



### **Health Care Reform**

After an August recess that will be remembered for its boisterous town hall meetings, President Obama addressed a joint session of Congress on September 9 to outline his vision for a health care bill and to clear up any “misunderstandings” about the current proposals.<sup>1</sup> Of particular note, the President asserted, “And one more misunderstanding I want to clear up—under our plan, no federal dollars will be used to fund abortions, and federal conscience laws will remain in place.”<sup>2</sup>

However, none of the three proposed bills, discussed below, reflect the sentiment expressed by the President. In fact, House and Senate proposals would authorize, if not mandate, abortion coverage. Conscience protections are also limited, and since the administration has been actively seeking to undo the regulations promulgated by the George W. Bush administration to enforce federal laws guaranteeing conscience protections,<sup>3</sup> the promise that they will remain intact rings hollow.

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<sup>1</sup> At the time of the President’s address, H.R. 3200, America’s Affordable Health Choices Act (the House bill), was reported out by the three House committees responsible for its proposal—House Energy and Commerce, Ways and Means, and Education and Labor—and the Senate Health, Education, Labor and Pensions (HELP) Committee had approved S. 1679, the Affordable Health Choices Act (the Senate HELP bill). The Senate Finance Committee bill, S. 1796, America’s Healthy Future Act (the Baucus bill), was offered by Sen. Max Baucus on September 16, 2009, and “marked-up” thereafter. The text of H.R. 3200 is available at <http://www.opencongress.org/bill/111-h3200/text>, S. 1679 at <http://www.opencongress.org/bill/111-s1679/text>, and S. 1796 at <http://www.opencongress.org/bill/111-s1796/text>.

<sup>2</sup> “President Obama’s address may be found in its entirety at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/).

<sup>3</sup> See William L. Saunders, “Washington Insider,” *National Catholic Bioethics Quarterly* 9.2 (Summer 2009): 234–235. See also William L. Saunders and Michael Fragoso, “Conscience Protection in Health and Human Services,” *Engage* 10.2 (July 2009): 115–120, [http://www.fed-soc.org/doclib/20090720\\_SaundersEngage102.pdf](http://www.fed-soc.org/doclib/20090720_SaundersEngage102.pdf).

On August 20, at the Organizing for America National Health Care Forum, President Obama stated, “There are no plans under health reform to revoke the existing prohibition on using federal taxpayer dollars for abortions. Nobody is talking about changing that existing provision, the Hyde Amendment. Let’s be clear about that. It’s just not true.”<sup>4</sup>

But there is no need to “change” the Hyde Amendment in order to mainstream abortion. The Hyde Amendment prohibits the use of taxpayer money for abortion only if funded through the Medicaid program. Hyde does not need to be repealed to ensure that abortion is funded under the proposed health care reform bills.<sup>5</sup> In fact, the Hyde Amendment, a yearly rider to the Labor, Health and Human Services (LHHS) Appropriations bill,<sup>6</sup> is entirely circumvented because of the funding mechanism envisioned to pay for health care reform.<sup>7</sup>

Prior to the President’s address, several proposed amendments to both the House bill and the Senate HELP bill that would explicitly have prohibited abortion funding were defeated. For example, an amendment to the House bill offered by Reps. Bart Stupak (D-MI) and Joe Pitts (R-PA) would have prevented abortions from becoming a required basic benefit of any government plan.<sup>8</sup> The bipartisan amendment was defeated in the House Energy and Commerce Committee on a vote of 30 to 29.

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<sup>4</sup>Full remarks by the President are available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-at-the-Organizing-for-America-National-Health-Care-Forum/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-Organizing-for-America-National-Health-Care-Forum/).

<sup>5</sup>“The health-care-reform bill proposed by House Democrats does not actually override [federal abortion funding] restrictions. But it does find a way for the federal government to expand the coverage of abortion services through a government-run program—the so-called public option—without spending what it defines as federal dollars on abortion.” Michael Scherer, “How Abortion Could Imperil Health-Care Reform,” *Time Magazine*, August 24, 2009, <http://www.time.com/time/politics/article/0,8599,1918261,00.html?xid=rss-politics-cnn>.

<sup>6</sup>Despite what certain Democratic members of Congress such as Sen. Richard Durbin of Illinois claimed, the Hyde Amendment is not settled law, but must be introduced and approved each year. Sen. Durbin made the claim on *Hardball with Chris Matthews* (MSNBC TV, broadcast July 13, 2009) that the Hyde Amendment was “basically the settled law.” Transcript, [http://www.msnbc.msn.com/id/31905856/ns/msnbc\\_tv-hardball\\_with\\_chris\\_matthews/](http://www.msnbc.msn.com/id/31905856/ns/msnbc_tv-hardball_with_chris_matthews/). For an analysis of the Hyde Amendment, see Americans United for Life (AUL) Action, “The Vulnerable Hyde Amendment,” [http://www.realhealthcarerespectslife.com/?page\\_id=388#](http://www.realhealthcarerespectslife.com/?page_id=388#).

<sup>7</sup>For instance, Section 207(c)(2) of the House bill makes it “self-appropriating,” meaning it bypasses the Appropriations Committee, funding its new programs through a trust fund created specifically for that purpose. This backdoor spending authority bypasses the Hyde Amendment, which applies only to annual appropriations made for the LHHS (Labor, Health and Human Services) bill. Funding mechanisms in the Senate reform bills also bypass the yearly appropriations process. Sec. 3111(h) of the Senate HELP bill self-appropriates the funding of its affordability credits. Tax credits in the Baucus bill are treated as entitlements and thus do not depend on the yearly appropriations process.

<sup>8</sup>Mary Harned, “A Pro-Life Look at the Health Care Reform Bills Currently in Congress,” rev. October 12, 2009, <http://blog.aul.org/2009/10/10/a-pro-life-look-at-the-health-care-reform-bills-currently-in-congress/>.

Sen. Orrin Hatch (R-UT) offered amendments to the Senate HELP bill that would have prevented federal funding of abortion unless the life of the mother was endangered or the pregnancy was a result of rape or incest.<sup>9</sup> The Hatch Amendments would have created in health care the same requirements Congress applies to Medicaid spending via the Hyde Amendment. They failed in committee on a vote of 12 to 11.<sup>10</sup>

An amendment proposed by Rep. Lois Capps (D-CA) was accepted by the House Energy and Commerce Committee. Abortion advocates claimed the Capps Amendment was a “compromise” that will bar abortion funding under the House bill.<sup>11</sup> While private plans will not be forced to provide abortion coverage, describing the Capps Amendment as a compromise is misleading.

The Capps Amendment allows the Secretary of Health and Human Services (HHS) to include abortion as a mandatory minimum benefit in the new public health care plan, even if the Hyde Amendment remains in place.<sup>12</sup> Kathleen Sebelius, the current Secretary of HHS, who has been praised by Planned Parenthood for her pro-abortion commitment, would make that determination.

The Capps Amendment also creates “affordability credits” that can be used for private health care plans that cover abortion.<sup>13</sup>

After the President’s speech to Congress in September, Secretary Sebelius was asked on ABC’s *This Week* about his statement regarding abortion funding. Host George Stephanopoulos asked, “So you’re saying [the President] will go beyond what we have seen so far in the House and explicitly rule out any public funding

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<sup>9</sup> Amendments 210 and 227.

<sup>10</sup>The only committee Democrat to vote in favor of the Hatch amendments was Sen. Robert Casey (D-PA). Other pro-life amendments were offered to the Senate HELP bill: Sen. Mike Enzi (R-WY) offered amendments that would have prevented taxpayer funding of abortion (amtds. 276 and 277), and an amendment to prevent abortion clinics from being eligible for federally qualified health center grants (amdt. 275). Sen. Tom Coburn (R-OK) offered amendments that would have ensured no abortion mandate (amdt. 270), prevented abortion clinics from being eligible for federally qualified health center grants (amdt. 273), and prevented the invalidation of state laws that regulate abortion (amdt. 272). Sen. Pat Roberts (R-KS) offered an amendment to prevent the invalidation of state laws regulating abortion (amdt. 204). These amendments all failed on a vote of 12 to 11, with all committee Democrats except Sen. Casey voting against them.

<sup>11</sup>“Center for Reproductive Rights Calls on Senators to Hold the Line on Abortion Funding As Gang of Six Huddles This Weekend,” news release, September 11, 2009, <http://reproductiverights.org/en/press-room/center-for-reproductive-rights-calls-on-senators-to-hold-the-line-on-abortion-funding-as->.

<sup>12</sup>For AUL legal analysis, see Mary Harned, “The Capps Amendment: A Pro-Life Analysis,” September 22, 2009, <http://blog.aul.org/2009/09/22/the-capps-amendment-a-pro-life-analysis/#>.

<sup>13</sup>*Ibid.* Affordability credits are government subsidies to help pay insurance premiums for those who are not eligible for Medicaid and have an annual income of up to 400 percent of the poverty level.

for abortion?” Sebelius responded, “Well, that’s exactly what the President said and that’s what he intends that the bill he signs will do.”<sup>14</sup>

That, however, would be a contradiction to what the President promised during his campaign. At a Planned Parenthood Action Fund event in July 2007, Candidate Obama stated, “In my mind, reproductive care is essential care, basic care, so it is at the center, the heart of the [health care] plan that I propose.”<sup>15</sup>

Seeking clarification, Dr. Charmaine Yoest, president and CEO of Americans United for Life (AUL) Action, met with senior White House officials Melody Barnes, Tina Tchen, and Joshua DuBois on September 17.<sup>16</sup> “Ms. Barnes reiterated the President’s statement about opposing abortion funding in his address before Congress last week, but the White House would not commit to language that explicitly excludes abortion from health care reform,” Yoest reported.<sup>17</sup>

Such language is certainly needed, as can be seen when one considers what originally happened with Medicaid. Even though nowhere in the language of the legislation creating Medicaid was abortion mentioned as a covered service, federal dollars, through administrative interpretation of statutory language, were paying for abortion before the enactment of the Hyde Amendment. The federal courts have since held that without the explicit prohibition of abortion funding by the Hyde Amendment, abortion would fall within “many of the mandatory care categories including ‘family planning,’ ‘outpatient services,’ ‘inpatient services’ and ‘physician services.’”<sup>18</sup> These court decisions mean that without explicit language in health care reform legislation prohibiting abortion funding, abortion funding will be read into the law and will be mandatory.

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<sup>14</sup> ABC News video, September 13, 2009, <http://abcnews.go.com/video/playerIndex?id=8561166>. Dan Gilgoff, “Did Sebelius Back More Steps for Banning Abortion Funding in Healthcare?” *U.S. News and World Report*, September 14, 2009, <http://www.usnews.com/blogs/god-and-country/2009/09/14/did-sebelius-back-more-steps-for-banning-abortion-funding-in-healthcare.html>.

<sup>15</sup> Barack Obama before Planned Parenthood Action Fund, July 17, 2007, transcribed by Laura Echevarria, <http://lauraetch.googlepages.com/barackobamabeforeplannedparenthoodaction>; video, [http://www.imoneinamillion.com/video.php?candidate=obama\\_speech](http://www.imoneinamillion.com/video.php?candidate=obama_speech).

<sup>16</sup> At the meeting Dr. Yoest delivered a petition with over thirty-nine thousand signatures from pro-life Americans telling President Obama that they urge him to veto any bill that does not specifically forbid mandating insurance companies to cover abortion, or any bill that makes taxpayers responsible for directly or indirectly paying for abortion.

<sup>17</sup> Heather Smith, “After White House Meeting, Leading Pro-Life Group Remains ‘Deeply Concerned’ about Abortion in Health Care Reform,” AUL, September 19, 2009, <http://blog.aul.org/2009/09/19/leading-pro-life-group-concerned-by-white-house-meeting-on-abortion/>.

<sup>18</sup> *Planned Parenthood v. Engler*, 73 F.3d 634 (6th Cir. 1996), <http://openjurist.org/73/f3d/634/planned-parenthood-affiliates-of-michigan-v-engler-k-j>. See also *Hope Medical Group for Women v. Edwards*, 63 F.3d 418 (5th Cir. 1995); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995), cert. denied, 116 S.Ct. 777 (1996); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), cert. denied, 116 S.Ct. 569 (1995).

The Senate Finance Committee's bill (the Baucus bill), introduced after the President's address, does not include a public insurance plan. However, plans that cover abortion can receive "cost-sharing credits." Although the bill requires that these funds be segregated, and that only money paid as a premium be used to pay for abortion services, the credits are an indirect subsidization.<sup>19</sup>

During mark-up, the Baucus bill was modified to remove language in its original draft that would have allowed an abortion mandate if the Hyde Amendment ever failed to be renewed.<sup>20</sup> However, currently the bill still provides that the government will spend six billion dollars establishing co-ops that could cover abortion, provides for tax credits that may be used to purchase insurance that covers abortion, and requires at least one plan in each premium rating area to cover abortion.<sup>21</sup>

An amendment offered by Sen. Hatch that would have prohibited authorized or appropriated funds from being used for elective abortions and plans that cover such abortions failed on a vote of 10 to 13.<sup>22</sup>

### *Conscience*

To address concerns about conscience protection, President Obama, meeting with representatives of the Catholic press in early July, said, "I think that the only reason that my position may appear unclear is because it came in the wake of a last-minute, eleventh-hour change in conscience clause provisions that were pushed forward by the previous administration that we chose to reverse." Seeking to explain why the repeal should not raise alarm, he continued, "I can assure all of your readers that when this review is complete there will be a robust conscience clause in place. It may not meet the criteria of every possible critic of our approach, but it certainly will not be weaker than what existed before the changes were made."<sup>23</sup>

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<sup>19</sup> AUL legal analysis of the Baucus bill by Mary Harned (September 22, 2009), <http://blog.aul.org/2009/09/22/auls-analysis-of-senator-baucus-finance-bill/#>.

<sup>20</sup> Under the original Baucus proposal, abortions for which funding is permitted in the LHHS bill could be mandated. If the Hyde Amendment were not renewed, all elective abortions would be permissible by the LHHS bill, and therefore funding could be mandated. The Baucus bill now mirrors language in the Capps Amendment that says the federal government is not permitted to mandate abortion in the "essential benefits package" (i.e., private insurers cannot be required to cover abortion). Mary Harned, "Update: Amendments in Senate Finance Committee 'Mark-Up,'" AUL, September 30, 2009, <http://blog.aul.org/2009/09/30/update-amendments-in-senate-finance-committee-mark-up/#>.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* Sen. Olympia Snow (R-ME) crossed party lines to vote against the amendment, and Sen. Kent Conrad (D-ND) crossed party lines to support it.

<sup>23</sup> "Obama Promises Conscience Protection," *Zenit*, July 2, 2009, <http://www.zenit.org/article-26353?l=english>. It is important to recall why HHS enacted those rules last year: though federal conscience protections "existed," there was no effective enforcement mechanism. The regulations were carefully crafted after solicitation of public comment and a lengthy period of review. The regulations did not expand federal law. They allowed federal

The House and Senate proposals afford some protections for conscience.<sup>24</sup> An amendment defeated in committee would have ensured under the Senate HELP bill that health care providers would not be forced to participate in abortions or discriminated against because they choose not to perform abortions (amdt. 246).<sup>25</sup> Instead, the committee accepted an amendment offered by Sen. Ted Kennedy (D-MA) that is limited in scope (not providing protection for non-referrals and non-coverage) and provides an undefined exception for “cases of emergency” that could fit almost any situation, effectively making the provision no protection at all (amdt. 205).<sup>26</sup>

The Capps Amendment to the House bill prohibits discrimination by insurance plans “against any individual health care providers or health care facility because of its willingness or unwillingness to provide, pay for, provide coverage of, or refer for abortions.”<sup>27</sup> The Baucus bill contains the same provision. This language protects pro-life health care providers’ right of conscience, but it would also require pro-life insurance companies to contract with abortion providers.

The House bill contains an additional conscience clause that was offered by Reps. Stupak and Pitts and Lee Terry (R-NE) and passed by voice vote in the Energy and Commerce Committee.<sup>28</sup> The two conscience clauses in the House bill are not harmonious and will not both survive in final legislation.

### *Rationing and End-of-Life Concerns*

In February, the Stimulus Bill enacted by Congress included \$1.1 billion for comparative effectiveness research (CER) to “determine which drugs, devices, and procedures are most effective and carry the lowest risk.”<sup>29</sup> The creation of CER

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law to be enforced. To say that the repeal of the enforcement mechanism leaves conscience laws no less effective than their ineffectiveness before is not comforting.

<sup>24</sup> AUL analysis of the status of conscience protections in the pending bills (August 6, 2009), [http://www.keepabortionoutofhealthcare.com/?page\\_id=245](http://www.keepabortionoutofhealthcare.com/?page_id=245).

<sup>25</sup> Sen. Coburn also offered an amendment to ensure that professional ethicists would inform government-funded medical decisions (amdt. 264). This amendment was also defeated.

<sup>26</sup> Amendment 205 states, “No individual health care provider or health care facility may be excluded from contracting with a health insurer participating in the Gateway on the basis that the provider or facility refuses to perform abortions, except in an emergency, if performing abortions is contrary to the religious or moral beliefs of the provider or facility.”

<sup>27</sup> The text of the Capps Amendment is available at [http://energycommerce.house.gov/Press\\_111/20090730/hr3200\\_capps\\_1.pdf](http://energycommerce.house.gov/Press_111/20090730/hr3200_capps_1.pdf). See AUL analysis of conscience protections at [http://www.keepabortionoutofhealthcare.com/?page\\_id=245](http://www.keepabortionoutofhealthcare.com/?page_id=245).

<sup>28</sup> The text of the Stupak amendment is available at [http://energycommerce.house.gov/Press\\_111/20090730/hr3200\\_stupak\\_1.pdf](http://energycommerce.house.gov/Press_111/20090730/hr3200_stupak_1.pdf).

<sup>29</sup> Emily P. Walker, “Stimulus Bill Gives \$1.1 Billion for Comparative Effectiveness Research,” *MedPage Today*, February 19, 2009, <http://www.medpagetoday.com/Washington-Watch/Washington-Watch/12963>. The text of the bill, H.R. 1, the American Recovery and Reinvestment Act, is available at <http://www.opencongress.org/bill/111-h1/text>.

entities within the House bill and Senate HELP bill raise concerns that their results will be used to ration health care to the sick, disabled, and elderly.<sup>30</sup>

The Senate HELP bill explains that “Center reports and recommendations shall not be construed as mandates for payment, coverage, or treatment.” However, this language does not prevent the results of the CER from being used to deny treatment. Several amendments to the Senate HELP bill to protect explicitly against this rationing of health care and denial of end-of-life care were defeated.<sup>31</sup>

The Baucus bill requires the Secretary of HHS “to provide reports to physicians that compare their resource use with that of other physicians or groups of physicians caring for patients with similar conditions.”<sup>32</sup> Starting in 2015, doctors would be penalized for falling in the top 10 percent of expenditures compared to those treating similar patents and conditions. This could provide an incentive to doctors to make decisions based not on concerns for their patients, but on concerns for their own financial benefit.

Three amendments offered to this provision of the Baucus bill were defeated. An amendment offered by Sen. Pat Roberts (R-KS) that would have removed comparative effectiveness provisions in the bill failed on a vote of 9 to 14.<sup>33</sup> Another amendment offered by Sen. Roberts would have prohibited comparative effectiveness research using federal funds under this bill and existing law from considering cost as a factor.<sup>34</sup> The amendment failed on a vote of 8 to 14. Sen. Jon Kyl (R-AZ) offered an amendment to ensure that data obtained by CER would not be used to deny coverage under a federal health care plan by adding the Preserving Access to

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<sup>30</sup>Sec. 1401 of the House bill (H.R. 3200) establishes a Center for Comparative Effectiveness Research within the Agency for Health Care Research and Quality (AHRQ). Sec. 219 of the Senate HELP bill establishes a Center for Health Outcomes Research and Evaluations.

<sup>31</sup>Sen. Enzi offered two amendments to the Senate HELP bill which would have prevented denial of end-of-life care and prohibit rationing on the basis of patient age, disability, medical dependency, or quality of life (amds. 278 and 280). Sen. Hatch offered two amendments to prevent the rationing of care (amds. 232 and 233) and one to ensure that taxpayers were not forced to fund assisted suicide (amdt. 228). Sen. Roberts offered three amendments to prevent private health insurers from being prohibited from covering treatments, ensuring all individuals have access to essential benefits regardless of age, expected length of life, disability, etc. and one which would have required certification that participating plans in the Exchange do not have a pattern or practice of denying coverage to individuals based on their age, expected length of life, or disability (amds. 209, 210, and 211). The amendments were all rejected on a vote of 13 to 10.

<sup>32</sup>AUL analysis of the Baucus bill, <http://blog.aul.org/2009/09/22/auls-analysis-of-senator-baucus-finance-bill/#>. See S. 1796, sec. 3003(9)(B).

<sup>33</sup>Roberts Amendment D4 to Title III, Subtitle F, of S. 1213, The Patient-Centered Outcomes Research Act of 2009. See Senate Finance Committee, AHFA [America’s Healthy Future Act] Delivery Amendments, September 19, 2009, 176, <http://finance.senate.gov/site/pages/leg/LEG%202009/091909%20AHFA%20Delivery%20Amendments.pdf>.

<sup>34</sup>Roberts Amendment D5, AHFA Delivery Amendments, 177.

Targeted, Individualized, and Effective New Treatments and Services (PATIENTS) Act of 2009.<sup>35</sup> The amendment was defeated on a vote of 10 to 13.

Only the House bill specifically addresses end-of-life care and allows reimbursement for “advance care planning consultation.”<sup>36</sup> An amendment accepted by Energy and Commerce Committee provides that such consultations “shall not include advance directives or other planning tools that list or describe as an option suicide, assisted suicide, or the intentional hastening of death regardless of legality.”<sup>37</sup> However, there is an exception for states that already require this information to be listed.

### *Looking Ahead*

There are still several steps before a final piece of legislation will emerge from Congress.<sup>38</sup> Throughout the process there will be many opportunities for lawmakers to include abortion and other anti-life measures as part of health care. Pro-life concerns will remain in the months ahead until a final version of health care reform is agreed on by both houses of Congress.

### **NIH Stem Cell Research Funding Guidelines**

The final National Institutes of Health “Guidelines for Human Stem Cell Research,” implementing President Obama’s Executive Order for the “responsible, scientifically worthy human stem cell research, including embryonic stem cell research, to the extent provided by law,” became effective July 7, 2009.<sup>39</sup>

Before the comment period for the draft guidelines ended May 26, 2009, approximately forty-nine thousand comments were submitted.<sup>40</sup> Thirty thousand of those comments which were in opposition were “deemed not responsive to the question put forth,” according to Dr. Raynard S. Kington, director of NIH. Explaining the decision to ignore the comments, Dr. Kington said, “We did not ask them whether to fund such funding, but how it should be funded.”<sup>41</sup> Commenting on the proposed guidelines,

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<sup>35</sup>Kyle Amendment D8, AHFA Delivery Amendments, 167. Text of the act, S.1259, is available at <http://www.opencongress.org/bill/111-s1259/text>.

<sup>36</sup>H.R. 3200, sec. 1233.

<sup>37</sup>H.R. 3200, sec. 138.

<sup>38</sup>AUL explains the process in “Back to the Hill Guide: What to Expect Next,” [http://www.realhealthcarerespectslife.com/?page\\_id=319](http://www.realhealthcarerespectslife.com/?page_id=319).

<sup>39</sup>Executive Order no. 13505, “Removing Barriers to Responsible Scientific Research Involving Human Stem Cells,” *Federal Register* 74.45 (March 11, 2009): 10667–10668, <http://edocket.access.gpo.gov/2009/pdf/E9-5441.pdf>.

<sup>40</sup>Draft NIH Guidelines for Human Stem Cell Research Notice, *Federal Register* 74.77 (April 23, 2009): 18578–18580; comments, [http://grants.nih.gov/stem\\_cells/web\\_listing.htm?StartID=1](http://grants.nih.gov/stem_cells/web_listing.htm?StartID=1).

<sup>41</sup>Nancy Frazier O’Brien, “Comments Opposing Stem-Cell Funding Rejected,” *National Catholic Reporter*, July 6, 2009, <http://ncronline.org/news/comments-opposing-stem-cell-funding-rejected>.

Msgr. David Malloy, General Secretary of the U.S. Conference of Catholic Bishops, wrote that the NIH missed “an enormous opportunity to show how sound science and responsible ethics can not only co-exist but support and enrich each other.”<sup>42</sup>

Lawsuits have been filed against HHS and NIH alleging both that the regulations violate existing law and that they did not pass through proper procedures. Plaintiffs in the suit include the Christian Medical Association and the embryo adoption agency Nightlight Christian Adoptions. Dr. James L. Sherley, a senior scientist at the Boston Biomedical Research Institute, and Dr. Theresa Deisher, founder of AVM Biotechnology, are also parties to the suit. Dr. David Stevens, executive director of the Christian Medical Association, said, “We are opposed to this proposed illegal and unethical federal funding of destructive embryonic research that would compel every American to cooperate with such unlawful human experimentation and the violation of our fundamental medical research ethic never to lethally experiment on one human being simply to benefit the interests of other human beings.”<sup>43</sup>

Since 1995, the Dickey-Wicker Amendment has expressly banned NIH from funding research in which human embryos “are destroyed, discarded, or knowingly subjected to risk of injury or death.”<sup>44</sup> The amendment has been renewed every year by Congress. NIH attorneys contend that since the federal government is only funding research on stem cells after being extracted from the embryos, not the actual destruction of the embryos, the NIH guidelines are not violating the law.

Under the new guidelines, funding of research is “restricted” to stem cells derived from embryos that were created for reproductive purposes and are “no longer needed for these purposes.”<sup>45</sup>

The view that disabled embryonic human beings are appropriate subjects for destructive research is reflected in the final guidelines, which specifically allow for the donation of embryos that have undergone pre-implantation genetic diagnosis. Justifying this decision, the NIH says,

Respondents noted that many embryos undergo pre-implantation genetic diagnosis. This may result in the identification of chromosomal abnormalities that

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<sup>42</sup>“USCCB Submits Comments to NIH on Proposed Guidelines for Stem Cell Research,” USCCB news release, May 22, 2009, <http://www.usccb.org/comm/archives/2009/09-115.shtml>.

<sup>43</sup>“Suit Filed in Federal Court against the U.S. Department of Health and Human Services to Stop Federal Funding of Research Involving the Destruction of Living Human Embryos,” *Christian News Wire*, news release, August 19, 2009, <http://christiannewswire.com/news/4728311288.html>. Plaintiffs claim NIH did not allow a sufficient time period for comments on the draft guidelines, did not respond to comments that were submitted, and improperly dismissed or ignored substantial scientific research demonstrating that adult stem cells and induced pluripotent stem cells (iPS) provide ethically and medically superior alternatives to medical experimentation on stem cells derived from human embryos.

<sup>44</sup>Public Law 104-99, sec. 128, *U.S. Statutes at Large* 110 (January 26, 1996): 34, <http://history.nih.gov/research/downloads/PL104.99.pdf>.

<sup>45</sup>National Institutes of Health Guidelines on Human Stem Cell Research 2009 [final], *Stem Cell Information* Web site (Bethesda, MD: NIH, 2009), <http://stemcells.nih.gov/policy/2009guidelines.htm>.

would make the embryos medically unsuitable for clinical use. In addition, the [in vitro fertilization] process may also produce embryos that are not transferred into the uterus of a woman because they are determined to be not appropriate for clinical use. Respondents suggested that stem cells derived from such embryos may be extremely valuable for scientific study, and should be considered embryos that were created for reproductive purposes and were no longer needed for this purpose. The NIH agrees with these comments.<sup>46</sup>

However, a study involving higher-resolution genetic screening indicates that these embryos deemed “unsuitable” for clinical use may actually be healthy.<sup>47</sup> The research suggests that human embryos naturally have high chromosome instability during the first few rounds of cell division. This means that most embryos go on to develop into healthy babies even though their chromosomes have defects at this early state.

The regulations require some informed consent from the embryo donors, but plaintiffs in the lawsuits assert that the guidelines do not have proper safeguards ensuring that embryo donors give truly informed consent.<sup>48</sup>

The consent requirements in the new guidelines may make some of the twenty-one lines that were available for funding under Bush administration rules ineligible for funding under the new guidelines. Prior eligible lines were not “grandfathered-in” under the new regulations. However, they may receive funding if a special committee so rules.<sup>49</sup> Whether this committee will provide meaningful review remains to be seen.

### Adult Stem Cell Research

Adult stem cells, which have been effectively treating a variety of ailments for years, continue to provide new success stories. Bone marrow stem cells are being

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<sup>46</sup>Ibid.

<sup>47</sup>Nora Schulz, “Healthy Embryos Show Chromosome Flaws,” *MIT Technology Review*, July 8, 2009, <http://www.technologyreview.com/biomedicine/22959/>. As the embryo grows, complementary mutations in its cells may compensate for each other, or cells without chromosome defects may preferentially populate the embryo.

<sup>48</sup>Plaintiffs argue that the guidelines fail to protect against conflicts of interest among the fertility clinic that creates the embryo, the destroyer of the embryo, and the recipient of federal funding. Plaintiff’s complaint is available at <http://kansasliberty.com/liberty-update-archive/2009/24aug/Complaint.pdf>. The guidelines were revised to state that there should be documentation that “no payments, cash or in kind, were offered for donated embryos.” Final NIH Guidelines, <http://stemcells.nih.gov/policy/2009guidelines.htm>.

<sup>49</sup>Ibid. Which lines remain eligible for federal funding is significant. An analysis by a researcher at the Stanford University School of Medicine suggests only two of those twenty-one approved lines have been used routinely. Christopher Scott, director of Stanford’s Program on Stem Cells in Society, says, “I was surprised by these results. I never imagined that we would find that three-fourths of the requests would be for the same two cell lines.” Krista Conger, “Two Lines Account for Most Human Embryonic Stem Cell Research, Stanford Scholar Finds” Stanford School of Medicine, August 7, 2009, <http://med.stanford.edu/ism/2009/august/scott.html>.

used to form new cartilage, repair torn ligaments, and ease arthritis.<sup>50</sup> They have saved a number of patients from having their legs amputated.<sup>51</sup> British scientists have developed a stem cell technique which is being used by patients to avoid hip replacements.<sup>52</sup> Bone marrow stem cells have also been used successfully to stop, and to some extent reverse, scleroderma, an incurable autoimmune disease that causes excess collagen to make skin tighten and feel hard and thick—a disease that may eventually spread internally to the point where it closes the esophagus and damages the heart and lungs.<sup>53</sup>

New research with mesenchymal stem cells, which can be taken from several tissue sources, indicates that these cells can actually form new heart and blood vessel cells, repairing damaged cardiac tissue. The findings have helped scientists understand how the cells work in already effective treatments for heart disease.<sup>54</sup> Scientists are also optimistic that it may one day be possible to regenerate the whole heart of a human being with adult stem cells.<sup>55</sup>

Researchers have also been able to transform normal skin cells from patients with type 1 diabetes into pluripotent iPS cells and then into cells that produce insulin when the patient's body needs it.<sup>56</sup> And Chinese scientists have published a study suggesting that adult stem cells from ovaries may lead to treatments to overcome infertility.<sup>57</sup>

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<sup>50</sup>Max Gomez, "Go! New York: Adult Stem Cells Help Ease Arthritis," *CBS*, July 14, 2009, <http://wcbstv.com/gonewyork/stem.cells.arthritis.2.1084587.html>.

<sup>51</sup>"Bone Marrow Stem Cell Treatment Saves Lives," *Hindu*, August 14, 2009, <http://beta.thehindu.com/sci-tech/science/article1200.ece>. Patients whose legs were affected by thromboangiitis obliterans (inflammation of the blood vessels of the hands or feet) were injected with bone marrow stem cells in an attempt to save their legs from amputation, with great success.

<sup>52</sup>Andrew Hough, "New Stem Cell Treatment 'Being Used by Patients to Avoid Hip Replacements,'" *Telegraph*, September 1, 2009, <http://www.telegraph.co.uk/health/healthnews/6118220/New-stem-cell-treatment-being-used-by-patients-to-avoid-hip-replacements.html>.

<sup>53</sup>Suzzane C. Russell, "Retired Perth Amboy Principal 'Reborn' after Stem-Cell Transplant," *Central Jersey*, July 19, 2009, <http://www.mycentraljersey.com/apps/pbcs.dll/article?AID=/20090719/NEWS/90719004&t>.

<sup>54</sup>"University of Miami Researchers Demonstrate How Stem Cell Line Regenerates New Cardiac Cells," *Medical News Today*, August 4, 2009, <http://www.medicalnewstoday.com/articles/159786.php>.

<sup>55</sup>Sarah Baldauf, "Clinical Trials Are Testing Stem Cells as Heart Failure Treatment," *U.S. News and World Report*, August 18, 2009, <http://health.usnews.com/articles/health/heart/2009/08/18/clinical-trials-are-testing-stem-cells-as-heart-failure-treatment.html>.

<sup>56</sup>Serena Gordon, "Researchers Make Insulin-Producing Cells from Adult Skin Cells" *Health Day*, August 31, 2009, <http://www.healthday.com/Article.asp?AID=630511>. Long-term safety of the process still has to be addressed, however, since the current technique uses genetic manipulation to change the cells. The abstract of the original study—R. Maehr et al., "Generation of Pluripotent Stem Cells from Patients with Type 1 Diabetes," *PNAS: Proceedings of the National Academy of Sciences* 106.37 (September 15, 2009)—appears on p. 760 of this issue.

<sup>57</sup>Richard Alleyne, "Stem Cell Breakthrough Could Help Infertile Women," *Telegraph*, April 12, 2009, <http://www.telegraph.co.uk/health/healthnews/5144823/Stem-cell-breakthrough-could-help-infertile-women.html>. Serious ethical concerns still remain for research in this

Blood from the umbilical cord may offer the most widespread potential, as it is packed with stem cells that may be used to treat dozens of illnesses, such as leukemia, Tay Sachs disease, lymphoma, and stroke.<sup>58</sup>

The Archdiocese of Sydney, Australia, announced in July that it is offering a hundred thousand dollar grant for adult stem cell research. The grant is part of a continued effort by the Church to promote ethical research with real results. As Cardinal Pell said, “The Catholic Church promotes and encourages medical research and we strongly support stem cell research and other forms of biotechnology that respect the dignity of every human life.”<sup>59</sup> A similar grant issued by the Archdiocese helped finance research that led to the discovery of fully pluripotent nasal stem cells in 2005.<sup>60</sup>

Three years ago, it was discovered that skin cells could be genetically reprogrammed to become what are known as induced pluripotent stem (iPS) cells, which are essentially indistinguishable from human embryonic stem cells. It was recently shown that fat cells are able to form iPS cells twenty times more efficiently than skin cells do, and can be turned into iPS cells much more quickly than fibroblast skin cells.<sup>61</sup> Fat cells are, of course, an inexhaustible resource.

As well as becoming more efficient, research using iPS cells has overcome a safety obstacle. An important development came earlier this year when scientists showed that purified proteins can be used to create iPS cells.<sup>62</sup> They will no longer have to rely on genetic manipulation requiring the use of known cancer-causing genes to induce the stem cells to a pluripotent state.

Research into iPS cells is also being directed to drug therapies that will induce a patient’s resident stem cells to repair or replace damaged tissues, instead of stem cell transplants.<sup>63</sup> Scientists predict that “research will shift more toward the use of adult stem cells, not only because the research avoids the ethical questions of using

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area, one concern being the possibility that those who want to do cloning will try to use these cells to create a large number of eggs for experiments. The harvesting of stem cells from ovaries may also pose health risks to donors.

<sup>58</sup>“Treatable Diseases and Future Uses of Umbilical Cord Blood Stem Cells,” Viacord Cord Blood Banking and Research, 2009, <http://www.viacord.com/treatable-diseases.htm>.

<sup>59</sup>“Catholics Offer \$100k Stem Cell Grant,” *Australian*, July 8, 2009, <http://www.theaustralian.news.com.au/story/0,25197,25750734-12377,00.html>.

<sup>60</sup>“Potential Seen in Adult Stem Cells,” CNN.com, March 22, 2005, <http://edition.cnn.com/2005/TECH/science/03/21/australia.stemcell/>.

<sup>61</sup>Krista Conger, “‘Liposuction Leftovers’ Easily Converted To iPS Cells, Study Shows,” Stanford School of Medicine, September 7, 2009, <http://med.stanford.edu/ism/2009/september/fat-cells.html>.

<sup>62</sup>Elie Dolgin, “Purely Protein Pluripotency,” *TheScientist.com*, April 23, 2009, <http://www.the-scientist.com/blog/display/55657/>.

<sup>63</sup>Lauren Gravit, “Provoking Our Inner Stem Cells,” *Technology Review*, July 17, 2009 <http://technologyreview.com/business/23017/>.

embryonic cells, but also because using adult stem cells allows treatment to be derived from a patient's own cells, which reduces risk of a person's immune system rejecting transplanted cells."<sup>64</sup>

While adult stem cells have been curing diseases for years, the Food and Drug Administration cleared the first human testing for a treatment based on embryonic stem cells only in January 2009. The treatment, developed by Geron Corporation, was for spinal cord injuries. In August, however, the FDA placed a clinical hold on the trial before human patients were enrolled because prior testing on animals showed that cysts developed at the injury sites. Geron responded that the cysts were "non-proliferative, confined to the injury site, and had no adverse affects on the animals." They have submitted their findings to the FDA and remain, as Geron describes it, "in discussions."<sup>65</sup>

### Cloning

The science world was scandalized when researcher Hwang Woo Suk's studies on human cloning and embryonic stem cells were exposed as phony in 2006.<sup>66</sup> His work, which had initially given him iconic status and created hope that cloning was on the verge of finding miracle cures, turned him into an international disgrace. Now, after a three year trial, Hwang has been found guilty by a South Korean court of embezzlement and fraud.<sup>67</sup> However, the court suspended his two-year sentence, considering the researcher sufficiently repentant. Hwang is now focusing his research on canine cloning.

### Supreme Court Appointment

President Obama had his first opportunity to fill a vacancy on the Supreme Court when Justice David Souter announced his retirement in May. In August, Obama's nominee Judge Sonia Sotomayor, of the Second Circuit Court of Appeals, was confirmed by the Senate on a vote of 68 to 31.

While Sotomayor's previous decisions as a federal judge did not directly concern abortion "rights," her record on abortion advocacy gave evidence that, given

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<sup>64</sup>David A. Wise, "New Stem Cell Rules Slowing Current Research," WisBusiness.com, July 14, 2009, <http://www.wisbusiness.com/index.iml?Article=164481>, reporting on a lecture by Steve Duncan, Marcus Professor of Human and Molecular Genetics at the Medical College of Wisconsin, to the Rotary Club of Milwaukee, July 14, 2009, [http://www.wuw.com/explore/rotary/view\\_rotary.php?articleid=32](http://www.wuw.com/explore/rotary/view_rotary.php?articleid=32).

<sup>65</sup>"Cysts at Spinal Cord Treatment Sites Led to FDA Hold on Geron's Stem Cell Trial," *Stem Cell Research News*, August 27, 2009, <http://stemcellresearchnews.com/absolutenm/annviewer.asp?a=1781&z=9>.

<sup>66</sup>See William L. Saunders "Washington Insider," *National Catholic Bioethics Quarterly* 6.2 (Summer 2006), [http://www.ncbcenter.org/summer\\_2006.asp](http://www.ncbcenter.org/summer_2006.asp).

<sup>67</sup>"South Korea Court Convicts Hwang of Stem Cell Fraud," Reuters, October 26, 2009, <http://www.alertnet.org/thenews/newsdesk/SEO292462.htm>.

the chance, she would expand the current abortion-on-demand regime.<sup>68</sup> From 1980 to 1992, Justice Sotomayor was a board member of the Puerto Rican Legal Defense and Education Fund (PRLDEF). In its brief to the Supreme Court in the 1988 case *Webster v. Reproductive Health Services*,<sup>69</sup> PRLDEF argued that the Court should read abortion into the Constitution as a “fundamental right” and apply “strict scrutiny,” the most stringent level of judicial review, to strike down abortion regulations.<sup>70</sup> During Sotomayor’s tenure on the PRLDEF board, the organization filed at least six such briefs in prominent abortion cases.<sup>71</sup> “The board monitored all litigation undertaken by the fund’s lawyers, and a number of those lawyers said Ms. Sotomayor was an involved and ardent supporter of their various legal efforts.”<sup>72</sup>

Once she became a judge, Sotomayor did not hide her liberal judicial philosophy. For instance, in a 2001 lecture she said, “personal experiences affect the facts that judges choose to see.”<sup>73</sup>

Speaking at Duke University in 2005, Sotomayor said “the Court of Appeals is where policy is made.” She then tried laughingly to qualify her remark: “I know this is on tape and I should never say that because we don’t make law. I know ... um ... okay ... I know, I know. I’m not promoting it, and I’m not advocating it, I’m ... you know.”<sup>74</sup>

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<sup>68</sup>AUL analysis, “Worse than Souter: Judge Sonia Sotomayor on Abortion and Other Life Issues,” is available at <http://www.sotomayor411.com/>. See also “Testimony of Dr. Charmaine Yoest, President and CEO, Americans United for Life, before the Senate Committee on the Judiciary on the Confirmation of Sonia Sotomayor to the United States Supreme Court” (July 16, 2009), [http://www.aul.org/Sotomayor\\_Testimony](http://www.aul.org/Sotomayor_Testimony).

<sup>69</sup>492 U.S. 490 (1989).

<sup>70</sup>Brief of Amici Curiae of the National Council of Negro Women et al. in *Webster v. Reproductive Health Services*, 1988 U.S. Briefs 605 (March 28, 1989), [http://www.sotomayor411.com/briefs/Webster\\_PRDF\\_Brief.pdf](http://www.sotomayor411.com/briefs/Webster_PRDF_Brief.pdf).

<sup>71</sup>Brief of Amici Curiae of the NAACP Legal Defense and Educational Fund et al. in *Planned Parenthood v. Casey*, 1991 U.S. Briefs 744 (March 6, 1991), [http://www.sotomayor411.com/briefs/PP\\_v\\_Casey\\_PRDF\\_Brief.pdf](http://www.sotomayor411.com/briefs/PP_v_Casey_PRDF_Brief.pdf); Brief of Amici Curiae of the American Indian Health Care Association et al. in *Ohio v. Akron Center for Reproductive Health*, 1988 U.S. Briefs 805 (October 14, 1989), [http://www.sotomayor411.com/briefs/Ohio\\_v\\_Akron\\_PRDF\\_brief.pdf](http://www.sotomayor411.com/briefs/Ohio_v_Akron_PRDF_brief.pdf); Brief of Amici Curiae of the Physicians National Housestaff Association et al. in *Williams v. Zbaraz*, 1979 U.S. Briefs 4 (February 28, 1980), [http://www.sotomayor411.com/briefs/Zabrazz\\_PRDF\\_Brief.pdf](http://www.sotomayor411.com/briefs/Zabrazz_PRDF_Brief.pdf); and two Briefs of Amici Curiae of the American Public Health Association et al. in *Rust v. Sullivan*, 1989 U.S. Briefs 1391 (May 4, 1990), [http://www.sotomayor411.com/briefs/Rust\\_v\\_Sullivan\\_PRDF\\_Brief\\_1.pdf](http://www.sotomayor411.com/briefs/Rust_v_Sullivan_PRDF_Brief_1.pdf).

<sup>72</sup>R. Hernandez and D. W. Chen, “Nominee’s Links With Advocates Fuel Her Critics,” *New York Times*, May 28, 2009, <http://www.nytimes.com/2009/05/29/us/politics/29puerto.html>.

<sup>73</sup>Sonia Sotomayor, “A Latina Judge’s Voice,” Judge Mario G. Olmos Memorial Lecture, University of California, Berkeley, School of Law, October 26, 2001, reprinted in *New York Times*, May 14, 2009, <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>.

<sup>74</sup>Morgen Richmond, “Leading Obama Supreme Court Candidate: Courts Make Policy (video),” Verum Serum blog, May 3, 2009, <http://www.verumserum.com/?p=5247>.

In April 2009, Sotomayor expressed her belief that a judge is not limited to the Constitution and applicable statutory law when deciding cases. In a speech about international law she said, “Ideas [from foreign law] have no boundaries, ideas are what set our creative juices flowing, they permit us to think. And to suggest to anyone that you can outlaw the use of foreign or international law . . . would be asking American judges to . . . close their minds to good ideas. . . . But ideas are ideas, and whatever their source—whether they come from foreign law, or international law, or a trial judge in Alabama, or a circuit court in California, or any other place—if the idea has validity, if it persuades you . . . then you are going to adopt its reasoning.”<sup>75</sup>

During her confirmation hearing before the Senate Judiciary Committee, Sotomayor was directly asked if she believed the Constitution contained a fundamental right to privacy that included a right to abortion. She responded, “It contains, as has been recognized by the courts for over ninety years, certain rights under the liberty provision of the due process clause that extend to the right to privacy in certain situations. . . . The Court has said, in many cases, and as I think has been repeated in the Court’s jurisprudence in *Casey*, that there is a right to privacy that women have with respect to the termination of their pregnancies in certain situations.”<sup>76</sup> In her testimony she described her “judicial philosophy” as “simple: fidelity to the law.”<sup>77</sup> While on the board at the PRLDEF, Sotomayor also said, under oath, that she “wouldn’t know until after the fact that a brief was actually filed,” and that she did not review the briefs.<sup>78</sup> However, evidence in the minutes of the meetings of the PRLDEF board’s litigation committee shows Sotomayor was responsible for briefing the board on current litigation.<sup>79</sup>

### Agency Appointments

Dr. Francis Collins was sworn in as director of the National Institutes of Health on August 17 after unanimous confirmation by the Senate. Collins, known for heading the Human Genome Project and for being an evangelical Christian, has said, “The NIH director needs to focus on science. I have no religious agenda for the NIH.”<sup>80</sup>

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<sup>75</sup> Sonia Sotomayor, Speech to the American Civil Liberties Union of Puerto Rico, April 2009, available at <http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html>.

<sup>76</sup> “What Judge Sotomayor Said—And Should Have Said,” Sotomayor411, [http://www.sotomayor411.com/?page\\_id=199#](http://www.sotomayor411.com/?page_id=199#).

<sup>77</sup> “Sotomayor Pledges ‘Fidelity to the Law,’” CNN, July 13, 2009, <http://www.cnn.com/2009/POLITICS/07/13/sotomayor.hearing/index.html>.

<sup>78</sup> See Dawn Eden, “Sotomayor Contradicted Herself on What She Knew about PRLDEF Abortion Advocacy,” AUL, July 17, 2009, <http://blog.aul.org/2009/07/17/did-sotomayor-contradict-herself-on-what-she-knew-about-prldef-abortion-advocacy/#>.

<sup>79</sup> *Ibid.*

<sup>80</sup> Lauran Neergaard, “Chief Envisions NIH ‘Doctor to the World,’” *Boston Globe*, August 18, 2009, [http://www.boston.com/news/nation/washington/articles/2009/08/18/nih\\_chief\\_collins\\_says\\_he\\_has\\_no\\_religious\\_agenda/](http://www.boston.com/news/nation/washington/articles/2009/08/18/nih_chief_collins_says_he_has_no_religious_agenda/).

Since Collins' nomination in July, many have expressed concern about his views on human embryonic stem cell research and cloning.<sup>81</sup> While the new NIH guidelines do not permit federal funding for somatic cell nuclear transfer (SCNT), or cloning,<sup>82</sup> Collins has advocated in favor of the process, arguing that "the immediate product" of therapeutic cloning "falls short of the moral status of the union of sperm and egg."<sup>83</sup>

At a Pew Forum event in May, Collins described Obama's new expansive position on funding stem cell research as "not very radical because [Obama's policy is] what Bush said in August of 2001."<sup>84</sup> It is expected that Collins, who helped President Obama develop his new policy on embryonic stem cells, will emphasize human embryonic stem cell research in his new role at NIH.

Alta Charo was named a senior advisor to FDA Commissioner Margaret Hamburg. Charo has written extensively as an advocate for human embryonic stem cell research and cloning. Testifying before the U.S. Senate Committee on the Judiciary in 2002, Charo stated, "I am pleased to testify in support of legislation that protects valuable non-reproductive uses of cloning technology."<sup>85</sup> In her testimony, Charo described reproductive cloning as a danger to children "at this time," leaving open the possibility that she would support its use if it became "safe."

Charo co-authored an article in October 2008 advocating an expansive definition of reproductive rights, "even if Americans elect an administration committed to nominating Supreme Court justices who support a constitutionally protected right to privacy encompassing reproductive choice, reproductive health services must still be legally, financially, and practically accessible."<sup>86</sup>

Charo has called conscience clauses, "artifacts of the abortion wars." She has described health care providers who morally object to participating in or referring for procedures like abortion to be "claiming an unfettered right to personal autonomy while holding monopolistic control over a public good," which amounts to "an abuse of the public trust." Charo is also skeptical that these health care providers are acting on a true conscience objection, and not "an attempt at cultural conquest."<sup>87</sup>

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<sup>81</sup>For links to relevant statements made by Dr. Collins, see David Prentice, "New NIH Director," August 19, 2009, <http://www.frcblog.com/2009/08/new-nih-director/>.

<sup>82</sup>Final NIH Guidelines, <http://stemcells.nih.gov/policy/2009guidelines.htm>.

<sup>83</sup>Justin D. Barnard, "The Embryo Troubles of Obama's Top Doctor," *Public Discourse*, July 13, 2009, <http://www.thepublicdiscourse.com/2009/07/385>, quoting Collins' *The Language of God: A Scientist Presents Evidence for Belief* (New York: Free Press, 2006), 256.

<sup>84</sup>Francis Collins speaking at the Pew Forum Faith Angle Conference, May 2009, transcript at "Religion and Science: Conflict or Harmony?" <http://pewforum.org/events/?EventID=217>.

<sup>85</sup>Hearing on "Human Cloning: Must We Sacrifice Medical Research in the Name of a Total Ban?" February 5, 2002, transcript, [http://judiciary.senate.gov/hearings/testimony.cfm?id=147&wit\\_id=127](http://judiciary.senate.gov/hearings/testimony.cfm?id=147&wit_id=127).

<sup>86</sup>Allen Rosenfield, R. Alta Charo, and Wendy Chavkin, "Moving Forward on Reproductive Health," *New England Journal of Medicine* 359:18 (October 30, 2008): 1869–1871.

<sup>87</sup>R. Alta Charo, "The Celestial Fire of Conscience: Refusing to Deliver Medical Care," *New England Journal of Medicine* 352: 24 (June 16, 2005): 2471.

Charo has been a member of the boards of the Alan Guttmacher Institute and the National Medical Advisory Committee of the Planned Parenthood Federation of America.<sup>88</sup>

### International Expansion of Abortion

*A, B, C v. Ireland*, a case before the European Court of Human Rights, could potentially be “the *Roe v. Wade* of Europe.”<sup>89</sup> Three women, identified as A, B, and C, claim that the protections for unborn children in the Irish constitution,<sup>90</sup> which permits abortion only to save the life of the mother, jeopardized their “health and well-being” because they were required to travel abroad for abortions. The decision of the Court will affect policy for all of the European Union, and the outcome may be influential on American courts, which have increasingly looked to what other countries are doing when interpreting our own law.

Plaintiffs claim certain provisions of the European Convention on Human Rights displace, as superior law, Ireland’s constitutional provisions. They face many obstacles to proving such a claim, including the facts that (a) the Convention does not expressly provide a right to abortion and, (b) under the European legal doctrine called “the margin of appreciation,” social matters are left to state signatories of the Convention to determine. Further, the Convention requires that a matter be “exhausted” in lower (e.g., national) courts before being appealed to the ECHR, which does not appear to have happened here.<sup>91</sup>

However, there are worrying signs. First, already in 2007, the ECHR applied Convention standards to decide a Polish case.<sup>92</sup> Second, in a highly unusual development, before the lower chamber has reached a decision in *ABC v. Ireland*, the matter has been referred from one “chamber” (i.e., a panel of three judges), as cases are usually decided, to the Grand Chamber.<sup>93</sup> This could mean the Court is preparing to issue what it sees as a “historical decision.”

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<sup>88</sup>Faculty profile for R. Alta Charo, University of Wisconsin Law School, <http://law.wisc.edu/profiles/racharo@wisc.edu>.

<sup>89</sup>The author is a consultant in this case

<sup>90</sup>“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.” Article 40.3.3 of Ireland’s Constitution, [http://www.taoiseach.gov.ie/attached\\_files/html%20files/Constitution%20of%20Ireland%20\(Eng\).htm](http://www.taoiseach.gov.ie/attached_files/html%20files/Constitution%20of%20Ireland%20(Eng).htm).

<sup>91</sup>Council of Europe, European Court of Human Rights, *Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11*, September 2003, article 35.1, “Admissibility Criteria.”

<sup>92</sup>*Tysiac v. Poland*, European Court of Human Rights, App. No. 5410/03 (Eur. Ct. H.R. March 20, 2007).

<sup>93</sup>“Importance of Europe’s ‘*Roe v. Wade*’ Case Grows Exponentially with Elevation in Status,” Alliance Defense Fund, news release, July 13, 2009, <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=5004>.

A proposed law in Spain emphasizes the importance of conscience protections for health care providers. Through the creation of a more expansive “right” to abortion, gynecologists opposed to performing abortions for ethical or moral reasons may be prosecuted for civil disobedience, according to Justice Minister Francisco Caamaño. Dr. Esteban Rodriguez, spokesman for the organization Right to Life (*Derecho a Vivir*) in Spain, observes, “A new category of victims of the laws on abortion and the regulation of conscience will be created in the gynecologists who wish to carry out their moral obligations in the face of an imposed ideology.”<sup>94</sup> The cabinet of the government of Spain approved a draft of the bill, and the measure will now go before the nation’s parliament.<sup>95</sup>

## State Developments

### *Stem Cell Research Funding*

In October, California awarded two hundred thirty million dollars in grants through its stem cell research program.<sup>96</sup> While the program was designed in 2004 primarily to go around federal restrictions of human embryonic stem cell research, of the fourteen projects receiving the state aid, ten do not involve human embryonic stem cells. The disproportionate funding of nonembryonic stem cell research reflects the truth on the ground: embryonic stem cell research is not living up to its overblown promise, but adult stem cell research is.

### *Abortion*

Legislation in Oklahoma banning sex-selection abortions was signed into law by Democratic Governor Brad Henry.<sup>97</sup> To ensure enforcement of the sex-selection ban, the law requires doctors to report to the state the reasons women choose abortion as well as complications that occur. This reporting provision is the most comprehensive in the nation.

Virginia’s partial-birth abortion ban was upheld by the Fourth U.S. Circuit Court of Appeals. In his concurring opinion, Judge J. Harvie Wilkinson III wrote, a partially born child is among the weakest, most helpless beings in our midst and on that account exerts a special claim on our protection. . . . The fact is that we—civilized people—are retreating to the haven of our Constitution to justify dismembering a partly born child and crushing its skull. Surely centuries hence,

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<sup>94</sup>“Gynecologists in Spain Plan to Choose Jail before Performing an Abortion,” *Catholic News Agency*, August 20, 2009, <http://m.catholicnewsagency.com/new.php?n=16894>.

<sup>95</sup>Steven Ertelt, “Spain Cabinet Approves Measure to Expand Abortions, No Parental Involvement,” *LifeNews.com*, September 28, 2009, <http://lifenews.com/int1332.html#>.

<sup>96</sup>Andrew Pollack, “California Awards Grants for Research Projects in Nonembryonic Stem Cells,” *New York Times*, October 28, 2009, <http://www.nytimes.com/2009/10/29/health/research/29stem.html>.

<sup>97</sup>“Oklahoma Enacts Sex-Selection, Cloning Bans,” *Baptist Press News*, May 28, 2009, <http://www.bpnews.org/bpnews.asp?id=30569>.

people will look back on this gruesome practice done in the name of fundamental law by a society of high achievement. And they will shudder.<sup>98</sup>

A provision of South Dakota's informed consent law, requiring that women be informed prior to an abortion that it "will terminate the life of a whole, separate, unique, living human being," was upheld by a federal court.<sup>99</sup> In her decision Judge Schreier, who in 2005 issued an order preventing the law from taking effect, held that the term "human being" can be used in a "biological sense" and not an "ideological" one.<sup>100</sup> The South Dakota Department of Health announced in July, even prior to the ruling, that it may formally suspend the license of South Dakota's only abortion facility for failing to disclose several pieces of information required by the law.<sup>101</sup>

### *Assisted Suicide*

Montana could become the third state where assisted suicide is legal, but it would be the first to have it by court-created mandate. Interpreting the state constitution, a lower state court overturned the state's homicide laws against assisted suicide. The state district court held that "the Montana constitutional rights of individual privacy and human dignity, taken together, encompass the right of a competent terminal patient . . . [to] use the assistance of his physician to obtain a prescription for a lethal dose of medication."<sup>102</sup>

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<sup>98</sup>*Richmond Medical Center v. Herring*, 570 F.3d 165 (4th Cir. 2009), <http://pacer.ca4.uscourts.gov/opinion.pdf/031821B.P.pdf>. The court held that the prohibition does not constitute an undue burden, provides adequate protection for women's health, and is clear about what type of procedure is banned, providing "sufficient clarity" to enable a doctor of "reasonable intelligence" to avoid criminal liability.

<sup>99</sup>*South Dakota Codified Laws*, chap. 34-23A, art. 10.1, <http://legis.state.sd.us/statutes/DisplayStatute.aspx?Type=Statute&Statute=34-23A-10.1>.

<sup>100</sup>Decision by the U.S. District Court for South Dakota in *Planned Parenthood v. Rounds*, August 20, 2009, <http://www.alliancedefensefund.org/news/story.aspx?cid=5044>. Two provisions were struck down in the same ruling: a requirement that a woman be informed about the increased risks of suicide and suicidal thoughts, and a requirement that doctors tell a woman she has an existing legally protected relationship with her unborn child. Both the state and Planned Parenthood, who challenged the law, are considering whether to appeal the decision.

<sup>101</sup>During an inspection of the Sioux Falls clinic by the state health department in May 2009, Planned Parenthood did not tell a pregnant woman that the "abortion will terminate the life of a whole, separate, unique, living human being"; that she "has an existing relationship with that unborn human being," which is protected by law; and that the abortion will terminate the relationship and those rights. They also did not tell her about "all known medical risks of the procedure and statistically significant risk factors . . . including . . . depression and related psychological distress [and] increased risk of suicide ideation and suicide." The disclosures were required by South Dakota law and had to be given to the pregnant woman at least two hours before the abortion. See "State Threatens Abortion Business License," *WorldNetDaily*, August 12, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=106787>.

<sup>102</sup>*Baxter v. State*, 2008 Mont. Dist. LEXIS 482 (Mont. 1st Jud. Dist. Ct., December 5, 2008).

The court did not define “terminally ill.” Thus, under this broadly created right, any person who survives on life-sustaining medication would be entitled to physician-assisted suicide, which presumably includes diabetics taking insulin, anyone on blood pressure medication, and asthmatics with inhalers.<sup>103</sup> Nor did the court announce any safeguard to ensure a person requesting suicide is not suffering from a treatable mental illness.<sup>104</sup> The court did not even consider whether physicians who do not want to participate in or refer their patients for assisted suicide would be legally protected.

The “exemplary” experience in Oregon was heavily relied on by the plaintiffs in the lower court. But a study conducted by Oregon Health and Science University researchers has found a deterioration in the quality of palliative care since assisted suicide was legalized.<sup>105</sup>

The Montana supreme court heard oral arguments in early September and generally announces its rulings within one hundred twenty days.

### *Marriage*

The federal Defense of Marriage Act (DOMA)<sup>106</sup> is being challenged both in Congress and in the courts. Rep. Jerrold Nadler (D-NY) and more than ninety co-sponsors introduced the Respect for Marriage Act<sup>107</sup> to repeal part of DOMA. Under the Act, any same-sex marriage considered valid by a state where the marriage was entered into would be recognized as a valid marriage for purposes of federal law.

Multiple lawsuits have been filed in California both against the federal DOMA and California’s Proposition 8, claiming the laws violate the U.S. Constitution. In August, the Obama Administration made clear its lukewarm support of DOMA in a brief filed by the Justice Department: “With respect to the merits, this Administration

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<sup>103</sup>Mailee Smith, “Review of the Trial Court Decision in *Baxter v. State*: Montana Physician Assisted Suicide Case,” AUL, [http://www.aul.org/mt\\_pas\\_memo](http://www.aul.org/mt_pas_memo).

<sup>104</sup>The Royal College of Psychiatrists in England observed in 2006 that systematic studies have “clearly shown” the wish for assisted suicide among terminally ill patients is “strongly associated with depression.” They estimate that 98 to 99 percent of those patients will subsequently change their minds about wanting to die once effective treatment for depression occurs. Statement from the Royal College of Psychiatrists on Physician Assisted Suicide (London), April 24, 2006, <http://www.rcpsych.ac.uk/pressparliament/collegeresponses/physicianassistedsuicide.aspx>.

<sup>105</sup>Eric Fromme et al., “Increased Family Reports of Pain or Distress in Dying Oregonians: 1996 to 2002,” *Journal of Palliative Medicine* 7.3 (June 2004): 431–442. See also Paul Nowak, “Palliative Care for Elderly, Disabled, Worse Since Assisted Suicide Legalized,” *LifeNews.com*, July 28, 2004, <http://www.lifenews.com/bio406.html>.

<sup>106</sup>Public Law 104-199, *U.S. Statutes at Large* 110 (September 21, 1996): 2419, [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104\\_cong\\_public\\_laws&docid=f:publ199.104](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ199.104).

<sup>107</sup>H.R. 3567, introduced September 15, 2009, <http://www.govtrack.us/congress/billtext.xpd?bill=h111-3567>.

does not support DOMA as a matter of policy, believes that it is discriminatory, and supports its repeal. Consistent with the rule of law, however, the Department of Justice has long followed the practice of defending federal statutes as long as reasonable arguments can be made in support of their constitutionality, even if the Department disagrees with a particular statute as a policy matter, as it does here.”<sup>108</sup>

One suit was dismissed in August by a federal court for lack of jurisdiction.<sup>109</sup> Another has a trial date set for January, but dispositive motions will be heard in October.<sup>110</sup>

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<sup>108</sup>*Smelt v. United States*, reply brief by the Justice Department, August 24, 2009, [http://www.politico.com/static/PPM118\\_090817\\_domareplybrief.html](http://www.politico.com/static/PPM118_090817_domareplybrief.html).

<sup>109</sup>Alliance Defense Fund, “Federal Court Tosses Lawsuit Challenging Federal Defense of Marriage Act,” news release, August 24, 2009, <http://www.adfmedia.org/News/PRDetail/2931>.

<sup>110</sup>Dan Levine, “Advocacy Groups Shut Out of Federal Challenge to Calif. Ban On Gay Marriages,” *Recorder*, August 20, 2009, <http://www.law.com/jsp/article.jsp?id=1202433195355>.