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The ACA Controversy: Women's Rights versus Religious Freedom

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The Patient Protection and Affordable Care Act was signed into law in 2008 and went into effect in June 2012 [1,2] Of the numerous healthcare components covered in the ACA, one heavily scrutinized issue was the inclusion of free FDA-approved contraceptives. New health insurance plans created in the Health Insurance Marketplace are required to provide free (i.e. plans cannot charge a co-payment, co-insurance, or deductible when care is provided by an in-network provider) physician-prescribed contraceptive methods (i.e. barrier methods, hormonal methods, implanted devices, etc), as well as counseling for women [1,2]. Almost all insurance plans cover prescription drugs; however, some plans do not provide coverage for FDA-approved contraceptives [2]. The FDA-approved contraceptives includes implantable rods, IUDs, Depo Provera, the pill, the patch, vaginal contraceptive ring, and Plan B [1,3].

However, not all plans are required to cover specific types of contraceptives or any at all. The new health insurance plans created in the Health Insurance Marketplace are not required to cover drugs used to induce abortions and vasectomies [1]. Some state policies allow employers or insurers to refuse to cover contraception due to religious or moral reason [2]. Currently, only 28 states require insurers to cover the full-range of FDA-approved contraceptives [2]. Regardless of religious and moral exemptions and the 22 states that do not mandate contraceptive coverage, this policy change still has an impact on women's health and the overall health of the nation.

This policy brief explores the concept of women's rights in regard to the impact of the ACA's contraception policy. The purposes of this policy brief are to provide a more detailed understanding of the scope of contraception, the prevalence of birth control use, states' policies regarding contraception, and finally, the legal and political controversies of contraceptives in the Patient Protection and Affordable Care Act.

Prevalence of Women in Need and Birth Control Use

In 2013, there were approximately 62 million women in the United States who were aged 15-44, which is considered the childbearing years [4]. About 70% of these women were at-risk of experiencing an unwanted pregnancy, about 62% used a contraceptive method, and finally 99% of sexually active women in this age range have used at least one form of contraception [4]. Young women, aged 15 – 19 year olds, were at highest risk of not using contraceptives (18%), while women who are 40-44 were at the lowest at risk of not using (9%) [4]. In terms of race, black women used contraceptives less (83%) than their Hispanic (91%), white (91%), and Asian (90%) counterparts [4]. Married women use contraceptives more than unmarried women, 77% and 42%, respectively [4]. Related to religion, 89% of Catholics and 90% of Protestants used contraception [4]. Finally, 82% of sexually active teenagers used a contraceptive [4].

As a result of the ACA, the rate of women who had private insurance paid no copayment for oral contraceptives rose from 15% to 40% from fall 2012 to spring 2013, while women using vaginal rings increased from 23% to 52% [5]. No change was found in injectable birth control use or the IUD during that same time period.[5] Furthermore, a study on expanding contraceptives within the Medicaid population in Oregon found that extension of contraceptive coverage from 185% to 399% of the Federal Poverty Level (FPL) saved money and improved outcomes [6]. This coverage expansion was credited with preventing 72 pregnancies per 1,000 women over a period of 5 years and helped Oregon save $489 per woman enrolled in the health insurance plan that covered contraception [6].

Overview of States' Policies

Each state has different insurance coverage for contraceptives. Currently, twenty-eight states are required by insurance to cover contraceptive prescription drugs and devices and seventeen states are required to cover outpatient services [2]. However, Arkansas and North Carolina has an exception for emergency contraception and West Virginia has an exception for minor dependents [2]. Furthermore, twenty states have policy that allow certain employers and insurers for refuse to comply with the ACA contraceptive mandate and 8 states do not allow refusal by any employer and insurer [2]. Three states have a limited refusal clause, which allows churches and church organizations to refuse the contraceptive mandate coverage [2]. Seven states expanded this by not only allowing churches and church organizations to refuse the contraceptive mandate coverage, but also allowed religiously affiliated elementary and secondary schools, religious charities, and religious universities to refuse the mandate [2]. Finally, nine states include further expansive refusal clause, which allows religious organizations, including hospitals, to refuse the contraceptive mandate coverage [2]. Additionally, fourteen of the twenty states that have exemptions require employers to notify their employee's when/if their health plan do not cover contraceptives [2]. Moreover, four states have a policy in place to provide alternative access to contraceptives for their employees, in which, employees can purchase contraceptive coverage on their own at a group rate [2].

While the ACA has increased access for many women, each state has their own policies with how birth control is covered. Many states have refusal clauses for various religious organizations. Each state has different policies, so each state has various rights in question: the rights of women to be able to access contraceptives compared to the rights of religious organizations in not providing a medication that they are fundamentally against.

Controversies

Contraceptives, including emergency contraception, have been no strangers to controversies within the legal, political, and social realm.

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While the 1965 *Griswold v Connecticut* case recognized the right to use contraception because of the right to privacy, women still experience barriers to the use of contraception [7]. This controversy is intertwined with the disagreements regarding abortion and whether contraceptives should be classified as "abortifacients" instead of "contraceptives" [8]. Another controversy is whether healthcare providers will prescribe contraceptives to women [8]. Additionally, women who cannot afford contraception have limited access to contraceptives compared to women who can afford it; however, the Patient Protection and Affordable Care Act have started to change this [8]. Religious organizations have sued the federal government claiming that offering female employee's contraception goes against their freedom and expression of religion [8].

In March of 2014, the U.S. Supreme Court will begin to hear arguments in two cases, *Sebelius v. Hobby Lobby Stores, Inc*. and *Conestoga Wood Specialties Corp. v. Sebelius* [9,10]. The defendants in these cases are arguing that their religious freedom and expression is against contraceptives and they do not want to offer them to their female employees [9,10]. Each case will be arguing whether for-profit corporations have religious rights the same way as churches or religious organizations have. Specifically in the *Sebelius v. Hobby Lobby Stores, Inc*., the challenge derives from the Religious Freedom Restoration Act (RFRA), stating that the government cannot infringe on religious freedom unless there is state interest [9,10]. More specifically, Hobby Lobby plaintiffs will be arguing that Hobby Lobby and the affiliated Christian bookstore, Mardel, have adopted work policies that reflect their Christian faith [9]. For the *Conestoga Wood Specialties Corp. v. Sebelius*, the plaintiffs are claiming that the government violated the RFRA and are infringing on the First Amendment [9]. As a result, the Supreme Court will analyze whether women's health and rights are a state interest. Not only will the Supreme Court be looking at whether for-profit corporations have a say in the RFRA, the Supreme Court will also have to analyze whether contraceptive services are a public health need, which in turn, would decide whether contraceptive services are also a compelling state interest.

The claims of these lawsuits are grounded in religious freedom: however, they are not primarily constitutional claims, they are also based on the RFRA, the Free Exercise Clause, and the Free Speech Clause [11-13]. As of right now, district courts have made decisions in 11 cases regarding the contraceptive mandate; however, the courts have dismissed six of these cases due to premature claims. Three district courts have issued a temporary order, which prohibits the federal government from forcing employers to submit with the contraceptive mandate [11]. The districts courts are going to continue to review the cases [11]. As of July 2013, 60 lawsuits had been filed against the federal government regarding the contraception mandate and health insurance [12]. There may be some compelling reasons regarding the district course cases, particularly the ones that have issued a temporary order.

On the other side, Corbin argued that the contraception mandate does not violate the RFRA, Free Exercise Clause, or the Free Speech Clause [13]. She continued to argue that the neutral law of general applicability does not allow any of these lawsuits to claim the contraceptive mandates violates the Free Exercise Clause. She added that the contraception mandate does not breach the RFRA because it declines to "qualify as a strict burden on anyone's conscience and would survive strict scrutiny in any case" [13]. She also added that many Catholic women have used birth control, so banning contraception is not essential to Catholic beliefs [13]. Catholic institutions that claim to be illegally forced to cover contraception under their insurance policies clash with fundamental beliefs of individuals in the Catholic religion [13]. The Free Exercise Clause was devised to encourage free flow of ideas and protect "expressive associations because they allow like-minded people to associate …" [13]. Corbin argued that because of this, the contraceptive mandate does not jeopardize that plaintiffs' claim to Free Exercise Clause. The plaintiffs' are not being forced to accept people whose contraceptives views will "dilute the Vatican's anti-contraceptive stance." [13]. They are asked to cover contraceptives for their female employees. The mandate does not infringe on anti-contraceptive beliefs, as no religious entity is being enforced to supply or fund contraception. Health insurance companies will be covering the cost of contraception, not the employers [13,14]. This brings up the question of women's sexuality and sexual behavior. Is this a problem for employers? Do they understand that they do not have to pay for contraceptives?

For the Supreme Court to make a decision regarding the increased access of contraception the Patient Protection and Affordable Care Act provides as a compelling state issue, they need to consider many issues. The Institute of Medicine has recommended that women have full access to contraception because not only does it prevent pregnancy, it also is essential for women's physical and mental health [14]. Women use birth control for more than just contraceptive purposes, such as polycystic ovary syndrome, irregular menstrual cycles, excessive menstrual bleeding, dysmenorrhea, and endometrosis [15-17]. Will these other medical issues be considered by the Supreme Court when reviewing the contraceptive mandate and the rights of religious organizations and corporations?

Women's individual rights include the control of reproductive health and having this control is fundamental to a woman's autonomy and freedom [13,18]. Women cannot participate as full citizens if they do not have the ability to control their reproductive health [13,18]. Corbin also argued that "excluding contraception not only discriminates against female employees, it also imposes the employer's religious values onto them" [13]. If women want to deny the contraception coverage of their health insurance, they can, but denying the coverage in the first place denies them of a basic public health service [13]. What if the employees do not follow the religious beliefs of their bosses? What if the employees follow the religious beliefs of their bosses, but they support contraception? These are more questions to consider.

One plaintiff argued that their employees are aware of the religion associated with the place of employment and making the choice to work at these particular places [13]. Of course, a person can look for employment somewhere else. However, with an unemployment rate of 6.7%, that is not as easy as it appears. While anyone may be able to quit a job and find a new one, if they do not have skills to find professional, white collar jobs, the job market may prove that to be difficult.

The controversies of this issue are clearly complicated. The controversies lie in whether various religious corporations have the right to deny contraceptive coverage to female employees based on RFRA, Free Exercise Clause, and the Free Speech Clause. One important issue is that the health insurance companies will be paying for the contraceptives, not the actual employers. Does this change the outcome of these court cases? While there are religious exemptions on the federal level and state level, do these exemptions matter if the actual corporation and religious organization are not paying? This will be an important point to note as the lawsuits move forward.

The other controversy is how denial of contraceptives can infringe upon the privacy and rights of women. As noted previously, many women use contraceptives and state health insurance plans modeled

after the ACA have demonstrated long-term savings [4,6]. In the end, whose rights matter more; the rights of the women wanting contraceptives or the rights of the religious organization denying contraceptive coverage?

Conclusion

Since this is a new issue and ongoing topic, this topic is not conclusive. The court cases have not been argued yet and decisions have yet to be made. This issue represents a broad scale of problems regarding rights, justice, liberty, and equal opportunity, each of which are represented in the rights of individuals and the right to religion in the United States Constitution. This issue is beyond the conscience of physicians and other healthcare providers. This is an issue that is going to challenge whether private corporations can influence decision-making and implement policies based on religious rights and freedoms. This issue will also challenge the Supreme Court on deciding whether contraception access is a legitimate state issue and a public health issue. The ACA provides a critical opportunity not only to restructure the U.S. health care system, but also to improve the population's health through the use of evidence-based policy [6]. This policy brief attempts to unbiasly reveal the importance of contraceptive access for women and the public. In the end, contraception is both an individual and societal problem; yet, religious freedom is a fundamental belief of America. Breaking down these walls will not be easily accomplished nor performed in a uniform fashion. But, in order to ensure that individuals' rights and freedoms are accounted for, dramatic overall of a fragmented health care system may be the only answer. Only time will tell.

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