THE HYDE AMENDMENT: PERPETUATING INJUSTICE AND DISCRIMINATION AFTER THIRTY-NINE YEARS

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I. INTRODUCTION

A. WHAT IS THE HYDE AMENDMENT?

The Hyde Amendment, passed on September 30, 1976,[1] restricts federal funding for abortion for women receiving Medicaid except in the cases of rape, incest, or when the woman's life is endangered.[2] Before the Hyde Amendment went into effect, Medicaid funded almost 25 percent of abortions in the United States.[3] Now, as reported in a 2009 study published by the Guttmacher Institute, "one in four women with Medicaid coverage subject to the Hyde Amendment who seek an abortion are unable to obtain one due to lack of coverage."[4] The Centers for Disease Control found that in 1977, the first year following the passage of the Hyde Amendment, "approximately 295,000 low-income women obtained abortions financed by combined federal-state Medicaid funds . . . " and by 1979, the federal government funded a mere 2400 abortions.[5] Although the original 1976 Hyde Amendment solely limited coverage available to women on Medicaid, later versions of Hyde further restricted federal abortion funding

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1 Carly Manes, *Viewpoint: Happy Anniversary Hyde*, THE MICH. DAILY (Sept. 28, 2014), http://www.michigandaily.com/opinion/09viewpoint-happy-anniversary-hyde-29.

2 William L. Saunders, Jr. & Anna R. Franzonello, *Health Care Reform and Respect for Human Life: How the Process Failed*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 593, 599-600 (2011).

3 Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 401–02 (2012).

4 Heather D. Boonstra, *Insurance Coverage of Abortion: Beyond the Exceptions for Life Endangerment, Rape and Incest*, GUTTMACHER POL'Y REV., Summer 2013, at 5, http://www.guttmacher.org/pubs/gpr/16/3/gpr160302.html.

5 Richard Vuernick, Comment, *State Constitutions as a Source of Individual Liberties: Expanding Protection for Abortion Funding Under Medicaid*, 19 J. CONTEMP. L. 185, 195-96 (1993).

for women in the military, Peace Corps, disabled women, American women using Indian Health Services, and federal prisoners.[6]

Much of the controversy surrounding Hyde stems from the fact that the Amendment was not passed through an authorization measure—the traditional and more direct venue for legislation of this nature[7]—but was instead passed as an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare.[8] Because of this, many view the Hyde Amendment as a "back-door attempt"[9] by Congress to limit abortions in a manner that circumvents the rights outlined in *Roe v. Wade*,[10] and see the amendment as disproportionately affecting impoverished and minority women.[11]

Because Medicaid is a joint program between federal and state governments, states may decide to use their own public funds to provide abortion services for indigent women on Medicaid.[12] As of July 1, 2015, only "32 states and the District of Columbia follow the federal standard and provide abortions in cases of life endangerment, rape, and incest. . . . 17 states use state funds to provide all or most medically necessary abortions" (some voluntarily and some by court order) and one state (South Dakota) "provides abortions only in cases of life endangerment, in apparent violation of the federal standard."[13] There have been successful challenges against statutes similar in nature to Hyde on the state level, which will be analyzed in more detail later.[14]

In the years following its enactment, the Hyde Amendment came under attack on multiple occasions, and the Supreme Court responded by repeatedly upholding its constitutionality.[15] In spite of these rulings, this note will explore why the Hyde Amendment is unconstitutional under the Due Process Clause and the Equal Protection Clause and why it is inconsistent under both *Roe v. Wade* and *Planned Parenthood v. Casey*.[16]

This Note will first explore the real-life implications of the Hyde Amendment for indigent women today and how this discriminatory federal funding restriction imposes severe financial, emotional, and physical hardships.[17] In Part II, I will outline the Court's analysis in the three primary cases that reaffirmed the constitutionality of the Hyde Amendment:

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6 Soohoo, *supra* note 3, at 407.

7 Sandra Berenknopf, Comment, *Judicial and Congressional Back-Door Methods That Limit the Effect of Roe v. Wade: There Is No Choice If There Is No Access*, 70 TEMP. L. REV. 653, 658-59 (1997).

8 Soohoo, *supra* note 3, at 402.

9 Berenknopf, *supra* note 7, at 655.

10 Roe v. Wade, 410 U.S. 113 (1973); Larry P. Boyd, Comment, *The Hyde Amendment: New Implications for Equal Protection Claims,* 33 BAYLOR L. REV. 295, 300 (1981).

11 Boonstra, *supra* note 4, at 5.

12 *Id.*

13 *State Funding of Abortion Under Medicaid*, GUTTMACHER INSTITUTE, (updated Nov. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

14 *See infra* Part III.

15 Saunders & Franzonello, *supra* note 2, at 600.

16 *See* Roe v. Wade, 410 U.S. 113 (1973) (one of two seminal cases that outlined a woman's right to seek an abortion and to be free from government interference that amounts to an undue burden in obtaining an abortion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (same).

17 Boonstra, *supra* note 4, at 1-2.

Harris v. McRae, *Maher v. Roe,* and *Beal v. Doe*.[18] In discussing the unconstitutionality of the Hyde Amendment, I will utilize the dissents of each of these cases to argue that the Supreme Court was fundamentally wrong in each of these decisions. Next, I will perform a Due Process analysis, using *Planned Parenthood v. Casey* to demonstrate that the Hyde Amendment creates a discriminatory funding scheme that amounts to an "undue burden" that the government places on indigent women seeking an abortion, thereby violating their due process rights.[19] I will then evaluate the Hyde Amendment under the Equal Protection Clause, arguing that the Supreme Court was mistaken in its failure to view indigent women as a "suspect class" requiring a heightened level of scrutiny.[20] Additionally, I will show how Congressional interests in protecting the life of the fetus are arbitrary and improper under the Hyde Amendment, as outlined by the Equal Protection Clause.[21] Through a discussion of the legislative history and moral objectives of Congress in passing Hyde, I will then argue that this is inconsistent with *Roe v. Wade*.[22] Finally, in Part III, I will discuss the challenges brought in various states under their respective state constitutions, including Connecticut, Massachusetts, Oregon, New Jersey, and New York, which will provide examples of potential approaches that can be utilized by other plaintiffs seeking to challenge the unconstitutionality of this discriminatory funding scheme. States have paved the way through multiple suits to restore the rights granted by *Roe v. Wade* and have provided hope that legislation of this nature can be declared unconstitutional.[23]

B. HOW THE HYDE AMENDMENT AFFECTS WOMEN

Without insurance, the average cost of a first trimester abortion is $470.[24] The average cost of a second trimester abortion at twenty weeks is $1500.[25] Moreover, of the women obtaining abortions, 42 percent have incomes below 100 percent of the federal poverty line.[26] Indigent pregnant women on Medicaid who want to obtain an abortion must bear these costs out-of-pocket, imposing severe financial hardship upon them.[27] A 2013 study that surveyed more than 630 impoverished women who sought abortions highlights the extent of this financial burden.[28] The study revealed that "many are forced to divert money meant for living expenses—such as rent (14%), food (16%), or utilities and other bills

18 *See* Harris v. McRae, 448 U.S. 298 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 439 (1977).
19 Soohoo, *supra* note 3, at 423-24.
20 Boyd, *supra* note 10, at 302-03.
21 *Id.* at 298-99.
22 *Roe v. Wade*, 410 U.S. at 113.
23 *E.g.*, Hope v. Perales, 634 N.E.2d 183, 188 (Ct. App. N.Y. 1994).
24 Manes, *supra* note 1.
25 *Id*.
26 *Induced Abortions in the United States*, GUTTMACHER INSTITUTE (Jul. 2014), http://www.guttmacher.org/pubs/fb_induced_abortion.html [hereinafter *Induced Abortions*].
27 Boonstra, *supra* note 4, at 6.
28 *Id.*

(30%)—as they scrape together the funds to pay for the procedure."[29] The lack of access to family planning services and reproductive education compounds this issue—one study revealed that "[b]etween 1994 and 2006, the number of unintended pregnancies among women whose incomes fall below the national poverty line rose by 50 percent—but during the same time period, unintended pregnancies dropped among more economically privileged women."[30] Middle and upper-class women have safer and more reliable access to contraceptives and other fertility-planning resources, giving them a greater degree of autonomy over their reproductive decisions.[31] This is a "luxury" that most indigent women do not have.[32] Indigent women's lack of access to proper reproductive education and family planning services leads to a greater number of unintended pregnancies, creating an even greater financial burden as the number of pregnancies rise.[33] This cycle is unique to indigent women.[34]

Further, there is research that the longer these women spend gathering the money to pay for an abortion, the riskier and more expensive the procedure becomes.[35] For example:

> [S]tudies show a link between unintended pregnancy and rates of infant mortality and morbidity. Studies also point to the disproportionate toll unwanted pregnancies take on women socio-economically: a woman's inability to prevent pregnancy can effectively undermine her attempts to become stable economically and to control how and in what ways she will contribute to society.[36]

The risk of death from abortion is very low to begin with: "[a] first trimester abortion is one of the safest medical procedures, with minimal risk—less than 0.05%—of major complications that might need hospital care."[37] However, after eight weeks of pregnancy, with each week that passes, the risk of death increases by roughly 30 percent.[38] In other words, at or before eight weeks the risk of death is one for every one million abortions, at sixteen-to-twenty weeks the risk increases to one death per twenty-nine thousand abortions, and at twenty-one weeks or later the risk increases to one death per eleven thousand abortions.[39] While these risks

29 *Id.*

30 Tara Culp-Ressler, *'No Taxpayer Funding For Abortion': How The Right's Rallying Cry Ends Up Hurting Millions Of Women*, THINKPROGRESS (Sept. 24, 2014, 2:27 PM), http://thinkprogress.org/health/2013/09/24/2672251/no-taxpayer-funding-abortion-report/.

31 Jacoba Urist, *Social and Economic Benefits of Reliable Contraception*, THE ATLANTIC (Jul. 2, 2014), http://www.theatlantic.com/health/archive/2014/07/the-broader-benefits-of-contraception/373856/.

32 *Id.*

33 *Id.*

34 *Id.*

35 Berenknopf, *supra* note 7, at 661.

36 Brietta R. Clark, Article, *Erickson v. Bartell Drug Co.: A Roadmap for Gender Equality in Reproductive Health Care or an Empty Promise?*, 23 LAW & INEQ. 299, 321 (2005).

37 *Induced Abortions*, *supra* note 26.

38 J. Daniel Siefker, Jr., Comment, *Louisiana's Abortion Politics and the Constitution: The Attempt to Regulate Health Insurance Benefits in the Wake of National Healthcare Reform*, 13 LOY. J. PUB. INT. L. 253, 273 (2011).

39 *Induced Abortions*, *supra* note 26.

are still very low, they are nevertheless an important factor to consider. This has a disproportionate effect on indigent women because many women cited the need to obtain funds due to financial constraints as the reason for delay past eight weeks gestation.[40] In *McRae v. Califano*, the case that was ultimately overturned by *Harris v. McRae*, expert testimony from a doctor found that of the pregnant indigent women he saw as patients who were seeking abortions, "their health needs were greater, their level of nutrition lower, their levels of anemia worse, and likely to worsen as pregnancy continued [and] were at significantly greater risk in their pregnancies than women generally."[41] For many of these women, access to abortion early in the pregnancy is much safer than carrying the pregnancy to term.[42] In fact, a study reported by the U.S. News and World Report in January 2012 reported that the risk of death for carrying a baby to term is "8.8 deaths per 100,000, while the risk of death linked to legal abortion is 0.6 deaths per 100,000 women . . . [which] means that a woman carrying a baby to term is 14 times more likely to die than a woman who chooses to have a legal abortion."[43] Additionally, the expert doctor testified that most of the poor women he saw were not seeking abortions out of convenience, but rather for financial or health reasons.[44]

Women who seek an abortion and are unable to obtain one are faced with severe financial, physical, and psychological hardships when forced to carry an unwanted pregnancy to term.[45] About 20 percent of women who do not obtain public funding for an abortion—a group consisting of many teenagers[46]—end up bearing unwanted children or alternatively turning to "back alley" abortions, which are often unsafe and psychologically damaging.[47]

To compound this issue, a 2012 study by researchers at the University of California, San Francisco reveals the after-the-fact economic implications for women who had been denied access to an abortion.[48] Out of the 800 women surveyed:

> [O]ne year later [after being denied or having obtained the abortion], the women denied an abortion were less likely than the women who received the abortion to be working full time and more likely to be receiving public assistance and living below the federal poverty line—*despite the fact that there were no economic differences between the two groups a year earlier*.[49]

40 *Id.*
41 McRae v. Califano, 491 F. Supp. 630, 668-69 (E.D.N.Y. 1980), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).
42 Berenknopf, *supra* note 7, at 662.
43 Serena Gordon, *Abortion Safer for Women Than Childbirth, Study Claims*, U.S. NEWS & WORLD REPORT (Jan. 23, 2012, 5:00 PM), http://health.usnews.com/health-news/family-health/womens-health/articles/2012/01/23/abortion-safer-for-women-than-childbirth-study-claims.
44 *McRae*, 491 F. Supp. at 668-69.
45 Boonstra, *supra* note 4, at 5; *see also* Siefker, *supra* note 37, at 276.
46 Berenknopf, *supra* note 7, at 662.
47 Siefker, *supra* note 38, at 291.
48 Boonstra, *supra* note 4, at 5.
49 *Id.* at 6 (emphasis added).

Women who are denied access to abortions are subject to much greater financial hardship in the years after being denied an abortion than those who were able to successfully terminate their pregnancy.[50] Moreover, many of these women end up receiving more money in the form of federal subsidies upon the birth of the child.[51] The Hyde Amendment ensures that these cycles of poverty remain firmly in place: for indigent women on Medicaid, they are faced with further financial hardship; for women who had not initially faced financial hardship, the lack of access pushes them further into the cycle of poverty.[52]

This problem is highlighted by the 2011 cuts to the Department of State Health Services (DSHS) Family Planning Program in Texas, as a result of which abortion clinics have been shut down at an alarming rate, Planned Parenthood has lost a significant portion of their funding, and other family planning services have faced cuts as well.[53] These cuts were expected to result in an additional twenty-four thousand unplanned births between 2014 and 2015 and to cost Texas' taxpayers an estimated additional $273 million in medical expenses and Medicaid coverage.[54] This is in stark contrast to the fact that family planning services lead to Medicaid *savings* of up to $5.60 per dollar invested.[55] As Fran Hagerty, the president and CEO of the Women's Health and Family Planning Association of Texas noted, "On average it costs less than $240 to provide a year's worth of family-planning services to each client . . . compare[d] . . . to the cost of just one Medicaid birth at over $12,000."[56] Given that nearly one-third of women of child-bearing age will have an abortion at some point in their lifetime,[57] abortion has become the most common gynecological surgery.[58] Not only does it make economic sense to continue to provide access to safe and affordable abortions, but it also contributes to the health, safety, and well-being of women.

Finally, despite the various moral objections by abortion opponents, we should grant women the respect and reproductive autonomy they deserve and to which they are legally entitled. Put in other words:

> Medicine can never be completely divorced from our social and moral judgments about the proper role of medical treatment in our lives or whether scarce resources should be used to provide such treatment. The role that morality plays is most prominent in the reproductive health area, especially for treatment that enables women to control their fertility.

50 *Id.*
51 Alexia Garcia-Ditta, *Teen Pregancy Prevention, Family Planning Programs Face Cuts*, TEXAS OBSERVER (June 23, 2015, 5:09 PM), http://www.texasobserver.org/budget-cuts-planned-parenthood-family-planning/.
52 *See id.*
53 *E.g.*, Tara Culp-Resser, *By The Numbers: The Dangerous Consequences of Texas' Crusade Against Planned Parenthood*, THINKPROGRESS (Mar. 15, 2013, 10:45 AM), http://thinkprogress.org/health/2013/03/15/1725771/by-the-numbers-texas-planned-parenthood/.
54 *Id.*
55 *Id.*
56 Garcia-Ditta, *supra* note 51.
57 *Induced Abortions*, *supra* note 26.
58 Siefker, *supra* note 38, at 274.

> However, society has decided that discrimination based on certain kinds of assumptions is unacceptable because of the harm it can cause socially, psychologically, physically, and economically. Actions that exclude women or treat them differently based on gender stereotypes are such examples, and Title VII and PDA [Pregnancy Discrimination Act of 1978] were enacted precisely to combat this type of discrimination.[59]

It is important to consider the message that is being conveyed when we provide funding for family planning and childbearing services but refuse to fund abortions. It is "telling that reproductive health care such as prescription, infertility, and abortion have routinely been labeled as not medically necessary, but rather a luxury or lifestyle choice."[60] This discriminatory funding suggests that we as a society only care about women when it comes to their ability to raise a family, but do not respect women when it comes to their personal decisions about controlling their fertility. We must treat and recognize abortion as an integral aspect of women's health care, which includes ensuring that women of all socioeconomic statuses are able to reliably and safely access this procedure.

II. THE SUPREME COURT'S SUPPORT FOR THE HYDE AMENDMENT

Since 1977, the Supreme Court has consistently upheld the constitutionality of the Hyde Amendment.[61] The Court has concluded that since Congress is permitted to adopt certain viewpoints to the exclusion of others,[62] the Hyde Amendment permissibly funds prenatal and postnatal expenses while withholding funds for nontherapeutic abortion.[63] These cases assert that while a woman has a right to seek an abortion, the government is not required to provide the funds to help her realize this right.[64] Namely, financial hardship is not a burden that has been created by the government and therefore the funding restriction does not violate a woman's due process rights.[65] While the three cases below demonstrate plain constitutional support for the Hyde Amendment,[66] ultimately the Court's analysis under the Due Process and Equal Protection clauses are faulty and merit further discussion.

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59 Clark, *supra* note 36, at 361.
60 *Id.* at 326.
61 *See* Harris v. McRae, 448 U.S. 297 (1980); Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977).
62 Siefker, *supra* note 38, at 280.
63 Soohoo, *supra* note 3, at 406.
64 *Harris*, 448 U.S. at 316.
65 *See id.* at 323.
66 *See id.*; *Beal*, 432 U.S. at 438; *Maher*, 432 U.S. at 464.

A. *BEAL V. DOE*

Beal v. Doe was one of the first cases that addressed the objectives of the Hyde Amendment.[67] Here, the Supreme Court upheld a challenge to a Pennsylvania regulation that required three separate doctors to certify that an abortion was "medically necessary" in order for the woman to receive federal funding under Medicaid.[68] This case articulated the distinction between abortions that are "medically necessary" (i.e. as a result of rape, incest, or instances in which the mother's life is endangered), versus nontherapeutic abortions (i.e. for any other reason for seeking an abortion).[69] The majority concluded that Medicaid funding could not be prohibited from covering medically necessary abortions, but was not required to fund nontherapeutic abortions.[70]

B. *MAHER V. ROE*

In *Maher v. Roe*, the Supreme Court evaluated a Connecticut regulation that, similar to *Beal v. Doe*, limited federal funding of abortions under Medicaid to "medically necessary" abortions by requiring a certificate of proof of medical necessity from a physician.[71] The Connecticut regulation also paid for medical services incident to childbirth and prenatal care, but did not fund nontherapeutic abortions.[72] The plaintiffs challenged the regulation for its viewpoint favoring childbirth over abortion.[73] The Supreme Court upheld this Connecticut regulation as constitutional, stating:

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternate activity consonant with legislative policy. Constitutional concerns are greatest when the state attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.[74]

Therefore, the Court held that this child-centric viewpoint was permissible for the state to adopt as long as the state did not implement an outright restriction on access to abortion.[75]

The Supreme Court went on to distinguish this regulation from the criminal sanctions that were at issue in *Roe v. Wade*.[76] It concluded that the Connecticut regulation "places no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . ."[77] Further, the Court held that *Roe* did not

67 *Beal*, 432 U.S. at 440.
68 Soohoo, *supra* note 3, at 403-04.
69 *Id*.; *Beal*, 432 U.S. at 441.
70 Soohoo, *supra* note 3, at 403-04.
71 Terry J. Wechler, *Tenth Circuit Survey*: *Health Law*, 73 DENV. U. L. REV. 767, 768 (1996).
72 Harris v. McRae, 448 U.S. 297, 313 (1980).
73 2 CHARLES E. TORCIA, 2 WHARTON'S CRIM. L. § 262 (15th ed. 2015).
74 Soohoo, *supra* note 3, at 405.
75 *Id.* at 404.
76 *Id.*
77 *Id.*

create an unqualified *right* to an abortion, but rather simply protects women from "unduly burdensome interference" in seeking an abortion.[78]

Because the Court concluded that there was no infringement upon a fundamental right and held that these women did not constitute a "suspect classification," the Court evaluated this regulation using the least stringent rational basis review.[79] Under this test, the Court found that the distinction in funding between childbirth and nontherapeutic abortion was "rationally related" to the State's "strong interest" in encouraging childbirth.[80] Once again, the Supreme Court reinforced the view that it is permissible for the State to encourage childbirth over nontherapeutic abortion, as long as the State does not establish an outright restriction on abortion access—thus, the indigent woman must still be able to pay for her own abortion.[81] However, the government is permitted to place certain obstacles in the path of a woman seeking an abortion, in this case, requiring proof of medical necessity and requiring the woman to pay out-of-pocket, in order to make childbirth a more attractive option.[82]

C. *HARRIS V. MCRAE*

Debate about the constitutionality of the Hyde Amendment and the government's ability to withhold federal funding for abortion culminated in *Harris v. McRae*.[83] In this case, the Supreme Court held the Hyde Amendment was constitutional under the Due Process Clause of the Fifth Amendment, the Equal Protection Clause, as well as the Establishment Clause.[84] Once again, the Court determined rational basis to be the appropriate standard of review because Congress did not infringe on a fundamental right and indigent women did not constitute a suspect class.[85] From this, the Court concluded that the Hyde Amendment bears a rational relationship to the legitimate state interest of "protecting the potential life of the fetus," thereby satisfying rational basis review.[86]

In *Harris*, the plaintiffs first challenged the Hyde Amendment's constitutionality under the Equal Protection Clause, arguing the Hyde Amendment unconstitutionally permitted states to discriminatorily and arbitrarily fund all other medical procedures at the exclusion of abortions.[87] In response to this challenge, the Court distinguished nontherapeutic abortions from other medical procedures as "inherently different," because no other procedure "involves the purposeful termination of potential life."[88] Therefore, the Court held that it was reasonable for Congress to refuse to

78 Maher v. Roe, 432 U.S. 464, 473-74 (1977).
79 Soohoo, *supra* note 3, at 406-07.
80 TORCIA, *supra* note 73.
81 *Id.*
82 *See Maher*, 432 U.S. at 464.
83 Harris v. McRae, 448 U.S. 297 (1980).
84 Saunders & Franzonello, *supra* note 2, at 600.
85 Soohoo, *supra* note 3, at 406.
86 *Harris*, 448 U.S. at 324.
87 Berenknopf, *supra* note 7, at 670-71.
88 *Harris*, 448 U.S. at 325.

fund such a procedure since it is uniquely and rationally related to the Government's legitimate objective of protecting the life of the fetus.[89]

Plaintiffs also brought a challenge under the Due Process Clause, noting that the Hyde Amendment infringes on their liberty, which includes the right to seek an abortion under *Roe v. Wade*.[90] The Court responded that liberty is indeed protected by the Due Process Clause and includes protection against "unwarranted government freedom of choice in the context of personal decisions."[91] Liberty also grants a woman the freedom to choose to terminate her pregnancy for health reasons.[92] However, the Court held that plaintiffs' liberty was not infringed upon because, although they are entitled to obtain an abortion prior to viability without government interference under *Roe*,[93] they were not entitled to the funds "to realize all the advantages of that freedom."[94] The Court analogized that the Government may not prohibit use of contraceptives or prevent parents from sending their children to private school, but it is not required to provide the funds in order for individuals to realize these rights.[95] In essence, the Court is permitting any woman to seek an abortion out-of-pocket, but will not take responsibility to ensure that women without funds to pay for an abortion can have this right realized through government funding. Congress's refusal to fund abortion does not constitute an infringement of this right; it is simply absolving itself of responsibility to help women realize this right.[96]

In response, plaintiffs argued that indigent women are a "suspect class" and therefore the Hyde Amendment should be evaluated under heightened scrutiny instead of rational basis review, because indigent women are systematically targeted through this law.[97] The Court responded that indigency was not a government-created obstacle preventing women from seeking an abortion because "financial constraints that restrict an indigent woman's ability to enjoy the full range of the constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[98] The Court held a woman's indigency was the obstacle in obtaining the abortion rather than the Hyde Amendment's "discriminatory funding scheme."[99] The Court continued, "in a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court had never held that financial need alone identifies a suspect class for purposes of an equal protection

89 Berenknopf, *supra* note 7, at 670-71.
90 *Harris*, 448 U.S. at 298.
91 *Id.* at 317-18.
92 *Id.*
93 TORCIA, *supra* note 73.
94 *Id.*
95 *Harris*, 448 U.S. at 318.
96 Boyd, *supra* note 10, at 298-99.
97 Soohoo, *supra* note 3, at 406.
98 *Harris*, 448 U.S. at 316.
99 Soohoo, *supra* note 3, at 406.

analysis."[100] After *Harris*, it became very difficult to challenge the Hyde Amendment based on financial status.[101]

Harris reaffirmed *Maher*'s conclusion that the states are permitted to "encourage an alternate activity consonant with legislative policy" and that this does not constitute direct interference with a protected activity.[102] The Court found that the funding scheme of the Hyde Amendment does not place a "government obstacle" in the path of a woman, but rather, "by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."[103] Once again, the Court held it is permissible for the government to exclude funding in favor of promoting their viewpoint about which course of action a pregnant woman should take.[104] Unfortunately, as will be discussed below, the *Harris* holding does not leave true options for women who are on Medicaid, and therefore, the Hyde Amendment presents a substantial obstacle in obtaining an abortion more often than not.

III. WHY THE HYDE AMENDMENT IS UNCONSTITUTIONAL

A. THE HYDE AMENDMENT IS INCONSISTENT WITH *ROE V. WADE*

The United States Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to protect individuals from certain government intrusions upon their fundamental rights.[105] *Roe v. Wade* established the principle that, under the fundamental right of privacy, the government may not outlaw abortion prior to viability because before this point in gestation, the woman's interest in terminating her pregnancy is greater than the State's interest in protecting the fetus.[106] The Court explicitly rejected the States' interest in protecting fetal life in the first trimester, upholding the woman's interest in terminating her pregnancy as more important.[107] Following this line of reasoning, "it could be argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in *Wade*."[108] However, in the abortion funding cases discussed above, the Supreme Court has unfortunately failed to follow its own established precedent:

> If *Roe v. Wade* stands for the proposition that a state's interest in prohibiting a woman from having a previability abortion is constitutionally subordinate to a woman's interest in having one, how in *Maher* did the

100 *Harris*, 448 U.S. at 323.
101 *Id.*
102 Boyd, *supra* note 10, at 300.
103 *Id.*
104 *Id.*
105 Boyd, *supra* note 10, at 299.
106 Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113, 1116 (1980).
107 *Id.* at 1126-27.
108 TORCIA, *supra* note 73.

> state's interest in discouraging abortion become paramount to a woman's interest in terminating her pregnancy?[109]

The narrowest reading of *Roe v. Wade* suggests "government may not predicate action on the view that abortion is in and of itself morally objectionable" because if the government was permitted to take such actions based on moral viewpoints,[110] it would necessarily follow that "the government's interest in preventing abortion would be weightier than a woman's interest in terminating her pregnancy" in the first trimester.[111] However, as the legislative history discussed below will demonstrate, moral objections to abortion are the foundation and primary purpose of the Hyde Amendment.[112] The Medicaid program is designed to provide comprehensive medical services to women in need; however, the Hyde Amendment narrows the scope of Medicaid to further Congress's viewpoint that abortion is morally objectionable.[113]

Additionally, *Roe v. Wade* established the principle that the government may not take actions that would make an abortion "unduly burdensome" to obtain.[114] Although the Court does permit the government to further its pro-childbirth viewpoint by refusing to subsidize abortion, the funding scheme that the Hyde Amendment sets in place is, in practice, unduly burdensome.[115] Justice Brennan interpreted this to mean that *Roe* freed women from "any state burden which would restrict her choice to have an abortion."[116] The Hyde Amendment is in tension with this principle, since it was a "deliberate attempt by Congress to coerce women out of their choice and to achieve indirectly what Congress could not achieve directly," and poor women were the unfortunate targets and victims of Hyde.[117] Moreover, Brennan's dissent in *Maher* points to the "majority's due process analysis as conditioning the benefit (the funding of expenses related to childbirth) on relinquishing of a woman's constitutionally protected right (the right of privacy to choose to bear a child)."[118] Admittedly, the *Roe* Court only recognized a woman's right to seek an abortion in the first trimester and did not grant her the right to have this procedure funded by the government.[119] However, this right works better in theory than it does in practice. A poor woman without the resources to obtain an abortion cannot actually realize her right to seek an abortion.[120] Therefore, "If she cannot seek an abortion, she cannot choose an abortion."[121] The Hyde Amendment thus creates an "undue burden" upon

109 Michael J. Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO L.J. 1991, 1197 (1978).
110 Perry, *supra* note 106, at 1120.
111 *Id.* at 1116-17.
112 *E.g.*, Boonstra, *supra* note 4.
113 Perry, *supra* note 106, at 1125.
114 *Id.*
115 *Id.* at 1117.
116 Berenknopf, *supra* note 7, at 671.
117 *Id.*
118 Vuernick, *supra* note 5, at 195.
119 Berenknopf, *supra* note 7, at 672-73.
120 *Id.*
121 *Id.*

these women because it forces them to bear children they otherwise would not have due to financial constraints.[122]

The Court has held that infringements of the fundamental right of privacy are not limited to outright denials of this right, but can also include placing obstacles in the way of a woman's ability to fully realize this right.[123] If the Government infringes upon the fundamental right to privacy, the Court must evaluate the statute under strict scrutiny, the highest standard of review.[124] The *Roe* Court recognized "first, that only fundamental rights are embraced by the concept of privacy; second, that the right of privacy includes the abortion decision; and finally, that where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'"[125] Since *Roe* requires an infringement of this privacy right to be evaluated under strict scrutiny, and since the government's interest in the Hyde Amendment is not sufficient to succeed under strict scrutiny, the Hyde Amendment is unconstitutional under *Roe v. Wade*.[126]

The Hyde Amendment circumvents the holding in *Roe v. Wade* by preventing indigent women in their first trimester from obtaining an abortion.[127] The Hyde Amendment does not encourage an alternate activity that it finds more favorable, instead it circumvents *Roe* through discriminatory funding.[128]

B. THE HYDE AMENDMENT VIOLATES THE DUE PROCESS CLAUSE

The Supreme Court, in the three aforementioned cases, failed to fully appreciate that the right to seek an abortion has consistently been recognized as protected under the fundamental right of privacy.[129] Justice Brennan echoed this sentiment in his *Maher* dissent, suggesting that the funding was being withheld in a way that prohibited women from exercising their right to seek an abortion, and therefore, violated the Due Process Clause.[130] The Supreme Court has repeatedly held that infringements of fundamental rights include "restraints that make exercise of these rights more difficult."[131] Justice Brennan argued that the disparity in funding between childbirth and abortion "clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure."[132] By financing pregnancy and childbirth only, the government essentially

122 *Id.*
123 Maher v. Roe, 432 U.S. 464, 487 (1977) (Brennan, J., dissenting).
124 JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 5:17 (2014).
125 Roe v. Wade, 410 U.S. 113, 155 (1973).
126 *See id*.
127 Barenknopf, *supra* note 7, at 672-73.
128 *Id.*
129 *Id.* at 673 n.142.
130 Maher v. Roe, 432 U.S. 464, 484-85 (1977) (Brennan, J., dissenting).
131 *Id.* at 487.
132 *Id.* at 483.

eliminates any real option a woman in poverty has in deciding whether to bear her child or seek an abortion.[133]

Additionally, even in situations where there was no rape, incest, or other extreme circumstance that threaten a woman's health or life, pregnancy can impose substantial harm on a woman if she "does not consent to the condition of pregnancy."[134] This might seem contradictory—since if she engages in consensual sexual activity, she arguably consents to the "condition of pregnancy" that might occur as a consequence. However, this is not always the case. It is helpful to think about pregnancy as a nonconsensual harm using this example:

> A person who voluntarily smokes (action X), for example, may be considered responsible for that subsequent condition of lung cancer (condition Y), should it occur, but the person is not required to consent to the presence of cancer in her body. So, too, with pregnancy. A woman who voluntarily engages in sexual intercourse (action X), may be partially morally responsible for the condition of pregnancy (condition Y), should it occur, but it does not follow that she is legally required to consent to that condition.[135]

Therefore, if a woman does not consent to her pregnancy, it is an undue burden (as will be discussed further below) to compel her, through lack of funding, to carry through with this pregnancy.

1. The Hyde Amendment is an "Undue Burden" Under Planned Parenthood v. Casey

The principle tenet that emerges from *Planned Parenthood v. Casey* is that the State may encourage a woman to choose childbirth over abortion, but it must not place a "substantial obstacle" in the path of a woman that ultimately decides to obtain an abortion.[136] Debate following *Planned Parenthood v. Casey* was primarily concerned with which obstacles were considered to be "substantial" enough to be unconstitutional.

While the state may adopt a pro-childbirth viewpoint and may implement regulations that advocate childbirth over abortion, if these regulations would *prevent* a woman from obtaining an abortion, they would constitute substantial obstacles or burdens.[137] In *Planned Parenthood v. Casey*, the Court struck down a provision that required a woman to obtain spousal consent from her husband before obtaining an abortion.[138] The Court held this requirement to be a "substantial obstacle," even though it could be overcome if a woman was able to successfully persuade her husband.[139] Another example arises from *Planned Parenthood v. Danforth*,

133 *Id.*
134 Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1073 (1999).
135 *Id.* at 1091-92.
136 KUSHNER, *supra* note 124, § 6:23.
137 Siefker, *supra* note 38, at 280.
138 Maher v. Roe, 432 U.S. 464, 486 (1977) (Brennan, J., dissenting).
139 *Id.*

in which the Court held that Missouri's spousal consent requirement was unconstitutional because it prevented women from realizing their constitutionally protected right.[140] While the spousal consent requirement could undoubtedly have severe psychological implications for the woman, these effects are arguably not as "substantial" as the psychological, physical, and financial hardships that an indigent woman must face in the circumstance that she must bear an unwanted or unintended child because she was unable to secure the funds to have an abortion.

Applying *Casey* to the Hyde Amendment, the government has unconstitutionally placed a "substantial obstacle" in the path of an indigent woman on Medicaid.[141] As discussed earlier regarding the Hyde Amendment's effects on women, when a woman is denied funding for an abortion, she faces dire financial, psychological, and health consequences.[142] The Court in *Casey* struck down less stringent restrictions on abortion access than the ones in the Hyde Amendment.[143] By funding all of the expenses associated with pregnancy and childcare, and refusing to fund the expenses incident to nontherapeutic abortion, the government has once again placed a substantial obstacle in the path of a woman's right to obtain an abortion.

C. THE HYDE AMENDMENT VIOLATES THE EQUAL PROTECTION CLAUSE

1. Improper Fit to a Legitimate Government Interest

In rational basis review, the least stringent tier of scrutiny under an Equal Protection challenge, a statute will be upheld as constitutional as long as it bears a rational relationship to a legitimate government interest.[144] As discussed previously, the Hyde Amendment was upheld under rational basis review because the Court found the Government has a legitimate interest in promoting childbirth and protecting the fetus.[145] However, this government interest is both irrational and illegitimate, and should not have succeeded an analysis even under the lowest level of scrutiny.[146] The Medicaid funding restriction stems from an improper legislative purpose,[147] furthers a two-tiered system of medical services,[148] and irrationally singles out one medical procedure from receiving funding.[149] The Hyde Amendment discriminates "based on the

140 Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Vuernick, *supra* note 5, at 193.
141 *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992).
142 *E.g.*, Tara Culp-Ressler, *'No Taxpayer Funding For Abortion': How The Right's Rallying Cry Ends Up Hurting Millions Of Women*, THINKPROGRESS (Sept. 24, 2014, 2:27 PM), http://thinkprogress.org/health/2013/09/24/2672251/no-taxpayer-funding-abortion-report/.
143 *Maher*, 432 U.S. at 486 (Brennan, J., dissenting).
144 *Rational Basis*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/rational_basis (last visited Nov. 10, 2015).
145 Boyd, *supra* note 10, at 303.
146 Siefker, *supra* note 38, at 298-99.
147 McRae v. Califano, 491 F. Supp 630, 641 (E.D.N.Y. 1980), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).
148 Berenknopf, *supra* note 7, at 671-72.
149 KUSHNER, *supra* note 124, § 6:23.

classification burdening the decision to exercise the fundamental right established by *Roe v. Wade*. Simply the impact of the classification on women deserves closer scrutiny."[150] Because the Hyde Amendment creates a discriminatory funding scheme that impinges on a fundamental right, it should be evaluated under a higher level of scrutiny than rational basis. This would require a stronger government interest that is more closely tied to the purpose of the Hyde Amendment.[151] Using the following line of reasoning, it is clear that the fundamental right to privacy is being infringed upon by preventing a pregnant, indigent woman from seeking an abortion:

> Bodily integrity and liberty are a fundamental right. When a woman does not consent to pregnancy, the fetus situates her similarly to other victims of harm to their bodily integrity and liberty. To the degree that the state protects people from legal and medical harm to their bodily integrity and liberty, the Equal Protection Clause mandates the state to protect a woman from the legal and/or medical harm of a nonconsensual pregnancy. State failure to do so deprives a woman of her constitutional right to equal protection and her fundamental right to bodily integrity and liberty.[152]

Since the only interest the government has set forth as a justification for violating this fundamental right is the protection of the fetus, it is unlikely that the Hyde Amendment would succeed under a heightened level of scrutiny.[153]

From an Equal Protection standpoint, "[t]here is no rational basis for denying Medicaid coverage for one singled-out medical procedure that is safer than childbirth and significantly, indeed, overwhelmingly, less costly than childbirth in view of the probability of continuing welfare obligations for the state and federal government."[154] As Justice Brennan points out in his *Harris* dissent, childbirth and abortion are simply "two opposite approaches to pregnancy, and thus abortion should be viewed as any other medically necessary procedure."[155] Even under rational basis review, the Hyde Amendment's effect of singling out one medical procedure is arbitrary and should be re-evaluated.[156] Moreover, in his dissent in *Beal v. Doe*, Justice Brennan argues for an alternative definition of "medically necessary," and suggests it be defined as "any treatment chosen by a physician [for a particular condition]."[157] This is a much more accurate definition of "medically necessary," since, as discussed earlier, the health risks indigent women face as a result of pregnancy are much broader in scope than risks that result from rape, incest, or life endangerment.

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150 *Id.*
151 KUSHNER, *supra* note 124, § 5:17.
152 McDonagh, *supra* note 134, at 1084-85.
153 *See* McRae v. Califano, 591 F. Supp 630, 641 (E.D.N.Y. 1980), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).
154 KUSHNER, *supra* note 124, § 6:23.
155 Berenknopf, *supra* note 7, at 671.
156 KUSHNER, *supra* note 124, § 6:23.
157 Lucinda M. Finley, Note, *State Restrictions on Medicaid Coverage of Medically Necessary Services*, 78 COLUM. L. REV. 1491, 1497 (1978).

The Supreme Court has repeatedly upheld that the Hyde Amendment's classification of "pregnant individuals" versus "non-pregnant individuals" does not constitute gender discrimination under the Equal Protection Clause because pregnant women are a distinct group from non-pregnant women and men.[158] However, this issue has been framed incorrectly. This is undoubtedly a gender-based classification, which, as Justice Ruth Bader Ginsburg has noted, influences "the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life."[159] Pregnancy is a condition that is unique to women and therefore it is impossible to avoid gender-based distinctions when creating funding programs regarding reproduction and family care.

Additionally, since the Hyde Amendment passed via an amendment to an appropriations bill, it ideally should have an economic reason for choosing to exclude abortion funding from Medicaid services (although even a strong economic justification would likely not outweigh the medical necessity that many women face in seeking an abortion).[160] Justice Stevens points out the irony of the situation, since it is actually much more expensive for the government to pay for pre-natal and postpartum care than it would be to provide funding for abortions. He noted in his *Harris* dissent, "one lower court found that while a publicly funded abortion cost the State of Illinois an average of less than $150, the average cost to the state of a childbirth exceeded $1,350."[161] Funding abortions actually saves the Medicaid program money—money that could be used to provide women with prenatal and postnatal care for mothers who choose to carry the pregnancy to term.[162] Therefore, the Hyde Amendment does not reduce federal expenditures and is an irrational appropriations measure. This further undermines the credibility of the government's "legitimate interest" of protecting the fetus under the Equal Protection Clause.

The Hyde Amendment further violates the Equal Protection clause because the legislative history surrounding the passage of the Amendment contradicts and delegitimizes the government interests set forth in *Harris*.[163] Only after the Hyde Amendment failed to come to fruition in the form of a proposed constitutional amendment was it then introduced on the floor of the House of Representatives as an amendment to the annual appropriations bill for the Department of Health, Education, and Welfare in September 1976.[164] Prior to the Hyde Amendment, abortion opponents attempted to pass a similar measure in the House and ultimately failed.[165] Because of these failed attempts, Congress resorted to passing Hyde

158 McDonagh, *supra* note 134, at 1081-82.
159 *Id*. at 1081.
160 McRae v. Califano, 591 F. Supp 630, 641 (E.D.N.Y. 1980), *rev'd sub nom.* Harris v. McRae, 448 U.S. 297 (1980).
161 Perry, *supra* note 106, at 1124.
162 *Id.*
163 Finley, *supra* note 157, at 1515.
164 *McRae*, 591 F. Supp at 641.
165 *Id.*

through an appropriations measure rather than an authorization measure, which is the traditional venue for a piece of legislation of this nature.[166]

The legislative history also suggests that Congress viewed this Amendment as a moral rather than a financial issue.[167] In fact, Henry Hyde himself acknowledged the discriminatory motive of the Hyde Amendment. He explained, "If rich women want to enjoy their high-priced vices, that is their responsibility . . . that is fine, but not at the taxpayers' expense."[168] He conceded further, "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill."[169] In looking at the legislative history surrounding the Hyde Amendment, it is clear that the legislature acted with animus and that the amendment's intentions were to prohibit abortions through the only means available at the time (rather than shifting the costs, which is what passage through an appropriations bill would suggest).[170]

Although the government claims a legitimate interest in preserving the life of the fetus, the legislative history makes clear that the purpose of the measure was to target as many women as possible to prohibit them from obtaining an abortion rather than protecting the fetus.[171] Further, because a fundamental right is being infringed upon, the government has failed to offer any compelling interest that would justify such infringement on this right.[172] No economic justifications or moral justifications are sufficient to uphold the Hyde Amendment, rendering it unconstitutional under all levels of scrutiny.

2. Poverty as a Suspect Classification

The Supreme Court has recognized that in determining whether or not to evaluate a classification based on wealth:

> [The classification] must be found to be arbitrary or should be linked to the denial of a fundamental right in order to receive strict scrutiny. *Harris v. McRae* . . . failed to appreciate that the law in practice restricted the access to abortion that *Roe v. Wade* had held to be a fundamental right. It is necessary to find an absolute denial of access to the right, rather than a mere impediment.[173]

Poverty is the common denominator in all cases where women on Medicaid are seeking an abortion.[174] Since the Hyde Amendment disproportionately targets impoverished women, these women should be considered a suspect classification under an Equal Protection analysis.[175]

166 Berenknopf, *supra* note 7, at 658-659.
167 *McRae*, 591 F. Supp at 641.
168 Boonstra, *supra* note 4, at 3.
169 *Id.*
170 *Id.*
171 *Id.*
172 *McRae*, 591 F. Supp at 641.
173 KUSHNER, *supra* note 124, § 5:17.
174 *McRae*, 591 F. Supp at 668-69.
175 Boyd, *supra* note 10, at 302-03.

Once a "suspect classification" is established, the Supreme Court must analyze the Amendment under strict scrutiny, which requires Congress to put forward a compelling government interest narrowly tailored to achieve this interest.[176] However, under the Hyde Amendment's discriminatory funding scheme, the legitimate interest of "protecting the life of the fetus" would likely not have sufficed under strict scrutiny, since, as discussed above, it was not even tailored appropriately under the least stringent rational basis review.[177]

As Justice Marshall recognizes in his dissent in *Harris v. McRae*, the *Harris* decision perpetuates a "'two-tiered' approach to equal protection."[178] Justice Marshall advocated applying heightened scrutiny to the evaluation of the Hyde Amendment since "indigent women were a powerless class in need of protection."[179] Furthermore, he contended that since the Hyde Amendment amounts to a near outright denial of indigent women's ability to exercise their right to obtain an abortion, this infringement of a fundamental right would have made Congress' interests in protecting the fetus invalid even under rational basis review.[180]

While the Court in *Harris v. McRae* rejected plaintiffs' contention that indigent women are a suspect class and therefore should be evaluated under strict scrutiny, it is important to look at how the *Harris* Court incorrectly came to this conclusion.[181] In holding that indigent women are not a suspect class, the Court utilized the two-prong test from *San Antonio Independent School District v. Rodriquez*.[182] This test, that "indigent women" as a group failed to satisfy, required "evidence that the financing system discriminates against any *definable category* of poor people" and "[the financing system] results in the absolute deprivation of [the asserted right]."[183] The *Harris* court was mistaken, as it is clear that indigent women do satisfy this two-part test in *Rodriquez*.[184] First, in order to have been eligible to receive the Title XIX benefits under the New York law at issue in *Harris*, indigent women must "fall within the strictly defined parameters of the federal-state program of cooperative federalism" and the "New York statutes set out the specific age, health, residence, and income requirements necessary to receive benefits."[185] These parameters are sufficient to qualify indigent women as a "definable category" of poor women, which satisfies the first prong of the *Rodriquez* test.[186]

Next at issue is whether or not the New York statute amounted to a full deprivation of the right to seek an abortion.[187] These women are fully

176 *Id.* at 302.
177 Harris v. McRae, 448 U.S. 297, 346 (1980).
178 *Id.* at 341.
179 *Id.* at 342.
180 *Id.* at 346.
181 Boyd, *supra* note 10, at 302-03.
182 *Id.*; San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973).
183 Boyd, *supra* note 10, at 302.
184 *Id.* at 302–03.
185 *Id.* at 302.
186 *Id.*
187 *Id.*

dependent on Title XIX funds in order to obtain an abortion and Medicaid withholds funds for women who are seeking a safe and affordable abortion.[188] Therefore, they are effectively deprived of the right to seek an abortion unless they turn to funds needed to sustain their livelihood or funds devoted to basic necessities, which creates an undue burden for them if they must use this money towards an abortion. Consequently, the second prong of the *Rodriquez* test is satisfied.[189] The Court's analysis in *Harris* missed these crucial aspects, failing to afford indigent women the suspect classification they deserve.[190] Thus, any challenges to the Hyde Amendment should be evaluated under strict scrutiny.[191] Because Congress has not set forth any interests besides that of protecting the life of the fetus, the Hyde Amendment likely would not survive review under strict scrutiny, and is therefore likely unconstitutional.

IV. STATE CONSTITUTIONS AS ALTERNATIVE BASES FOR CHALLENGING THE CONSTITUTIONALITY OF WITHHOLDING FUNDING FOR ABORTIONS TO INDIGENT PREGNANT WOMEN

It is highly unlikely that the Hyde Amendment will be repealed anytime soon, given the current political climate marked by a polarization of Congress and a shocking lack of bipartisanship. Despite this, state constitutions are a promising avenue for achieving individual liberties, as many state constitutions interpret privacy interests broader than the federal interpretations.[192] Given that "[t]he U.S. Supreme Court has not clearly demarcated the boundaries of the due process right to privacy . . . [a] state court seeking to diverge from federal precedent is therefore likely to explore its own constitution's due process clause."[193] Further, "state courts may also perceive themselves as the primary guardians of state citizens' individual rights and liberties and be more inclined to read their constitutions broadly."[194] Success on a claim to the right to privacy, particularly regarding indigent pregnant women, will depend on the following:

> (1) the court's perception of the state constitution as a guarantor of protection of citizens' rights; (2) the court's willingness to follow the U.S. Supreme Court's recent right to privacy decisions; and (3) the court's view of the right to privacy as demonstrated by state case law.[195]

Most courts which have challenged the abortion-funding restrictions based their challenges on due process concerns, specifically emphasizing

188 *Id.* at 303.
189 *Id.*
190 *Id.*
191 *See id.* at 302.
192 Vuernick, *supra* note 5, at 187-88.
193 *Id.* at 210.
194 *Id.*
195 *Id.* at 211.

that the states are "uniquely suited to protecting individual rights and liberties."[196]

A. NEW YORK

Hope v. Perales, provides an excellent example of a state Supreme Court case in which a program similar to the Hyde Amendment was declared unconstitutional.[197] The program at issue was the Prenatal Care Assistance Program in the state of New York, which provided prenatal medical assistance but did not fund abortions to pregnant women who had incomes below 185 percent of the federal poverty line.[198] The Court held that this program violated the Due Process Clause because it discriminated against the fundamental right of those women who needed an abortion but could not obtain one and was thus unconstitutional.[199] The Court held:

> . . .state statutes providing a system of prenatal and postpartum care for income-eligible women and their children, but denying funding for exercise of right to choose medically necessary abortion, violated state constitution as to due process, where restriction on abortions had no rational relationship to statutory purpose of promoting infant and mother health.[200]

While the State may favor childbirth over abortion, it could not do so through interference of a fundamental right.[201] The Supreme Court of New York County also recognized the practical implications of the program, noting "freedoms such as [the right to choose an abortion] are protected not only against heavy handed frontal attack but from being stifled by more subtle interference."[202] Therefore, just as the New York State Supreme Court did, the United States Supreme Court should repeal the Hyde Amendment as it violates the Due Process clause for denying pregnant indigent women safe and affordable access to an abortion.

B. NEW JERSEY

In *Right to Choose v. Byrne*, the New Jersey Supreme Court was faced with a funding prohibition on medically necessary abortions.[203] Although the statute differed somewhat from the Hyde Amendment, the themes underlying the right to privacy remained the same.[204] First, the Court determined that the proper standard of review was strict scrutiny given the fact that the fundamental right to choose whether or not to have an abortion was at issue (although, notably, the New Jersey equal protection clause explicitly outlines the individual's right to privacy).[205] Distinct from the

196 *Id.* at 203.
197 Hope v. Perales, 634 N.E.2d 183 (Ct. App. N.Y. 1994).
198 *Id.* at 185.
199 *Id.*
200 TORCIA, *supra* note 73.
201 *Hope*, 634 N.E.2d at 187.
202 Vuernick, *supra* note 5, at 213.
203 *Id.* at 198; Right to Choose v. Byrne, 91 N.J. 287 (1982).
204 Vuernick, *supra* note 5, at 198.
205 *Id.* at 199-200.

Supreme Court, the New Jersey Supreme Court found that "[t]he right to choose whether to have an abortion . . . was a fundamental right of all pregnant women, including those entitled to Medicaid reimbursement for necessary medical treatment."[206] The court found that the State interest in preserving the life of the fetus did not outweigh a woman's interest in her life and health.[207] From this, the court found that a balancing test was appropriate in such situations "where a state law directly infringes on a fundamental right."[208] In their application of the balancing test, the court concluded that "In balancing the protection of a woman's health and her fundamental right to privacy against the asserted state interest of protecting potential life, we conclude that the governmental inference is unreasonable."[209] If other states were to follow New Jersey's example, and analyze the statute under a balancing test whenever a fundamental right is being infringed upon, it would lead to the recognition of the mother's interest and the health, financial, and emotional implications that pregnancy has on her, not just the fetus.

C. MASSACHUSETTS

In *Moe v. Secretary of Admininstration & Finance*, the court established that the plaintiffs had "the right to have abortions nondiscriminatorily funded."[210] From there, they determined that "[w]hile the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burdens the exercise of a fundamental right."[211] The funding scheme at issue withheld funds related to abortions while funding expenses related to childhood, which the court found placed an obstacle in the path of a woman seeking an abortion and was therefore unconstitutionally discriminatory.[212] Because the state had begun distributing funds to pregnant women, they were prohibited from distributing these funds in a discriminatory manner.[213] The court explained, "although the legislature may determine not to subsidize any medical procedures for the indigent, once it had chosen to fund the cost of health care for a pregnant woman, it had to do so with genuine indifference."[214] Although this argument has not succeeded in the Supreme Court since it has been established that the legislature may fund programs favoring one viewpoint over another, this might be an approach that would succeed on the state level, depending on the individual state constitution.

206 Tracy Bateman Farrell, Annotation, *Validity of State Statutes and Regulations Limiting or Restricting Public Funding for Abortions Sought by Indigent Women*, 118 A.L.R. 5TH 463, § 7[b] (2004).
207 *Id.*
208 Vuernick, *supra* note 5, at 199.
209 *Id.*
210 Vuernick, *supra* note 5, at 204-05; Moe v. Secretary of Admininstration & Finance, 382 Mass. 629 (1981).
211 Vuernick, *supra* note 5, at 204-05.
212 *Id.*
213 *Id.* at 204–05.
214 *Id*.

D. OREGON

In *Planned Parenthood Ass'n. v. Department of Human Resources*, 297 Or. 562 (1984), the Supreme Court of Oregon upheld the proposition that was established by *Roe v. Wade* despite the United States Supreme Court's failure to do so.[215] The Oregon court stated, "*Wade* established that the state's interest in protecting potential human life during the first two trimesters is no greater than the mother's interest in protecting her health. The state is not free, as a matter of constitutional law, to challenge that proposition."[216] The state upheld the principal established by *Roe v. Wade* and determined that any state interest in prohibiting abortions in the first trimester are not sufficient to outweigh a woman's privacy interest.[217]

E. MINNESOTA

In *Women of the State v. Gomez*, the Court recognized the real-life implications of refusing to fund abortions for women on Medicaid.[218] The court admitted that, "[they] could not say that an indigent woman's decision whether to terminate her pregnancy was not significantly impacted by the state's offer of comprehensive medical services if the woman carried the pregnancy to term."[219] Therefore, the court utilized strict scrutiny given the fact that this withholding of funding violated these women's fundamental right to privacy.[220] Minnesota recognized the real-life implications of withholding funding from indigent women and realized that, more often than not, the funding scheme left them little choice but to carry the pregnancy to term, even if the child was unwanted.[221] Going forward, it is important for other states to recognize the practical implications of these statutes that withhold funding.

F. CONNECTICUT

Doe v. Maher, which grappled with a Connecticut regulation that restricted funding for abortions in cases of emergency for women on Medicaid, is useful in utilizing its analysis to formulate an equal protection argument.[222] The *Maher* court highlighted the gender-based discrimination that was present in abortion funding schemes, stating, "all the male's medical expenses associated with reproductive health, for family planning and for conditions unique to his sex were paid . . . [S]ince only women can become pregnant, discrimination against pregnancy by not funding abortion when it was medically necessary . . . was sex oriented discrimination."[223] This suggests that individuals seeking to challenge a similar statute or

215 *Id.* at 200–01.
216 *Id.*
217 *Id.*
218 Farrell, *supra* note 206, § 17[b]; Women of the State v. Gomez, 542 N.W.2d 17 (Minn. 1995).
219 *Id.*
220 *Id.*
221 *Id.*
222 Farrell, *supra* note 206, § 8; Doe v. Maher, 40 Conn. Supp. 394 (1986).
223 *Id.* § 12.

program would be wise to utilize an equal protection argument for gender discrimination since the court in *Maher* accepted this argument.

V. CONCLUSION

Although the Supreme Court has consistently supported the Hyde Amendment through the years, there is compelling evidence that it is unconstitutional. First and foremost, the Hyde Amendment is inconsistent with the precedent established by *Roe v. Wade* and *Planned Parenthood v. Casey*, which prohibits the government from establishing an "undue burden" in the path of a woman seeking an abortion, a standard that is almost certainly met here by indigent women seeking an abortion. Additionally, the Hyde Amendment violates the Due Process Clause, infringing upon indigent women's fundamental right to privacy by eliminating any real option they have in deciding whether to bear a child or seek an abortion.

Furthermore, the government interest in withholding funding for abortion is not only improper, as evidenced by the animus-ridden legislative history, but it is also arbitrary, as shown by the contradicted "economic goals" of the government justifications for the Hyde Amendment, which costs more money than it saves. Although the Supreme Court has recognized that it is permissible for Congress to fund prenatal and childbirth-related expenses at the exclusion of funding abortion, it is crucial that the real-life effects of the Hyde Amendment be considered as well. The discriminatory nature of Hyde's funding scheme creates a subclass of women who are unable to obtain an abortion, creating a "suspect classification" meriting evaluation under strict scrutiny in an Equal Protection analysis. Given the government's lack of a legitimate justification for withholding funding, if the Supreme Court evaluates the Hyde Amendment under strict scrutiny, it is highly likely that it would be found unconstitutional.

Although on the United States Supreme Court level a repeal at this point in time is improbable, the various state challenges in New Jersey, Oregon, Minnesota, Massachusetts, Connecticut, and New York have demonstrated the possibility of successful challenges against Hyde-type statutes on the state level. Individuals interested in challenging similar state statutes would be advised to explore their individual state constitution's due process clause, given that many state constitutions interpret privacy interests broader than the federal interpretations.

While the Hyde Amendment only withholds funding in theory, in practice it completely eliminates any option for millions of women to obtain an abortion. Not only is this unconstitutional, but it creates an exclusive sub-class of women and denies their agency in making decisions about their reproductive health.