IMPLICATIONS OF *FLORIDA V. DEPT. OF HEALTH AND HUMAN SERVICES* ON ACCOUNTABLE CARE IMPLEMENTATION:

A GREEN LIGHT, A SPEED BUMP, OR A ROADBLOCK ON THE ROAD TO A HIGHER PERFORMING HEALTH CARE SYSTEM?

Third National Accountable Care Organization Summit

June 6, 2012

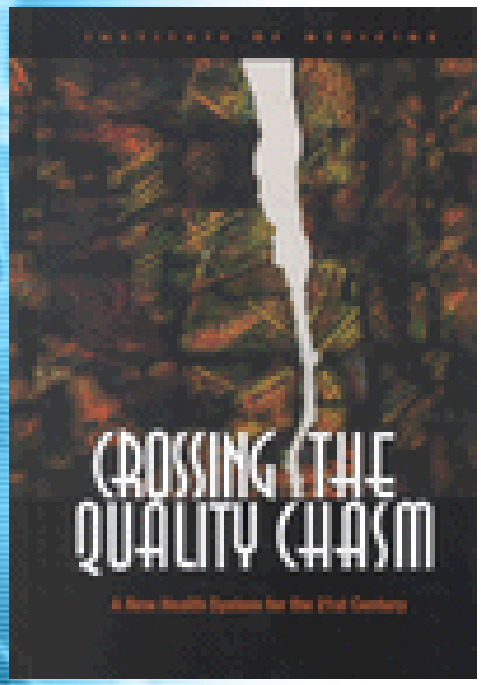
Doug Hastings

The Underlying Challenges Are Still There

- No matter what the Supreme Court decides, we still need to deal with the issues of quality, cost, and access

- The underlying dynamics that have led us to this point – fragmentation, safety issues, runaway costs – are still with us, and just as daunting as in 2010

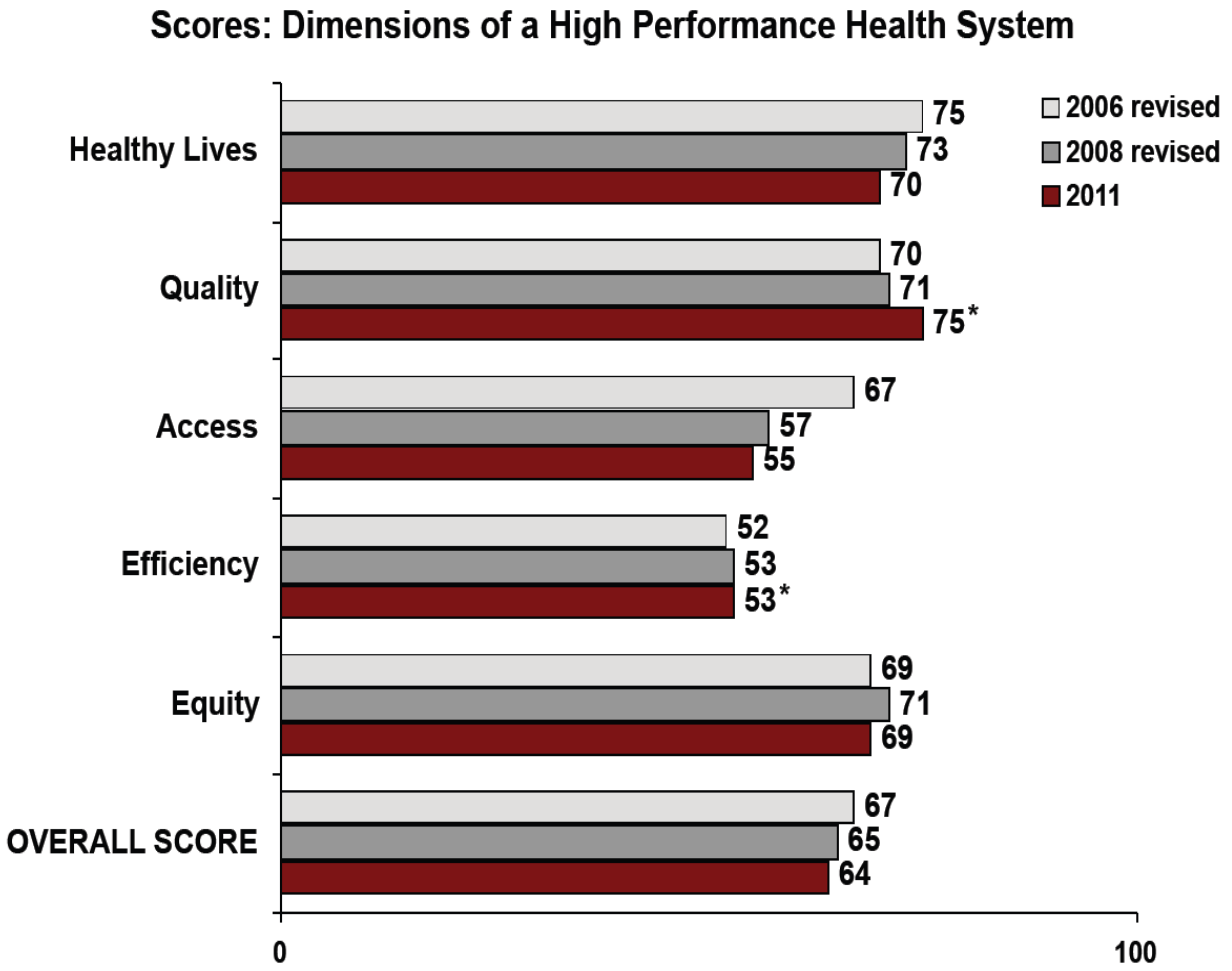
Crossing the Quality Chasm



"The American health care delivery system is in need of fundamental change. Many patients, doctors, nurses, and health care leaders are concerned that the care delivered is not, essentially, the care we should receive…Quality problems are everywhere affecting many patients. Between the health care we have and the care we could have lies not just a gap, but a chasm."

- Institute of Medicine, 2001

Quality: National Scorecard



* Note: Includes indicator(s) not available in earlier years.

Based on the Scorecard's 42 indicators of health system performance, the U.S. earned an overall score of 64 out of a possible 100 when comparing national averages with benchmarks of best performance achieved internationally and within the U.S.

Across all measures, a 40 percent improvement or more would be required in U.S. national rates to achieve benchmark levels of performance.

Source: Commonwealth Fund National Scorecard on U.S. Health System Performance, 2011.

Quality: Overall Ranking

Country Rankings	
	1.00–2.33
	2.34–4.66
	4.67–7.00





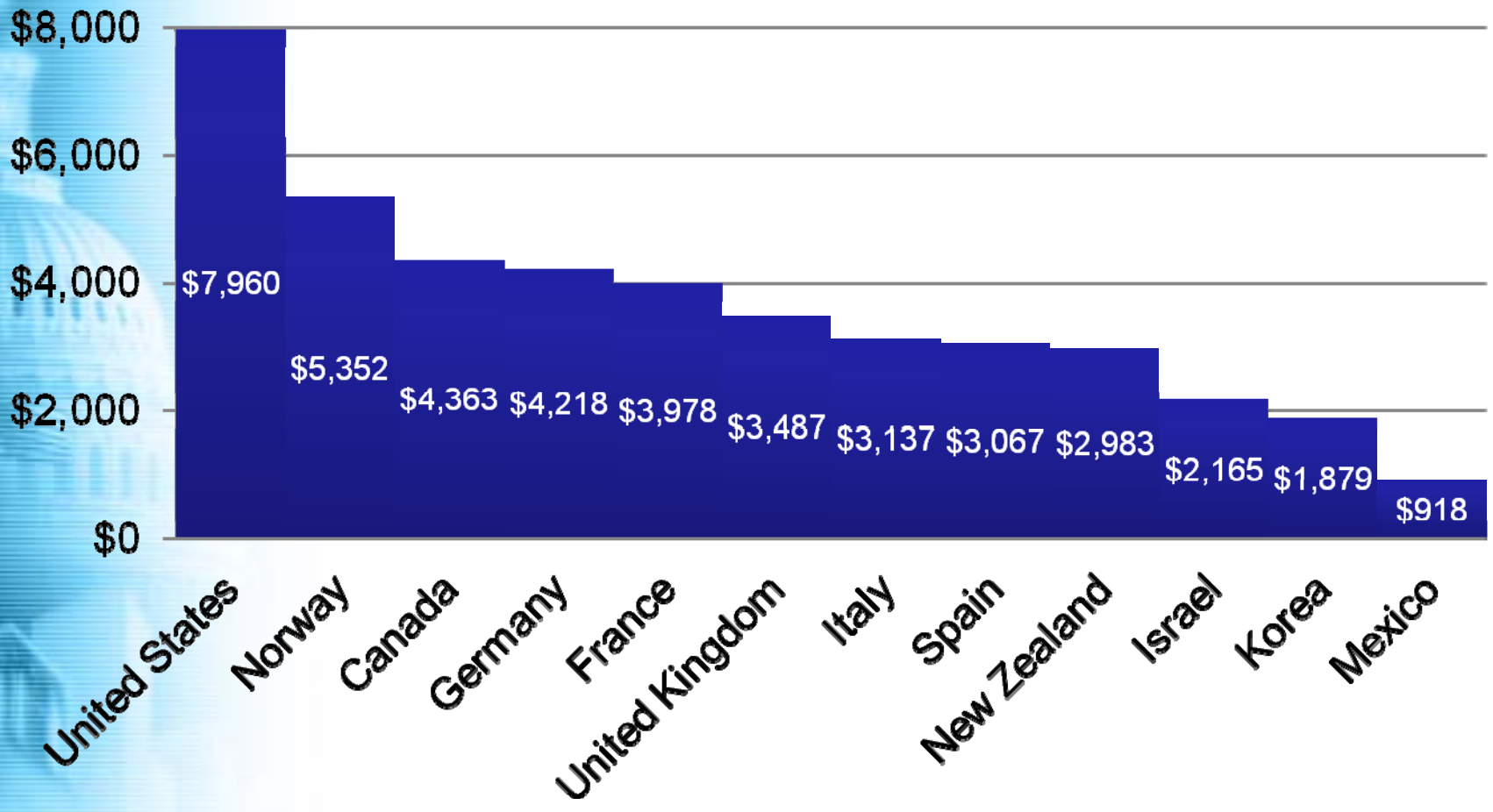


	AUS	CAN	GER	NETH	NZ	UK	US
OVERALL RANKING (2010)	3	6	4	1	5	2	7
Quality Care	4	7	5	2	1	3	6
Effective Care	2	7	6	3	5	1	4
Safe Care	6	5	3	1	4	2	7
Coordinated Care	4	5	7	2	1	3	6
Patient-Centered Care	2	5	3	6	1	7	4
Access	6.5	5	3	1	4	2	6.5
Cost-Related Problem	6	3.5	3.5	2	5	1	7
Timeliness of Care	6	7	2	1	3	4	5
Efficiency	2	6	5	3	4	1	7
Equity	4	5	3	1	6	2	7
Long, Healthy, Productive Lives	1	2	3	4	5	6	7
Health Expenditures/Capita, 2007	$3,357	$3,895	$3,588	$3,837*	$2,454	$2,992	$7,290

Note: * Estimate. Expenditures shown in $US PPP (purchasing power parity).

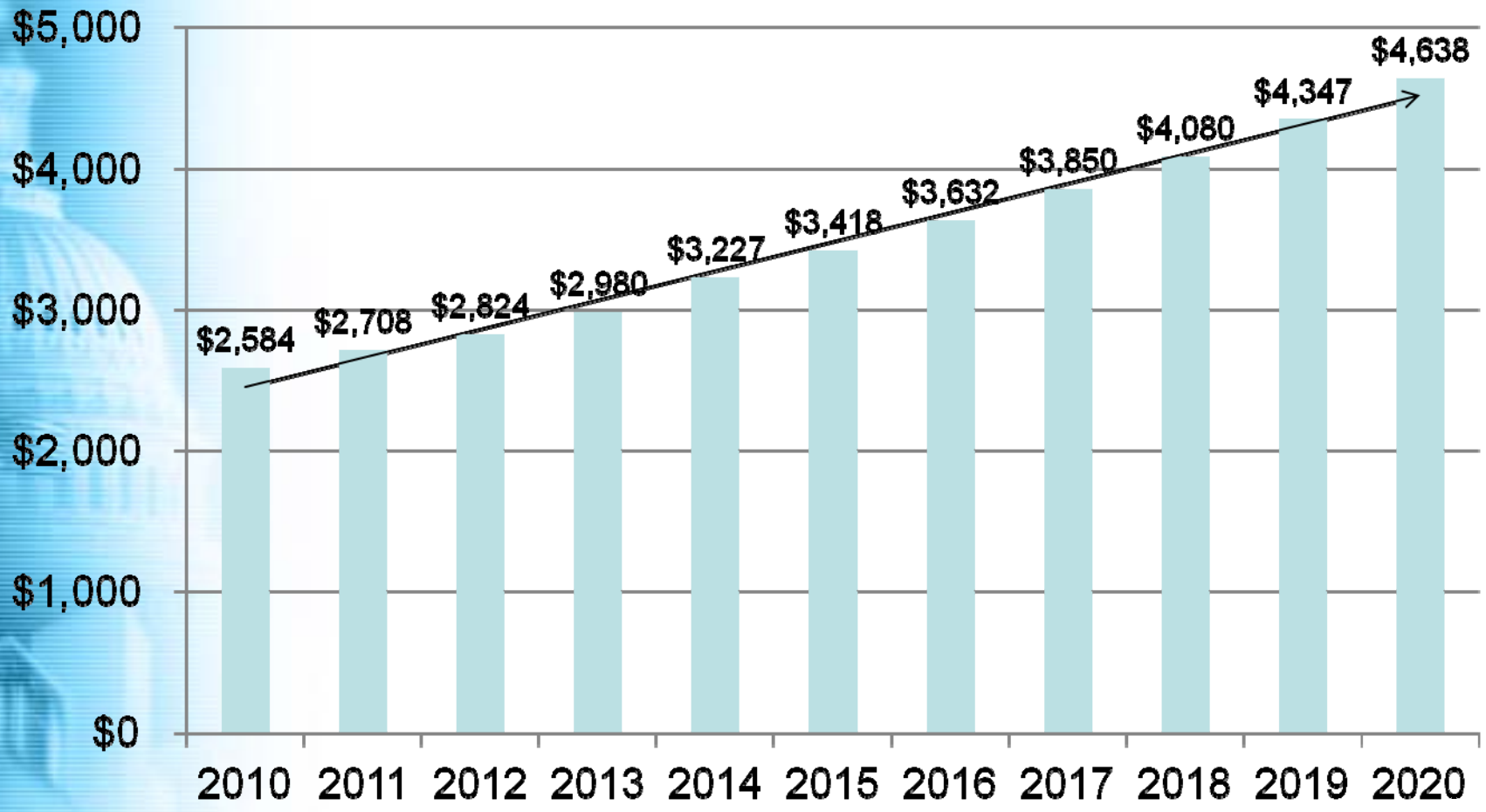
Source: Calculated by The Commonwealth Fund based on 2007 International Health Policy Survey; 2008 International Health Policy Survey of Sicker Adults; 2009 International Health Policy Survey of Primary Care Physicians; Commonwealth Fund Commission on a High Performance Health System National Scorecard; and Organization for Economic Cooperation and Development, *OECD Health Data, 2009* (Paris: OECD, Nov. 2009).

Cost: National Health Expenditures per Capita



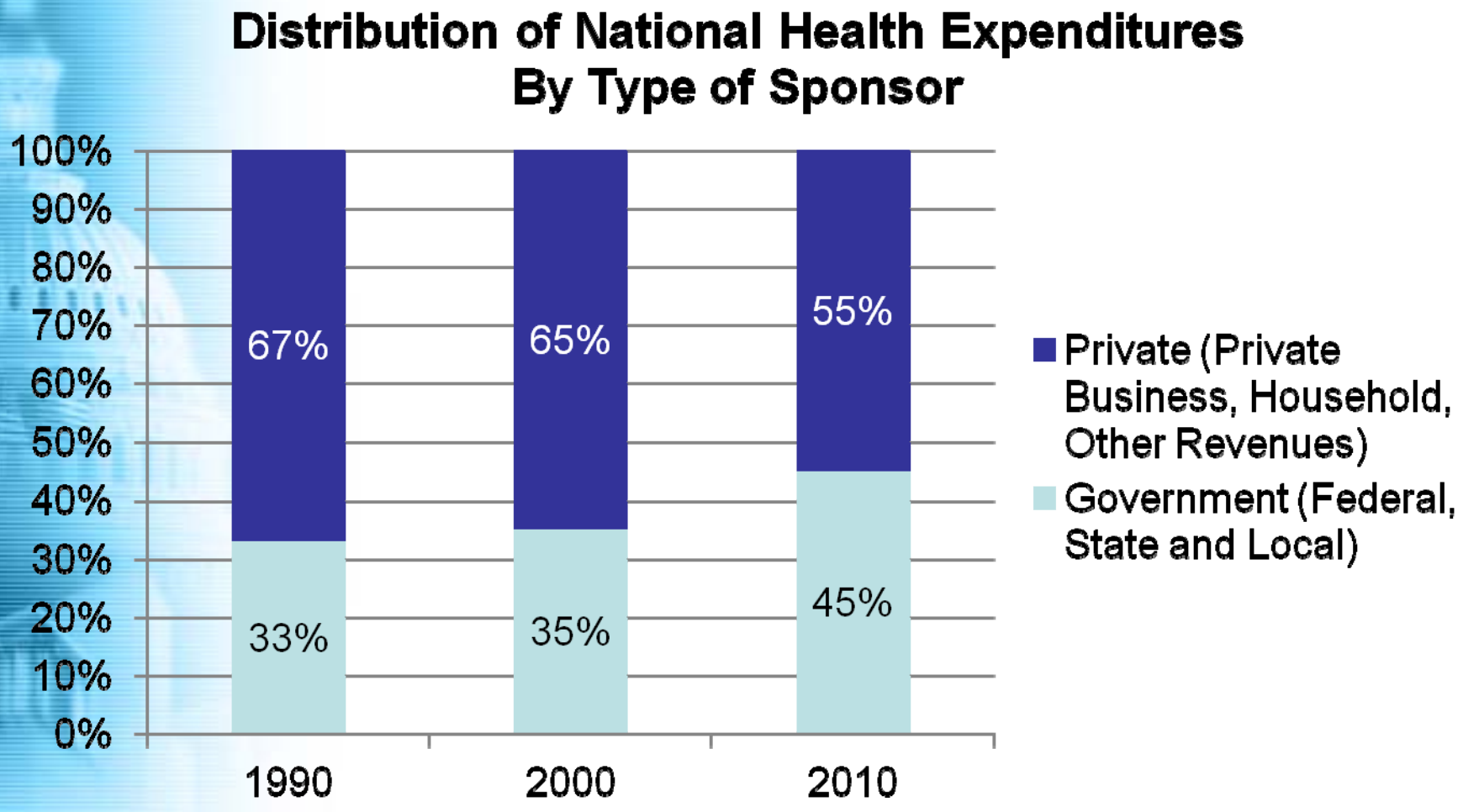
Source: OECD Health Data 2011: Key Indicators, *available at* www.oecd.org.

Cost: National Health Expenditures 2010-2020



Source: CMS Office of the Actuary, National Health Expenditure Data, *available at* www.cms.hhs.gov/NationalHealthExpendData/.

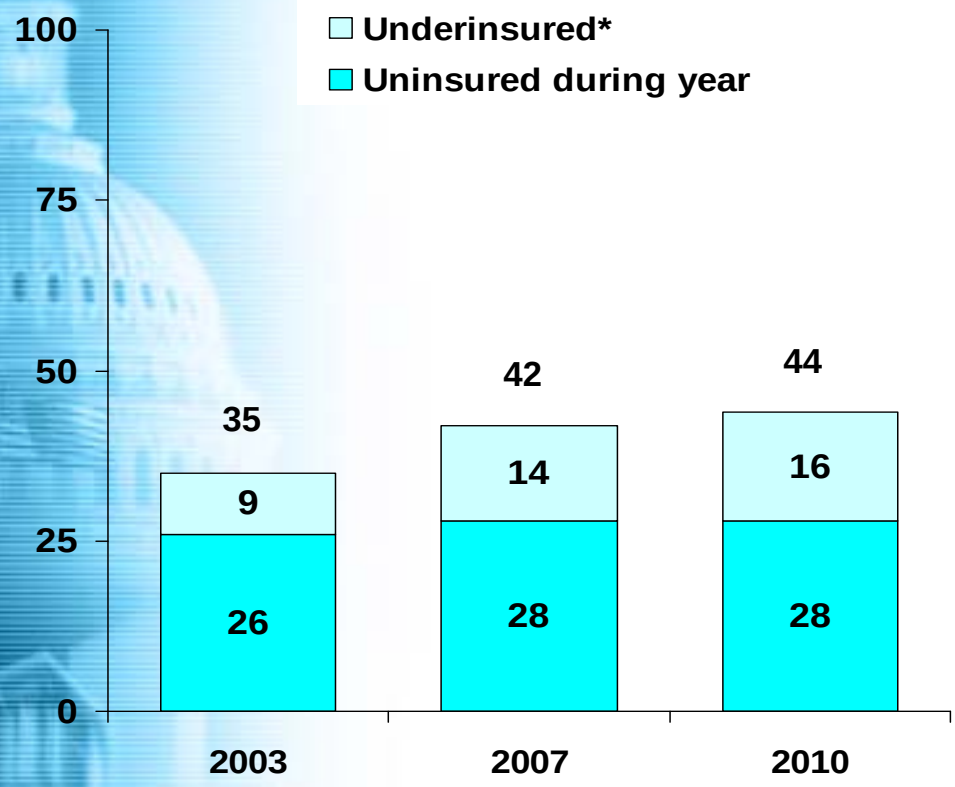
Access: Mixed Employer/Government Coverage



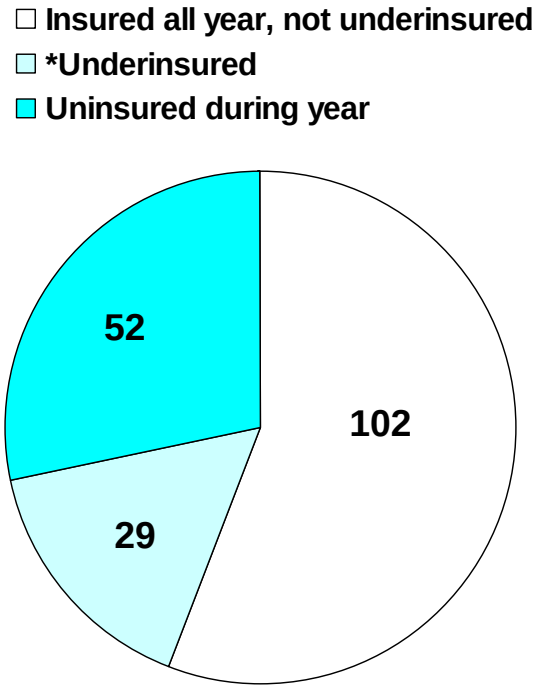
Source: CMS Office of the Actuary, National Health Expenditure Data, *available at* www.cms.hhs.gov/NationalHealthExpendData/.

Access: Uninsured and Underinsured Adults = 81 Million

Percent of adults ages 19–64 who are uninsured or underinsured



Millions of adults ages 19–64 who are uninsured or underinsured, 2010



Total: 184 million**

* Underinsured defined as insured all year but experienced one of the following: medical expenses equaled 10% or more of income; medical expenses equaled 5% or more of income if low-income (<200% of poverty); or deductibles equaled 5% or more of income.
** Subgroups may not sum to total because of rounding.
Data: 2003, 2007, and 2010 Commonwealth Fund Biennial Health Insurance Surveys.

Source: Commonwealth Fund National Scorecard on U.S. Health System Performance, 2011.

Impact of the Supreme Court's Decision on Number of Uninsured

- Uphold the Affordable Care Act
  - 23.1 million uninsured in 2019
- Strike Down Medicaid Expansion
  - 43.5 million uninsured in 2019
- Strike Down the Affordable Care Act
  - 59.6 million uninsured in 2019

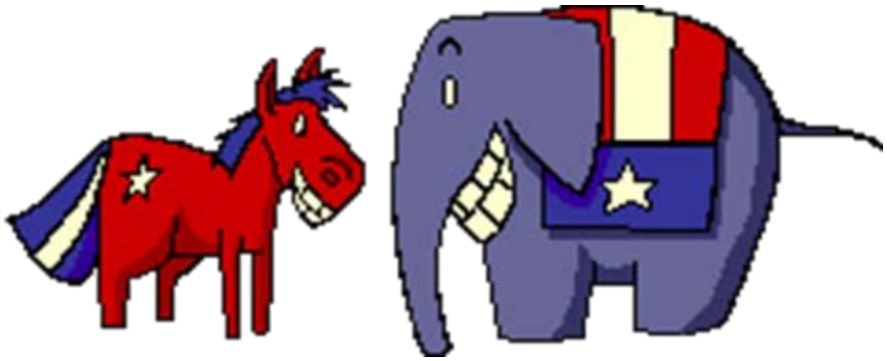
Source: CMS Office of the Actuary (Apr. 22, 2010), *available at* https://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/HealthCareReform.html.

"The issue of universal coverage is not a matter of economics. Little more than 1% of GDP assigned to health could cover all. It is a matter of soul."

- Dr. Uwe Reinhardt

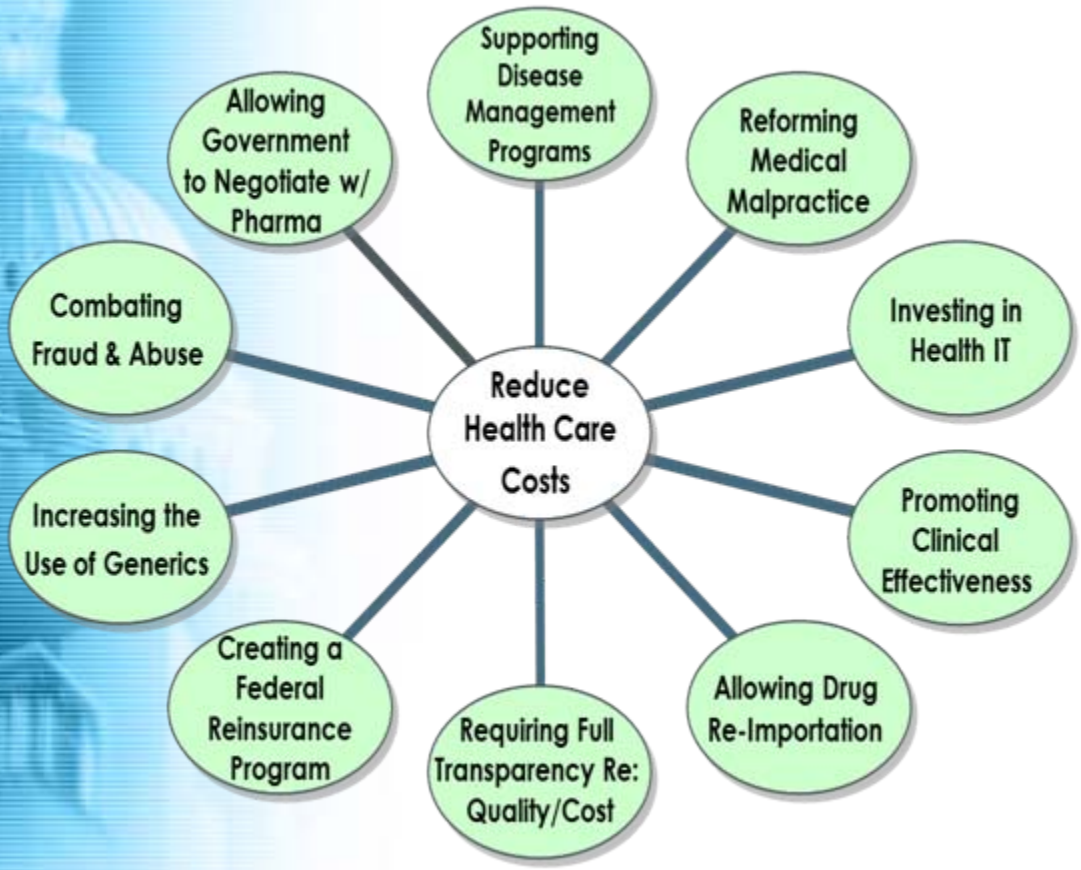
Reducing Costs and Improving Quality of Care

Despite differences on how to reform the health care system overall, both presidential candidates in 2008 proposed similar measures for reducing costs and improving the quality of care.



Reducing Costs and Improving Quality of Care

Some of these initiatives included:



The common theme was not only to improve quality and cost efficiency, but also to use long-term savings to help cover the uninsured

ACA Timeline for Accountable Care

- 2011 Programs Announced and/or Implemented
  - Extension of Physician Group Practice Demonstration and Gainsharing Demonstration
  - State Option to Provide Health Homes for Enrollees with Chronic Conditions
  - National Strategy for Quality Improvement in Health Care
  - Plans for Value-Based Purchasing Program for Ambulatory Surgical Centers
  - Medicare Community-Based Care Transitions Program
  - Hospital Value-Based Purchasing Program Regulations

ACA Timeline for Accountable Care (cont.)

- 2011 Programs Announced and/or Implemented
  - Plans for Value-Based Purchasing Programs for Skilled Nursing Facilities and Home Health Agencies
  - Federally Qualified Health Center Advanced Primary Care Practice Demonstration Project
  - Pioneer ACO Program
  - Multi-payer Comprehensive Primary Care Initiative
  - Bundled Payment Initiative
  - Medicare Shared Savings Program Final Rule
  - Innovation Advisors Program
  - Advance Payment ACO Model
  - Independence at Home Demonstration Program

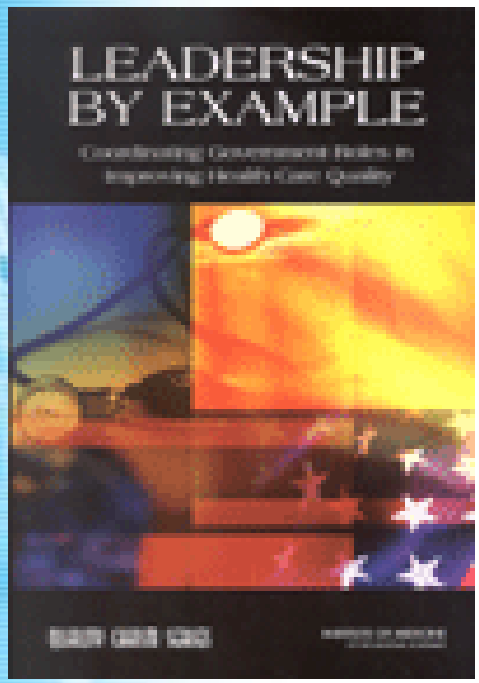
ACA Timeline for Accountable Care (cont.)

- 2012 Programs Scheduled
  - Demonstration Project to Evaluate Integrated Care Around a Hospitalization
  - Patient-Centered Outcomes Research Institute (PCORI) Pilot Projects and First Research Grants Hospital Value-Based Purchasing Program
  - Hospital Readmissions Reduction Program
  - Graduate Nurse Education Demonstration
  - Health Care Innovation Awards
  - Initiative to Reduce Avoidable Hospitalizations Among Nursing Facility Residents

ACA Timeline for Accountable Care (cont.)

- 2013
  - National Pilot Program on Payment Bundling
  - Quality Reporting for Long Term Care Hospitals, Inpatient Rehabilitation Hospitals, and Hospice Programs
- 2014
  - Payment Adjustment for Hospital Acquired Infections in Medicare Program
- 2015
  - Mandatory Participation in the Physician Quality Reporting System

Leadership by Example

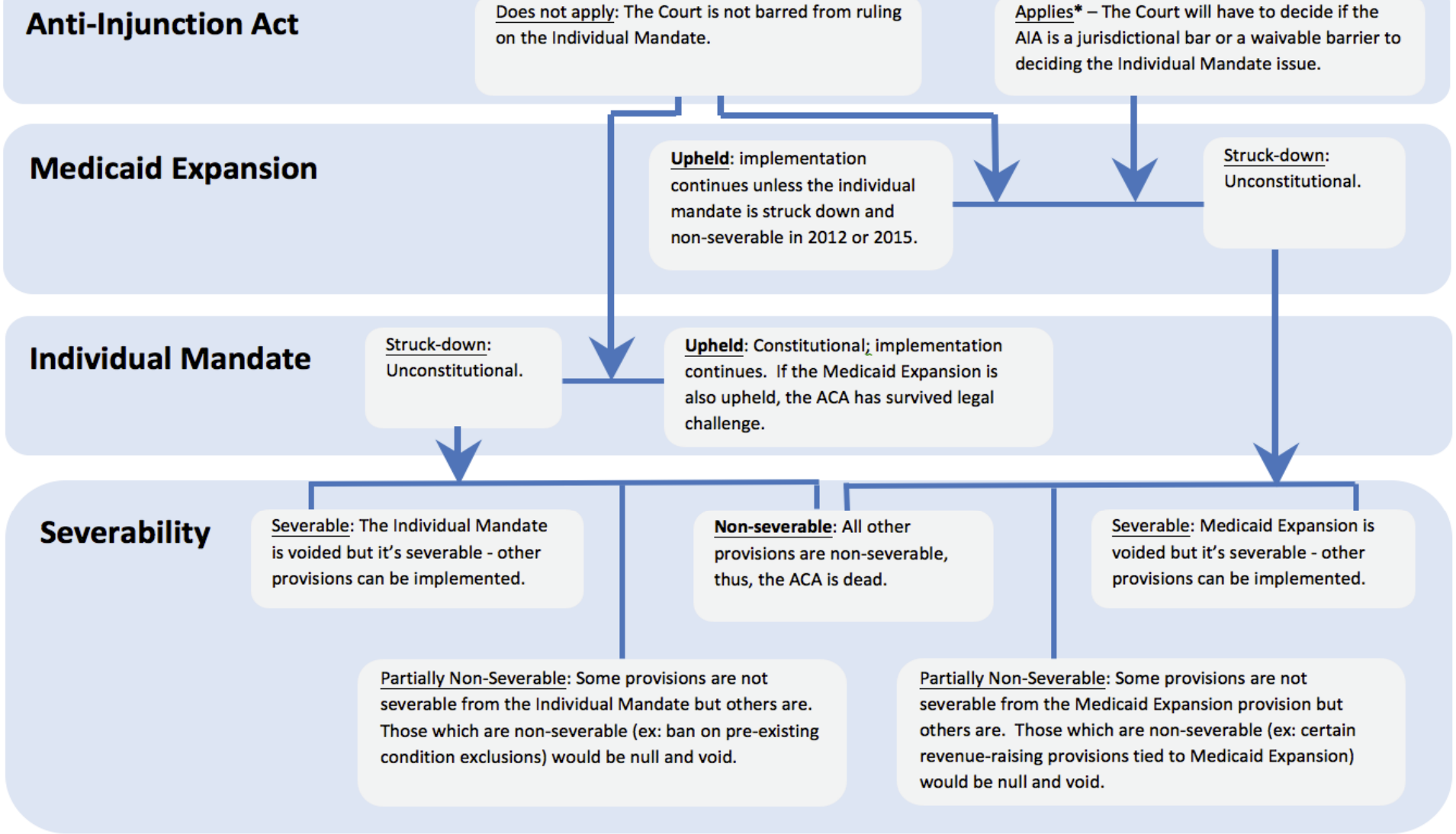


"The federal government has the central role in shaping all aspects of the health care sector. Strong federal leadership, a clear direction in pursuit of common aims, and consistent policies and practices across all government health care functions and programs are needed to raise the level of quality for the programs' beneficiaries and to drive improvement in the health care sector overall."

- Institute of Medicine, 2002

Options for the Supreme Court

- Uphold the Affordable Care Act
- Hold that the Anti-Injunction Act Applies
- Strike Down the Individual Mandate Only
- Strike Down the Individual Mandate and Related Provisions
- Uphold the Individual Mandate and Strike Down Medicaid Expansion
- Strike Down the Individual Mandate and Medicaid Expansion
- Strike Down the Affordable Care Act



* Given that the Individual Mandate penalty would not take effect until 2014, with collection in 2015, if the Supreme Court finds that the Anti-Injunction Act applies and is a jurisdictional rule, the arguments regarding the Individual Mandate could not be decided until someone has paid the tax penalty to the IRS, in 2015. However, arguments regarding Medicaid Expansion would still be decided this term.

COUNCIL FOR Affordable Health Coverage

Uphold the Affordable Care Act

- Implementation continues for states that have begun the process
- States that were awaiting the outcome of the litigation begin implementation
  - Alternatively, the Administration begins implementation for those states
- Accountable care moves forward in both public and private markets

Hold that the Anti-Injunction Act Applies

- Forestalls decision until at least 2015
- Implementation (and related expenditures) continues
- Accountable care moves forward in both public and private markets
- Unwinding more difficult should the Affordable Care Act, or some portion thereof, later be determined to be illegal

Strike Down the Individual Mandate Only

- Need fixes to address adverse selection in the insurance markets
  - e.g., only allow individuals to purchase insurance during open enrollment periods
- Stakeholders who supported the Affordable Care Act based on increased coverage may turn against the Affordable Care Act
- Insurer costs increase, triggering payment issues in commercial market and affecting payer/provider relationships
- Accountable care moves forward in both public and private markets, but pool of enrollees in insurance programs reduced, lessening overall impact of accountable care programs in the short run
- Role of insurers in accountable care uncertain due to cost increases
- Providers will continue to spend time managing the uninsured, and thus devote less resources to engaging in accountable care

Strike Down the Individual Mandate and Related Provisions (Guaranteed Issue and Community Rating)

- Stakeholders who supported the Affordable Care Act based on increased coverage may turn against the Affordable Care Act
- Other stakeholders who supported the Affordable Care Act based on prohibitions against pre-existing condition exclusion and medical underwriting may turn against the Affordable Care Act
- State laws that have been passed that prohibit pre-existing condition exclusion and medical underwriting following passage of the Affordable Care Act would have to be evaluated by state legislatures
- Accountable care moves forward in both public and private markets, but confusion over coverage and benefits at state level slows down the pace of and resources allocated to accountable care implementation

Strike Down Medicaid Expansion

- Approximately 20 million Americans lose coverage
- If Medicaid expansion is struck down but the individual mandate is upheld:
  - Some would have access to federal subsidies to help buy coverage in insurance exchanges, but others who would have qualified for the expanded Medicaid program with incomes below 100 percent of the federal poverty level may not qualify for Medicaid or federal subsidies
  - Accountable care moves forward in both public and private markets, but pool of enrollees in Medicaid programs reduced
- If both the individual mandate and Medicaid expansion are struck down, total pool of enrollees for accountable care greatly reduced, but cost increases and/or revenue decreases for both providers and payers remain in place

Strike Down the Affordable Care Act

- The unwinding of many parts of the Affordable Care Act already in place causes unprecedented chaos
  - Supreme Court could appoint a Special Master to determine how to unwind the law
  - Supreme Court could stay the order and invite Congress to make legislative fixes
- Accountable care may move forward in the private market, but with Medicare still in fee-for-service, real change, at the pace necessary, would be in question
- Less payer-provider collaboration likely

Strike Down the Affordable Care Act (cont.)

- What is the specific fate of sections 3021, 3022, 3023?
  - CMMI funding?
    - Limited number of programs where funding has been provided
    - CMS could request appropriations for CMMI through the budget process
  - ACOs?
    - Potential implementation as demonstrations under the Secretary's authority at Section 1115 of the Social Security Act
  - Payment Bundling Pilots?
    - Potential implementation as demonstrations under the Secretary's authority at Section 1115 of the Social Security Act
  - Other Demonstrations?
    - Not clear what happens to programs where payment changes have to be made (i.e., value-based purchasing, readmissions reduction programs)
- Impact on corollary guidance from DOJ/FTC, OIG and IRS?
  - Application to the private market
  - Ability to issue advisory opinions and guidance on enforcement

Conclusions

- The ACA accountable care provisions are unrelated to the individual mandate or Medicaid expansion from any logical, legal perspective
- Declaring them unconstitutional is unnecessary and would be careless and harmful
- In addition to setting back the progress on quality made in the last decade, it likely would lead to another round of price controls affecting both payers and providers
- Conversely, any of the other possible outcomes would leave the ACA accountable care provisions largely intact
- While increasing access and paying for it remains a contentious issue, improving quality and cost efficiency is not

Conclusions

- Only one of the seven paths the Supreme Court might choose would seriously threaten accountable care implementation
- If the Supreme Court goes there, you should understand that, as a legal matter, there was no need to do so
- If that were to happen, those who believe in the promise of accountable care will need to take a deep breath, and then move ahead in the commercial market, at the state level, and work with the next Congress to pick up the pieces at the federal level