

NITPICKING APART THE AFFORDABLE CARE ACT: THE IMPACT OF THE DECISION IN *LITTLE SISTERS OF THE POOR SAINTS PETER AND PAUL HOME V PENNSYLVANIA* ON CONTRACEPTIVE COVERAGE FOR WOMEN AND THE ACA

In the last term, the United States Supreme Court addressed many of the topics in the zeitgeist of American politics. In *Bostock v Clayton*, the Court addressed transgender and gay rights, ruling that Title VII of the Civil Rights Act of 1964 gave transgender and gay people protection from being discriminated in the workplace based on their sexual orientation or gender identity. In *DHS v. Board of Regents*, the Supreme Court addressed the hot button issue of immigration and ruled that the Trump Administration could not just roll back the protections for ‘dreamers’ created during the Obama Administration without good reason. A lesser known decision made by the Supreme Court last term In *Little Sisters of the Poor and Saints Peter and Paul Home v Pennsylvania*, 140 S. Ct 2367 (2020). This case presented the question: Did the Federal Departments of Health and Human Services, Labor and/or Treasury have the authority to draft rules affecting the Affordable Care Act? This paper will address how the decision in *Little Sisters* continued the attacks on different parts of the Affordable Care Act and how the opponents of the ACA continue to use the Courts to repeal, and not Congress. The paper will also address how the *Little Sisters* case extended the decision of *Burwell v. Hobby Lobby Stores Inc* 573 U.S. 682 (2014).

The Patient Protection and Affordable Care Act, better known as Obamacare or the ACA was passed in 2010 with the intent of providing affordable, quality health insurance coverage to millions of Americans who had no or bad coverage. The ACA is a complex law that attempted to achieve this goal in many different ways and included many different provisions to do so. One aspect of the ACA was the Women’s Health Amendment. This was added to the ACA to force health insurance companies and employers to provide coverage for “preventive care and screenings” for women. However, the ACA did not define what preventive care and screenings for women meant. It left that responsibility to the Health Resources and Service Administration, (HRSA) within the Department of Health and Human Services. The HRSA would have to accomplish the specification of these services through its rule-making function under the Administrative Procedures Act (APA).

During the Obama Administration, HRSA initially promulgated rules that defined preventative care and screening to include contraceptives for women. As a result, employers could be forced to provide health insurance that included free contraceptives for their female employees. The contraceptives covered under this regulation were the 20 which had been previously approved by the Food and Drug Administration. The rules did include a provision that allowed qualifying religious organizations to opt out of having to provide this coverage based on their religious objections. The overall purpose of this amendment to the ACA was to ensure that women could gain access to proper health care which included this type of preventative care.

From the very beginning, the opponents of the ACA attempted to repeal the entire bill. Many bills were presented by the Republicans in Congress to repeal the ACA in the years after its passage. All attempts were defeated by President Obama’s veto power. While Obama was in office it was clear that the ACA could not be repealed through legislation.

The opponents of the ACA then took to the courts to try and repeal the law as unconstitutional in its entirety. In *National Federation of Independent Business v. Sebelius* 567 U.S. 519, 132 S.Ct 2566 (2012). Opponents of the ACA argued three main reasons why the ACA was unconstitutional: 1. The individual mandate exceeded the Congress' power under the commerce clause; 2. the Medicaid expansions were unconstitutionally coercive; and 3. The employer mandate impermissibly interfered with state sovereignty. In a 5-4 decision with Chief Justice Roberts casting the deciding vote, the ACA was not ruled unconstitutional. The individual mandate was upheld as a tax; the expansion of Medicaid funding was ruled to be unconstitutionally coercive but the ACA did not have to be completely struck down because states could opt in or out and not lose all its federal funding.

The *Sebelius* decision did not end the legal attacks on the ACA. The opponents of the bill now turned to attacking the individual parts of the ACA as unconstitutional on other grounds to make the ACA irrelevant and useless. The most effective attacks so far have come on the ACA's existing requirement that employers not only have to provide health insurance but that the insurance must also include preventative care and treatment for women; which includes contraceptives under the existing HRSA rules. The cases that have been most successful in attacking the contraception requirements are *Burwell v. Hobby Lobby Stores Inc.* and *Little Sisters of the Poor and Saints Peter and Paul Home v Pennsylvania*.

In *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682 (2014) the Court ruled that for-profit employers like the Hobby Lobby stores could opt out of providing health insurance for their female employees that included contraceptive devices due to religious objections. The Court held that the Religious Freedom Restoration Act of 1993 (RFRA) allowed employers to not provide contraceptives, in turn creating a loophole that would harm women due to the companies' ability to deny them coverage.

In *Little Sisters of the Poor and Saints Peter and Paul Home v Pennsylvania*, 140 S. Ct 2367 (2020) the Court allowed the opponents of the ACA to take a subtler approach to weakening the health care protections for women through the use of contraceptives. As such, this case also impacted the ability of the ACA to provide the protections originally intended.

On its face, *Little Sisters of the Poor* is a look into how administrative law works and how the rule making procedure is supposed to operate. What agencies can regulate and how they can do it. In actuality, there is much more depth to the ruling than simply how the rules are made. In 2017, under the Trump administration, the Department of Health and Human Services promulgated two new rules to expand the meaning of religious exceptions to excuse providing contraception. The first of these rules in question expanded the religious exception to include employers that "object ...based on its sincerely held religious beliefs." The second rule that was promulgated asserted that any employer who had a moral objection to providing contraceptives could be exempt from doing so. Pennsylvania, joined by New Jersey, filed a complaint and sought an injunction. The States argued that the HRSA lacked the statutory authority to promulgate a rule that was an exception to providing coverage required by the ACA. The State also argued that even if they had the power to create an exception by rule, that they did not follow the proper procedures under the Administrative Procedures Act (APA). The District Court and the Court of Appeals of the Third Circuit both found the HRSA Rules invalid and granted an injunction preventing enforcement of the new HRSA rules. The Supreme Court ultimately reversed and upheld the new HRSA rules.

In *Little Sisters of the Poor* the constitutionality of the ACA or the issue of religious freedoms was not directly addressed like the other cases discussed. Rather the attacks to the ACA by its opponents came disguised by using the rule-making power once the administrations changed and the opponents took over the administrative functions. However, this case extended a result that significantly changed the ability of the ACA to provide preventative care and treatment for women as intended by the ACA.

By allowing the rules promulgated in *Little Sisters of the Poor* to be enforced, alongside the precedent set in *Hobby Lobby*, the Supreme Court creates more openings to attack the ACA and prevent it from its intended purpose. The rules now allow any employer from who holds any “religious” or “moral” objection to deny providing contraceptive care for women. This is a significant extension from genuinely held religious beliefs to the much more broad and undefined “moral” objections. It is now significantly easier for employers to avoid paying for this type of coverage by simply saying they are morally opposed to it. In *Hobby Lobby* the opponents of the ACA used the Court to expand the employers who could assert a genuine religious exception from religious employers and non-profit religious based employers to all for-profit employers. Now, the combination of the Court cases and the rule making allows for virtually any employer to opt out of providing this type of coverage for women.

In her dissent in *Little Sisters of the Poor*, Justice Ginsburg points out several reasons how and why this ruling will affect the Women’s Health Amendment of the ACA. The first important point Justice Ginsburg makes is that this ruling creates a precedent that the right to religious freedom supersedes any harm it may do to third parties. In writing the dissent, Justice Ginsburg stated, “Today, for the first time, the Court casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree.” (Ginsburg 1) Justice Ginsburg signaled the impact of *Little Sisters of the Poor*. The rulings in *Little Sisters* clearly demonstrates the massive shift in the ideology of the court from protections for the individual to protections for religious freedom, no matter the impact on third persons.

Overall, it is important to see the case of *Little Sisters of the Poor Saints Paul and Peter v. Pennsylvania* in the context of the ACA and the actions taken against it. This case plays a role in the long effort by opponents to allow for the openings within the ACA to grow. However, the opponents of the ACA have yet to successfully repeal the Affordable Care Act in its entirety. If cases such as *Little Sisters* continue to have the present effects opponents can successfully pull at procedure and rules to rule in favor of religious rights over those of the individual. Ultimately defeating the purpose, the bill: to ensure millions of Americans have easy access to healthcare.

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