PPACA (Obamacare) and Abortion

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ABSTRACT: The Patient Protection and Affordable Care Act (PPACA) is President Obama's signature accomplishment regarding health care (Obamacare). Applicable to virtually all employers of fifty or more employees, it involves massive federal subsidies for various healthcare coverage plans, most of which cover elective abortions. Supreme Court rulings show that Congress can exclude PPACA coverage and funding of elective abortion. An Executive Order prohibits direct federal funding of abortion in PPACA grants. Nonetheless, in several ways Obamacare expands federal support for and funding of abortions, and it will significantly increase availability of elective abortion.[1]

I. Introduction: The Difficult Political Road to Healthcare Reform

The Patient Protection and Affordable Care Act (PPACA),[2] also called the Affordable Care Act (ACA), is sometimes known as "Obamacare" after the President of the United States who promoted and achieved its enactment into law in March 2010. Combined with the Health Care and Education Reconciliation Act,[3] the ACA represented a massive modification and enlargement of the public healthcare program of the United States of America. By 2016 it will apply to virtually all employers with fifty or more employees.[4] Those employers are not absolutely required to provide health insurance coverage to their employees, but under such an employer-sponsored health insurance[5] they are subject to a significant "pay or play" penalty in the form of an

[1] The valuable research assistance of Benjamin T. Dyches, DDS, is gratefully acknowledged.

[2] Pub. L. 111-148, 124 Stat. 119–1025 (2010), 906 pages of text.

[3] Pub. L. 111-152, 124 Stat 1029–1084 (2010), amending the ACA.

[4] I.R.C. § 4980H (2011).

[5] Ibid.; 27 U.S.C. § 5000A. See generally Kathryn L. Moore, "The Pay or Play Penalty under the Affordable Care Act: Emerging Issues," *Creighton Law Review* 47 (2014): 612.

excise tax if they fail to offer "minimum essential coverage":

> PPACA requires most individuals to obtain acceptable health insurance coverage or pay a penalty, beginning in 2014. The penalty will start at $95 per person for 2014 and increase each year. The penalty amount increases to $325 in 2015 and to $695 (or up to 2.5 percent of income) in 2016, up to a cap of the national average bronze plan premium. After 2016, dollar amounts are indexed. Families will pay half the penalty amount for children, up to a cap of $2,250 per family."[6]

Moreover, employers with fifty or more employees are subject to penalties of "up to $2,000 annually for each full-time employee, excluding the first 30 employees" if even a single employee receives a government subsidy for health coverage.[7] All states have been required to establish health insurance exchanges by 2014, through which individuals and small business may shop for health insurance.[8]

The PPACA already has been the subject of two major rulings by the U.S. Supreme Court: *National Federation of Independent Business v. Sebelius*, (herein "*National Federation"* or *"NFIB"*)[9] and *Burwell v. Hobby Lobby*.[10] Additional cases are pending at present.

The impact of the enactment of PPACA upon numerous facets of medicine, healthcare, healthcare law, health service and public health in America is the subject of numerous ongoing controversies, including confusion about whether insured persons may keep their existing insurance policies,[11] objections to the "individual mandate,[12] opposition

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[6] Mars Maddocks & Associates Insurance Services, Inc., PPACA Timeline 2014, Coverage Mandates, *Individual Coverage Mandates,* available at http://ppaca.com/index.php?page=hcr-timeline-2014 (last seen 22 May 2015).

[7] Ibid. Employers are required to report to the federal government on the health coverage that they offer.

[8] Ibid.

[9] 567 U.S., 132 S.Ct. 2566 (2012).

[10] 573 U.S., 134 S.Ct. 2751 (2014).

[11] See, e.g., Michael Ollove & Christine Vestal, "Affordable Care Act: Sorting out the controversy over canceled insurance policies," *Daily* News, 22 Nov. 2013, available at http://www.dailynews.com/health/20131122/affordable-care-act-sorting-out-the-controversy-over-canceled-insurance-policies (seen 27 March 2015).

[12] Lawrence D. Brown, "Five controversies surrounding the Affordable

by some states to the ACA requirement that all states expand Medicaid coverage to include nearly all individuals with incomes at or below 138% of poverty level,[13] the botched federal government rollout of the new insurance exchanges,[14] uncertain and uneven state insurance regulations to prevent preferred risk selection by insurers,[15] and the unpopular ACA cost-containment requirements, including the controversial "rationing" by the Medicare payment review board. One of the key driving motivations for and one of the principal political justifications for the ACA was the reduction of healthcare costs. Viewed from the perspective of 2015 (five years after it was enacted), achieving that goal appears to be elusive if not a major failure.[16]

Reflecting its contentious origins and evolution in national party politics and the desire of politicians to distance themselves from unpopular provisions of the new law, as well as to associate themselves with popular provisions of the new enactment, some controversy is hardly surprising. Complicating the matter, as the healthcare and health insurance industries accommodate and adjust to the ACA, structural and financial changes are being made that make it difficult for health insurers (and for lawmakers) to abandon, overturn, or substantially

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Care Act," DevinMD.com (June 8, 2014) available at http://www.kevinmd.com/blog/2014/06/5-controversies-surrounding-affordable-care-act.html (seen 27 March 2015).

[13] Ibid.

[14] Ibid. See further "Health Insurance Exchanges and the Affordable Care Act: Key Policy Issues," The Commonwealth Fund, available at http://www.commonwealthfund.org/Publications/Fund-Reports/2010/Jul/Health-Insurance-Exchanges-and-the-Affordable-Care-Act.aspx (seen 27 March 2015).

[15] Brown, supra n12,

[16] Ibid. See also Dean Coddington, "Continued Controversy as Implementation of the ACA Moves Forward," Feb. 15, 2013, available at http://www.hfma.org/Content.aspx?id=15806 (seen 27 March 2015). See also "Eight facts that explain what's wrong with American healthcare," Vox Health Care, Jan. 20, 2015, available at http://www.vox.com/2014/9/2/6089693/health-care-facts-whats-wrong-american-insurance (last seen 26 May 2015): "Much of the waste in our system has to do with the fact that we run an inefficient health-care system, in which hundreds of health insurance plans all charge different prices for the same surgeries and scans. That requires lots of billing staff: for every three doctors in the United States, there are two administrative staff to handle all the paperwork. That's unique to the US system."

revise Obamacare. For example,

> During his opening remarks to the Senate Appropriations Health subcommittee, Senator Richard Shelby (R-Ala.) said ACA funds had been used in such a way that could compromise long-standing, worthwhile programs if the law was repealed. "The administration then diverts discretionary dollars to fund new programs," he said. "When the Affordable Care Act is repealed, many important programs like Community Health Centers and the [federal] Immunization program at the Centers for Disease Control will be in jeopardy because their base funding...has been so significantly reduced."[17]

PPACA has had several other high-profile problems, as well. For example, as one critic put it:

> President Obama promised the American people that if they liked their current health coverage, they could keep it. But even the Obama Administration admits that tens of millions of Americans are at risk of losing their health care coverage, including as many as 8 in 10 plans offered by small businesses.[18]

Also,

> The Congressional Budget Office (CBO) predicts that health insurance premiums for individuals buying private health coverage on their own will increase by $2,100 in 2016 compared to what the premiums would have been in 2016 if the law had not passed.[19]

Additionally,

> The law creates a new nationwide requirement for health plans to cover essential health benefits and preventive services, but does not allow stakeholders to opt out of covering items or services to which they have a religious or moral objection, in violation of the Religious Freedom Restoration Act (Public Law 103–141). By creating new barriers to health insurance and causing the loss of existing insurance arrangements, these inflexible mandates

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[17] Jeff Smith, "D.C. Report: Controversy over Health IT Study, ACA Repeal Faces Long Road," March 13, 2012, available at http://www.healthcare-informatics.com/article/dc-report-controversy-over-health-it-study-aca-repeals-face-long-road (seen 27 March 2015).

[18] H.R. 6079, 112th Cong., 2d Sess., §2(1).

[19] Ibid., §2(2).

jeopardize the ability of institutions and individuals to exercise their rights of conscience and their ability to freely participate in the health insurance and health care marketplace.[20]

Additionally, PPACA "expands Government control over health care, adds trillions of dollars to existing liabilities, drives costs up even further, and too often puts Federal bureaucrats, instead of doctors and patients, in charge of health care decisionmaking."[21]

These economic and practice problems and objections, however, may be surpassed by the morally controversial potential (and now reality) of PPACA to require millions of Americans who have strong moral objections to subsidize and fund elective abortion.

The impact of the ACA upon elective abortion access, practices, and rates is also of concern. This paper reviews the major provisions of PPACA that relate to or have some impact upon abortion in the United States. It discusses how Obamacare has impacted, *inter alia,* the provision of abortion services, regulations of abortion services, public funding of abortions, abortion practices, and the incidence and trends of abortion in the various states and in the United States. It also assesses the potential for future additional abortion-related healthcare reforms.

II. A Short History of the Enactment of PPACA

A. The Reasons for the Healthcare Reform Movement

Within months after becoming the President of the United States on January 20, 2009, Barack Obama began a major campaign to enact a very ambitious healthcare reform law to extend health insurance coverage for Americans. As the President explained in an op-ed article he published a few months later in *The New York Times*, his health reform law was designed to provide all Americans with affordable health insurance coverage that would stay with them "whether you move, change your job, or lose your job," and it would "finally bring skyrocketing healthcare costs under control."[22] PPACA also was

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[20] Ibid. at 2(8).

[21] Ibid. at 2(9).

[22] Barack Obama, "Why We Need Healthcare Reform," *The New York Times*, August 15, 2009, available at http://www.nytimes.com/2009/08/16/

promised to make Medicare more efficient, to "reduce the amount our seniors pay for their prescription drugs," and also to "put an end to" discrimination by health insurance companies.[23]

The Patient Protection and Affordable Care Act (PPACA) was signed into law by President Obama on March 23, 2010, just fourteen months after he took office.[24] The White House reports that, as of May 2015, 16.4 million Americans have obtained private health insurance coverage as a result of the enactment of PPACA.[25] According to the White House, PPACA provides stronger consumer rights and protections in healthcare, including ending pre-existing condition discrimination, ending limits on care for some chronic illness and cancer, and ending coverage cancellation due to application mistakes). It provides for more affordable healthcare coverage, including the 80/20 rule requiring that insurers spend at least 80% of the premium dollars on medical care. It requires public justification for premium increases of 10% or more, helps persons lacking health insurance through their employers to get coverage), and provides better access to healthcare, including mandatory insurer coverage of some preventative services relating to cancer, diabetes, blood pressure screening. It prevents denial of insurance coverage due to some pre-existing conditions such as asthma and diabetes and extends parental insurance coverage of young adults to age 26. It has involved the creation of the Health Insurance Marketplace to help Americans find affordable health insurance).[26] The White House claims that PPACA insures senior citizens "cheaper prescription drugs...[brings an] end to limits on care..., [provides] free preventive services [such as mammograms and colonoscopies]..., [and]

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opinion/16obama.html?pagewanted =all &_r=0 (last seen 8 May 2015).

[23] Ibid.

[24] The White House, "About the Healthcare Law: Healthcare that Works for Americans," available at https://www.whitehouse.gov/healthreform/health care-overview (last seen 8 May 2015) (herein ""About the Healthcare Law").

[25] The White House, At a Glance, Recent Post, "After 5 Years of the Affordable Care Act," available at https://www.whitehouse.gov/healthreform (last seen 8 May 2015).

[26] "About the Healthcare Law," supra note 24; ibid. at "Relief for You," "Healthcare and You," and "Women and Families."

protect[s] Medicare Benefits."[27] Thus, wrapped in all of the political hype that one expects to accompany the adoption of any major, new government program there are some very appealing promises about positive health insurance coverage and benefits in PPACA.

But there are also some very serious concerns accompanying PPACA. Some of those relate to the impact of the healthcare reform legislation upon elective (non-therapeutic) abortion rates, practices and funding. Those were not major issues in the political debate about the ACA.

B. The Politics of Healthcare Reform and a History of Its Enactment

When Congress was getting ready to enact PPACA in 2010, the issue of application of the traditional Hyde Amendment restriction against federal funding for elective abortions arose. The Hyde Amendment is a rider to the annual Labor/Health and Human Services (HHS)/Education appropriations bill which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. It is named after Rep. Henry J. Hyde (R-IL) who, as a freshman legislator, first offered the amendment.[28]

The Hyde Amendment was first passed by Congress in 1976 and has been enacted in some form ever since then, for four decades.[29] While some details have changed over the years, the core principle of the Hyde Amendment has remained constant. It is to ensure – at a minimum – "that abortion is not covered in the comprehensive health care services

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[27] Ibid. at *Seniors.*

[28] NCHLA Fact Sheets, *The Hyde Amendment,* available at http://nchla.org/factdisplay.asp?ID=41 (last ween 8 May 2015). The original Hyde Amendment provided: "[None] of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service."

[29] See Hyde Amendment in National Committee for a Human Life Amendment," available at http://nchla.org/issues.asp?ID=1 (last seen 8 May 2015), hereinafter NCHLA, Hyde Amendment). The Hyde Amendment was first attached as a rider on September 30, 1976. See generally "So Called Hyde Amendment...," available at http://hydeamendmenet.org (last seen 8 May 2015).

provided by the federal government through Medicaid."[30] The Hyde Amendment has been supplemented by other abortion-funding restrictions over the years. Other provisions of current law, like the annual Smith Amendment governing insurance plans available to federal workers under the Federal Employees Health Benefits Program (FEHBP), bar the government from incurring any costs in connection with administering a health insurance plan that covers abortions beyond the limits established by the Hyde Amendment.[31]

The Hyde Amendment does not directly apply to PPACA. The Hyde Amendment only bars federal funds for Medicaid and for a few other specific federal programs from being used to pay for elective abortion. So, the simplest way for the Hyde Amendment to apply to PPACA would have been to include in PPACA language similar to the Hyde Amendment language. When the proposal to include Hyde Amendment-type language in PPACA was raised, the PPACA bill was in a posture that would not allow that amendment to be made without delaying and possibly endangering passage of the entire PPACA bill. So, to facilitate passage of PPACA, President Obama issued Executive Order 13535, which provided that the Hyde Amendment rules would apply to grants made under the ACA.[32] Of course, an Executive Order can be repealed unilaterally by the President, and thus security for the application of the Hyde Amendment principles to PPACA is weak.

Many commentators and analysts, including congressional

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[30] See NCHLA, Hyde Amendment, supra note 28 at para. 1

[31] Sarah Torre, "Obamacare's Many Loopholes: Forcing Individuals and Taxpayers to Fund Elective Abortion Coverage," Backgrounder #2872, The Heritage Foundation, available at http://www.heritage.org/research/reports/2014/01/obamacares-many-loopholes-forcing-individuals-and-taxpayers-to-fund-elective-abortion-coverage (last seen 15 June 2015).

[32] The official title of Executive Order 13535 is "Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion" and it contains the President's Order "to establisn an adequate enforcement mechanism to ensure that Federal funds are not used for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment" (ibid., § 1). It requires standards for and a model set of "segregation guidelines" to insure that federal funds are not used to pay for elective abortions (ibid. §2).

committees, have noted several ways in which PPACA supports and can allow federal funding to pay for elective abortions.

(1) "The HRSA [Health Resources and Services Administration] Guidelines include a recommendation for all Food and Drug Administration (FDA) approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a health care provider."[33] It is no secret that some of the drugs and treatments designated by the FDA as "contraceptive" methods or products can operate after fertilization, even after implantation, of the post-conception growing small human (zygote, pre-embryo or embryo, however it may be labeled). Thus, those so-called "contraceptives" also can cause abortions.

(2) While neither the term "abortion" nor any of its cognates appears in PPACA, a congressional committee report (House Report 112-038, Part 1) identifies several ways in which PPACA provides federal funding for abortion. The Report states specifically: "The PPACA subsidizes abortion in private health plans and can pay directly for abortion in new health programs."[34]

Moreover, Sarah Torre, a policy analyst at the DeVos Center for Religion and Civil Society at the Heritage Foundation, has noted that "it is also possible that many individuals and families who would otherwise object to paying for abortion coverage may not even be aware of the [abortion] surcharge on their insurance. Specifically, Obamacare regulations allow insurers to disclose the existence and amount of the abortion surcharge only at the time of enrollment – a warning that may constitute but a single sentence in a massive plan document.[35]

(3) That same committee report noted that PPACA authorized funding for community health centers and that "money appropriated for

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[33] Dept. of Labor, Employee Benefits Security Administration, "FAQs about Affordable Care Act Implementation Part XII, February 20, 2013," at Q14, available at http://www.dol.gov/ebsa/faqs/faq-aca12.html (last seen 27 March 2015).

[34] House Report 112-038, Part 1, No Taxpayer Funding for Abortion Act, Committee Reports, at p. 10, 112th Congress (2011-2012), available at http://thomas.loc.gov/cgi-bin/cpquery/?&r_n=hr038p1.112&dbname=cp112&&sel=TOC_22747& (seen 27 March 2015).

[35] Torre, supra n27.

community health centers can be used to pay for elective abortions directly, as these funds are not appropriated under the HHS Appropriations bill and therefore is [sic] not subject to the Hyde Amendment."[36] The ACA also appropriated $6 billion for loans and grants for the creation of non-profit health co-ops.[37] Since the funds for such co-ops would not be directly appropriated by the HHS Appropriations bill, they would not be covered by the Hyde Amendment and could be used to pay for elective abortions.[38]

(4) PPACA provides tax credits for qualified health plans in the state exchanges. "Section 1303, as amended, permits qualified health plans to include coverage for elective abortions even if they receive tax credits or cost-sharing credits."[39] The congressional report noted that "this provision directly conflicts with the principle of the Hyde Amendment and the restriction on subsidizing health benefits plans that include abortion through the Federal Employee Health Benefits Program (FEHBP)."[40] The Committee Report stated:

> Section 1303, as amended, also permits private insurance plans that receive Federal subsidies to cover elective abortions. If the issuer of the plan chooses to cover elective abortions and receive Federal subsidies, then every individual who is part of that plan is required to pay an abortion surcharge and the insurance company will take that surcharge payment and hold it in a special account. This gimmick does nothing to cure the problem: it still allows Federal dollars to be used to subsidize abortion coverage, and the Federal Government still requires Americans enrolling in these federally subsidized health plans to pay for other people;s abortions.[41]

(5) PPACA also created "a new government-controlled, multi-state [health insurance] plan to be run by the Director of the Office of Personnel Management that can include insurance plans with abortion coverage."[42] This new federally-managed multi-state plan "is similar to

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[36] Ibid. at 15.
[37] Ibid. at 16.
[38] Ibid. at 16, n16.
[39] Ibid. at 18.
[40] Ibid. at 19.
[41] Ibid., n19.
[42] Ibid. at 21.

the FEHBP for Federal employees...but without the FEHBP restriction on coverage of elective abortion."[43]

Thus, it should come as no surprise that then-Secretary of Health and Human Services Kathleen Sebelius said on December 22, 2009 that "'everyone in the exchange would pay' a 'portion of their premium' for 'abortion coverage.'"[44] A report published by the Heritage Foundation noted:

> Public policy regarding the use of tax dollars to fund abortion has been stable for decades. The Hyde Amendment, which forbids taxpayer funding of abortion except in cases of rape, incest, or threat to the mother's life, has been attached to the appropriations bill for the Department of Health and Human Services (HHS) each year since 1976.

Congress has also blocked health insurance plans that fund elective abortions from participating in the Federal Employees Health Benefits Program (FEHBP), which offers roughly 250 private plan options to four million federal workers and annuitants. Besides these two policies, Congress has adopted a series of other amendments that affect other federal programs in the same way.

After the U.S. Supreme Court upheld the constitutionality of the Hyde Amendment in 1980, the States conducted their own debates on using state revenues to pay for the procedure. Litigation followed as well, as abortion-funding proponents claimed that state constitutions contained abortion funding mandates not present in the U.S. Constitution. When all was said and done, thirty-three states had adopted strong abortion-funding limitations, four state legislatures decided to fund elective abortions, and thirteen states were subjected to court rulings obliging them to fund abortions for lower-income residents with state tax dollars.[45]

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[43] Ibid. at 21 n21.

[44] Ibid. at 20. See also ibid. at n. 20: "Sebelius Praises Abortion Accounting Trick in Senate Bill," Real Clear Politics Video (last modified December 22,2009).

[45] Chuck Donovan, "Obamacare: Impact on Taxparer Funding of Abortion," The Heritage Foundation, WebMemo #2872, April 19, 2010, available at http://www.heritage.org/research/reports/2010/04/obamacare-impact-on-taxpayer-funding-of-abortion (last seen 27 March 2015).

Moreover, the Heritage Foundation reports that "[u]nder PPACA, unless the state first opts out, each of these markets must have at least one plan that offers coverage of elective abortions."[46] Chuck Donovan has estimated that at least 5.5 million women would gain potential coverage for elective abortions under PPACA.[47] PPACA "requires insurers that sell plans in new government-run exchanges to segregate payments for abortion coverage from other premiums to ensure government subsidies won't go toward the procedure."[48] Thus, PPACA has reignited debates over state coverage of abortion in state-regulated health insurance plans. Sarah Torre has noted:

> In passing Obamacare, Congress made one additional attempt to allay concerns about abortion funding in the insurance exchanges. It established a mechanism that proponents say ensures that only private funds are used to purchase elective abortion coverage. Thus, Section 1303(b)(2)(A)-(C) of the Obamacare law mandates that insurance companies must "segregate" any federal affordability tax credits that they receive from the individual premiums used to pay for abortions....
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> By 2017, every insurance exchange is required to have one plan that excludes coverage of elective abortions, but the law provides no opt-out for individuals or families who may want to buy a particular plan but without abortion coverage. Indeed, individuals' and families' "choice" of one plan that excludes elective abortion coverage could be overwhelmed by an array of plans that they would otherwise prefer and that more closely meet their overall health needs.[49]

III. A Short History of PPACA Litigation since Its Enactment

PPACA has been embroiled in litigation since it became law. The U.S. Supreme Court has already rendered significant rulings in two major cases involving the new federal healthcare law, and other cases are

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[46] Ibid.

[47] Chuck Donovan, "Multi-State Health Plans: A Potential Avenue to Tens of Thousands of Publicly Subsidized Abortions," September 1, 2013, available at http://www.lozierinstitute.org/multistateplan/ (last seen 15 June 2015).

[48] Anna Wilde Mathews, "States Reignite Abortion Debate," *Wall Street Journal* (April 8, 2010), available at http://www.wsj.com/articles/SB10001424052702303591204575170280629165078 (last seen 22 May 2015).

[49] Torre, supra n27.

pending before the Court.[50] The same day as President Obama signed PPACA into law, state officials (governors or state attorneys general) from Florida and twelve (ultimately twenty-five) other states filed suit, along with the National Federation of Independent Business (NFIB) and other parties, challenging the Act.[51] The plaintiffs alleged

> that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution. The District Court agreed, holding that Congress lacked constitutional power to enact the individual mandate.... The District Court determined that the individual mandate could not be severed from the remainder of the Act, and therefore struck down the Act in its entirety.[52]

A. *National Federation of Independent Business v. Sebelius*

In *National Federation of Independent Business v. Sebelius,* the Supreme Court in a 5-4 decision upheld PPACA's "individual mandate," which requires all covered individuals to obtain health insurance by 2014 (since delayed).[53] Thus, the Court reversed in large part the decision of the Federal District Court for the Northern District of Florida[54] and that of the Eleventh Circuit Court of Appeals.[55] Both had ruled that the individual mandate of the ACA were unconstitutional.

District Judge Roger Vinson had concluded that the "individual mandate" was both unconstitutionally beyond of the constitutional powers of Congress to enact and un-severable from the PPACA as a whole.[56] The Eleventh Circuit had affirmed (by a vote of 2-1) the holding that the individual mandate was unconstitutional but (in contrast

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[50] For example, in March 2012, the Supreme Court listed six cases addressing PPACA in which Petitions for Writs of Certiorari had been filed. Supreme Court of the United States, Case Documents, Patient Protection and Affordable Care Act cases, March 26-28, 2012, available at http://www.supremecourt.gov/docket/PPAACA.aspx (last seen 14 May 2015).

[51] *Florida v. U.S. Dept. of Health and Human Services*, 780 F.Supp.wd 1256, 1263 (N.D. Fla. 2011).

[52] Ibid., at 1305–1306.

[53] 567 U.S, 132 S.Ct. 2566 (2012).

[54] Ibid.

[55] 648 F.3d 1235 (11th Cir. 2011).

[56] 780 F.Supp.2d at 1263.

to the district court) held that it could be severed from the rest of the PPACA and that the rest of the PPACA was constitutional.[57]

The Supreme Court was extremely divided in deciding *National Federation.* The last paragraph of the syllabus suggests the complicated divisions in the Court. It notes:

> Roberts, C. J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III–C, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined; an opinion with respect to Part IV, in which Breyer and Kagan, JJ., joined; and an opinion with respect to Parts III–A, III–B, and III–D [which no one joined]. Ginsburg, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Sotomayor, J., joined, and in which Breyer and Kagan, JJ., joined as to Parts I, II, III, and IV. Scalia, Kennedy, Thomas, and Alito, JJ., filed a dissenting opinion. Thomas, J., filed a dissenting opinion."[58]

Thus, four opinions were filed. Justices who did not write opinions joined some parts of three of the opinions (the dissent of Roberts, Ginsburg, and Scalia). Just one opinion (the dissent by Thomas) was joined by no other justice.

Chief Justice Roberts wrote the majority opinion for five justices of the Supreme Court in *National Federation,* concluding that PPACA was a valid exercise of Congress' taxing power.[59] That was a politically interesting conclusion since the Administration that was arguing for the validity of the Act had emphatically insisted that PPACA was *not* a tax. The Court first concluded that PPACA was a *penalty* and not a *tax* for purposes of the Anti-Injunction Act because Congress had intended for the ACA to be considered a "penalty" not a "tax," specifically for purposes of that Act.[60] He further concluded (for himself alone) that the individual mandate was not a constitutionally permissible exercise of Congressional power under the Commerce Clause or the Necessary and Proper Clause.[61] He reasoned that the individual mandate imposed a *tax* on persons who do not have health insurance, and as such is within the

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[57] 648 F.3d at 1235.
[58] 567 U.S.
[59] 567 U.S.
[60] 26 U.S.C. § 7421(a).
[61] 567 U.S.

constitutional taxing power of Congress.

Most of the justices in *NFIB* agreed that PPACA was *not* a valid use of Congress's constitutional powers under Commerce Clause or the Necessary and Proper Clause. Likewise, a majority of the justices in *NFIB* agreed that some provisions of PPACA that significantly expanded the Medicaid program were not a valid exercise of Congress's spending powers, for those provisions would coerce states to either accept the expansion or risk losing existing Medicaid funding. The Supreme Court was severely divided about the various issues, but on the core issue the majority held (per Roberts): "The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."[62] The majority also held, per Roberts, that "imposing economic mandates on the people was unconstitutional under the Commerce and Necessary and Proper Clauses."[63] In part of his "majority" opinion, which was joined only by Justices Breyer and Kagan, Chief Justice Roberts wrote that the Medicaid expansion violated the Spending Clause by threatening States with the loss of their existing Medicaid funds if the rejected the expansion of Medicaid, in derogation of the core principles of federalism.

Justices Ginsburg and Sotomayor joined the majority opinion of Chief Justice Roberts regarding the inapplicability of the Anti-Injunction Act and agreeing that the taxing power of Congress allows it to enact the individual mandate. However, their separate opinion dissented in part, arguing that Commerce Clause also authorized the PPACA and asserting that the Secretary of HHS could withhold Medicaid funds based on a State's refusal to comply with the expanded Medicaid program as only the withholding – not the granting – of federal funds was incompatible with the Spending Clause. They would have upheld the Medicaid expansion entirely. Joined also by Justice Breyer and Kagan, they would

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[62] Ibid., slip op. at 40.

[63] See Randy E. Barnett, "Who Won the Obamacare Case (and Why Did So Many Law Professors Miss the Boat)?" Florida Law Review(2013) in Georgetown Law, The Scholarly Commons.

have held that the Commerce Clause and Necessary and Proper Clause also justify the individual mandate.

Dissenting, Justice Scalia, writing for himself and Justices Kennedy, Thomas, and Alito, asserted that "the complex structures and provisions of the [PPACA] go beyond" "the powers accorded to it under the Constitution."[64] The dissenters concluded that the ACA was unconstitutional because "the power to tax and spend cannot be used to coerce state administration of a federal program...."[65] The dissenters emphasized: "The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying non-consenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative."[66]

B. *Burwell v. Hobby Lobby*

In *Burwell v. Hobby Lobby,*[67] the history and scope of the ACA's contraceptive mandate were described by Justice Alito as follows:

> Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements" [42 U. S. C. §300gg–13(a)(4)]. Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. Ibid. The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require. See 77 Fed. Reg. 8725–8726 (2012).

In August 2011, based on the Institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines.[68] The

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[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] 573 U.S., 134 S.Ct. 2751 (2014).

[68] See ibid., at 8725–8726, and n1; online at http://hrsa.gov/womens guidelines (all Internet materials as visited June 26, 2014, and available in Clerk of Court's case file).

Guidelines provide that non-exempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling."[69] Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus.[70]

Hobby Lobby filed a federal court lawsuit in Oklahoma in 2012 against enforcement of the Obamacare contraception mandate. Hobby Lobby argued that the mandate violated provisions of the federal Religious Freedom Restoration Act (RFRA) as well as the Free Exercise Clause of the First Amendment. The U.S. District Court denied Hobby Lobby's request for a preliminary injunction. In June 2013, the U.S. Court of Appeals for the Tenth Circuit ruled that Hobby Lobby Stores, Inc. is a person with religious freedom and ordered the government to stop enforcing the contraception rule on Hobby Lobby. On remand, the district court granted a preliminary injunction against enforcement of the ACA contraceptive mandate. The government appealed to the U.S. Supreme Court.

The Supreme Court decision in *Hobby Lobby* came on the last day of the 2013-2014 term. Like *National Federation* it was a 5-4 decision. The four justices who dissented in *National Federation,* plus Chief Justice Roberts, who wrote the majority opinion in the earlier case, constituted the majority in *Hobby Lobby.*

The *Hobby Lobby* majority opinion, authored by Justice Alito, was calm, restrained, and narrow. In contrast, the dissenting opinion, authored by Justice Ginsburg was shrill and alarmist. *The New York Times* described her opinion thus: "She attacked the majority opinion as a radical overhaul of corporate rights, one she said could apply to all corporations and to countless laws."[71]

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[69] 77 Fed. Reg. 8725 (internal quotation marks omitted).

[70] Burwell, 573 U.S. (emphasis added).

[71] Adam Liptak, "Supreme Court Rejects Contraceptives Mandate for Some Corporations," *The New York Times* (June 30, 2014), available at http://

The plaintiffs in *Hobby Lobby* were a chain of craft stores and a business that made wood cabinets. Both companies had voluntarily provided insurance coverage for many of the contraceptive medications mandated by the ACA for their employees, but on moral and religious principles they declined to provide some Obamacare-mandated "contraceptives" that could operate later to cause an abortion. Specifically, they objected to providing, *inter alia,* IUDs and "morning-after pills.[72] However, "[t]he *companies said they had no objection to some forms of contraception*, including condoms, diaphragms, sponges, several kinds of birth control pills and sterilization surgery."[73]

The Supreme Court conceded for purposes of the case that the government had a valid interest in making contraceptives available to women. But the majority noted that the penalties for a company that opted to provide insurance not covering such drugs were draconian. For instance, Hobby Lobby could face annual fines of up to $475 million under the ACA. Since there were other ways the government could help women get access to contraceptives[74] and since requiring employers to provide controversial contraceptives and abortifacients clearly violated the religious beliefs of some employers, the failure to provide an exception to accommodation for such employers was unconstitutional.

For the dissenters, Justice Ginsburg joined by Justice Sotomayor objected to extending religious liberty protections to non-human corporate persons. Justices Breyer and Kagan agreed with most of the Ginsburg dissent but opined that it was unnecessary to rule on whether corporations could claim religious liberty protections under the federal religious liberty law.

C. The Legal Significance of *National Federation* and *Hobby Lobby*

Both *National Federation* and *Hobby Lobby* were close (5-4) decisions, but jurisprudentially inconsistent and hard to understand and

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www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html?_r=0 (seen 27 March 2015).

[72] Ibid.

[73] Ibid., emphasis added.

[74] For instance, the government could pay for the insurance coverage for the drugs (ibid.).

to reconcile. The groupings of the justices in *National Federation* are notable for the fragmentation of the Court. They defied the traditional ideological/philosophical groupings in the Court, and they varied from the groupings in *Hobby Lobby*. The usually moderate Chief Justice Roberts joined the three most liberal members of the court in dissenting in *National Federation,* but joined the traditional conservative coalition (with Alito, Scalia, Thomas), plus unpredictable moderate Kennedy, in the majority in *Hobby Lobby.*

Hobby Lobby was a fine but narrow victory for the employees and owners of that closely-held chain of stores that had developed and operated in an openly religious environment. The main legal principle underlying the Court's decision concerns the duty of lawmakers to achieve their legislative goals by the means that are the least restrictive of the religious liberty rights of those impacted by the legislation. *Hobby Lobby* involved interpretation and application of a federal statute, the Religious Freedom Restoration Act ("RFRA"),[75] and not First Amendment religious liberty rights. The explicit purposes of RFRA are:

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[76]

The main legal principle established by Congress in RFRA is that:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except...if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[77]

Hobby Lobby re-affirms RFRA and its well-established rule that strict

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[75] Religious Liberty Restoration Act, Pub. L. 103-141, 107 Stat, 1488 (1993), codified at 42 U.S.C. § 2000bb-4.

[76] 42 U.S.C. § 2000bb (b)(1)-(2).

[77] Ibid. at § 2000bb-1 (a)-(b).

scrutiny is required whenever a law of general applicability "substantially burden[s] a person's exercise of religion." Yet *Hobby Lobby* has been described as a "nominally incremental ruling[] with vast potential for great change."[78] That is because it extends religious liberty protections (under RFRA, at least) to some (relatively small, closely-held) corporations.

IV. The Practical Significance of PPACA and the PPACA Cases

The PPACA cases illustrate the interaction of law and culture regarding abortion. Against the cultural messages that accept and encourage easy abortion the law can send a counter-message of respect for the sanctity of life and of protection for the lives of the weakest and most vulnerable human beings, the unborn. Laws dealing with health careand federal health care programs can be powerful influences for good or for evil.

President Obama has declared PPACA a "success." However, as one commentator noted:

> In the positive column, the law does appear to have reduced the ranks of the uninsured in America, including a significant number of previously-uninsurable people. Of course, when you pass a law that requires people to obtain insurance, touting the fact that millions of people ended up abiding by your mandate is pretty weak. Also, the majority of those "newly insured" through the exchanges previously had coverage.[79]

There also are some very profound failings of PPACA. As Guy Benson summarized:

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[78] Adam Liptak, "Supreme Court Rejects Contraceptives Mandate for Some Corporations," *The New York Times* (June 30, 2014), available at http://www.nytimes.com/2014/07/01/us/hobby-lobby-case-supreme-court-contraception.html?_r=0 (last seen 19 May 2015).

[79] Guy Benson, "Obama: Let's Face It, Obamacare is Blowing Away Expectations," Townhall.com (24 March 2015), available at http://townhall.com/tipsheet/guybenson/2015/03/24/obamacare-anniversary-n1974949?utm_source=thdailypm&utm_medium=email&utm_campaign=nl_pm&newsletterad= (last seen 20 May 2015).

Obamacare has failed to substantially reduce all Americans' premiums (they've gone up for the vast majority of people, with the worst yet to come), it has substantially increased health costs for tens of millions (out of pocket costs are astronomical for many), it has stripped people of their preferred plans and doctors, it has exacerbated primary care doctor shortages, it has inflicted "access shock" upon consumers, it has increased the government's healthcare tab, it has impeded economic growth, it has hurt employment, and polls show that it has actively harmed many more people than it's helped.[80]

Given the political lineage of PPACA, it would be unrealistic to expect that signature healthcare law of President Obama to provide significant legal protection for the unborn. PPACA could be interpreted or evolve to provide federal funds and programs to subsidize and support elective abortions throughout the nation. PPACA could undermine the Hyde Amendment. Chuck Donovan has observed:

The Hyde Amendment now hangs by two tender threads. First, Congress may omit the annual Hyde Amendment from the HHS funding bill. Second, President Obama or his successor may quietly amend or repeal Executive Order 13535 [to delete application of the Hyde Amendment to PPACA] with no further action by Congress.

The PPACA, moreover, establishes a new principle for heavy federal subsidies of insurance plans that cover elective abortion, subverting the principle now applied to federal employee plans, which are barred from covering elective abortions in any way.

To avoid these outcomes, Congress would have to adopt permanent Hyde Amendment legislation and a permanent FEHBP policy applicable to all federally subsidized insurance plans.[81]

Section 1334(a)(6) of the ACA states that:

In entering into contracts under this subsection, the Director [of OPM] shall ensure that with respect to multi-State qualified health plans offered in an Exchange, there is *at least one* such plan that does *not* provide coverage of services described in section 1303(b)(1)(B)(i) [emphasis added].

By September 2013, twenty-three States had adopted legislation barring plans that participate in their state exchanges from covering elective

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[80] Ibid.

[81] Donovan, supra n45 at para. 9.

(non-therapeutic) abortions.[82] Yet, PPACA can be interpreted carefully and applied strategically to support pro-life values, as *National Federation* and *Hobby Lobby* clearly show. But such interpretations and applications are not automatic. Achieving such results requires great effort, legal skill, and careful attention. Professional, political and grass-roots activism are needed to prevent federal funding of elective abortions. The trend of abortion numbers in recent years has been slightly pro-life.[83] But these are very fragile pro-life gains.

Research from both the Charlotte Lozier Institute (CLI) and the Kaiser Family Foundation found that millions of women will gain elective abortion coverage through PPACA subsidies and Medicaid expansion. For example, the Charlotte Lozier Institute estimates that up to 111,500 additional abortions per year will be heavily subsidized by taxpayers.[84] Primary areas of concern for promoting abortion include federal insurance subsidies, Medicaid expansion, and Multi-state Health Plans. PPACA opened the door to significant expansion of abortion

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[82] Chuck Donovan, *Multi-State health Plans: A Potential Avenue to Tens of Thousands of Publicly Subsidized Abortions,* Charlotte Lozier Institute (1 September 2013), available at http://www.lozierinstitute.org/multistateplan/ (last seen 22 May 2015).

[83] Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report vol. 63 (11). See the following sites:
2000: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5212a1.htm
2001: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5309a1.htm
2002: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5407a1.htm
2003: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5511a1.htm
2004: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5609a1.htm
2005: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5713a1.htm
2006: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5808a1.htm
2007: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm
2008: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm
2009: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6108a1.htm
2010: http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6208a1.htm
2011: http://www.cdc.gov/reproductivehealth/Data_Stats/index.htm
Also compiled at wikipedia: http://en.wikipedia.org/wiki/Abortion_statistics_in_the_United_States. Guttmacher stats also verified on their site. A compiled abortion statistics table using these number can be found at: http://www.johnstonsarchive.net/policy/abortion/graphusabrate.html; http://www.nrlc.org/uploads/factsheets/FS01AbortionintheUS.pdf.

[84] Chuck Donovan, "Multi-State Health Plans," supra n72.

coverage as it interacted with the mandated Medicaid expansion to 138% poverty level. Because some states cover elective abortions through their Medicaid programs, the Medicaid expansion meant more government-subsidized abortions. The Hyde Amendment puts a barrier between direct federal funding of abortions, many states have enacted workarounds to facilitate access to abortion procedures. Even without the expansion of Medicaid expansion, state funded abortions account for a disproportionate 20% of all abortions today.[85] Women below poverty level already accounts for 70% of current abortions.[86] So, much of the abortion battle was within the Medicaid expansion provision of the PPACA at this point in the litigation.

Thus, "because Congress failed to apply Hyde amendment or similar language to the totality of the healthcare law, Obamacare potentially allows large taxpayer subsidies to flow to health plans that cover elective abortion."[87] Specifically, "[b]y allowing health insurers that sell plans on many state exchanges to cover abortion while remaining eligible for federal subsidies, Obamacare opens new avenues for federal funding of abortion coverage."[88]

The complexity of Obamacare enhances the potential for abortion funding. As one critic noted:

> Even if individuals and families successfully navigate the labyrinth of abortion-funding provisions in the exchanges and avoid covering elective abortion in their own plans, taxpayer funds will unavoidably go to fund some health plans that include such coverage. Whether through tax credits to private health plans in a state that allows abortion coverage in its exchange or through subsidies to the multi-state plans that include such coverage, taxpayers will be supporting access to plans that cover elective abortion.

According to analysis by the Charlotte Lozier Institute, a pro-life research organization, this flood of new funding for health plans that

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[85] Guttmacher Institute, "An Overview of Abortion in the United States" (2014) https://www.guttmacher.org/presentations/abort_slides.pdf.]

[86] See Guttmacher Institute, "Fact Sheet: Induced Abortion in the United States" (July 2014) available at http://www.guttmacher.org/pubs/fb_induced_abortion.html (last seen 15 June 2015).

[87] Torre, supra n27.

[88] Ibid.

include elective abortion coverage could have a significant impact on the number of abortions that are covered by publicly subsidized plans. "If only one-third of the girls and women who are newly privately covered for elective abortions proceed and file for them," explains the institute, "an additional 18,397 abortions will be paid for each year under ObamaCare's exchange expansion."[89]

There are some protective actions that states can take to minimize the risk that state and taxpayers funds will be used to subsidize elective abortions.[90] For instance, states can and should prohibit abortion coverage in their state exchanges. Likewise, Congress could and should permanently prohibit federal funding of elective abortions, and not rely on the annual Hyde Amendment and other appropriations abortion funding restrictions. Congress could do much to enact protections for individuals, employers and employees to prevent coercion to offer or support elective abortion drugs, treatments, and actions.

V. Conclusion

Many factors and influences work to promote abortion in contemporary American society. For example, social acceptance of premarital sex and of non-marital cohabitation, media glorification of such relationships, easy access to contraceptives, easy access to abortion all facilitate easy abortion and promote the culture of abortion-on-demand. Other legal developments influence attitudes towards abortion, also. For instance, some research indicates that jurisdictions that have legalized same-sex marriage have experienced a disproportionate increase in abortion rates.[91] A recent Guttmacher Institute article reports that women in states with restrictive abortion policies are more likely to use highly effective contraceptives than women in less restrictive states.[92] Likewise, women

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[89] Torre, supra n31 at para. 29.

[90] Ibid.

[91] "Does The Adoption Of Genderless Marriage Lead To More Abortions?" (dated August 25, 2014), available at http://www.law2.byu.edu/files/ marriage_family/140825%20Does%20Adoption%20 of%20SSM %20 Lead%20to%20More%20Abortions.pdf (last viewed 19 May 2015).

[92] Josephine Jacobs & Maria Stanfors, "State Abortion Context and U.S. Women's Contraceptive Choices, 1995-2010," *Perspectives on Sexual and*

in states with greater "abortion hostility" were found to be more likely to use highly effective contraceptives that women in other states.[93] So, the laws and social attitudes do matter! "There are several ways that Obamacare expands the availability of abortion."[94] In many subtle ways (and some not-so-subtle) ways, the expanded and enhanced federal health care program that bears President Obama's name supports and facilitates elective abortions. As Representative Eric Cantor put it in his proposed legislation to repeal PPACA:

> While President Obama promised that nothing in the law would fund elective abortion, the law expands the role of the Federal Government in funding and facilitating abortion and plans that cover abortion. The law appropriates billions of dollars in new funding without explicitly prohibiting the use of these funds for abortion, and it provides Federal subsidies for health plans covering elective abortions. Moreover, the law effectively forces millions of individuals to personally pay a separate abortion premium in violation of their sincerely held religious, ethical, or moral beliefs.[95]

Pro-life citizens seem to have dodged a bullet in PPACA and the cases interpreting it, so far. But the process of interpreting that law has just begun. Moreover, that health care reform act is a powerful reminder that for pro-life advocates there is no resting on laurels, no reason to think that there is or will be an end to the struggle to protect the weakest, the most defenseless and the most vulnerable from danger, abuse and exploitation. It is and will continue to be an ongoing, never-ending battle. Every new administration, every new health law poses a potential threat to the Hyde Amendment and to other pro-life laws, values and principles. We must be vigilant always. We must constantly re-educate and teach and persuade lawmakers. We must work and pray always to

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Reproductive Health 47/2 (June 2015), available at http://www.guttmacher.org/pubs/journals/47e23015.html (last seen 27 May 2015).

[93] Ibid.

[94] See Life Legal Defense Foundation, "Abortion and Birth Control in Obamacare: Part I," available at http://lldf.org/abortion-birth-control-obama care/ (seen 15 June 2015).

[95] H.R. 6079, 112th Cong., 2d Sess., To repeal the Patient Protection and Affordable Care Act, § 2(7), available at https://www.govtrack.us/congress/bills/112/hr6079/text (last seen 15 June 2015).

protect the unborn.