PPACA Abortion Restrictions and Illinois Policy

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I. INTRODUCTION

Just over forty years ago abortion was still illegal in the United States.1 With the passage of the Patient Protection and Affordable Care Act (ACA) and its many requirements and restrictions in the area of abortion, it seems as though the laws of this country have come almost full circle, and the nation is regressing towards the restrictive, paternalistic policies of the not so distant past.2 The Supreme Court’s decision in Roe v. Wade decriminalized abortion and signified a giant leap in the fight for women and their right to choose and determine the course of their lives.3 Since then, however, several Supreme Court decisions and legislative efforts have operated to rescind some of those rights, effectively restricting women’s access to health care and simultaneously the right to choose.4

Traditionally, abortion restrictions in the United States have only applied in the realm of public insurance and affected only those individuals participating in Medicaid and other federal programs that depend upon the federal

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2. See generally Patient Protection and Affordable Care Act, 42 U.S.C. § 18023 (2012) (permitting states to opt out of providing abortion coverage in their exchanges, and prohibiting certain Federal credits and reductions if states choose to cover certain types of abortions).
3. Roe, 410 U.S. at 166.
4. See generally Cynthia Soohoo, Hyde-Care for All: The Expansion of Abortion-funding Restrictions Under Health Care Reform, 15 CUNY L. REV. 391, 401-10 (2012) (discussing the Hyde Amendment and implications of Supreme Court decisions in Harris v. McRae, Beal v. Doe, and Maher v. Roe as they relate to abortion rights and state and federal abortion coverage requirements).
government for health care.\(^5\) The requirements of the ACA effectively bring abortion coverage restrictions to an unprecedented level. The abortion coverage restrictions now apply not only to public insurance plans, but also to private insurance plans, as all plans participating in the exchanges must comply with the ACA.\(^6\)

This article argues that although the ACA is a major advancement in health reform, bringing insurance coverage to millions of individuals who were previously uninsured, it simultaneously restricts women’s access to health care by incorporating significant restrictions on abortion coverage in both public and private insurance, largely in the form of the Hyde Amendment.\(^7\) In the face of these restrictions, Illinois responded with policies to ensure that women will still have significant access to abortion services and coverage by excluding any restrictions on private insurance plans and placing only minimal restrictions on public insurance plans beyond those required by the ACA.\(^8\) Conversely, many other states opted to implement restrictions far beyond what is required by the ACA, effectively limiting women’s access to health care and their constitutional right to choose abortion. These states should consider repealing their laws and implementing laws similar to those in Illinois to ensure that all women have access to health care and freedom of choice.

The first part of this article will focus on various requirements of the ACA and discuss the recent healthcare reform efforts in the United States. The second part of this article will focus specifically on abortion re-

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5. See id. at 392.
8. See generally State Employees Group Insurance Act of 1971, 5 ILL. COMP. STAT. 375/6 (2003) (abortion benefits for state employees are limited to cases where an abortion is necessary to preserve the live of the pregnant woman); Illinois Public Aid Code, 305 ILL. COMP. STAT. 5/5-5 (2014) (listing all medical services eligible for government reimbursement).
restrictions, beginning with a short historical review of the original source of federal restrictions on abortion coverage and then turning to the ACA provisions. Next, this article will discuss Illinois’ response to the ACA, specifically the policies it has in place that comply with the ACA in the least restrictive manner and provide Illinois women a meaningful right to choose. Lastly, this article will demonstrate that the more restrictive states in this country should alter their policies to mirror those of Illinois to ensure women have access to health care, including abortion services.

II. THE ACA

President Barack Obama signed the ACA into law on March 23, 2010. The ACA is designed to expand access to health care coverage for individuals across the nation by making insurance more affordable and accessible. The ACA required all states to establish health insurance exchanges by January 1, 2014. Through these exchanges individuals will be able to enroll in public health insurance programs or purchase private health insurance, either unsubsidized or with the aid of federal subsidies. Insurers seeking to participate in state exchanges must satisfy a set of standards to be qualified to offer plans on the exchanges. The ACA requires all health plans offered on the exchanges provide minimum coverage in the form of an essential health benefits package, often referred to as “minimum essential cover-

10. Id.
12. Huberfeld, supra note 6, at 1376.
13. Schaler-Haynes et al., supra note 11, at 368-70 (this package must include ambulatory services, emergency services, hospitalization, maternity and newborn care; mental health and substance use disorder services; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services).
While the ACA mandates certain coverage, states are permitted to require and insurance companies may offer additional benefits beyond the federal requirements.

The ACA also provides financial assistance to certain individuals who purchase a private insurance plan on the exchange. Recognizing that there will be individuals with income levels above the Medicaid eligibility, but who are nonetheless unable to afford a private health insurance plan without financial assistance, the federal government established a system of federal subsidies. Thus, individuals with incomes between 100 to 400% of the federal poverty level will be eligible for federal subsidies to cover the premium for purchasing private health insurance. Individuals who receive federal subsidies are required to purchase a qualified health plan from an insurer through an exchange.

Additionally, the ACA offers states the option to expand Medicaid coverage. For those states that opt into expansion, all adults under the age of sixty-five with incomes up to 133% of the federal poverty level will be eligible for Medicaid coverage, regardless of their reproductive or parental status. Although this expansion will provide millions of previously uninsured individuals with health insurance, it will simultaneously subject all of the newly eligible lower-income women to the restrictions imposed by the ACA, including abortion restrictions.
III. ABORTION AND THE ACA

A. History of Abortion Coverage Restrictions – the Hyde Amendment

The major restriction on federal funding for abortion is the Hyde Amendment.\(^\text{23}\) Congress passed the Hyde Amendment in 1976 as a tool to prohibit the use of federal Medicaid funds to pay for abortion services.\(^\text{24}\) In its original form, the Amendment contained an exception to permit federal funding for abortions only in cases “where the life of the mother would be endangered if the fetus were carried to term.”\(^\text{25}\) The specific exceptions permitting federal funding for abortions have changed over the years following its passage, and the Hyde Amendment currently in force provides an exception that permits federal funding for abortions in cases where pregnancy is the result of rape or incest, and where a woman’s life is endangered if the abortion is not performed.\(^\text{26}\) Federal Medicaid dollars are prohibited from funding abortion in any other circumstances.\(^\text{27}\) Nevertheless, the ACA explicitly permits the use of state-only funds to finance abortions beyond the restrictions contained in the Hyde Amendment,\(^\text{28}\) as Medicaid is a jointly funded state-federal program\(^\text{29}\)

B. ACA Abortion Restrictions

Traditionally, abortion coverage was primarily restricted within the realm of public insurance, especially under Medicaid or within other groups that rely on the federal government for health care, such as federal employ-

\(^{23}\) Schaler-Haynes et al., supra note 11, at 337.
\(^{24}\) Soohoo, supra note 4, at 392.
\(^{25}\) Schaler-Haynes et al., supra note 11, at 339.
\(^{26}\) Id.
\(^{28}\) Schaler-Haynes et al., supra note 11, at 338.
ees and military personnel.\textsuperscript{30} Prior to the passage of the ACA, an estimated 87\% of private insurance plans covered abortion services.\textsuperscript{31} However, with the restrictions imposed by the ACA that percentage is all but guaranteed to decrease, perhaps drastically, because the restrictions on federal funding of abortion services now apply to all public and private insurance plans participating in the exchanges.\textsuperscript{32}

Although the ACA neither prohibits qualifying insurance plans from covering abortions nor requires them to cover abortions,\textsuperscript{33} it explicitly states that abortion services are excluded from the list of essential health benefits the plans are required to offer.\textsuperscript{34} In other words, health insurers on the exchanges are not required to offer abortion coverage. Furthermore, each marketplace must include at least one plan that does not cover abortion services beyond those that are federally funded.\textsuperscript{35}

The Hyde Amendment abortion restrictions affect any private insurance plan purchased on an exchange. An individual who qualifies for federal subsidies may purchase a private insurance plan on the exchange. Yet the ACA forbids the use of federal subsidies to fund abortion services beyond those permitted by the Hyde Amendment.\textsuperscript{36} As such, any health plan participating on the exchanges that offers such abortion coverage must collect two separate premium payments from all enrollees, regardless of whether or not the individual enrollee is receiving federal subsidies.\textsuperscript{37} One payment goes towards abortion benefit services and the other is for the value of all over covered services.\textsuperscript{38} This payment scheme unnecessarily burdens an unsubsidized enrollee by requiring them to make multiple payments for one

\textsuperscript{30} Soohoo, supra note 4, at 392.
\textsuperscript{31} Huberfeld, supra note 6, at 1363.
\textsuperscript{32} Id. at 1374.
\textsuperscript{33} Schaler-Haynes et al., supra note 11, at 347.
\textsuperscript{34} Salganicoff, supra note 9, at 4.
\textsuperscript{35} Id.
\textsuperscript{36} Huberfeld, supra note 6, at 1384.
\textsuperscript{37} Salganicoff, supra note 9, at 3.
\textsuperscript{38} Id.
Subsidized enrollees, who are by definition already lower-income individuals because they are eligible for federal subsidies, may also be significantly burdened. For lower-income individuals the two-payment system means they must pay for abortion services out-of-pocket while the payment for remaining health benefits covered by the health plan will be made using the federal subsidies.

The two-payment collection scheme is designed to ensure that all federal funds are segregated from personal funds, as insurance companies may only use personal funds from enrollees to cover abortion services. To highlight the importance of segregating federal funds, President Obama issued an executive order just one day after the ACA became law. The purpose of this executive order was to “establish a comprehensive, Government-wide set of policies and procedures” designed to enforce the Hyde Amendment restrictions and ensure that federal funds are not used for abortion services except where permitted.

The ACA does not preempt any state law that either prohibits or requires coverage or funding of abortion, however it explicitly permits states to prohibit abortion coverage in the policies offered on their insurance exchanges. As of October 2014, twenty-five states enacted laws prohibiting such coverage. Some states went to the extreme and implemented bans on all private insurance coverage of abortion services, regardless of whether

39. See Schaler-Haynes et al., supra note 11, at 326.
40. See Salganicoff, supra note 9, at 7.
41. Huberfeld, supra note 6, at 1384.
42. Id.
43. Schaler-Haynes et al., supra note 11, at 353.
44. Id. at 354.
45. Id.
46. Id. at 352.
47. Soohoo, supra note 4, at 393.
49. See id. at 1-2 (as of December 1, 2014, nine states (Idaho, Kansas, Kentucky, Michigan, Missouri, Nebraska, North Dakota, and Oklahoma) restrict insurance coverage of abortion in all private insurance plans).
the policies are sold on the state exchange or not.\textsuperscript{50} Conversely, no states require abortion coverage in private health insurance policies,\textsuperscript{51} and the ACA does not require the exchanges to offer at least one plan that includes abortion coverage.\textsuperscript{52} Additionally, the ACA mandates that health plans participating in the exchanges are prohibited from discriminating against any individual health care provider or healthcare facility “because of its unwillingness to provide, pay for, cover, or refer for abortion.”\textsuperscript{53} Yet, there is no equivalent protection offered for those providers and facilities that do cover, pay, or refer patients for abortion.\textsuperscript{54}

IV. ILLINOIS’ RESPONSE TO THE ACA

A. Abortion in Illinois

Abortion is an incredibly common medical procedure in the United States\textsuperscript{55} and is a form of health care for women.\textsuperscript{56} It is estimated that “by the time they reach age 45, three in ten American women will have had an abortion.”\textsuperscript{57} In 2011 alone, nearly 45,000 women in Illinois obtained an abortion.\textsuperscript{58} This amounts to a rate of approximately seventeen abortions per one thousand women of reproductive age in Illinois.\textsuperscript{59} These statistics illustrate just how many women in Illinois elect to have abortions annually, and furthermore, how many women will have their access to health care restricted by the ACA requirements, whether they are covered by the Illinois’ Medicaid program or purchasing insurance on the state exchange.

\textsuperscript{50} Soohoo, supra note 4, at 394.
\textsuperscript{51} Schaler-Haynes et al., supra note 11, at 352.
\textsuperscript{52} Id. at 353.
\textsuperscript{53} Ikemoto, supra note 27, at 759.
\textsuperscript{54} Schaler-Haynes et al., supra note 11, at 353.
\textsuperscript{55} Quick Sheet: Insurance Coverage of Abortion Care, supra note 22, at 1.
\textsuperscript{56} Id. See also Huberfeld, supra note 6, at 1362-63 (“Abortions may be performed for a number of medical reasons.”).
\textsuperscript{57} Quick Sheet: Insurance Coverage of Abortion Care, supra note 22, at 1.
\textsuperscript{59} Id.
B. Illinois Abortion Coverage Policies as Compared to Other State Policies

In spite of the many restrictions the ACA imposes on access to abortion, Illinois responded with several policies that help preserve women’s access to health care. Unlike many other states, Illinois did not place any additional restrictions on abortion coverage beyond those required by the ACA in the context of private insurance, and maintains minimal restrictions on its state Medicaid program. The policies in place in Illinois are essential to women’s access to health care and their corresponding right to choose. States like Kentucky and North Dakota maintain much more restrictive abortion laws and should adopt policies similar to Illinois. States restricting women’s right to choose should consider altering their policies in order to ensure that women are provided the greatest access to health care and the right to choose an abortion.

Illinois does not limit its Medicaid coverage of abortions to only those permitted by the Hyde Amendment. Illinois is one of twenty-eight states, including the District of Columbia, which opted to expand Medicaid. As a result of the Medicaid expansion, thousands of low-income women in Illinois will now be eligible for Medicaid coverage, but they will also be subject to the abortion restrictions imposed by the Hyde Amendment. Fortunately, the ACA provides that states may use state-only funds to finance

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60. See Salganicoff, supra note 9, at 8.
61. Id. at 4.
abortions in their Medicaid programs beyond the Hyde exceptions. Illinois extends coverage to fund medically necessary abortions as well, including instances where a woman’s mental or physical well-being is endangered by her pregnancy. Illinois is one of seventeen states that uses state funds to finance such abortions. In 1994, a state court held the Illinois constitution requires the state Medicaid program to cover medically necessary abortions even though the federal government will not provide reimbursement for those services. Even still, the reality is that these restrictions weigh heaviest upon Medicaid-insured women because they have the least available funds to finance any abortion that falls outside of Illinois coverage.

In the area of private insurance, both on and off the state exchange, Illinois equally responded with unrestrictive policies related to abortion coverage. The U.S. Department of Health and Human Services reports that over 217,000 individuals in Illinois selected a marketplace plan, 53% of whom were female. Thus, a significant number of Illinois women will be subject to ACA restrictions but will nevertheless find a greater degree of choice in Illinois than in other more restrictive states, because Illinois did not place any restrictions on abortion coverage in private insurance plans. The Illinois policies operate to maintain women’s access to health care and ensure that women purchasing private insurance on the exchange will not be bur-

68. Schaler-Haynes et al., supra note 11, at 338.
70. See Soohoo, supra note 4, at 410. See also Schaler-Haynes et al., supra note 11, at 328 (explaining that medically necessary abortions are generally defined as those that are necessary to protect the physical or mental health of the woman).
71. State Funding of Abortions Under Medicaid, supra note 64.
73. See Quick Sheet: Insurance Coverage of Abortion Care, supra note 22, at 2.
75. U.S. Dep’t of Health & Human Servs., supra note 66.
dened with any restrictions beyond those imposed by the federal government.\footnote{Id.}

The only restrictive abortion coverage policy Illinois currently has in place is the restriction on insurance policies for public employees.\footnote{State Employees Group Insurance Act of 1971, 5 ILL. COMP. STAT. 375/6 (2003).} In this case, abortion coverage is limited to life endangering pregnancies, but Illinois provides these women the option to purchase additional coverage through a separate rider at additional costs.\footnote{Id.} While it will cost more, this option ensures that women will still have the choice to obtain abortion coverage.

In sharp contrast to Illinois abortion policies, a significant number of states have implemented various laws severely restricting women’s rights to access health care by limiting abortion coverage. For example, while Kentucky and North Dakota opted to expand their state Medicaid programs and extended insurance coverage to thousands of individuals,\footnote{A 50-State Look at Medicaid Expansion: 2014, supra note 65.} they limited abortion coverage only to situations permitted by the Hyde Amendment.\footnote{State Policies in Brief: State Funding of Abortion Under Medicaid, supra note 62, at 1-2.}

This effectively ensures that low-income individuals enrolled in the state Medicaid program are required to pay for additional abortion services out-of-pocket.\footnote{See Huberfeld, supra note 6, at 1381.} Such individuals generally have the least available means to do so. These two states went a step further and enacted a ban on abortion coverage that extends to all private insurance plans sold within the respective states.\footnote{State Policies in Brief: Restricting Insurance Coverage of Abortion, supra note 48, at 2.} Limiting abortion coverage more severely than the Hyde Amendment, Kentucky and North Dakota only permit private insurance coverage in cases when the life of the woman is in danger.\footnote{Id.} While there is an option
to purchase a separate rider for coverage in these two states, this option has not proven effective in providing women with any abortion coverage.\textsuperscript{85}

As stated by Blue Cross Blue Shield representatives from North Dakota and Kentucky, this is because very few citizens are reportedly aware of the option with no members purchasing the rider.\textsuperscript{86} Consequently, most women in these states seeking abortion services must pay out-of-pocket\textsuperscript{87} despite the fact that the aim of the ACA is to increase healthcare coverage for individuals across all income levels.\textsuperscript{88} The laws of Kentucky and North Dakota operate to severely restrict access to coverage and as such these states and others like them should alter their laws to mirror those in Illinois where the laws are significantly less restrictive.\textsuperscript{89}

V. RECENT COURT DECISION RESPONDING TO A RESTRICTIVE STATE ABORTION LAW

Not only did Illinois respond to federal action with unrestrictive abortion coverage policies, but some courts also took a similar position in regard to state actions attempting to restrict abortion services.\textsuperscript{90} A recent Seventh Circuit Court of Appeals decision supports this notion.\textsuperscript{91} In 2012 the court upheld a preliminary injunction to block a newly enacted Indiana law, which provides that state agencies may not enter into a contract or make a grant to any entity that performs abortions or maintains or operates a facility where abortions are performed.\textsuperscript{92} The law cancelled any existing contracts with abortion providers.\textsuperscript{93} As a provider of abortion services, Planned Parenthood of Indiana was directly affected because the law prevented it

\begin{footnotes}
85. Huberfeld, supra note 6, at 1385.
86. Id. at 1386.
87. Salganicoff, supra note 9, at 6.
88. Id. at 1.
89. See id. at 8.
90. Planned Parenthood of Indiana v. Comm’r of Indiana State Dep’t. of Health, 699 F.3d 962, 969-70 (7th Cir. 2012).
91. Id.
92. Id.
93. Id.
\end{footnotes}
from receiving any state-administered funds, including Medicaid reimbursement, for services unrelated to abortion.\textsuperscript{94} Planned Parenthood challenged this law, arguing it violated a Medicaid requirement that Indiana must comply with in order to receive federal Medicaid reimbursement.\textsuperscript{95} This “free choice of provider” requirement provides that all state Medicaid plans must provide any Medicaid beneficiary the option to obtain medical assistance from any institution qualified to perform the service or services required.\textsuperscript{96}

The Court held that a state could not interfere with an individual’s choice except when it determines a provider is not qualified.\textsuperscript{97} The Court strictly defined “qualified” to mean capable of performing medical services needed in a professionally competent, safe, legal, and ethical manner, and held that Planned Parenthood is qualified under this definition.\textsuperscript{98} In upholding the grant, the Court found that Indiana’s law excluded a class of providers from Medicaid funds for reasons unrelated to the provider’s qualifications, and held Planned Parenthood was likely to succeed in its claim that the law violates the Medicaid free choice of provider requirement.\textsuperscript{99} This decision demonstrates that while the ACA granted states significant autonomy in determining the amount and type of abortion coverage they will permit,\textsuperscript{100} the courts maintain the power to impose restrictions on state laws that impermissibly discriminate against abortion providers and operate to severely limit Medicaid-insured women’s choice to access a qualified healthcare provider.

\textsuperscript{94} Id. at 971.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 969.
\textsuperscript{97} Id. at 981.
\textsuperscript{98} Id. at 978.
\textsuperscript{99} Id. at 980-81.
\textsuperscript{100} See Ikemoto, supra note 27, at 758-61 (discussing how the ACA does not preempt state laws requiring or prohibiting abortion coverage in private insurance and permission of state Medicaid programs to fund abortions beyond Hyde Amendment). See also Huberfeld, supra note 6, at 1384 (discussing how the ACA permits states to prohibit abortion coverage and private insurers to choose whether or not to offer abortion coverage).
VI. CONCLUSION

The myriad of requirements the ACA imposes on both abortion services and abortion coverage severely restricts women’s access to health care and specifically, the right to choose an abortion. In an unprecedented move, the federal government declared it would not only govern abortion coverage restrictions in the public insurance sphere, but in the private sphere as well. Women dependent upon public insurance coverage have long been subjected to the federal restrictions on abortion coverage under the Hyde Amendment, and the ACA continues to impose these restrictions on women who choose to purchase private insurance on the exchanges. This is a substantial burden on both private insurers and women purchasing insurance that covers abortion on the exchanges because all payments must now be segregated to ensure no federal subsidies are unlawfully used to pay for abortion services. Opponents argue this tactic will simply discourage private insurers from offering abortion coverage altogether because of the difficulty and administrative burden required to maintain segregated accounts.

Despite such complex restrictions and requirements, Illinois took steps in the right direction to ensure women still have a meaningful choice. Unlike many other states, Illinois did not implement any policies to further restrict abortion coverage in private insurance plans, on or off the exchanges, nor did it limit Medicaid abortion coverage to the Hyde Amendment except-

101. See generally Huberfeld, supra note 6, at 1375-84 (discussing the development of exchanges under the ACA, the expansion of Medicaid, and coverage requirements for participation on exchanges, as well as the particular restrictions on abortion coverage in both public and private insurance).
102. Id. at 1374.
103. Ikemoto, supra note 27, at 760-61.
104. Quick Sheet: Insurance Coverage of Abortion Care, supra note 22, at 2.
105. Soohoo, supra note 4, at 417-18.
The laws implemented by the federal government are essentially the only laws that place restrictions upon women’s right to choose, and access abortion services and coverage in Illinois. Compared to many other states, Illinois laws and policies regarding abortion coverage are fairly restrictive. The states with more restrictive abortion coverage laws, such as Kentucky and North Dakota, should alter their policies and model them after those of Illinois. Such a change will increase women’s access to health care across the nation and result in the least restrictive abortion laws in the face of the most federally restrictive law of all, the ACA and its incorporation of the Hyde Amendment.