nobody knew that healthcare could be so complicated."** http://www.latimes.com/politics/washington/la-na-essential-washington-updates-nobody-knew-that-health-care-could-be-1488215694-htmlstory.html
- In fact, many experts in health law and health policy already knew that healthcare is very complicated!
- All of my students already knew that healthcare is very complicated!

Under Republican control, what types of changes are likely <u>within</u> the US?

A. <u>Shifting</u> the balance of power from the federal government to the 50 state governments;
B. <u>Reducing</u> individual rights to health insurance coverage and access to health care services;
C. <u>Reducing</u> the protection of individual rights to choice in reproductive health services; and
D. <u>Reducing</u> government regulation for public health and safety

II. The context: Law, society, and health care in the United States

The U.S. spends more on health care (compared to other wealthy countries)

- As a **percent of 2014 GDP**, U.S. spends more for health care (**17.2%**) than other wealthy countries (*e.g.* Switzerland & Japan 11.4%; or U.K. 10.2%). http://international.commonwealthfund.org/stats/percentage_gdp/
- **Per capita**, the U.S. spends much more for health care **($9,364**) than other wealthy countries (*e.g.* Switz.-$6,787; Japan-$4,152; or U.K.-$4,094).

http://international.commonwealthfund.org/stats/spending_per_capita/

- But the U.S. health system does **not** get good results (even though it spends a lot on health care).

The U.S. health system has worse results than other wealthy countries

- A 2014 report showed poor U.S. performance on: (1) infant mortality and (2) deaths that might have been prevented with proper care. (Commonwealth Fund, 2014, at page 9) http://www.commonwealthfund.org/~/media/files/publications/fund-report/2014/jun/1755_davis_mirror_mirror_2014.pdf
- The 2016 U.S. infant mortality rate was 6 per 1,000 live births (but only 4 in Switz., Canada & U.K; 3 in France & Germany; and 2 in Japan). https://data.worldbank.org/indicator/SP.DYN.IMRT.IN

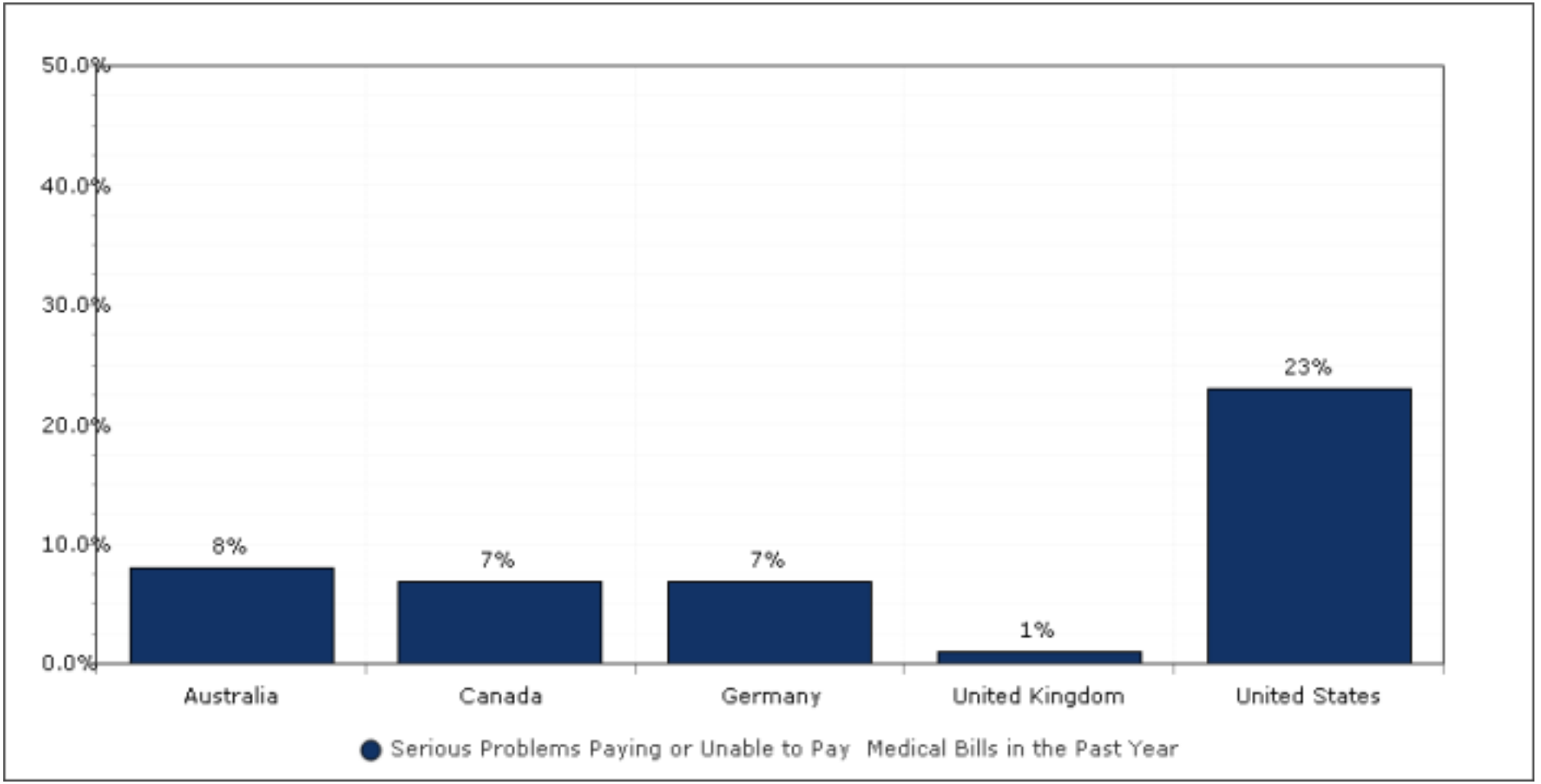
The U.S. has serious problems of financial access to health care

- Unlike other wealthy countries, the U.S. system does **not** provide universal health insurance coverage.
- Many people in the U.S. cannot afford medical care.
- "Adults in the U.S. are more likely than those in the 10 other countries to go without needed health care because of costs." (emphasis added)
  http://www.commonwealthfund.org/publications/in-the-literature/2016/nov/2016-international-health-policy-survey-of-adults
- "One-third (33%) of U.S. adults went without recommended care, did not see a doctor when sick, or failed to fill a prescription because of costs." (Id.)

Costs

Serious Problems Paying or Unable to Pay Medical Bills in the Past Year

Percent of adults age 18 and older



Source: 2013 International Health Policy Survey in Eleven Countries

Data collection: Social Science Research Solutions

The COMMONWEALTH FUND

The U.S. Constitution does not provide a right to health care

- The U.S. Constitution is based on negative rights (government in the U.S. cannot do bad things ***to*** you), not positive rights (government is not required to do good things ***for*** you).
- Generally, the U.S. has not ratified international agreements that impose legally enforceable human rights obligations (or it has imposed reservations or insists that agreements are not self-executing).
- Thus, the U.S. Constitution (as interpreted by U.S. courts) is the last resort on issues of legal rights.

The U.S. is different from other rich countries in obesity and gun violence

- The U.S. obesity rate of 38.2 % is the highest of OECD countries (while Japan is lowest at 3.7 %, and Switzerland is 4th lowest at 10.3%).
  https://www.oecd.org/els/health-systems/Obesity-Update-2017.pdf
- The U.S. rate of violent gun deaths is 3.85 per 100,000 people (while Japan's rate is only 0.04).
  https://www.npr.org/sections/goatsandsoda/2017/10/06/555861898/gun-violence-how-the-u-s-compares-to-other-countries
- In Switzerland, the rate of death from physical violence by firearm in 2015 was 0.26 per 100,000.
  https://vizhub.healthdata.org/cod/

The U.S. has a high level of income inequality and mistrust of government

- The 2013 U.S. GINI Index (40.8) was comparable to Russia (40.1) and Morocco (40.9), and was less equal than Switz. (33.7) and Germany (28.3). http://hdr.undp.org/en/content/income-gini-coefficient
- The U.S. has big health disparities (on the basis of race, ethnic group, geography, education, *etc*.).
- Many Americans do not trust government (public sector), regardless of which party is in power.
- "Government is the problem--not the solution."

Americans and Europeans have very different views about causes of poverty

- Only **15%** in a 2010 EU study said people live in poverty "because of laziness and lack willpower."
- Instead, most Europeans blamed poverty on injustice in society (**48%**), bad luck (**14%**), or "an inevitable part of progress" (**16%**). (Eurobarometer, 2010, p. 64).
- In contrast, many more Americans think that poverty is due to laziness (lack of effort). (Pew, 2014).
- "Which has more to do with why a person is poor?"
- **35%** of Americans said "lack of effort." (Pew, at 3).

Debates about health reform are really debates about ethics and values

- The U.S. value system does not place a high priority on **social solidarity** (but rather prioritizes values of **autonomy, individualism,** and **self-reliance**).
- Former President Obama described health reform as **"a core ethical and moral obligation."**
- However, some of President Obama's political opponents believe that **"nobody should be forced to pay for anyone else's health care."**

The U.S. is almost evenly divided between two groups of people

- One group thinks the U.S. should become more like countries that have values of social solidarity and universal health systems (*e.g*, Europe, Canada, etc.).
- The other group is convinced that this model of universal coverage is the wrong approach (and they point at the economic crisis to argue that social welfare states are unsustainable).
- The pendulum of political power in the U.S. shifts back and forth between these two groups and their political parties (Democratic and Republican parties).

Many people in the U.S. do not want to give up employer-based insurance

- Many people in the U.S. obtain health insurance through their employer.
- Employers that provide health benefits do not merely make financial contributions for insurance.
- Rather, those employers operate their own company health plans (with their own risk pools).
- Many people oppose any comprehensive health reform that would take away their employer health insurance (and put them in a government system).

Health reform in the U.S. has been a series of incremental steps

- Instead of comprehensive reform, the U.S. has taken a series of smaller, **incremental** steps to provide insurance coverage for specific groups (such as the elderly, disabled, poor people, *etc*.).
- Thus, the U.S. still has a very **fragmented** health system (with separate risk pools for the elderly and disabled, the poor, and the employees of each company plus dependents and retired employees).
- The ACA is merely the latest step in a series of incremental reforms that preserve existing systems (government programs & employer health plans).

III. Efforts to “repeal and replace” President Obama’s Affordable Care Act (ACA)

The ACA provides health insurance for about 20 million people in the US

- About 10 million people have expanded Medicaid.
- About 10 million other people buy individual policies of private insurance on an Obamacare "exchange" (which is an insurance marketplace).
- Uninsured people can buy private insurance on an "exchange" (even if they have pre-existing medical conditions), and those people can get government subsidies based on their income.
- ACA costs are funded partly by taxes on the rich.

The ACA has some problems (but those problems could be fixed)

- Premiums have increased for individual health insurance purchased on an Obamacare exchange.
- But most of the approximately 10 million people who buy individual insurance on an exchange get federal subsidies (to help them pay the cost).
- Thus, only a few million people pay the increased cost without a subsidy (out of 325 million people).
- Also, some insurance companies lost money (and some stopped selling insurance on an exchange).

The practical problems of Obamacare could be fixed by the U.S. Congress

- If members of Congress worked together, those practical problems could be fixed.
- For example, Congress could provide subsidies for an additional 2 or 3 million people who buy insurance on an exchange but get no subsidy.
- But Republicans want to "repeal and replace" Obamacare (rather than fix it).
- If you had a leak in your roof, would you fix the leak (or destroy the house and build a new house)?

The U.S. House of Representatives has voted <u>many</u> times to repeal the ACA

- That was merely "*political theater*" (because they knew the Senate and Obama would <u>not</u> agree).
- Simply **repealing** Obamacare would take away insurance from about 20 million people (and could cause a political backlash against Republicans).
- Therefore, in 2017 Republicans <u>tried</u> to pass a bill to "**replace**" as well as "**repeal**" Obamacare.
- After 8 years of complaining, Republicans have **<u>not</u>** developed a realistic <u>replacement</u> health plan.

So far, Congress has <u>not</u> been able to <u>completely</u> repeal the entire ACA

- Some Republicans described ACA repeal as giving people "**freedom**" to not buy insurance.
- But there was widespread public opposition to Republican proposals that would take away insurance from 20 million people.
- Thus, Congress took an **<u>incremental</u>** approach by repealing only part of the ACA (the penalty for not having health insurance).
- This is <u>incremental</u> repeal of <u>incremental</u> reform.

Congress has power to impose a tax on people who do not have insurance

- The U.S. Supreme Court held that Congress does not have power under the Constitution to require people to buy insurance (under the authority of Congress to regulate interstate commerce.) National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (June 28, 2012).
- But the Supreme Court also held that Congress does have power to impose a penalty (a tax) on anyone who does not have insurance (under the taxing power of Congress). (Id.)

Congress repealed the ACA's penalty for not having insurance (as of 2019)

- Repeal of the penalty (tax) takes effect in 2019.
- The tax helped to increase enrollment on ACA exchanges by young and healthy people (and thus reduced the cost of insurance on ACA exchanges).
- Repeal of the tax will increase the cost of insurance on ACA exchanges. (Jost, 2017).
- But people can still buy ACA insurance (despite any pre-existing medical condition) and can still get subsidies based on their income. (Id.)

The administration (executive branch) is also using an incremental approach

- The administration does not have power to repeal a statute (such as the ACA), but it can change the regulations and impose barriers to implementation.
- The administration has imposed practical barriers (such as making it more difficult for people to enroll for coverage on an ACA exchange).
- Also, it discouraged insurance companies from selling on an ACA exchange (by refusing to pay subsidies for companies to help poor customers).

What is the effect of not paying cost-sharing subsidies to the companies?

- The administration's refusal to pay cost sharing subsidies to insurance companies caused the companies to raise their rates for ACA coverage.
- When the rates for ACA coverage increased, the federal government had to pay more in subsidies to individual enrollees who have low incomes.
- As usual, increases in rates for ACA coverage only hurt those individuals who have too much income to receive government subsidies.

The administration also wants to allow healthy people to buy cheap insurance

- The ACA required people to have insurance that met federal standards of coverage (and could be purchased by anyone regardless of health status).
- Insurance meeting ACA requirements is relatively expensive (but most buyers get federal subsidies).
- Some healthy people complained that they do not need (and do not want) comprehensive insurance.
- Now, the administration wants to let people buy cheap insurance (not meeting ACA standards).

One type of cheap insurance is called "short-term" insurance

- The administration issued a proposed rule to allow "short-term" insurance for 12 months (and then extend for 12 more months).
- "Short-term" insurance is cheaper than ACA coverage (because it provides less coverage).
- Some people call this "**junk insurance**."
- Also, companies would only sell cheap insurance to healthy people (by rejecting people with pre-existing conditions or charging them higher rates).

The proposal for "short-term" insurance would put buyers at risk

- Many people would buy "short-term" insurance when they are healthy (because it is cheap).
- But they would not have adequate coverage if they (or dependents) become seriously sick or injured.
- In theory, they could buy more comprehensive insurance at that time from an ACA exchange.
- However, they might need to wait many months until the next ACA open enrollment period.
- Meanwhile, they might not be able to afford care.

The proposal for "short-term" insurance would also harm society

- If more healthy people buy "short-term" coverage, that would leave sicker people in ACA exchanges.
- The effect would be to increase the premiums for ACA-compliant coverage in the exchanges.
- In fact, one of the administration's goals is probably to reduce participation (and raise costs) in the ACA exchanges.
- Cheap insurance for only healthy people violates the principles of solidarity and fairness.

IV. Reducing the mandate for insurance coverage of contraceptives

The ACA requires (mandates) the insurance coverage of preventive care

- ACA mandates insurers to cover specific benefits (*e.g.* preventive care with no payment by patients).
- This is not limited to coverage from an ACA exchange (but also applies to employee groups).
- The ACA's "Women's Health Amendment" makes sure that preventive care includes additional preventive services for women.
- HHS considers preventive care to include all FDA-approved contraceptives (but some religious employers object to providing that coverage).

Legislative history shows intent of Congress was to stop discrimination against women

- In the 2009 debate about the ACA, Senator Kirsten Gillibrand (Democrat-New York) stated "Not only do we [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men .... This fundamental inequity in the current system is dangerous and discriminatory and we must act…." 155 Cong. Rec. S12,019, S12,027 (daily ed. Dec. 1, 2009) (emphasis added).

Current U.S. officials are changing the rules adopted by Obama's officials

- The Obama administration adopted rules that required ("mandated") insurance companies and employers to provide coverage for the full range of FDA-approved contraceptives (subject to an **exemption** for houses of worship, and subject to **accommodations** for some employers that objected on the basis of their religion).
- The current administration has issued new rules which **expand** the number of employers that could be exempt from the contraceptive mandate (in which case employees would not have this coverage).

The U.S. government's proposed rules discriminate against women

- As explained by the Planned Parenthood Action Fund, "**Failing to provide coverage is sex discrimination.**" https://www.plannedparenthoodaction.org/issues/birth-control/facts-birth-control-coverage
- "Prescription contraceptives are used exclusively by women. Failure to provide coverage for prescription contraceptive drugs and devices in health plans that otherwise cover prescription drugs …. constitutes discrimination on the basis of sex." (Id.)

The dispute over contraceptive coverage is based on conflicting ethical views

- The individual rights of employees to make their own personal decisions about their health care: ("My birth control is not my boss's business!!!")
- The individual rights of employers not to be forced to pay for something that violates their religious beliefs: ("My employees can use contraception and abortion if they choose, but it is against my religion and the government cannot make me pay for it!!!")

Can the government require people to do things that violate their religious beliefs?

- Many people argue that the U.S. government cannot make individuals do something which violates their individual religious beliefs.
- As a legal matter, that argument is simply wrong.
- The U.S. government can (and often does) make people do things which violate individual religious beliefs (such as requiring people to pay taxes to support wars or capital punishment).
- Moreover, religious **belief** is not an excuse to perform legally prohibited **conduct** (*e.g.* polygamy, etc).

In part, this dispute is a result of the U.S. system of employer-based coverage

- One reason that we are arguing about this issue in the U.S. is because we have a system of employer-based health insurance (rather than a system of government health insurance like Canada).
- U.S. employers do not merely make financial contributions for their workers' health insurance (but also operate their own company health plans).
- Therefore, some owners of businesses believe they should have the right to control the types of coverage which is provided for their employees.

Federal rules provided an exemption from the mandate for churches

- The federal government provided an exemption for employees of **churches (houses of worship)**.
- But there was no exemption for the employees of **church-affiliated organizations** (such as religiously-affiliated universities or hospitals).
- Also, there was no exemption for **private businesses** that are owned by religious individuals who claim that providing contraceptive coverage violates their religious beliefs (but they already pay taxes to support Medicaid which provides contraceptives).

The government also provided accommodations for some non-profits

- Even if an employer is not exempt from the mandate, it might be eligible for an accommodation (which is an alternative way to comply with the mandate).
- As an accommodation, the government created a "work-around" (so that religiously-affiliated employers would not have to directly provide contraceptive coverage for their employees).
- In fact, there are separate "work-arounds" for eligible employers with insured and self-insured health plans.
- This is like a so-called "Rube Goldberg machine."

Federal litigation on the issue of mandated contraceptive coverage

- Dozens of cases were filed to challenge the mandate.
- Plaintiffs include religious organizations, religiously-affiliated colleges, individuals, businesses, and state governments.
- The main issues: Does the mandate violate the First Amendment or the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §2000bb *et seq*.?
- Under RFRA, the court must consider several issues: **(1)** Does the government's action "substantially burden the exercise of religion"; **(2)** If so, does that government action "serve a compelling government interest"; and **(3)** Is that government action "the least restrictive means of serving that interest." *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

The U.S. Supreme Court's decision in Hobby Lobby and Canestoga

- On June 30, 2014, the Court ruled against HHS in two cases by for-profit corporations that were "closely-held."
- The Religious Freedom Restoration Act (RFRA) does apply (even though the owners chose to operate as corporations).
- The Court assumed that the action of the government (HHS) serves a compelling government interest.
- But HHS did not use the least restrictive means (as shown by HHS's accommodation for religious, non-profits to self-certify their objection and let insurers or TPAs provide that coverage).
- Therefore, HHS must also make its accommodation available to closely-held, for-profit corporations. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

Some religious employers opposed the process to request an accommodation

- Rather than requesting an accommodation, they wanted an exemption from the mandate.
- Those religious employers argued that requesting an accommodation would make them **morally complicit** (by taking action that would cause others to provide contraceptive coverage in their place).
- The federal government tried to reach a compromise.
- But there was no way to provide contraceptive coverage without some action by religious employers (which they consider to be morally complicit).

In 2017, the new President issued an Executive Order that addresses this issue

- The Executive Order "Promoting Free Speech and Religious Liberty" was issued on May 4, 2017. https://www.gpo.gov/fdsys/pkg/FR-2017-05-09/pdf/2017-09574.pdf
- Section 3 of the Executive Order provides that "The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services shall consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code." (emphasis added).

The administration has issued new rules that reduce the contraceptive mandate

- The new administration issued rules that give exemptions to a broader range of employers (without the need to apply for an accommodation or submit a notice to HHS). 82 Fed. Reg. 47792, 47838 (Oct. 13, 2017).
- These new rules have been challenged in cases by several state governments (and others). *See*, *e.g.* Pa. v. Trump, 2017 U.S. Dist. LEXIS 206380 (E.D. Pa. 2017) (granting the state's motion for a preliminary injunction).
- Legal issues include rulemaking procedure, statutory authority, equal protection, and establishment clause.

Conclusions

- The U.S. system is still fragmented (because the U.S. has not adopted comprehensive reform).
- Instead, the U.S. has adopted several incremental reforms (including President Obama's ACA).
- Most opposition to the ACA is not based on facts (but rather as a symbol of the role of government).
- Despite years of opposition, the Republicans do not have a plan to "repeal and replace" the ACA.
- Therefore, Congress has repealed part of the ACA.

Conclusions (continued)

- Even without further action by Congress, the Executive Branch can continue to impose practical and legal barriers to President Obama's health reform.
- Eventually, the political pendulum in the U.S. will swing back to promote public health and access to care.
- Meanwhile, advocates for public health and access must continue to speak, write, and teach the truth.

References

- Commonwealth Fund, “Mirror, Mirror on the Wall, 2014 Update: How the U.S. Health Care System Compares Internationally,” (June 2014), http://www.commonwealthfund.org/~/media/files/publications/fund-report/2014/jun/1755_davis_mirror_mirror_2014.pdf
- European Commission, “Special Eurobarometer 355: Poverty and Social Exclusion Report,” (December 2010), http://ec.europa.eu/public_opinion/archives/ebs/ebs_355_en.pdf
- Jost, T, “The Tax Bill And The Individual Mandate: What Happened, And What Does It Mean?” **(**Dec. 20, 2017), https://www.healthaffairs.org/do/10.1377/hblog20171220.323429/full/

References (continued)

- Jost, T, "Day One And Beyond: What Trump's Election Means For The ACA," *Health Affairs Blog* (November 9, 2016), http://healthaffairs.org/blog/2016/11/09/day-one-and-beyond-what-trumps-election-means-for-the-aca/

- Kaiser Family Foundation, "Where President-elect Donald Trump Stands on Six Health Care Issues" (November 09, 2016), http://kff.org/health-reform/issue-brief/where-president-elect-donald-trump-stands-on-six-health-care-issues/

References (continued)

- Pew Research Center, "Most See Inequality Growing, but Partisans Differ over Solutions," (January 23, 2014), http://www.people-press.org/files/legacy-pdf/1-23-14%20Poverty_Inequality%20Release.pdf

- Siddiqi A and C Hertzman, "Towards an epidemiological understanding of the effects of long-term institutional changes on population health: A case study of Canada versus the USA," *Social Science & Medicine*, (2007), 64(3): 589–603.