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Elizabeth Y. McCuskey

University of Toledo, elizabeth.mccuskey@utoledo.edu

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THE BODY POLITIC: FEDERALISM AS FEMINISM IN HEALTH REFORM

ELIZABETH Y. MCCUSKEY*

ABSTRACT
This essay illuminates how modern health law has been mainstreaming feminism under the auspices of health equity and social determinants research. Feminism shares with public health and health policy both the empirical impulse to identify inequality and the normative value of pursuing equity in treatment. Using the Affordable Care Act’s federal health insurance reforms as a case study of health equity in action, the essay exposes the feminist undercurrents of health insurance reform and the impulse toward mutuality in a body politic. The essay concludes by revisiting—from a feminist perspective—scholars’ arguments that equity in health insurance is essential for human flourishing.

* ©2018 Elizabeth Y. McCuskey. This essay is the product of the Mainstreaming Feminism project launched at the American Association of Law Schools 2018 Annual Meeting. It owes its impulse to the founders of that project, Brooke Coleman and Liz Porter, and to my co-panelists, Anastasia Boles and Linda Malone. Elizabeth Pendo and Nicole Porter also generously provided input. I dedicate this essay to the memory of my mother, Anne T. McCuskey—a warrior for human flourishing.
I. INTRODUCTION

Health reform in the United States has slowly and tentatively come to embrace a normative foundation of equity and equality. As this slow-motion embrace has unfolded, feminism has been hiding in plain sight. This essay aims to illuminate some feminist principles at work in the federalism of health insurance reform.

Initially, this essay traces feminist principles through the empiricism, doctrine, and federalism of modern health law, revealing parallels in the empirical observations of disparity and normative arguments for eliminating them. Public health research on the social determinants of health has focused health policy on eliminating health disparities at their social sources. This empirical demonstration of disparities has catalyzed health law scholarship on “health equity” and health care as social justice. While the health equity movement does not routinely claim the mantle of feminism, its core focus on eradicating the social structures of inequality in bodily health fits within feminism’s intellectual lineage and embraces the pivot toward intersectionality.

Data on health disparities have informed recent legal reforms. The most comprehensive health reform law to-date—the Affordable Care Act (ACA)—in many ways embodies the health equity ethos, approaching equality in access to care via health insurance. In the ongoing debate about health reform and the ACA, feminism and health insurance regulation have converged in subtle but

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5. See generally, e.g., DAWES, supra note 2.
consequential ways, explored in this essay. For example, under most states’ laws predating the ACA, health insurers could charge higher premiums to women than men, and could exclude coverage for contraception, maternity and prenatal care, and fertility treatments, while covering drugs to treat erectile dysfunction in men. By federalizing a set of “essential health benefits” for insurance sold on the exchanges and enacting a nationwide prohibition on sex-based underwriting, the ACA brought a modicum of equality to health insurance sold to individuals.

Data exposing disparities and their consequences drove this shift, which was a long time in the making, and not irrevocably made. As but one example from 2017, Congress considered repealing the ACA’s mandate for essential health benefits, including insurance coverage of women’s preventive care without a copay, in all plans sold on the exchanges. A male member of Congress who supported the repeal quipped sarcastically, “I wouldn’t want to lose my mammograms.” Other male senators supporting repeal expressed similar sentiments about having insurance policies cover essential health benefits for prenatal and maternity care. Focusing national debate on the tensions between the collective good of risk pooling versus perceptions of the individual good in health insurance has highlighted feminist principles of equality, without identifying them as such.

11. Id.
13. See Jost, supra note 9.
By federalizing a notion of uniform baseline insurance protections, the ACA addressed some demonstrable disparities in access to care, including disparities based on sex. This essay makes a case for federalism as feminism in the ACA’s health insurance regulatory infrastructure. Comprehensive federal baseline regulations for health care access promote equity and address some forms of discrimination in health care access and finance. This relatively new federalism relationship in health insurance regulation also incorporates feminist principles by making the data-driven case for eliminating some of the health care costs of discrimination. Infusing health insurance with greater equality at the federal level reflects the metaphor of the body politic—that just as the parts of a human body are mutually necessary for physical health, so too are all members of a corporate body essential to its flourishing.

Ultimately, this essay illuminates how modern health law has been mainstreaming feminism under the auspices of health equity and social determinants research. First, the essay explores the empirical impulses and equality norms that bind feminism, public health, and health policy. Next, it explains some ways the equality norm has translated into the health equity framework for health reform. Then, it uses the ACA’s federal health insurance reforms as a case study of equity in action, exposing the feminist undercurrents of health insurance reform and the impulse toward mutuality in a body politic. The essay concludes by revisiting—from a feminist perspective—scholars’ arguments that equality in health insurance is essential for human flourishing.

14. See Amy B. Monahan, The ACA, the Large Group Market, and Content Regulation: What’s a State To Do?, 5 ST. LOUIS J. HEALTH L. & POL’Y 83, 83 (2011) (“One of the primary, and overarching, changes made by the ACA is to regulate health insurance at the federal, rather than state, level.”).


17. See generally Catharine A. MacKinnon, Mainstreaming Feminism in Legal Education, 53 J. LEGAL EDUC. 199, 205 (2003); cf. 112th Annual Meeting Program, ASS’N AM. LAW SCHOOLS 21 (Jan. 3–6, 2018), https://www.aals.org/wp-content/uploads/2017/09/AM18_regBrochure.pdf (“The goal of the program is to de-compartmentalize feminism from other strains of legal scholarship ... Stated differently, the goal is to begin normalizing the consideration of intersectionality—including, but not limited to, feminism—within traditional legal scholarship to create a scholarly environment where this kind of inquiry is the norm and not just the panel regarding ‘other.’”).

II. EQUALITY & EMPIRICISM

Health reform and feminism have often shared an empirically-informed philosophy of equality. At first glance, feminism’s commitment to empiricism and health law’s commitment to equality may seem less obvious than feminism’s focus on equality and health law’s empiricism. But closer inspection reveals the essential relationship between equality and empiricism in feminist philosophy and in modern health care regulation.

Equality offers a unifying principle in feminism. Feminism resists male domination and female subordination in all forms: legal and political rights, civic participation, social structure, cultural content, and consciousness. Feminist thought has many branches from the same roots. Feminism, at its core, is a philosophy of equality, dissecting inequalities in these spheres both normatively and descriptively. Descriptively, feminism identifies ways in which beliefs about and treatment of women reflect and perpetuate subordination. Normatively, feminism claims that these forms of subordination “[are] in some way illegitimate or unjustified.” The descriptive informs the normative and vice versa.

Public health and health reform exhibit a strikingly similar feedback loop of doctrine and empiricism on inequalities. Public health and health law are distinct but increasingly linked disciplines. Health law typically concerns regulation of the health care delivery system and access to it, while public health concerns influence over health at the population level. Public health traditionally is known as “the science and art of preventing disease, prolonging life, and promoting physical health … through organized community efforts” aimed at sanitation, health and hygiene education, medical intervention, disease prevention, and development of “social machinery, which will ensure to every individual in the community a standard of living adequate for the maintenance of health.” The

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20. See, e.g., id.
21. Id.
23. Susan James, Feminism, in 10 ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY 576, 576 (Edward Craig ed., 1998) (“Feminism is grounded on the belief that women are oppressed or disadvantaged by comparison with men, and that their oppression is in some way illegitimate or unjustified.”).
24. Haslanger et al., supra note 19 (defining descriptive and normative feminism which belies the considerable intellectual diversity within feminism, the details of which remain just beyond the parameters of this essay).
“prevention of chronic conditions, environmental hazards, and policy and regulations” have come to define public health concerns in the 21st century.26

These two disciplines inform each other, with public health often supplying the empirical perspective and health law injecting regulation as an intervention or “reform” of empirically-identified problems. This essay refers to “health law” as the wide field of regulation dealing with the health care access and delivery systems, and “health reform” as the sub-category of health laws designed to address one or more major failures (actual or perceived) in those systems.27 Over the last two decades, public health research demonstrating the “social determinants of health” has infused most facets of health reform with both a critical perspective on health disparities and a range of normative claims about addressing those disparities.28

Social determinants of health are “the structural determinants and conditions in which people are born, grow, live, work and age,”29 including socioeconomic status, education, the physical environment, employment, social support, stress, and access to health care. Visually,30 Dahlgren and Whitehead illustrated the main determinants of health as a wheel of factors surrounding an individual’s core biological features:31


29. Marmot et al., supra note 2, at 1661.


This complex web of external influences determines how individuals’ and groups’ inherent physical characteristics (like age, sex, and genetics) express themselves. These social determinants create inequalities in health outcomes among individuals with similar inherent physical characteristics.32 According to current research, nearly one-third of premature deaths result from social determinants, rather than individual behavior or genetics.33 The most powerful determinant is wealth: life expectancy positively correlates with income on a gradient.34 In terms of income, the gender pay gap reveals that women on average make less than men, and that the gap is even wider for Black and Hispanic women.35 While sex is an individual physical characteristic, gender is a population-wide social determinant of health that intersects with other factors.36

Public health research has found that discrimination—gender and otherwise—also is a powerful determinant of health.37 According to the U.S. Department of Health and Human Services’ Healthy People 2020 research initiative, “health disparities adversely affect groups of people who have systematically experienced greater obstacles to health based on” social

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32. See id. at 1653.
34. Id. at 1462–63.
37. Heiman & Artiga, supra note 1, at 3.
determinants such as gender, race, disability, geography, and “other characteristics historically linked to discrimination or exclusion.” Further, the cumulative effects of multiple social determinants of health, such as sex and race, painfully and powerfully illustrate the concerns of intersectionality in feminism.

Public health research provides empirical evidence of inequality as a social disease with physical consequences. Health disparities research from the field of public health thereby performs a descriptive function and serves an inherently critical objective—identifying the constructs that produce disparities. Health reform supplies the normative half of the descriptive-normative relationship, as modeled by feminism.

III. Health Reform’s Equity Framework

Health reform has evolved to embrace social determinants of health doctrinally, philosophically, and actuarially. With the recognition of quality, cost, access, and ethical issues in health care, “health law” has expanded from medical liability and bioethics into a diverse field encompassing regulation of all aspects of human health and the health care system. Health law has been plagued by theoretical tensions between market-based individualism and social solidarity. Health reform movements of late suffer from that tension, but tilt definitively toward social solidarity and recognition of social determinants.

With this expanded recognition of the complexity in social determinants and in the U.S. health care system, health law scholars have proposed normative values of justice and equity to supplant the traditional patient rights and market-

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38. Id.


40. See Wiley, supra note 2, at 50–51 (defining “health law broadly to encompass the law of health care financing and delivery as well as public health law”); Elizabeth Y. McCuskey, Body of Preemption: Health Law Traditions and the Presumption Against Preemption, 89 Temp. L. Rev. 95, 113–23, 123 fig. 1 (2016) (illustrating “health law’s diversity, density, and diffusion across regulatory authorities”). Health law’s expansive nature has prompted some to question the field’s coherence. See Elizabeth Y. McCuskey, The Space Between Two Words: Foreword to the Health Law Symposium, 46 U. Tol. L. Rev. vii, viii (2015).

41. See Gluck & Huberfeld, supra note 15, at 8 (noting how, despite the ACA’s compromises, health law “remains caught in centuries-old, unresolved tension between the so-called ‘social solidarity’ model . . . and the ‘individual responsibility’ model . . . .”)

42. See id.
based competition paradigms. In *Health Law as Social Justice*, for example, Lindsay Wiley chronicled this evolution and outlined the health justice framework through which to examine the role of law in reducing health disparities.

“Health equity” has emerged as a guiding principle in public health research, health care regulation, and health law scholarship. “Health equity” seeks “attainment of the highest level of health for all people” and “requires valuing everyone equally with focused and ongoing societal efforts to address avoidable inequalities, historical and contemporary injustices, and the elimination of health and health care disparities.” Health equity values, at the very least, equality in the conditions for optimal individual health—the conditions for flourishing.

Actuarily, the constructed disparities underlying health equity contribute to health care costs in an already overburdened and uneven health care economy. Health care services which treat symptoms of disparity—the socially-imposed determinants—are largely avoidable by addressing underlying social causes. Addressing the social determinants may in some circumstances even cost less than dealing with the medical consequences of inequality. Yet the political debate over whether laws should address inequality and whether we should devote government resources to help the neediest among us persists, and even is amplified.

The law’s embrace of health equity has come slowly, in piecemeal progression, and incompletely over time. While a handful of states have become leaders in enacting health equity-based legal reforms, the momentum behind

43. See Wiley, supra note 2, at 50–51; see generally Ruger, supra note 2.
44. See Wiley, supra note 2, at 51–53.
48. See Gluck & Huberfeld, supra note 15, at 6 (“The field remains caught in centuries-old, unresolved tension between the so-called ‘social solidarity’ model—every person should be guaranteed some minimal level of health care; and the ‘individual responsibility’ model—a person gets only the health care she can pay for.”).
equity reforms has largely come from federal statutes. Medicare, Medicaid, the Emergency Medical Treatment and Labor Act, the Employee Retirement Income Security Act (ERISA), the Family and Medical Leave Act, the Supplemental Nutrition Assistance Program, and the Americans with Disabilities Act all address disparities at some level, though not expressly those based on sex. Antidiscrimination laws are applied to health care providers and health insurance programs. But the effects of those applications have been limited. Despite gains in small ways, before the ACA insurers were allowed under state law to charge higher premiums to women versus men and to account for individual health status. Health law scholarship and policy have largely embraced equity, but health insurance regulation has lagged in most states.

Through the health justice lens and normative focus on disparities, laws regulating access to health care become most crucial. In part, the ascendance of health equity and health care access helps explain the fact that the vast majority of regulatory work in the past decade has targeted health insurance—the financial and pragmatic point of access to care for most people.

IV. THE BODY POLITIC: EQUITY & EQUALITY IN HEALTH REFORM

Health insurance is the new field on which equity’s resistance against the forces of disparity is being waged. Health reform is by now nearly synonymous with health insurance reform, owing to the increasingly unbearable costs of

49. See DAWES, supra note 2, at 10–90 (tracing the historical development of health reform); cf. McCuskey, supra note 40, at 93 (sketching the role of states vis-a-vis federal health laws).


54. See Monahan, supra note 14, at 92.

health care in the United States.\footnote{56} The third-party payment mechanism that health insurance offers almost entirely dictates access to medical care in the United States because the overwhelming majority of Americans cannot afford to pay out-of-pocket for needed care.\footnote{57} It is this financial access dimension that has catalyzed federal health reform.

Health insurance regulation, at least at the federal level, has evolved in a large piecemeal fashion since 1965, when Congress established the Medicare and Medicaid programs. This piecemeal progress produced single-issue patches, many of which aimed to correct small parts of pervasive income- and gender-based disparities in health care and coverage. A federal statute in the 1970s, for example, required that hospitals participating in Medicare accept all patients in active labor at their emergency rooms, who had routinely been “dumped” or shut out based on doctors’ and administrators’ perceptions that labor and delivery were too risky and low-income patients were not worth the risk.\footnote{58} Similarly, federal Medicaid law added a patch that allows state Medicaid programs to add coverage for breast and cervical cancer screenings, and ERISA amendments added patches to private coverage for hospital stays after childbirth and for breast reconstruction after mastectomy.\footnote{59}

Particularly for insurance regulation, this issue-by-issue process resembled a game of whack-a-mole with gender-based health care and access disparities based on sex. Health insurers in the private market routinely underwrote policies with different (always higher) premiums for women, which then made coverage less affordable for women.\footnote{60} Women were less likely than men to have employer-sponsored health insurance and women who had to buy insurance in the individual market were charged up to 1.5 times more than men for health insurance, resulting in gender rating costs of approximately $1 billion each year.\footnote{61} This gender-based underwriting, permitted by most states’ insurance

\footnote{56} E.g., Elisabeth Rosenthal, The $2.7 Trillion Medical Bill, N.Y. TIMES, June 2, 2013, at A1.

\footnote{57} See id.


laws, contributed not just to costs, but exacerbated health disparities as women’s policies often excluded important conditions—like maternity care—and women who were priced out of insurance developed preventable conditions, incurring the enormous social and individual costs of dealing with disease and disability.62

Before the ACA, state laws supplied the majority of health insurance regulation, beyond the thin patchwork of federal provisions and Medicare.63 The ACA stands as the first successful, comprehensive federal health reform statute in the United States.64 The ACA made health law broadly across all segments of the health care system, focused mostly on reforming health insurance.65 Among the ACA’s federal insurance reforms were several provisions that directly address gender disparities: explicit prohibition of sex discrimination by any recipient of federal health care funds (including insurance companies, providers, and assistance programs),66 prohibition of gender rating,67 federalizing “essential health benefits” to include women’s preventive care without cost-sharing and maternity and newborn care,68 and prohibiting pre-existing

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63. See McCuskey, supra note 63, at 1115.

64. 42 U.S.C. § 18116(a) (2012) (“[A]n individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency . . . .” on the basis of membership in a protected class, age, sex, or disability); see Blake, supra note 16, at 236.

65. 42 U.S.C. § 300gg(a)(1) (“prohibiting discriminatory premium rates” based on any factors other than household size, geographic rating area, age, and tobacco use).

66. Id. §§ 300gg–13(a), 18022(b).
condition penalties or exclusions, which disproportionately disadvantaged women.70

Establishing preemptive federal protections against health insurance discrimination represented a departure from the traditional state-based regulation71 and an embrace of feminism through federalism. The shift of health insurance regulation from an individualized, piecemeal, state-by-state approach to a population-wide, federal regime was supposed to benefit health care expenditures by reducing the economic drain of preventable conditions and reliance on emergency, rather than preventive care. But this economic focus on population health and access to health care—this goal of universal coverage under meaningful insurance—belies an inherently feminist commitment to health equity best served on the scale of nationwide protections.

The body politic offers a longstanding metaphor for civil society72 with relevance to the feminism of health insurance regulation. The thrust of this concept is “that as all parts of the human body have their own function and are mutually necessary for its proper performance, so all members of a corporate body are essential for its health and well-being.”73 Health insurance regulation that sets equality protections at the federal level serves the entire body politic and acknowledges the mutuality inherent in public health and the pooling of risk. It also wields feminism as federalism in the quest for health equity by establishing a national baseline of equal treatment.

V. CONCLUSION

The empiricism and equity concerns advanced by feminism have thus quietly taken root in health insurance reform. The ACA, reacting to data-driven evidence of disparity in women’s access to health care via insurance, creates federal baseline rules that bring some gender equity to health insurance.74 The federalization of these risk-pooling rules, however, neither achieves full equality nor entirely safeguards partial equality—even if the statute itself survives further

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69. Id. § 300gg–3(a).

70. See Marcia Greenberger & Lisa Codispoti, What Health Reform Means for Women, 37 Hum. RTS., Summer 2010, at 5, 6–7 (surveying insurance premium penalties based on classifying cesarean sections, IVF, rape, and domestic abuse as pre-existing conditions).

71. See, e.g., McCuskey, supra note 40, at 113–139, 123 fig.1.


73. Hicks, supra note 72.

74. The ACA also reaffirmed the health equity commitment to empiricism and intersectionality by elevating the National Institute on Minority Health and Health Disparities. See Rene Bowser, The Affordable Care Act and Beyond: Opportunities for Advancing Health Equity and Social Justice, 10 Hastings Race & Poverty L.J. 69, 80–95 (2013); Dawes, supra note 2, at 49.
legislative appeal attempts and administrative sabotage.\textsuperscript{75} States may apply for waivers of some of these baseline rules and supplant them with their own versions.\textsuperscript{76} While the ACA’s waiver provision contemplates state substitute rules that have equivalent protections, the danger that states will water down protections lurks in the waiver process’s fuzzy standards.\textsuperscript{77}

But the health equity paradigm and the data-norm feedback loop have embedded themselves in the structure of health insurance reform. Perhaps one of the most important revelations of the health equity and social determinants role in health reform is just how essential access to care is to the conditions for human flourishing.\textsuperscript{78}

Jennifer Prah Ruger has long argued that universal health insurance “is essential for human flourishing,” applying Aristotelian theory of the “supreme good,” as well as the capability approach.\textsuperscript{79} Ruger poses that “[u]niversal health insurance is [] morally justified because it ensures (some of) the conditions for human flourishing, by reducing, mitigating and coping with the risks of ill health and the resulting financial insecurity.”\textsuperscript{80} This view of health insurance offers a communitarian alternative to the neo-classical economic approach frequently applied to health insurance questions.\textsuperscript{81}

The health insurance reforms the ACA ultimately produced do not fully realize equity or universality in coverage. But they do take a necessary first step toward securing equal conditions for human flourishing by eroding some socially-constructed gender disparities in health insurance—a salubrious step for the body politic.


\textsuperscript{76} See McCuskey supra note 63, at 1129–33.

\textsuperscript{77} See id. at 1164–67.

\textsuperscript{78} See, e.g., Ruger, \textit{The Moral Foundations}, supra note 18, at 53.

\textsuperscript{79} Id. at 53, 55.

\textsuperscript{80} Id. at 55.

\textsuperscript{81} Id. at 53, 57.