The legal development in mid-2015 with the most far-reaching implications for Catholic bioethics was not directly about bioethics: the US Supreme Court's June 26 decision on marriage in *Obergefell v. Hodges*.[1] By a five-to-four majority, the Court found that the Constitution demands a legal redefinition of marriage to encompass same-sex relationships, invoking the protection of "liberty" under the due process and equal protection clauses of the Fourteenth Amendment. While a detailed legal critique of the decision is beyond the scope of this column, the Court's action has ominous implications for bioethics in two areas: the law's treatment of in vitro fertilization (IVF) and other artificial reproductive technologies and its respect for religious freedom and conscience rights. Both areas are already the subjects of intense legal and political debate, and there is reason to be concerned that the Court's decision may tilt those debates further against Catholic concerns.

The present column also reviews new developments on public funding of abortion and on issues at the end of life, both the withdrawal of treatment and the more radical and troubling issue of physician-assisted suicide.

The Marriage Decision: Implications for Procreation and Religious Freedom

Justice Anthony Kennedy's majority opinion in *Obergefell*, declaring that none of the fifty states may define marriage as a covenant between one man and one woman, has been amply criticized for usurping the American people's right of self-governance and ignoring the canons of legal reasoning and the Supreme Court's own precedents. This criticism began immediately with the dissenting opinions filed by Chief Justice Roberts and Justices Alito, Scalia, and Thomas. Particularly noteworthy for purposes of this column are logical flaws in the majority opinion's argument, specifically regarding the link between marriage and procreation.

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[1] *Obergefell v. Hodges*, 576 US ___ (2015).

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Notably, Justice Kennedy defends his redefinition of marriage by citing some of the sources (including Supreme Court opinions) that have extolled marriage between man and woman as the foundation of the family, a basic unity of society, and a sacred institution. Precisely because of "the centrality of marriage to the human condition" that has been recognized throughout history, he argues, it cannot be denied to two persons of the same sex who aspire to its "privileges and responsibilities."[2]

This argument, however, makes little sense. The physical, psychological, and spiritual complementarity between man and woman—and the openness of this kind of union of opposites to generating new human beings who biologically "belong" to both parents but are uniquely new individuals in their own right—have been foundational for marriage and for the respect and legal status it has enjoyed throughout the centuries. One must forget or ignore this understanding in order to extend marriage to persons of the same sex.[3] This Justice Kennedy proceeds to do, by arguing that the basic premises of marriage are a personal "liberty" to choose one's relationships, a drive for "intimate association," an interest in raising children, and a role in the "social order." This vague account, reducing marriage to genderless abstractions, prejudges the conclusion of the argument; it also provides no clear reason why marriage should consist of a union of only two people of any sex.

The dissenting opinions by Chief Justice Roberts and Justice Alito focus on the majority opinion's treatment of marriage and procreation. In even the most pragmatic view, says the Chief Justice, "the human race must procreate to survive."[4] Sexual relations between men and woman lead to children (sometimes without prior planning by the couple), and children are essential for the future of society; thus society has a fundamental interest in the progenitors creating a "lasting bond" stable enough to ensure a nurturing home for the dependent children, planned in advance or not, that are produced by their union. Even the Supreme Court itself has described marriage as "fundamental to our very existence and survival"—an understanding, notes the Chief Justice, that "necessarily implies a procreative component."[5]

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[2] *Obergefell*, slip op. at 3–4.

[3] The logical fallacy here is one in which a fact and its opposite are both assumed in the argument to create a false conclusion. Philosopher John Dolan has called this the fallacy of "*Contrafactum Interruptum*." Its classic example is taken from Lewis Carroll: one of his characters says she is very glad she doesn't like asparagus, because if she did like it she would eat a lot of it, and she can't stand the stuff. Dolan found this fallacy in proposals for assigning the task of assisting suicides to physicians, on the basis that most people trust their physicians to keep their best interests at heart—the problem being that people trust physicians precisely because physicians are devoted to healing rather than killing their patients. See John Dolan, "Is Physician-Assisted Suicide Possible?," *Duquesne Law Review* 35.1 (Fall 1996): 374–375. In the present case, the majority opinion likes marriage as it has always been understood (as union of one man and one woman) so deeply that it finds great injustice in not extending it to relationships that lack the qualities that have always been understood to define it as marriage.

[4] *Obergefell*, slip op. at 5 (Roberts, C.J., dissenting).

[5] Ibid. at 7. This quote is from *Loving v. Virginia*, 388 US 1, 12 (1967), which invalidated state laws that banned interracial marriage. Oddly, the majority opinion cites that same decision to bolster its case, citing it as an example of the Court insisting on marriage equality

Similarly, Justice Alito observes, "For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate." He adds poignantly, "If this traditional understanding of the purpose of marriage does not ring true to all ears today, that is probably because the tie between marriage and procreation has frayed" at a time of widespread unwed motherhood. But, he says, if some states "worry that by officially abandoning the older understanding, they may contribute to marriage's further decay," the Court has no right to overrule that judgment.[6]

What does the majority opinion make of procreation? It agrees that marriage has some link with the rearing of children. Confusingly, however, it declares that "many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted," and that failing to recognize their relationship as a marriage will "harm and humiliate the children of same-sex couples."[7]

It is true that persons in same-sex relationships have adopted children. But that does not serve the interest cited by Chief Justice Roberts in dissent: ensuring that children's own progenitors remain together where possible, to provide a stable home for the children they engendered by consummating their relationship. For that matter, many jurisdictions allow single people to adopt children; and where that is disallowed or discouraged, it is because it is seen as better for children to have the guidance of both a mother and a father—an interest that two persons of the same sex cannot serve.

But it is even less clear what the majority means by the "biological" children of same-sex couples. It seems to mean children produced by artificial reproductive technologies—using sperm or eggs from donors (in most cases more accurately called vendors) and, in a relationship involving two men, a "surrogate" mother hired to gestate the child. If the reproductive technology is IVF, even the act of procreation is performed by a laboratory technician unrelated to either person.

These factors raise the question, in what sense is a resulting child "biologically" the child of this relationship? To be sure, one of the two persons may have a genetic relationship with the child through use of that individual's sperm or egg. But there may be no physical involvement between these persons and the child until after birth (as in adoption). IVF technology itself is independent of whether the persons involved have ever met or whether they are still alive. Therefore, it is only in a new and more attenuated sense that this is the "biological" child of this union, as Justice Kennedy's argument would demand. One is left to wonder whether it will be the responsibility

against the narrow prejudices of some legislatures. *Loving*, 388 US at 12. The majority's argument ignores the fact that this court decision, too, understood marriage precisely as a bond between man and woman open to procreation. Racial identity has nothing to do with the essence of marriage; throughout history, sex difference has had everything to do with it.

[6] *Obergefell*, slip op. at 4–5 (Alito, J., dissenting). It is also true, as the majority opinion observes, that marriage is valid among opposite-sex couples even if they are infertile or are too old to reproduce. The point of the dissenting opinions is that by its nature the male–female union is open in principle to procreation, and this has been cited throughout history as a major reason for society's respect and support for the institution.

[7] *Obergefell*, slip op. at 15.

of the law to treat these technologies as equal in all respects to natural procreation so that the biological impossibility of same-sex procreation is compensated by whatever the latest technology provides.

The majority opinion in *Obergefell* may thus pave the way for a future case in which persons of the same sex demand a constitutional right to procreate by reproductive technologies and therefore call for invalidation of state laws limiting the practice of IVF, commerce in donated eggs or sperm, and the exploitative practice of hiring women as "surrogate" wombs. Already this future prospect is clear to commentators on both sides of the "same-sex marriage" issue[8]—and legislation advancing these practices under federal auspices is already being debated, as we will see below.

The other corollary to the marriage decision is that religious organizations holding to the millennia-old definition of marriage, and their adherents, are in danger of being forced to ignore their conscientious beliefs in a society that officially dismisses those beliefs as obsolete and discriminatory. Justice Kennedy does not here repeat the inflammatory comment in his opinion in the Court's Defense of Marriage Act case, that this federal law could only be based on "animus" against people who want their same-sex relationship treated as a marriage.[9] In fact, he says that "many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises," which will not be "disparaged" by the Court. But he immediately adds that any reflection of such views in law "demeans or stigmatizes" some with a liberty right to marry and that it would "disparage their choices and diminish their personhood to deny them this right."[10] This hardly signals a readiness to treat religious and philosophical views against same-sex marriage as decent and honorable or as reasonable viewpoints in a public policy dialogue.

Justice Kennedy proceeds to assure "religions, and those who adhere to religious doctrines" that they "may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned." In his dissent, Justice Roberts cites this passage about what religious people may "advocate" but notes, "The First Amendment guarantees, however, the freedom to '*exercise*' religion. Ominously, that is not a word the majority uses."[11] In other words, there is now an open question whether churches and their adherents may continue to *act* on their recognition of marriage as solely between one man and one woman.

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[8] Jennifer Lahl cites, and responds to, a call for such "family equality" in the wake of the Court's "marriage equality" decision, in "'Family Equality' Requires Eggsploitation," June 30, 2015, and "'Family Equality' Exploits Women as Breeders," July 2, 2015, Center for Bioethics and Culture Network, http://www.cbc-network.org/.

[9] *United States v. Windsor*, 133 S. Ct. 2675, 2693–2696 (2013).

[10] *Obergefell*, slip op. at 19. Note that the majority opinion assumes that those who disagree with it hold same-sex marriage to be "wrong." But the position of the Catholic Church, at least, is not that it is a moral wrong but that it is not truly marriage. Marriage is a particular kind of covenant and institution whose essential meaning is only fulfilled if the participants are a man and a woman. In this tradition, to say that a same-sex union is a marriage is not to condone a moral wrong on the part of the persons involved—it is to act wrongly oneself, by speaking falsely.

[11] *Obergefell*, slip op. at 27; and slip op. at 28 (Roberts, C.J., dissenting).

Religious freedom, as well, has increasingly been a matter of bitter controversy, and the marriage decision will only inflame that controversy. Among the bills now pending in Congress on this issue is the Child Welfare Provider Inclusion Act of 2015 (H.R. 1299, S. 667), requiring that federal and state authorities "shall not discriminate or take an adverse action against a child welfare service provider on the basis that the provider has declined or will decline to provide, facilitate, or refer for a child welfare service that conflicts with, or under circumstances that conflict with, the provider's sincerely held religious beliefs or moral convictions." Among other things, the legislation would allow religiously affiliated adoption agencies to place children for adoption only with opposite-sex couples. The question is whether courts will see this as a reasonable accommodation to "decent and honorable" religious views or as an act of government that would "demean and stigmatize" two persons of the same sex who are seeking to adopt. The answer to that question will help determine whether Catholics and others will be able to act on their deepest convictions on other issues involving human life and procreation.

Congressional Activity on Reproductive Technologies

At about the same time that the Supreme Court issued its marriage decision, the Republican chairmen of the House and Senate Veterans Affairs committees announced plans to advance legislation to fund IVF services for disabled veterans. The *Washington Post* paved the way for this effort with a sympathetic but thoroughly misleading front-page story about the plight of veterans with service-related fertility problems.[12] It accused the Department of Veterans Affairs of refusing to fund a "chance for the wounded to have kids"—ignoring the fact that since 1999, by federal regulation, the VA has provided all fertility assistance except IVF. This includes "surgery to reverse voluntary sterilization, infertility services (other than in vitro fertilization), and surgical implantation of penile prostheses."[13] The purpose of the new legislation is to fund IVF, which differs from other procedures in its destruction and discarding of large numbers of human embryos, high rates of miscarriage (and of some birth defects among those children who are born alive), health risks to the women subjected to superovulatory drugs, and scandals involving "mix-ups" in which children are given to the wrong couples.[14]

The House bill, H.R. 2257, is sponsored by the chairman of the House Veterans Affairs Committee, Rep. Jeff Miller (R-FL). It would pay for "not more than three in vitro fertilization cycles that result in a total of not more than six implantation attempts" for a disabled veteran, "regardless of sex," and his or her spouse. The government will also pay for not more than three years of cryostorage for remaining

[12] Emily Wax-Thibodeaux, "What Veterans Affairs Won't Pay For: Chance for the Wounded to Have Kids," *Washington Post*, May 25, 2015, http://www.washingtonpost.com/.

[13] Enrollment—Provision of Hospital and Outpatient Care to Veterans, 64 Fed. Reg. 54207, 54210 and 54218 (Oct. 6, 1999). That policy is now codified at 38 CFR 17.38(c)(2).

[14] For an overview of these problems, see USCCB Secretariat of Pro-Life Activities, "In Vitro Fertilization: The Human Cost," July 10, 2015, http://www.usccb.org/.

embryos (which the bill as introduced calls "genetic material"), after which apparently they will be discarded unless the couple takes over the expense of storage. The government will not "provide any benefits relating to surrogacy" or "assist with obtaining a third-party genetic material donation" (which could mean donation of sperm, egg, or embryo). The sponsor's office has clarified that while the government cannot "assist with obtaining" this "material," it will pay for the IVF procedure using third-party "material" obtained by the couple.

The Senate bill, S. 469 (Women Veterans and Families Health Services Act of 2015), is much longer and covers a number of issues, including some that should be noncontroversial such as adoption assistance. However, as introduced it is more sweeping in its coverage of IVF and related services. It was introduced by Senator Patty Murray (D-WA), a leading abortion advocate in Congress, but has attracted the interest of the Republican chairman of the Senate Veterans Affairs Committee, Senator Johnny Isakson (R-GA). It offers to pay for IVF for "a spouse, partner, or gestational surrogate" of a member of the Armed Forces or a veteran with a service-related fertility problem, "without regard to the sex or marital status" of the member or veteran. A "partner" is defined as any individual selected by the member or veteran who has agreed to share "parental responsibilities" with respect to any child born from these procedures. The government will fund "three completed cycles or six attempted cycles" of IVF, "whichever occurs first," and will pay or reimburse "the reasonable costs of procuring gametes from a donor" if needed.

In the original Senate bill, then, federal funds and other government assistance will be placed at the service of what has been called the production of the five-parent child, the various parents being the sperm donor, egg donor, "surrogate" mother, and the two individuals who, regardless of their gender, have contracted legally to raise the child. The link between marriage and procreation, already frayed in ways that concerned Justice Roberts, would be so thoroughly severed as to become meaningless.

In committee, S. 469 was revised to be a closer match to the House version. Whatever the differences of detail between the two bills, however, neither proposal acknowledges why federal programs have not funded IVF in the past. In 1979, after a lengthy ethical and policy debate among members of a federal ethics advisory board, the Carter administration's secretary of health, education, and welfare decided not to pursue federal funding of IVF. The issue was reopened during the Clinton administration, but the 1994 recommendations of the National Institutes of Health for federal funding of IVF and related embryo experimentation was decisively rejected by federal lawmakers. Instead, in 1995, Congress approved the Dickey amendment as a rider to the annual Labor, Health and Human Services (Labor HHS) appropriations bill—and that amendment has been re-approved by congresses and presidents of both parties every year since then. As contained in current law it reads,

> Sec. 508. (a) None of the funds made available in this Act may be used for—
> (1) the creation of a human embryo or embryos for research purposes; or
> (2) research in which a human embryo or embryos are *destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses in utero under 45 CFR 46.204(b) and section 498(b) of the Public Health Service Act (42 USC. 289g(b)).*
> (b) For purposes of this section, the term "human embryo or embryos" includes

> any organism, not protected as a human subject under 45 CFR 46 as of the date of the enactment of this Act, that is derived by fertilization, parthenogenesis, cloning, or any other means from one or more human gametes or human diploid cells.[15]

The portion of the amendment shown here in italics refers to pre-existing statutory and regulatory requirements for federally funded fetal research, beginning at an embryo's implantation in his or her mother's womb. That policy requires that interventions on the new human being, even when done for important medical knowledge not obtainable in other ways, cannot pose greater risk to that individual than would be involved in the activities of daily life while residing in his or her mother's womb. The Dickey amendment applies this standard to the preimplantation embryo—and the fertilization and manipulation of human embryos in the hostile environment of a glass dish in the laboratory is not even close to complying with that safety standard. Hence, federal programs under HHS jurisdiction do not fund IVF, as research or "treatment." Technically that law does not govern the Department of Veterans Affairs, but other federal agencies have traditionally observed the ethical standards for treatment of human subjects that govern the National Institutes of Health—until now.

Federal funding of IVF is therefore an important pro-life challenge as well as an issue about the dignity and meaning of human procreation. National pro-life groups therefore began to raise grave concerns about these proposals, and concerned members of the Senate committee said they would offer amendments when S. 469 was considered. These included provisions to prevent the program from being involved with fetal organ harvesting or any facility engaged in it, or with selective discarding of embryos because of their gender or expected disability. Another amendment would require the secretary of veterans' affairs to comply with Congress's recent demands for improvements in veterans' access to basic health care before pursuing IVF. On July 22, Senator Murray took the Senate floor to denounce these "poison-pill amendments" that, she said, "have turned our bipartisan effort to help wounded veterans into a partisan effort to attack women's health care." She said she would withdraw her bill at this time, but she and Senator Richard Blumenthal, ranking Democrat on the Senate committee, said this proposal will return.[16]

Developments on Conscience Rights and Religious Freedom

The House of Representatives took important steps toward the protection of conscience rights in health care and health coverage this summer. At the same time, the Obama administration has remained on its earlier course regarding imposition of its contraception coverage mandate on employers with conscientious objections.

In past issues, this column has criticized the Reproductive Health Non-Discrimination Amendment Act approved late last year by the Council of the District

[15] Consolidated and Further Continuing Appropriations Act 2015, Pub. L. 113–235, Division G §508, 128 Stat. 2130, 2515 (2014), emphasis added.

[16] 161 Cong. Rec. S5437, 5438 (daily ed. July 22, 2015).

of Columbia.[17] This law forbids employers, religious and nonreligious alike, to make employment decisions based on the "reproductive health" decisions made by employees or job candidates or their family members. For example, a Catholic pro-life advocacy organization could be forced to retain as its spokesperson on pro-life issues a man who has announced he will persuade his wife to have an abortion. Last December, even then-Mayor Vincent Gray, a liberal Democrat, had warned the Council of the District of Columbia that the law posed serious legal and constitutional problems; the law was passed over his objections and signed by incoming mayor Muriel Bowser on January 23.

On April 30, the full House of Representatives, exercising Congress's right to formally disapprove new laws of the District of Columbia, voted 228 to 192 to rescind this new law. Thirteen Republicans opposed the disapproval motion, while three Democrats supported it. However, the Senate did not take up this resolution during the time period allotted to Congress for such motions.

As a fallback, the House Appropriations Committee on June 17 approved a rider to the Financial Services and General Government appropriations bill for fiscal year 2016, which governs funding for the District of Columbia. This amendment, by Rep. Steven Palazzo (R-MS), forbids use of public funds to implement or enforce the new law. The amendment passed in committee on a vote of 28 to 22.

The same House Appropriations Committee on June 24 approved the Labor HHS appropriations bill for fiscal year 2016. Included in the bill is the text of the Health Care Conscience Rights Act (H.R. 940). It would provide a conscience exemption for anyone with a moral or religious objection to particular mandates under the Affordable Care Act such as the HHS contraceptive mandate, and make important changes to current federal conscience laws on abortion. Among other things it would provide a "private right of action" so those discriminated against because of their conscientious objection to abortion could defend their own rights in court. Currently enforcement of such rights is delegated by regulation to the HHS Office for Civil Rights, whose efforts in the current administration to protect the rights of pro-life health care providers have been absent or agonizingly slow. During committee markup, Rep. Debbie Wasserman Schultz (D-FL) offered an amendment to strike the conscience language; her amendment was defeated on a vote of 31 to 20.

Finally, on July 10 the Obama administration issued its latest "final rule" making refinements to the HHS contraceptive mandate.[18] In the wake of the Supreme Court's *Hobby Lobby* decision, which found that closely held for-profit companies can have a right to object to the mandate under the federal Religious Freedom Restoration Act, the administration is offering these companies the same "accommodation" it has already established for religious institutions that are not houses of worship. Ironically, this actually increases the burden on these companies' religious freedom, since they had been completely exempt from the mandate in the wake of the

[17] See Washington Insider columns by Richard Doerflinger, Spring 2015, 24–25, and William Saunders, Summer 2015, 216.

[18] Coverage of Certain Preventive Services under the Affordable Care Act, 80 Fed Reg. 41317 (July 14, 2015).

Supreme Court decision. The "accommodation" itself remains basically the same as in the administration's most recent proposed rule: a religious organization that is not exempt from the mandate must file its formal objection to some or all contraceptive coverage with the government, its insurer, or (in the case of a self-insured plan) its third-party administrator (TPA)—and that notice of objection will be used to authorize the insurer or TPA to pay for the objectionable items for all the organization's employees. These payments remain closely linked with the employer's health plan, as they are offered only to employees and dependents covered by that plan and cease once an employee leaves the organization. Many religious nonprofits have filed suit against this continued burden on their religious freedom, resulting in a patchwork of decisions in the federal courts. One or more of these cases may be taken up by the Supreme Court in its new term that begins October 2015.[19]

Developments on Public Funding of Abortion

Since the Hyde amendment was first passed in 1976, barring use of federal funds for most abortions in Medicaid and other HHS programs, laws against use of public funds for abortion have been perhaps the most important policy achievement of the pro-life movement. These laws respect the conscience of pro-life taxpayers, reduce the number of abortions, and (as the Supreme Court has said) reflect a government policy of encouraging childbirth over abortion.[20]

This is anathema to the pro-abortion movement, which in recent years has abandoned its "pro-choice" slogan in favor of a demand that abortion be enshrined as "basic health care" for women.[21] This new approach insists that abortion must be provided, and paid for with public funds, in all government health programs. Thus, the long-standing policy of the Hyde amendment is under renewed attack in a number of ways.

In the previous issue of the *NCBQ*, this column reported on one of those attacks, which involved blocking legislation to help the victims of human trafficking because the bill included language to keep the program's funds from subsidizing abortions.[22] The filibuster of the trafficking bill by Senate Democrats was ostensibly based on the argument that its funding ban "expanded" the Hyde policy by governing the use of "non-taxpayer" funds (fines collected from the perpetrators of human trafficking). The argument was specious, as Hyde and parallel provisions throughout federal law govern federally appropriated funds that do not come from tax revenue: State "matching funds" that supplement federal funding in Medicaid, patients' premiums paid into the Medicare trust fund, and premiums paid by federal employees for federally subsidized health coverage. But this argument allowed abortion funding advocates

[19] For an overview of pending cases, see the Becket Fund for Religious Liberty, "HHS Mandate Information Central," at http://www.becketfund.org/hhsinformationcentral/.

[20] See Richard Doerflinger, "Defending Hyde," *America*, November 19, 2012, http://americamagazine.org/.

[21] See Doerflinger, Washington Insider, Spring 2015, 28.

[22] Saunders, Washington Insider, Summer 2015, 215–216.

to avoid criticizing Hyde itself, which has acquired the patina of a long-standing law that everyone has at least pretended to accept.

The Senate filibuster against the trafficking bill finally ended when a compromise was reached. Health services for trafficking victims under the bill will not be subsidized by the fines paid to the government. Instead funding for these services will come from a different law approved by Congress around the same time—a law whose funds originate in tax revenues covered by the Hyde amendment. This convoluted solution allowed abortion advocates to "save face" while providing exactly the policy result that they tried to block.[23]

That other law, incidentally, addressed a number of health policy issues, including provisions to prevent substantial cuts in Medicare reimbursement for physicians (popularly known as the "doc fix"). It was approved overwhelmingly by both House and Senate, with less controversy about its abortion funding ban.[24] Not widely noticed at the time was that the bill provides $7 billion over two years for the federal community health centers program, subject to the Hyde amendment—and this replaces the previous funding stream for these centers through the Affordable Care Act, which had been widely criticized by pro-life groups for evading Hyde restrictions.[25] So the bill that did "expand" the reach of the Hyde policy passed easily, while pro-abortion groups focused on a symbolic attack on the trafficking bill that made no difference in substance.

But all pretense of consensus on the Hyde amendment itself vanished in July, when abortion advocates in Congress mounted an attack on H.R. 6, the 21st Century Cures Act. This bipartisan legislation, designed to streamline the federal process for turning medical research into clinical treatments, appropriated its own funding of $1.86 billion a year over five years, so it included a simple provision stating that its funds would be governed by the same policy limitations as funds under the annual Labor HHS appropriations bill. Thus, the funds cannot be used for elective abortions or destructive human embryo experimentation. This time abortion advocates, led by Rep. Barbara Lee (D-CA), sought to strike the Hyde-referencing provision by attacking the Hyde policy itself.

As if to dismiss any ambiguity on this point, Rep. Lee headlined a press conference on Capitol Hill shortly before the House vote, to announce her introduction of the Equal Access to Abortion Coverage in Health Insurance Act (H.R. 2972)—described on pro-abortion news sites as "comprehensive legislation to overturn the Hyde Amendment and ensure that every woman has access to insurance coverage of

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[23] See Associated Press, "Deal on Human-Trafficking Bill May Break Lynch Nomination Logjam," April 21, 2015, at http://www.sfgate.com/nation/article/Deal-on-human-trafficking-bill-may-break-Lynch-6214773.php.

[24] See Erin Kelly, "House Passes Bipartisan 'Doc Fix' Medicare Bill," March 26, 2015, and "Senate Passes Bipartisan 'Doc Fix' Medicare Bill," April 14, 2015, *USA Today*, http://www.usatoday.com/.

[25] See, for example, USCCB Secretariat of Pro-Life Activities, "The Senate Health Care Reform Bill: Funding Abortions at Community Health Centers," March 16, 2010, http://www.usccb.org/. This aspect of the Affordable Care Act was not corrected on final passage.

abortion care." As of this writing, the bill had seventy-six cosponsors. It would put all federal health programs in the elective abortion business, and overturn restrictions on abortion coverage passed by the states.[26] Rep. Lee urged support for her motion to strike the abortion funding ban in H.R. 6 as a first step toward this goal. On July 10, her motion was defeated on the House floor 245 to 176, opposed by all House Republicans and five Democrats. Clearly, however, abortion advocates have a long-range plan on this issue and will be forcing Congress to deal with it many times in the future.

Other abortion funding issues are raised by the annual appropriations bills for fiscal year 2016 now being marked up in House and Senate. Aside from the funding riders routinely approved each year, they include the following:

- As approved by the House Appropriations Committee, the Financial Services appropriations bill (mentioned above in the context of the District of Columbia's "reproductive health" law) contains a ban on use of any appropriated funds (federal or DC public funds) for elective abortions, and an amendment sponsored by Rep. Andy Harris (R-MD) to exclude elective abortion coverage from the "multi-state plans" approved by the federal Office of Personnel Management for inclusion in all state health exchanges across the country.
- As approved by the same committee, the Homeland Security appropriations bill includes a Hyde-type amendment sponsored by Rep. Robert Aderholt (R-AL) to prevent federal funding of abortion for immigration detainees. This will close a potential loophole created when Congress separated out Homeland Security as a separate federal department with its own appropriations bill; formerly its funding was part of the Justice Department appropriations bill and so was covered by that bill's Hyde language.
- As in recent years, current House and Senate versions of the State and Foreign Operations appropriations bill are in direct conflict on abortion-related matters. The House bill reinstates the Mexico City Policy forbidding US foreign aid to nongovernmental organizations that perform and promote abortion as a method of family planning, and bars funding of the UN Population Fund (UNFPA) because of its support for the coercive population program in the People's Republic of China. The Senate bill forbids reinstatement of the Mexico City Policy by a future president and earmarks funding for the UNFPA. As an executive policy, Mexico City has gone in and out of existence with changes in the White House since it was first established by President Reagan in 1984, being maintained during both Bush presidencies but rescinded by Presidents Clinton and Obama. In recent years the congressional standoff on these policies has ended with removal of both conflicting provisions on Mexico City and continued funding for the UNFPA; it remains to be seen whether the Republican takeover of the Senate in November 2014 will make a difference.

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[26] Emily Crockett, "Pro-Choice Advocates Go on Offense with Congressional Call to End Hyde Amendment," *RH Reality Check*, July 8, 2015, http://rhrealitycheck.org/.

Federal Policymakers Return to End-of-Life Counseling Issue

During Congress's 2009 debate on health care reform legislation, controversy emerged over a provision to reimburse physicians under Medicare for providing end-of-life or "advance care planning" counseling for seniors. The provision was removed from the final Affordable Care Act before enactment, when charges were raised that the government might authorize "death panels" to direct older Americans away from life-sustaining treatments that cost the government money. A later executive effort in 2014 to authorize such reimbursements by regulation also sparked controversy and was withdrawn.

Now the Obama administration has raised the issue a third time, as a small part of a lengthy Medicare regulation published in July.[27] This advance-care planning proposal, like other parts of the proposed rule, is open to public comment until September 4.[28] It emphasizes encouraging patients to complete an advance directive guiding treatment decisions in the event of future incompetency. The proposal was immediately criticized by the National Right to Life Committee, which cited research indicating that such planning sessions and documents are heavily biased against life-sustaining treatment and are often proposed by policy makers based on cost-saving motives.[29] As if to confirm this suspicion, the Medicare regulation states, "Increased advance care planning among the elderly is expected to result in enhanced patient autonomy and reduced hospitalizations and in-hospital deaths"—but the only documentation it cites for this statement is a study on reduced hospitalizations and consequent cost savings, not on enhanced autonomy.[30]

More ambitious is a Care Planning Act (S. 1549) introduced on June 10 by Senators Mark Warner (D-VA) and Johnny Isakson (R-GA). It would promote the broader use, implementation, and "portability" of advance directives nationwide. The legislation explicitly excludes directives for assisted suicide and has some welcome provisions on the conscience rights of health care providers and other specific issues.

The broader issue raised by both the regulation and proposed legislation is their underlying assumption that "advance directives" are an unalloyed benefit. The recent professional literature has raised questions whether these documents, particularly those which, like "living wills," try to predict future scenarios and guide treatment accordingly, truly enhance patient autonomy or responsible health care.[31]

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[27] See Associated Press, "Medicare to Cover End-of-Life Counseling," *Fox News*, July 8, 2015, http://www.foxnews.com/; and Medicare and Medicaid Programs; CY 2016 Home Health Prospective Payment System Rate Update; Home Health Value-Based Purchasing Model; and Home Health Quality Reporting Requirements, 80 Fed. Reg. 39839 (proposed July 10, 2015).

[28] 80 Fed. Reg. at 39882, 5(a).

[29] National Right to Life Committee, "Medicare Proposal Would Nudge Seniors to Agree to Premature Death," news release, July 9, 2015, http://www.nrlc.org/.

[30] 80 Fed. Reg. at 39883 (text and note 39).

[31] One of the most thoughtful critiques in this regard is "The Limited Wisdom of Advance Directives," by the President's Council on Bioethics, chapter 2 of *Taking Care:*

New questions have been raised by the rise of documents like physician orders for life-sustaining treatment (POLST), specifically promoted by the Care Planning Act, which have been criticized for transferring power from patients back to physicians.[32] And state laws on advance directives are a patchwork, with differing policies on such basic issues as food and fluids for patients with nonterminal illnesses or injuries, continuing life support for pregnant women for the sake of the unborn child, and the right of a health care provider to object to a morally objectionable request. Does the federal government take sides in these disputes or indiscriminately promote all these different policy decisions, documents, and biases to patients as if they are all equally beneficial?

The more radical issue weighing on this debate, of course, is physician-assisted suicide, which has taken on renewed visibility this year because of the media campaign featuring California cancer patient Brittany Maynard and the nationwide drive by the former Hemlock Society (now called Compassion and Choices) for new state laws to legalize the practice. Currently it seems this drive will fail for the year, with the bills stalled even in liberal states such as New Jersey, Massachusetts, New York, and California. At this writing a legalization proposal in the District of Columbia is being debated, but a July 10 hearing on the bill featured compelling testimony against it by disability rights advocates and medical professionals, including the director of the DC Department of Health.[33]

In this context it is worth recalling that while "death panel" charges were wildly overstated during the 2009 debate on end-of-life counseling, the sponsors of the controverted provision never did agree to a clear exclusion of assisted suicide from its scope—and Compassion and Choices later boasted that it had helped write the provision.[34] The issue of advance care planning does not benefit from hysteria, but it does warrant caution.

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Ethical Caregiving in Our Aging Society (Washington, DC: PCB, September 2005), 53–93, https://bioethicsarchive.georgetown.edu/.

[32] For example, see the white paper representing the view of the Catholic Medical Association: Christian Brugger et al., "The POLST Paradigm and Form: Facts and Analysis," *Linacre Quarterly* 80.2 (May 2013): 103–138, doi: 10.1179/0024363913Z.00000000027.

[33] See Richard Szczepanowski, "At DC Council Hearing, Medical Professionals Testify against Assisted Suicide Bill," *Catholic Standard*, July 14, 2015, http://www.cathstan.org/.

[34] See Richard Doerflinger, "Health Care Reform and a Dispute about Dying," *Life Issues Forum*, August 21, 2009, http://usccb.org/.