

Health Policy by Litigation

The Lauren LeRoy Health Policy Lecture
Grantmakers In Health

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Trends in Litigation

Affordable Care Act lawsuits continue...

- ACA may be the most litigated social legislation ever passed
- 3 Supreme Court cases, 1 this year with another on the way

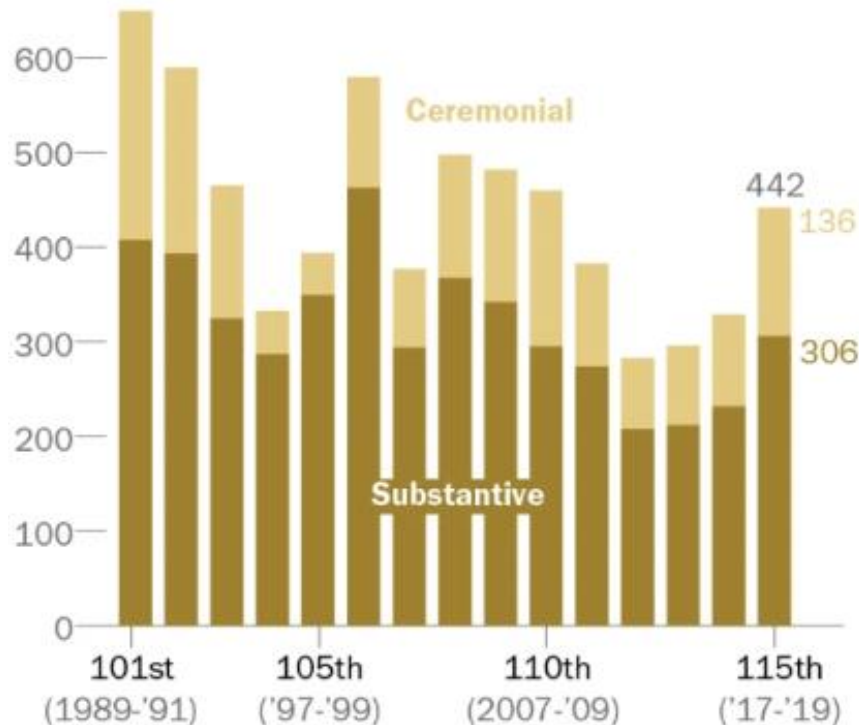
But it's not just the Affordable Care Act...

- Immigration
- Reproductive health
- Environment
- Prescription drugs
- Access to mental health and behavioral health services
- Labor and workplace safety

Why does it feel like there is so much more litigation?

Three decades of legislative productivity in U.S. Congress

Number of public laws enacted by each Congress, by type



Source: Pew Research Center analysis of U.S. congressional data.

PEW RESEARCH CENTER

Why so much litigation?

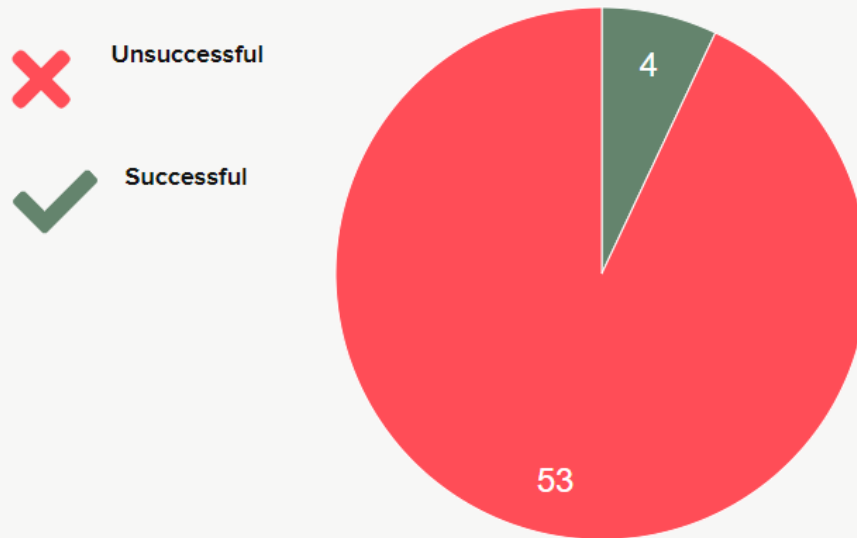
Congress is gridlocked →
no action

No congressional
policymaking →
emboldens the executive
branch to set policy

Courts step in to check
executive authority

Lots of Legal Losses for the Trump Administration (So Far)

The Institute for Policy Integrity¹ tracks the outcomes of litigation over the Trump administration's use of agencies to deregulate as well as to implement its other policy priorities.² This Roundup includes litigation over agency actions such as regulations, guidance documents, and agency memoranda.³



- “Loss rate” of 93% (versus a normal loss rate of 30%)
- Successful challenges on both process and substance

Last updated October 15, 2019. [Download PDF.](#)

Who is Bringing the Lawsuits?

State attorneys general (Republicans and Democrats)

- Democrats: Contraceptive mandate, Title X funding, association health plans, etc.
- Republicans: Contraceptive mandate, nondiscrimination protections, employer mandate, etc.
- Global challenge to the ACA → AGs on both sides

Nonprofit and advocacy organizations

- National Health Law Program re: Medicaid work requirements
- Patient advocates re: short-term plans
- ACLU re: health care nondiscrimination cases

Historic Gains Under the ACA

20 million people have gained coverage since 2010

- Uninsured rate dropped from 17.8% in 2010 to 10.2% in 2017
- Significant gains for people of color and low-income Americans
- But the uninsured rate is beginning to climb...

Academic analysis shows:

- Positive effect on access to and consumption of health care
- Suggestive but limited evidence on improved health outcomes
- No evidence of reductions in provider access, changes in labor supply, or increased budget pressures on state governments
- Total federal cost has been less than predicted

Texas v. U.S.: A Global Challenge

18 Republican AGs/Govs
Two individuals in Texas
Department of Justice

vs.

21 Democratic AGs
House of Representatives

Challengers' Argument

- SCOTUS upheld the mandate as a tax in *NFIB v. Sebelius* in 2012
- Congress zeroed out the individual mandate penalty in the Tax Cuts and Jobs Act so mandate is no longer a tax and is unconstitutional
- Entire ACA relies on the mandate so should also be struck down

Timeline

Feb. 2018: Lawsuit was filed

Dec. 2018: District court decision

Jan. 2019: Appeal to Fifth Circuit

Jul. 2019: Oral arguments

Decision expected this fall

Appeal to SCOTUS for 2020?

Texas v. U.S.: A Global Challenge

If the lawsuit is successful...we get chaos

- 20 million people lose coverage
- 130 million Americans with preexisting conditions lose protections
- Ends Medicaid expansion
- Reopens Medicare drug donut hole
- Eliminates the Prevention and Public Health Fund
- Reduces federal health care spending by \$135b in 2019 alone
- [Etc.]

If the lawsuit is unsuccessful...we get the status quo

Other ACA Lawsuits

- Unpaid risk corridor payments (SCOTUS)
- Exemptions to the contraceptive coverage mandate (SCOTUS?)
- Association health plans (D.C. Circuit)
- Short-term plans (D.C. Circuit)
- Unpaid cost-sharing reduction payments (Federal Circuit)
- Nondiscrimination protections (Fifth Circuit)
- Risk adjustment methodology (Tenth Circuit)
- “Take Care” case over multiple policy decisions (district court – MD)

Other Health Litigation Issues

- Medicaid work requirements (D.C. Circuit)
- Title X domestic gag rule (9th Circuit)
- Provider conscience rule (district courts in CA, NY, WA)
- Opioid litigation (many district courts)
- Reproductive health cases (SCOTUS, many other courts)
- Prescription drug transparency (D.C. Circuit)

Open Questions

Is litigation simply politics pursued through other means?

What does this mean for the next wave of health reforms in Congress and from presidential candidates?

President Trump is aggressively shaping the judicial branch – what impact might this have on future health litigation?

What (if anything) will spur Congress to act?

What are the opportunities and challenges for philanthropy?

Opportunities for Philanthropy

- File amicus briefs
- Fund research to track the effects of policy changes
- Support expert opinion and the development of an evidence base
- Fund organizations that do health impact litigation
- Fund story collection or facilitate connections between grantees
- Understand the “rapid response” nature of litigation
- Ask grantees or partners if there are unmet litigation needs



Thirty Philanthropic Institutions File Amicus Brief with US Supreme Court to Halt Census Citizenship Question

Monday, April 1, 2019

This week, 30 philanthropic organizations across the country took the unusual step of filing an *amicus* brief asking the United States Supreme Court to consider the harm an undercount in the upcoming 2020 Census will have on philanthropy's mission which relies on a complete census count for data-driven investments and solutions tailored to their communities.

SUPREME COURT OF THE UNITED STATES

Syllabus

KING ET AL. *v.* BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The combination of no tax credits and an ineffective coverage requirement could well push a State's individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. E. Saltzman & C. Eibner, *The Effect of Eliminating the Affordable Care Act's Tax Credits in Federally Facilitated Marketplaces* (2015). Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. L. Blumberg, M. Buettgens, & J. Holahan, *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums* (2015). And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U. S. C. §18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. Brief for Bipartisan Economic Scholars as *Amici Curiae* 11–12.

**DECLARATION OF FREDERICK ISASI IN SUPPORT OF MOTION TO INTERVENE
OF CALIFORNIA, ET AL.**

I, Frederick Isasi, declare:

1. I am the Executive Director of Families USA Foundation, a role that I assumed in April 2017. Prior to assuming this role, I served as the Health Division Director at the bipartisan National Governor's Association's Center for Best Practices, as Vice President for Health Policy at the Advisory Board Company, and I served as Senior Legislative

**DECLARATION OF HENRY J. AARON, Ph.D., IN SUPPORT OF MOTION TO
INTERVENE OF CALIFORNIA, ET AL.**

I, Henry J. Aaron, declare as follows:

1. I am currently the Bruce and Virginia MacLaury Senior Fellow in the Economic Studies Program at the Brookings Institution. From 1990 through 1996, I was the Director of the Economic Studies Program. I am a member of the District of Columbia Health Benefits Exchange Executive Board and a member and former chair of the Social Security Advisory

Gresham v. Azar

“Adrian McGonigal is 40 years old and lives with his brother in Pea Ridge, Arkansas. He used to have a job working in the shipping department of Southwest Poultry, a food-service company located nearby, although he received no medical insurance through his employer. Like many Americans, he has several serious medical conditions. Beginning in 2014, McGonigal was able to receive medical care — including regular doctor visits and numerous prescription drugs — through the state’s expanded Medicaid program. In mid-2018, however, McGonigal learned that he would be subject to new work requirements ... Despite his lack of access to, and difficulty working with, computers, he was able to report his employment in June 2018, but he did not know he needed to continue to do so each month. As a result, when he went to pick up his prescriptions in October, the pharmacist told him that he was no longer covered, and his medicines would cost him \$800. In the absence of Medicaid, he could not afford the cost of the prescriptions and so did not pick them up. His health conditions then flared up, causing him to miss several days of work, and Southwest Poultry fired him for his absences. He thus lost his Medicaid coverage and his job.”

– Judge James E. Boasberg

Thank you!

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More resources available at: healthaffairs.org/blog