

## A Travesty of Justice: Revisiting *Harris v. Mcrae*

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## A TRAVESTY OF JUSTICE: REVISITING *HARRIS V. MCRAE*

JILL E. ADAMS & JESSICA ARONS\*

*There is something drastically wrong with a conception of reproductive freedom that allows this wholesale exclusion of the most disadvantaged from its reach. We need a way of rethinking the meaning of liberty so that it protects all citizens equally.*

—Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*<sup>1</sup>

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### INTRODUCTION

Anniversaries present an opportunity to look back, reflect, and celebrate. However, on the occasion of the *William & Mary Journal*

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1. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY*, 294 (1998).

of *Women & the Law's* 20th anniversary, we think it is even more important to look ahead to the next twenty years and imagine what progress can be made over the coming two decades.

Specifically, the time has come to revisit the 1980 Supreme Court decision of *Harris v. McRae*,<sup>2</sup> which upheld the Hyde Amendment's<sup>3</sup> denial of federal funds for abortion coverage for low-income women enrolled in the joint federal-state Medicaid program.<sup>4</sup> Coming only seven years after the Court issued its landmark opinion in *Roe v. Wade*,<sup>5</sup> *McRae* represented a sharp and immediate departure from the *Roe* precedent.

By ignoring that the constitutional right to abortion means little if a woman does not have the resources to access abortion care, the Court effectively condoned a two-tiered system of abortion rights that protected the affluent but allowed the government to interfere with the reproductive decisions of the poor. In short, *McRae* was a betrayal of *Roe* and of the promise it offered to protect the autonomy, equality, and dignity of all women, regardless of their income.

This is not to suggest that abortion rights are the only ingredient needed to ensure the equality of low-income women: "While a low-income woman may have one or two abortions in her life, she also must deal with poor, unsafe housing, inept medical care, lack of health insurance, pay inequities, and a host of other issues on an ongoing basis."<sup>6</sup> Nevertheless, as women's health activist Byllye Avery has noted, "For poor women, abortion is a matter of survival . . ."<sup>7</sup>

Despite the travesty of justice that *McRae* represented, it has calcified as precedent and is now regarded by many among the bench and the legal elite as a foregone conclusion. As recently as August of this year, the District Court of Alabama, in what was an otherwise excellent analysis striking down a law that sought to require abortion providers to obtain admitting privileges at local hospitals, took pains to distinguish other obstacles to abortion care from restrictions

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2. 448 U.S. 297 (1980).

3. Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, §§ 506–07, 128 Stat. 5, 409 (2013).

4. As of 2014, individuals under age 65 with incomes below 133% of the federal poverty line (\$15,521.10 for a family of 1) are eligible for Medicaid in states that have taken up Medicaid Expansion under the Affordable Care Act. See *Non-Disabled Adults*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Population/Adults/Non-Disabled-Adults.html>, archived at <http://perma.cc/PZ3T-GVQ7> (last visited Nov. 4, 2014); *2014 Poverty Guidelines*, MEDICAID.GOV (2014) <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Eligibility/Downloads/2014-Federal-Poverty-level-charts.pdf>, archived at <http://perma.cc/7V3V-2H55>.

5. 410 U.S. 113 (1973).

6. Jael Silliman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice* 285 (2004).

7. *Id.* at 65.

on abortion funding, citing *McRae* for support.<sup>8</sup> This conventional wisdom mirrors similar assertions by policymakers that the Hyde Amendment is a “longstanding Federal statutory restriction”<sup>9</sup> and therefore cannot or should not be changed.

But there is nothing about the *McRae* decision that makes it untouchable or unchangeable. *McRae* was rendered by a sharply divided Court, with four of the nine justices issuing scathing dissents that called out the majority decision as the retreat from *Roe* that it was.<sup>10</sup> And following the *McRae* ruling, reproductive rights litigators and activists aggressively and creatively sought to restore the abortion rights of low-income women under state law.<sup>11</sup> As a result of their efforts, the laws of seventeen states now require abortion coverage with state Medicaid funds.<sup>12</sup>

Moreover, the ongoing development of international human rights law has imposed significant obligations on governments to guarantee public health in ways that were neither discussed nor anticipated at the time *McRae* was decided.<sup>13</sup> In addition, the enactment of the Patient Protection and Affordable Care Act (ACA) both created a new baseline for our own government’s responsibility to ensure that people

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8. Here, the court must note an error that some courts have made in their undue-burden analyses. These courts have treated obstacles that arise from the interactions of regulation with women’s financial constraints, as well as other aspects of women’s circumstances, as ineligible to be “substantial obstacles” under *Casey*. In so holding, the *Abbott I* court relied on Supreme Court and Fifth Circuit cases which refused to find unconstitutional governments’ decisions not to subsidize abortion in a way that they subsidized other medical procedures, including childbirth. The public-funding cases do not show that obstacles that are aggravated by poverty are irrelevant to the constitutional analysis. The Supreme Court in the public-funding cases distinguished between “plac[ing] obstacles in the path of a woman’s exercise of her freedom of choice” and “remov[ing] those not of its own creation.” In cases like this one, while poverty may be relevant, the plaintiffs seek only for government not to regulate in a way that makes it more difficult for those poor women, that is, not to place an obstacle in the path. In the public-funding cases, plaintiffs sought to force affirmative government action to facilitate women’s abortions, removing the difficulties that poverty creates generally. *There is a difference between declining to interfere with a person and refusing to assist her.* The plaintiffs in this case ask only that Alabama not interfere with their patients’ ability to obtain abortions.

Planned Parenthood Se. Inc. v. Strange, No. 2:13cv405-MHT, 2014 WL 3809403, at \*26 (M.D. Ala. Aug. 4, 2014) (emphasis added) (citations omitted).

9. Exec. Order No. 13535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

10. *Harris v. McRae*, 448 U.S. 297, 329–57 (1980) (Brennan, J., dissenting) (Marshall, J., dissenting) (Blackmun, J., dissenting) (Stevens, J., dissenting).

11. Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 501 (2009).

12. *State Policies in Brief: State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Aug. 2014), available at [http://www.guttmacher.org/statecenter/spibs/spib\\_SFAM.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf), archived at <http://perma.cc/Q3FM-U5CZ>.

13. See discussion *infra* Part II.E.

have access to affordable health care and reinvigorated a debate about insurance coverage for abortion care that has energized a new generation of activists to protest restrictions that deny abortion coverage to women.

The federal precedent will never change, however, unless those who recognize the injustices that *McRae* wrought fight to overturn it. Rhonda Copelon, an attorney and international human rights expert who challenged the Hyde Amendment and litigated several other cases that sought public supports for reproductive healthcare, wrote of a possible future in which reproductive rights were recognized as positive rights:

My hope for the next phase of the movement for procreative and sexual rights is that we not limit ourselves simply to winning back what we have lost, but rather set our sights on winning what we need: recognition of an affirmative right of self-determination. . . . This will [ ] require recognizing that it is society's responsibility both to protect [reproductive] choice and to provide the material and social conditions that render [reproductive] choice a meaningful right rather than a mere privilege.<sup>14</sup>

Outside of the legal arena, activists have undertaken a robust effort to challenge the status quo on abortion affordability, reimagine and create a new political reality and, as Copelon suggested, win what we need.<sup>15</sup> The campaign is multipronged, employing organizing, communications, policy, and movement building strategies. While this work focuses on abortion rights (as opposed to the other reproductive health needs of low-income women, including those necessary to carry a wanted pregnancy to term), it does so in a way that recognizes the real-life implications of restrictions on access to abortion care and criticizes the discriminatory nature of laws that exploit the vulnerabilities of low-income women.

There are times when changes in the law spur cultural change. But more often than not, the court of public opinion must change before we are able to change the opinion of the courts.<sup>16</sup> Now that the reproductive health, rights, and justice movement<sup>17</sup> has begun

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14. Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 16 (1990–1991).

15. See, e.g., *About*, ALL\* ABOVE ALL, <http://allaboveall.org/about/about-all-above-all/>, archived at <http://perma.cc/FV2-R9W9> (last visited Nov. 4, 2014). “All\* Above All unites organizations and individuals to build support for lifting the bans that deny abortion coverage. Our vision is to restore public insurance coverage so that every woman, however much she makes, can get affordable, safe abortion care when she needs it.” *Id.*

16. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336–39 (1st ed. 1991).

17. For a discussion of distinctions among reproductive rights, reproductive health, and reproductive justice, see ASIAN COMM. FOR REPROD. JUSTICE, *A NEW VISION FOR ADVANCING*

to develop the necessary infrastructure to shift culture and policy in response to the Hyde Amendment, it is time to create a complementary vision to challenge the legal status quo on abortion coverage and funding.

Thus, it is with the ultimate goal of overruling *McRae* in mind that we have written this Article. Many may view such an effort as a Sisyphean task, but it is not impossible. The U.S. Constitution is a living document whose principles are broad enough to adapt to our society's evolving understanding of human rights, and these principles require an interpretation of its provisions that affirms the dignity of all people and affords them the opportunity to achieve their full potential.

This Article proceeds in two parts. First, we provide a brief overview of the history of abortion funding and coverage restrictions and the jurisprudence surrounding them. Second, we lay out the ways in which *McRae* was wrongly decided and warrants further attention and scholarship. In doing so, we rely heavily upon the compelling arguments of the *McRae* dissenters and the rich literature that has previously explored this subject—especially in the sections that address the level of review used by the Court and arguments related to substantive due process and human rights law. However, we also try to advance some novel theories, particularly with regard to the Equal Protection Clause. Although we confined most of our arguments to Fourteenth Amendment jurisprudence, we would encourage scholars to consider other sources of constitutional law as well.

By revisiting familiar theoretical territory and exploring some new terrain, we aim to spur fresh scholarship and advocacy by emerging and established thinkers and leaders alike. As advocates, our hope is that, by the *Journal's* 40th anniversary, we can celebrate the overruling of *McRae* and the dawn of an era that protects the rights of all women to determine for themselves, without government coercion, whether and when to have a child. We are excited to see what the next twenty years bring and expect it to include genuine progress in changing the legal culture in this country to recognize that the right to abortion is a right in name only when it is unaffordable.

## I. THE HISTORY OF ABORTION FUNDING AND COVERAGE BANS

In 1973, the Supreme Court decided *Roe v. Wade*, recognizing that the fundamental right to privacy includes the right to decide to

have an abortion.<sup>18</sup> Abortion opponents wasted no time in seeking ways to limit and undermine that right. One of the first places they started was with the issue of abortion funding.

Within months of the *Roe* decision, in December 1973, its opponents introduced the Helms Amendment, which prohibits U.S. foreign aid from being used to fund abortion services for women abroad.<sup>19</sup> That same year, abortion opponents attempted to restrict Medicaid coverage for abortion care in the U.S., but that effort failed.<sup>20</sup> In the meantime, they managed to enact several state versions that withheld state Medicaid funds from covering abortion care.<sup>21</sup>

Women's rights advocates challenged two such state laws, those of Connecticut and Pennsylvania, in cases that ultimately reached the Supreme Court. In *Maier v. Roe*<sup>22</sup> and *Beal v. Doe*,<sup>23</sup> the Court held that neither the U.S. Constitution nor the federal Medicaid statute required states to cover nontherapeutic abortions. However, the Court did not rule on whether a denial of funds for medically indicated abortions was constitutionally or statutorily infirm because the challenged state statutes only prohibited the use of funds for abortions that were *not* "medically necessary,"<sup>24</sup> which was the relevant standard under the Medicaid statute.

In 1976, the Hyde Amendment, which limited federal Medicaid coverage of abortion care, was passed into law for the first time as a policy rider attached to the fiscal year 1977 annual appropriations bill that funded the Department of Health, Education, and Welfare.<sup>25</sup>

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18. 410 U.S. 113, 153 (1973).

19. LUISA BLANCHFIELD, CONG. RESEARCH SERV., RL41360, ABORTION AND FAMILY PLANNING—RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 3 n.7 (2014).

20. Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 402 (2012).

21. *Id.* at 402 n.49.

22. 432 U.S. 464, 478 (1977).

23. 432 U.S. 438, 447 (1977).

24. In the discourse surrounding abortion care, laws and regulations often draw distinctions between abortions that are necessary to preserve a woman's health (i.e., "therapeutic," "medically indicated," or "medically necessary") and those that are not (i.e., "nontherapeutic" or "elective"). However, as Justice Brennan noted in his *Beal* dissent, pregnancy always requires medical care, no matter whether its outcome is childbirth or abortion. *Beal*, 432 U.S. at 449 (Brennan, J., dissenting) (quoting *Roe v. Norton*, 408 F. Supp. 660, 663 n.3 (Conn. 1975)).

Pregnancy is unquestionably a condition requiring medical services. . . . Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth. "[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy . . . ."

*Id.*

25. *Harris v. McRae*, 448 U.S. 297, 302 (1980). The Department of Health, Education and Welfare was later split into the Department of Health and Human Services and the Department of Education. *Id.* at 302 n.2.

Abortion-rights advocates immediately obtained an injunction, which was eventually appealed to the Supreme Court, but Congress continued to re-enact various incarnations of the Hyde Amendment in subsequent annual appropriations measures or joint resolutions.<sup>26</sup>

After the Supreme Court decided *Maher* and *Beal*, the Court vacated the preliminary injunction against the Hyde Amendment and remanded the case for further consideration.<sup>27</sup> After a long trial, the district court found that all versions of the Hyde Amendment were unconstitutional under the Equal Protection and Due Process components of the Fifth Amendment and the Free Exercise Clause of the First Amendment.<sup>28</sup>

The initial measure as passed was a complete ban on abortion coverage in the Medicaid program. However, legislators later added an exception—allowing for abortion when a pregnancy endangers a woman’s life—in conference to end a months-long impasse between the House and Senate over the amendment.<sup>29</sup> The version that applied for most of the 1978 fiscal year and all of the 1979 fiscal year also included exceptions for abortions where a pregnancy resulted from rape or incest, as well as in “instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.”<sup>30</sup> By the time the case reached the Supreme Court, the version that was in effect (for fiscal year 1980) included exceptions for life-endangering pregnancies and those caused by rape or incest,<sup>31</sup> but not those that threatened the health of the woman.<sup>32</sup>

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26. *Id.* at 302–04.

27. *Id.* at 304.

28. *McRae v. Califano*, 491 F. Supp. 630, 736–42 (E.D.N.Y. 1980).

29. Julie Rovner, *Abortion Funding Ban Has Evolved Over the Years*, NPR (Dec. 14, 2009), <http://www.npr.org/templates/story/story.php?storyId=121402281>, archived at <http://perma.cc/FZQ7-SY5R>.

30. *Califano*, 491 F. Supp. at 642 (quoting H.R.J. Res. 662, 95th Cong. § 101 (1977)).

31. The specific reporting requirements in order to qualify for the rape or incest exception to abortion funding vary from state to state. See Dylan Matthews, *How Do Rape Exceptions Work?*, WASH. POST (Aug. 21, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/21/howdo-rape-exceptions-work/>, archived at <http://perma.cc/N46E-4TDN>. In Iowa, women must submit a police report of the rape within 45 days of the crime’s occurrence and attach the report to their Medicaid claim in order to get funding for an abortion. See *id.*; see also Amanda Dennis & Kelly Blanchard, *A Mystery Caller Evaluation of Medicaid Staff Responses about State Coverage of Abortion Care*, 22 WOMEN’S HEALTH ISSUES e143, e145 (2012) [http://www.whijournal.com/article/S1049-3867\(11\)00251-9/pdf](http://www.whijournal.com/article/S1049-3867(11)00251-9/pdf), archived at <http://perma.cc/84ZQ-USCW> (finding that Medicaid staff often provided inconsistent information in order to discourage women from seeking abortion coverage, including false information about coverage for pregnancies resulting from rape and incest).

32. *Harris v. McRae*, 448 U.S. 297, 302–03 (1980). Those same three exceptions (life, rape, and incest) are also in effect today.



Despite some indications in *Maher* and *Beal* that a denial of funds for medically necessary abortions might be fatal to the measure, the Court relied heavily on the reasoning of those cases to uphold the Hyde Amendment in *McRae*, even in the absence of a health exception. Drawing an arguably artificial distinction between “direct state interference with a protected activity” and “state encouragement of an alternative activity,” the Court found that the legislation created no new obstacle to accessing abortion care and that there was no constitutional obligation to “subsidize abortions.”<sup>33</sup> In sum, in the view of the five-Justice *McRae* majority, it was the woman’s poverty, not the denial of Medicaid coverage for abortion care, that interfered with her ability to get an abortion: “The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.”<sup>34</sup>

In response to the *McRae* decision, beginning in the early 1980s, abortion-rights advocates sought to expand Medicaid coverage for abortion at the state level.<sup>35</sup> They did so for the most part by challenging state policies that prohibited Medicaid coverage for medically necessary abortions while fully covering prenatal care and childbirth.<sup>36</sup> Challenges to these state restrictions were largely successful, with the majority of the courts in these suits finding the Medicaid restrictions to be invalid under state constitutional guarantees.<sup>37</sup> Today, whether pursuant to statute or court order, the law in seventeen states requires the use of state Medicaid funds to cover abortion care in most or all cases that are “medically necessary.”<sup>38</sup> In addition, Indiana, Utah, and Wisconsin provide state coverage for abortions deemed “necessary to prevent grave, long-lasting damage to the woman’s physical health,” and Iowa, Mississippi, and Virginia cover abortions in the case of fetal anomaly.<sup>39</sup> Outside of these states, however, women enrolled in Medicaid are still bound by the *McRae*

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33. *Id.* at 314–15.

34. *Id.* at 316.

35. Wharton, *supra* note 11, at 501.

36. *Id.* at 501–02.

37. *Id.* at 501–02, 502 n.189.

38. *State Policies in Brief: State Funding of Abortion Under Medicaid*, *supra* note 12. The seventeen states are: Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, Oregon, Vermont, Washington, West Virginia. *Id.* It should be noted, however, that of those seventeen states, two are not in compliance with court orders requiring Medicaid coverage of abortion care. See JESSICA ARONS & MADINA AGÉNOR, CTR. FOR AM. PROGRESS, SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR 7 (2010), available at [http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde\\_amendment.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf), archived at <http://perma.cc/7BS3-3TN2>.

39. *State Policies in Brief: State Funding of Abortion Under Medicaid*, *supra* note 12.

decision and the Hyde Amendment and are therefore denied coverage for abortion care beyond cases of life endangerment, rape, or incest.

In the wake of *McRae*, the number of abortions covered by federal Medicaid funds dropped 1000-fold.<sup>40</sup> In 1977, Medicaid covered nearly 300,000 procedures; in 1992, it covered fewer than 300.<sup>41</sup> Restrictions on abortion funding and coverage in other federal health programs and plans have since proliferated.<sup>42</sup> Today, coverage for abortion care in most circumstances is denied not only to women enrolled in Medicaid, but also to disabled women in Medicare, adolescents in the Children's Health Insurance Program, military personnel and dependents, veterans, federal civilian employees and their dependents, Peace Corps volunteers, Native Americans aided by the Indian Health Service, District of Columbia residents, and women in federal prisons and detention centers.<sup>43</sup>

In 2010, the Hyde policy barring federal funding of abortion coverage was applied to the private insurance market with the passage of the ACA.<sup>44</sup> Under the ACA, health insurers that cover abortion care in their plans must segregate tax credits and other federal subsidies from private premiums and use only the latter to pay for coverage of abortion care.<sup>45</sup> The ACA also permits states to ban abortion coverage in private health plans sold in their insurance marketplaces.<sup>46</sup> Thus far, twenty-five states have taken up the invitation to do so.<sup>47</sup>

Consequently, over time, opponents of abortion rights have cast ever-wider nets to draw more people into the untenable position of needing to terminate a pregnancy but lacking the insurance coverage or financial resources to do so:

With attacks on abortion funding, abortion opponents have patiently pursued an incremental approach to eroding abortion rights and access that affects wider swaths of women each time. But they started doing so with the most vulnerable and marginalized

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40. ROBERTS, *supra* note 1, at 231.

41. *Id.*

42. ARONS & AGÉNOR, *supra* note 38, at 7–9.

43. *Id.*; Heather D. Boonstra, *Insurance Coverage of Abortion: Beyond the Exceptions for Life Endangerment, Rape and Incest*, 16 GUTTMACHER POL. REV. 2, 4 (2013); see also U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 307 (2011), available at <http://www.ice.gov/detention-standards/2011/pbnds2011.pdf>, archived at <http://perma.cc/JA7D-VKFN> (outlining restrictions on abortion care in detention centers); 32 C.F.R. § 199.4(e)(1)–(2) (2014) (outlining restrictions on abortion care in the military); 38 C.F.R. § 17.38(c)(1) (2014) (providing no abortion care or counseling by the Veteran's Administration under any circumstances).

44. Boonstra, *supra* note 43, at 4–5.

45. 42 U.S.C. § 18023(b)(1)–(2) (2014).

46. *Id.* § 18023(a)(1).

47. *State Policies in Brief: Restricting Insurance Coverage of Abortion*, *supra* note 12.

groups of women in our society. It is on their bodies that abortion funding policy has been forged, and they are the ones who pay the harshest prices.<sup>48</sup>

## II. THE CASE FOR REVISITING *HARRIS V. McRAE*

In this section, we offer several reasons why *McRae* was wrongly decided under the precedent of the time and attempt to develop some new theories that might spark further scholarship: namely, that the Hyde Amendment violates the government's obligation to remain neutral in distributing benefits, uses government funds to coerce a constitutionally protected decision, and unconstitutionally conditions government benefits on the abrogation of a constitutional right; that the Court used the wrong (lower) level of review given that the right to decide to have an abortion has been recognized as fundamental; that the Court failed to consider the liberty interest of a right to health at issue in *McRae*; that the Hyde Amendment violates the equal protection of the laws guaranteed by the Constitution because women seeking an abortion should be afforded the protections of a suspect class, laws showing animus against women seeking an abortion should fail even rational review, and abortion coverage and funding bans have a disparate impact on low-income women of color; and that the Hyde Amendment and similar policies violate human rights norms.

### A. *Government Treatment of Benefits*

#### 1. *Government Neutrality*

The principle of government neutrality provides that with respect to constitutional rights, the government may not place its thumb on the scale in the exercise of those rights. Thus, it cannot exclude speech it disfavors from public facilities,<sup>49</sup> it cannot offer rides to the polls for members of one political party but not the other,<sup>50</sup> and—when the standard is applied appropriately—the government cannot fund child-birth over abortion.

As Justice Stevens explained in his dissent in *McRae*: “The federal sovereign . . . must govern impartially. . . . [W]hen the sovereign provides a special benefit or a special protection for a class of persons,

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48. ARONS & AGÉNOR, *supra* note 38, at 5.

49. Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1165 (1993) (citing *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 787–89 (Cal. 1981)).

50. *Harris v. McRae*, 448 U.S. 297, 336 n.6 (1980) (Brennan, J., dissenting).

it must define the membership in the class by neutral criteria, it may not make special exceptions for reasons that are constitutionally insufficient.”<sup>51</sup>

The Court contradicted the neutrality principle when holding in *Maher*, and reaffirming in *McRae*, that the state may make “a value judgment favoring childbirth over abortion. . . .”<sup>52</sup> This holding in particular belied the fact that the *McRae* Court did not genuinely view the abortion right as fundamental.

In this retreat from *Roe*, the Court expressed fear of the slippery slope.<sup>53</sup> Justice Stewart, the author of the majority opinion, worried that the plaintiffs’ logic in *McRae* would result in a governmental obligation to fund abortion even if it did not fund other pregnancy-related care.<sup>54</sup>

To translate the limitation on governmental power [to interfere with the abortion decision] implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services.<sup>55</sup>

However, what Stewart missed in his analysis is that Congress *did* choose to subsidize other medically necessary care for pregnant and non-pregnant people alike and that it cut off coverage for abortion care precisely in order to further the state’s interest in protecting potential human life—i.e., in order to discourage poor women from exercising their fundamental right to choose abortion.<sup>56</sup> Under those circumstances, the government most certainly violated its obligation to maintain neutrality toward a fundamental right.<sup>57</sup>

The majority in *Maher*, on which the *McRae* decision relied heavily, did acknowledge that there are constitutional limits to the government’s policy choices:

The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of the indigent. But when a

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51. *Id.* at 349 (Stevens, J., dissenting) (citation omitted).

52. *Id.* at 314 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

53. *Id.* at 316.

54. Indeed, under human rights law, other countries have found an independent affirmative obligation to ensure affordable access to abortion care. See discussion *infra* Part II.E.

55. *McRae*, 448 U.S. at 318.

56. *Id.* at 336 n.6 (Brennan, J., dissenting).

57. *Id.* at 356–57.

State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.<sup>58</sup>

Unfortunately, the *Maher* Court determined those limitations did not apply because there was no “discrimination against a suspect class”<sup>59</sup> and there was no obstacle “in the pregnant woman’s path to an abortion.”<sup>60</sup> Thus, the state was free to make a policy choice to “finance certain childbirth expenses.”<sup>61</sup>

From time to time, every state legislature determines that, as a matter of sound public policy, the government ought to provide certain health and social services to its citizens . . . . The decision to provide any one of these services—or not to provide them—is not required by the Federal Constitution. Nor does the providing of a particular service require, as a matter of federal constitutional law, the provision of another.<sup>62</sup>

Justice Stevens, however, took on this reasoning as faulty in his *McRae* dissent: “Having decided to alleviate some of the hardships of poverty by providing necessary medical care, the government must use neutral criteria in distributing benefits.”<sup>63</sup> He went on to explain that just as the government may not deny benefits to someone because of her political affiliation, her religion, her race, or her speaking out in opposition to a government program, it may not deny a person benefits because she chooses to exercise her right to an abortion.<sup>64</sup>

Several of the state courts that have struck down bans on state Medicaid coverage of abortion under their own constitutions have done so on the grounds that the bans violate the neutrality principle.<sup>65</sup> Perhaps the Massachusetts Supreme Court summarized it best when it said:

As an initial matter, the Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. However, once it chooses to enter the constitutionally protected area of [reproductive] choice, it must do so with genuine indifference. It may not weigh the options open to the pregnant woman

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58. *Maher v. Roe*, 432 U.S. 464, 469–70 (1977).

59. *Id.* at 470.

60. *Id.* at 474.

61. *Id.* at 481 (Burger, J., concurring).

62. *Id.* at 464 (majority opinion).

63. *Harris v. McRae*, 448 U.S. 297, 356 (1980) (Stevens, J., dissenting).

64. *Id.*

65. See Kolbert & Gans, *supra* note 49, at 1163–66; Soohoo, *supra* note 20, at 436–38; Wharton, *supra* note 11, at 505.

by its allocation of public funds; in this area, government is not free to “achieve with carrots what [it] is forbidden to achieve with sticks.”<sup>66</sup>

Like Massachusetts, many state courts, including those of Alaska, California, Connecticut, Minnesota, New Jersey, New Mexico, and West Virginia, have used the neutrality framework to strike down their states’ laws that cover pregnancy and childbirth while denying coverage for abortion.<sup>67</sup> Utilizing language similar to that quoted by the Massachusetts court, these courts agreed that when a state government chooses to dispense funds, it must do so in a nondiscriminatory fashion.<sup>68</sup> As the New Jersey Supreme Court succinctly stated, it is simply “not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions.”<sup>69</sup>

In his dissent in *Beal*, the companion case to *Maher*, Justice Brennan delineated some of the real-life consequences of the Court’s decision: “The Court’s construction can only result as a practical matter in forcing penniless women to have children they would not have borne if the State had not weighted the scales to make their choice to have abortions substantially more onerous.”<sup>70</sup> A reverse policy—that made carrying to term substantially more difficult and abortion a much more feasible option—would be just as offensive to the Constitution.

Under the principle of government neutrality, it is equally intolerable when the government places its thumb on the scale of reproductive decision making in either direction. “The government, whether through burdensome regulation or through inaction in the face of

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66. *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 933 n.77 (1978)).

67. *State Dept. of Health & Soc. Servs. v. Planned Parenthood of Ala.*, 28 P.3d 904, 915 (Alaska 2001); *Comm. to Defend Reprod. Rights v. Meyers*, 625 P.2d 779, 784 (Cal. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 33 (Minn. 1995) (Coyne, J., dissenting); *Right to Choose v. Byrne*, 450 A.2d 925, 935 (N.J. 1982); *Women’s Health Ctr. of W. Va. v. Panepinto*, 446 S.E.2d 658, 666 (W. Va. 1993); *Doe v. Maher*, 515 A.2d 134, 151–52 (Conn. Super. Ct. 1986); Linda M. Vanzi, *Freedom at Home: State Constitutions and Medicaid Funding for Abortions*, 26 N.M. L. REV. 433, 452 (1996) (citing N.M. *Right to Choose/NARAL v. Danfelter*, No. SF 95-867(C) (N.M. Dist. Ct. July 3, 1995)).

68. *See* *Planned Parenthood of Ala.*, 28 P.3d at 915 (Alaska 2001); *Comm. to Defend Reprod. Rights v. Meyers*, 625 P.2d at 784 (Cal. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d at 33 (Minn. 1995) (Coyne, J., dissenting); *Right to Choose v. Byrne*, 450 A.2d at 935 (N.J. 1982); *Women’s Health Ctr. of W. Va. v. Panepinto*, 446 S.E.2d at 666 (W. Va. 1993); *Doe v. Maher*, 515 A.2d at 151–52 (Conn. Super. Ct. 1986); Vanzi, *supra* note 67, at 452 (1996) (citing N.M. *Right to Choose/NARAL v. Danfelter*, No. SF 95-867(C) (N.M. Dist. Ct. July 3, 1995)).

69. *Byrne*, 450 A.2d at 935.

70. *Beal v. Doe*, 432 U.S. 438, 454 (1977) (Brennan, J., dissenting).

need, should not compel a woman to have either an abortion or a child against her will.”<sup>71</sup>

## 2. Government Coercion

Any coercion by the government infringing on the people's protected liberties ought to sound warning sirens for the ultimate arbiters of the Constitution. Their suspicions, along with their scrutiny, should heighten when that coercion is levied against a person or group of people least able to withstand or overcome it, due to economic constraints, political powerlessness, social stigma, or disenfranchisement. The *McRae* ruling allowed the government to use the Hyde Amendment to coerce the constitutionally protected procreative choices of poor women, who are disproportionately young and of color,<sup>72</sup> knowing their vulnerabilities often render their resistance futile.<sup>73</sup>

For the time being, a majority in Congress has adopted the view that childbirth is a greater public good than abortion<sup>74</sup> and has decided to use the Medicaid program as a means to promote and incentivize its favored pregnancy outcome while discouraging and, as a practical matter in many instances, preventing the disfavored outcome. Thus, under the Hyde Amendment, Medicaid covers prenatal, labor and delivery, and postpartum care, as well as miscarriage management when necessary—in other words, all costs associated with pregnancy except for abortion.<sup>75</sup> Any Medicaid-eligible person with this particular health condition—pregnancy—has a “choice” between a treatment that is fully covered by insurance on the one hand and a treatment that must be paid fully out-of-pocket on the other.

The Court explained that Congress has merely *encouraged* an alternative activity (childbearing) deemed in the public interest and has not directly interfered with a protected activity (abortion).<sup>76</sup> “Constitutional concerns are greatest when the State attempts to impose its

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71. Jessica Arons, *More than a Choice: A Progressive Vision for Reproductive Health and Rights*, CTR. FOR AM. PROGRESS 19 (Sept. 13, 2006) [http://cdn.americanprogress.org/wp-content/uploads/issues/2006/09/more\\_than\\_a\\_choice.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2006/09/more_than_a_choice.pdf), archived at <http://perma.cc/Z22L-U4UQ>.

72. See Jessica Arons & Lindsay Rosenthal, *How the Hyde Amendment Discriminates against Poor Women and Women of Color*, CTR. FOR AM. PROGRESS 5 (May 10, 2013), <http://americanprogress.org/issues/women/news/2013/05/10/62875/how-the-hyde-amendment-discriminates-against-poor-women-and-women-of-color>, archived at <http://perma.cc/9LP3-B3VP>.

73. See Kenneth Agran, *When Government Must Pay: Compensating Rights and the Constitution*, 22 CONST. COMMENT. 97, 100 (2005) (describing a constitutional framework mandating governmental assistance to realize the full promise of constitutional rights).

74. The majority acknowledges as much in deferring to Congress's “policy choice.” *Harris v. McRae*, 448 U.S. 297, 333 (Brennan, J., dissenting).

75. *Id.* at 333–34.

76. *Id.* at 325 (majority opinion).

will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."<sup>77</sup>

The Court effectively stated that the full funding of one pregnancy option over the other has no impact on a poor woman's "choice." "[T]he Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all."<sup>78</sup>

In *Roe*, however, the Court articulated a constitutionally protected right to privacy that encompassed the *choice* to terminate a pregnancy—a decision that is to be made free from government interference.<sup>79</sup> Both the majority opinion and the dissents in *McRae* recognized this critical aspect of *Roe*'s holding.<sup>80</sup> As Justice Brennan wrote in his dissent, *Roe* and its progeny stand for the proposition "that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion."<sup>81</sup>

Policy that makes either pregnancy option more attractive or available interferes in the decision-making process. Given that the affected population is, by virtue of qualifying for the program, severely poor, it is reasonable to surmise that the coverage disparity would, at a minimum, factor into a person's decision—simultaneously encouraging pregnancy and discouraging abortion.<sup>82</sup> Yet the opinion in *McRae* ignored how a disparate funding scheme casts a shadow on the abortion decision, mentioning only how it shines a light on pregnancy and birth.<sup>83</sup>

77. *Id.* at 314–15 (quoting *Maier v. Roe*, 432 U.S. 464, 475–76 (1977)).

78. *Id.* at 298. Given that the ACA relies on the government providing tax credits and other subsidies to offset premiums for private insurance plans as the primary means of achieving the goal of universal health coverage, the implications of the Court's reasoning are far reaching. Indeed, it is what the proponents of the Stupak Amendment, H.R. 3962, 111th Cong. § 265 (as passed by House, Nov. 7, 2009), were hoping would enable them to use health reform as a vehicle to effectively ban abortion coverage in private health plans. See Jessica Arons, *Why The Stupak Amendment Is a Monumental Setback For Abortion Access*, THINK PROGRESS (Nov. 9, 2009, 10:45 AM), <http://thinkprogress.org/health/2009/11/09/171044/stupak-amendment-jessica/>, archived at <http://perma.cc/CE5B-LUFQ>.

79. *McRae*, 448 U.S. at 329–30 (Brennan, J., dissenting).

80. "The doctrine of *Roe v. Wade*, the Court held in *Maier*, 'protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy' . . ." *Id.* at 314 (majority opinion).

81. *Id.* at 330 (Brennan, J., dissenting).

82. *Id.* at 333–34.

83. It follows that the Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life. By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions (except those whose lives are threatened), Congress has established incentives that make



The Hyde Amendment, however, may in some cases do far more than simply factor into a poor person's decision about an unwanted pregnancy; it may be dispositive. In such instances, the government reaches beyond mere influence in the woman's decision-making process to commandeer it. Justice Brennan describes how the financial incentive is so overbearingly powerful that it can make the abortion decision illusory:

[T]he reality of the situation is that the Hyde Amendment has effectively removed this choice from the indigent woman's hands. By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse.<sup>84</sup>

As Justice Brennan points out, it is this very intrusion into the decision-making process that renders the Hyde Amendment unconstitutional.<sup>85</sup> "By thus injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion, the Hyde Amendment deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty right recognized in *Roe v. Wade*."<sup>86</sup>

Of the thirteen state courts that have struck down abortion funding restrictions, nearly all have recognized the coercive effect of providing only select subsidies to Medicaid recipients.<sup>87</sup> The Minnesota Supreme Court, for instance, stated:

Indigent women . . . are precisely the ones who would be most affected by an offer of monetary assistance, and it is these women who are targeted by the statutory funding ban. We simply cannot say that an indigent woman's decision whether to terminate her pregnancy is not significantly impacted by the state's offer of comprehensive medical services if the woman carries the pregnancy to term.<sup>88</sup>

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childbirth a more attractive alternative than abortion for persons eligible for Medicaid.

*Id.* at 325 (majority opinion).

84. *McRae*, 448 U.S. at 333-34 (Brennan, J., dissenting).

85. *Id.* at 330 n.4.

86. *Id.* at 333.

87. Vanzi, *supra* note 67, at 446. See, e.g., *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 798 (Cal. 1981) (stating that the decision whether or not to have an abortion is guaranteed to every woman, rich or poor, free from government coercion).

88. *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995).

Similarly, the opinion dismantling Connecticut's funding restriction referred to this situation as "the poor woman's dilemma."<sup>89</sup> Like the Minnesota scheme, the Connecticut Medicaid program paid for all pregnancy and childbirth related costs, while only subsidizing abortions when a woman's life was in danger.<sup>90</sup> But other restrictions in Connecticut's welfare system served to make that state's Medicaid ban on abortion coverage even worse.

Calling the restriction a cruel one, the court explained how the policy placed a woman "in a trap" with no financial or legal recourse.<sup>91</sup> The recipient was not allowed to receive funds from any other sources without that amount being deducted from her welfare allowance the following month.<sup>92</sup> Failing to report such a loan could disqualify her from future benefits and subject her to criminal charges.<sup>93</sup> "Because payments [were] made directly to the provider and no cash allowance [was] given for medical assistance, [the recipient was not] given the choice of being able to forego [sic] other medical necessities in favor of the abortion."<sup>94</sup> The court concluded, "the state has boxed her into accepting the pregnancy and carrying the fetus to term."<sup>95</sup> It was this coercion that forced the court to find the scheme unconstitutional.

The record is clear that Hyde was designed to discourage people from exercising a fundamental right to terminate a pregnancy.<sup>96</sup> But the *McRae* Court only tepidly acknowledged that the amendment could result in more pregnancies being carried to term than would have occurred without it.<sup>97</sup> Instead, the Court tried to absolve the government of any role in these altered outcomes, or in the decision-making process itself, suggesting it is the pregnant woman's poverty alone that may push her into continuing an unwanted pregnancy—not the government's action in financially supporting childbirth or its inaction in not supporting the alternative.<sup>98</sup>

Justice Brennan disagreed, observing, "For what the Court fails to appreciate is that it is not simply the woman's indigency that

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89. *Doe v. Maher*, 515 A.2d 134, 153 (Conn. Super. Ct. 1986).

90. *Id.* at 137.

91. *Id.* at 153.

92. *Id.* at 154.

93. *Id.*

94. *Id.*

95. *Maher*, 515 A.2d at 154.

96. The Hyde Amendment has far-reaching influence. The very existence of a slanted funding scheme expresses a value judgment and inserts the government's voice into public and private conversations about abortion. In the current climate of abortion stigma, this implicit judgment could cause any person, regardless of insurance source, to feel ashamed of her abortion or intimidate her enough not to have one. See Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 *CULTURE, HEALTH & SEXUALITY* 625, 633–35 (2009).

97. *Harris v. McRae*, 448 U.S. 297, 302 (1980).

98. *Id.* at 316.

interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth."<sup>99</sup> Recognizing the full implications of the policy, he concluded that the Hyde Amendment "both by design and in effect . . . serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have."<sup>100</sup>

### 3. *Unconstitutional Conditions*

The government may choose how to distribute its largesse, including deciding whether, what, and whom to fund through social safety-net programs.<sup>101</sup> However, it must do so within constitutional constraints.<sup>102</sup> The Supreme Court has reviewed a variety of cases regarding the conditional allocations of benefits, including those involving public assistance, and it has taken different approaches to determining the constitutionality of the conditions applied.<sup>103</sup> One of the most commonly applied analytic frameworks for judicial review of these cases is the unconstitutional conditions doctrine.<sup>104</sup>

The Supreme Court first recognized the unconstitutional conditions doctrine in 1926 in *Frost & Frost Trucking Company v. Railroad Commission of California*, declaring:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not

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99. *Id.* at 333 (Brennan, J., dissenting).

100. *Id.* at 330.

101. *Maier v. Roe*, 432 U.S. 464, 469 (1977).

102. *Id.* at 469–70.

103. According to Professor Lynn A. Baker, analyses used to examine conditioned allocations include the "right/privilege distinction," "the Pareto superiority test of modern welfare economics and its implied 'bargain' model," and a "motivation analysis." Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1190 (1990); see also Candice T. Player, *Public Assistance, Drug Testing, and the Law: The Limits of Population-Based Legal Analysis*, 40 AM. J.L. & MED. 26, 75 (2014). Baker analyzed the constitutionality of mandatory drug testing of welfare recipients and explained that when analyzing unconstitutional conditions claims,

Courts will usually begin by asking whether the condition "burdens" or "impinges upon" protected interests. If so, courts will require the government to demonstrate that the regulation is narrowly tailored to a compelling governmental interest. If not, courts will sustain the regulation with evidence of a rational relationship between means and ends.

Baker, *supra*.

104. Baker, *supra* note 103, at 1193–94.

necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>105</sup>

Since then, the doctrine has been applied—often without explicit mention—to cases involving liquor licenses,<sup>106</sup> cash assistance,<sup>107</sup> unemployment benefits,<sup>108</sup> and more.

Essentially, the unconstitutional conditions doctrine prohibits the government from conditioning the receipt of discretionary benefits on the waiver of a constitutionally protected right.<sup>109</sup> While this classical iteration may seem straightforward in concept, its application has been anything but simple.<sup>110</sup>

In the absence of a clear explanation from the Court as to when and how the unconstitutional conditions doctrine will apply, and with what degree of scrutiny, lower courts and commentators have been left to connect the dots and try to pull patterns from the pages. Professor Lynn Baker has identified several themes in the Court's rhetoric:

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105. *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593–94 (1926) (holding that the railroad commission cannot require certain actions by the trucking company merely because it is required to obtain a permit).

106. *Liquormart v. Rhode Island*, 517 U.S. 484, 516 (1994) (striking down two Rhode Island statutes that prohibited advertisement of alcohol prices as abridging speech under the First Amendment).

107. *Wyman v. James*, 400 U.S. 309, 317–18 (1971) (holding that the receipt of public assistance depending on consent to a welfare official's entry into one's home is not a violation of the Fourth Amendment's prohibition against unreasonable searches); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (holding that the welfare family cap did not violate the Equal Protection Clause because it did not deprive the youngest child of any and all aid, but rather diminished the lot of the entire family); *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (holding that a statutory provision denying public assistance benefits on the basis of duration of residency constituted invidious discrimination).

108. *Sherbert v. Verner*, 374 U.S. 398, 398 (1963) (*overruled on other grounds* by *Emp't Div., Ore. Dep't. of Human Res. v. Smith*, 494 U.S. 872, 883–85 (1990)) (holding that conditioning unemployment benefits on a requirement to work on the Sabbath unconstitutionally penalizes the free exercise of religion).

109. See Carole M. Hirsch, *When the War on Poverty Became the War on Poor, Pregnant Women: Political Rhetoric, the Unconstitutional Conditions Doctrine, and the Family Cap Restriction*, 8 WM. & MARY J. OF WOMEN & L. 335, 352 (2002) (“[O]nce the government chooses to provide a benefit, it may not force the recipient to surrender a constitutional right to receive it.”).

110. Baker, *supra* note 103, at 1194.

The Court, in its search, has taken the perspective of the potential beneficiary and has focused on the extent and type of burden presented by the condition. Not surprisingly, given this perspective, the rhetoric of individual “choice” versus “coercion” permeates its discussions. In determining which conditions are coercive and therefore impermissible, the Court has explicitly looked to such characteristics as the “directness” or “substantiality” of the condition’s impact, the likelihood that the condition will deter the exercise of a constitutional right, the “germaneness” of the condition to the purpose of the benefit program, and the “importance” of the individual right or interest burdened.<sup>111</sup>

Many of these concepts and phrases appear in the *McRae* decision, particularly in the dissents.

The *McRae* Court stated that because the government was not required to cover *any* healthcare benefits through Medicaid, it could choose to exclude certain benefits or set conditions for the receipt of that benefit.<sup>112</sup> As Justice Brennan noted in his dissent, “Implicit in the Court’s reasoning is the notion that as long as the Government is not obligated to provide its citizens with certain benefits or privileges, it may condition the grant of such benefits on the recipient’s relinquishment of his constitutional rights.”<sup>113</sup> More recent assessments, however, have clarified that the discretionary nature of a particular benefit does not prohibit application of the unconstitutional conditions doctrine.<sup>114</sup>

The most robust treatment of the unconstitutional conditions doctrine by the majority appeared in a footnote.<sup>115</sup> There, the Court denied that the Hyde Amendment imposes a penalty on Medicaid recipients who exercise their right to choose abortion; “[a] refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”<sup>116</sup>

The Court then went on to state what *would* constitute an unconstitutional condition: if a woman were to lose eligibility to all Medicaid benefits because she exercised her constitutional right to have an abortion.<sup>117</sup> But because the Hyde Amendment does not

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111. *Id.* at 1194–95 (citations omitted).

112. *Harris v. McRae*, 448 U.S. 297, 308–09 (1980).

113. *Id.*

114. *See, e.g., Liquormart v. Rhode Island*, 571 U.S. 484, 513 (1984) (“Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right.”).

115. *McRae*, 448 U.S. at 317 n.19.

116. *Id.*

117. *Id.*

condition *all* Medicaid benefits on the surrender of a constitutional right, it is valid.

As Justice Brennan pointed out in his dissent, the Court's assessment missed a critical element.<sup>118</sup> The government is not simply *refusing to pay* the costs associated with a protected activity—in this case the right to terminate a pregnancy—it is *paying* the costs of one outcome of pregnancy but not the other.<sup>119</sup> “[T]he Court overlooks the fact that there is ‘more’ than a simple refusal to fund a protected activity in this case; instead, there is a program that selectively funds but one of two choices of a constitutionally protected decision, thereby penalizing the election of the disfavored option.”<sup>120</sup>

Justice Brennan analogized the government's one-sided financial support of a pregnant woman's decision to a hypothetical program in which the government would provide free transportation to the polls for a Democratic voter but no such service to a Republican voter:

[I]t is no answer to assert that no “penalty” is being imposed because the State is only refusing to pay for the specific costs of the protected activity rather than withholding other Medicaid benefits to which the recipient would be entitled or taking some other action more readily characterized as “punitive.” Surely the Government could not provide free transportation to the polling booths only for those citizens who vote for Democratic candidates, even though the failure to provide the same benefit to Republicans “represents simply a refusal to subsidize certain protected conduct,” . . . and does not involve the denial of any other governmental benefits.<sup>121</sup>

Although the Court recognized and condoned Congress's choice to favor one pregnancy option (childbirth), it failed to recognize the corollary, which is that the other option (abortion) is necessarily disfavored.<sup>122</sup> Justice Brennan was quick to observe how this led to an unprecedented result: “It suffices to note that we have heretofore never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally burdens one manner of exercising a constitutionally protected choice.”<sup>123</sup>

In response to the Court's argument that the unconstitutional conditions doctrine would be triggered only if *all* Medicaid benefits were denied to a woman who sought an abortion, Justice Brennan

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118. *Id.* at 336 n.6 (Brennan, J., dissenting).

119. *Id.*

120. *McRae*, 448 U.S. at 336 n.6 (Brennan, J., dissenting).

121. *Id.*

122. *Id.*

123. *Id.*

explained, “Whether the State withholds only the special costs of a disfavored option or penalizes the individual more broadly for the manner in which she exercises her choice, it cannot interfere with a constitutionally protected decision through the coercive use of governmental largesse.”<sup>124</sup>

Justices Brennan and Marshall also found that the Hyde Amendment creates an unconstitutional condition because for some women it has the same effect—rendering abortion out of reach—as would an outright prohibition on that activity.<sup>125</sup> Justice Brennan criticized the Court for not recognizing the amendment as a *de facto* ban: “The fundamental flaw in the Court’s due process analysis . . . is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.”<sup>126</sup>

Justice Marshall echoed Justice Brennan’s assertion that a denial in funding is tantamount to the outright denial of abortion: “The Court’s opinion studiously avoids recognizing the undeniable fact that, for women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of a legal abortion altogether. By definition, these women do not have the money to pay for an abortion themselves.”<sup>127</sup>

Unlike the majority, which did not give treatment to the real-life consequences of the amendment, Justice Marshall concentrated on the impact it has on the affected population.<sup>128</sup> He concluded, “The Court perceives this result as simply a distinction between a ‘limitation on governmental power’ and ‘an affirmative funding obligation.’ For a poor person attempting to exercise her ‘right’ to freedom of choice, the difference is imperceptible.”<sup>129</sup>

Like Justices Marshall and Brennan, a handful of state court judges have applied the unconstitutional conditions doctrine to invalidate state restrictions on Medicaid coverage for abortion.<sup>130</sup> For instance, in striking down Connecticut’s ban on state Medicaid funds to pay for most abortions, the Superior Court wrote that while there

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124. *Id.*

125. Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385, 398 (2013) (explaining that “for the [McRae] dissent, not only was the abortion recognized as an aspect of healthcare, but the abortion right included access to abortion services. This led to the conclusion that laws that restricted access also restricted the right itself.”).

126. *McRae*, 448 U.S. at 334 (Brennan, J., dissenting).

127. *Id.* at 338 (Marshall, J., dissenting).

128. *Id.*

129. *Id.* at 347 (citation omitted).

130. *See, e.g., Doe v. Maher*, 515 A.2d 134, 151 (Conn. Super. Ct. 1986).

is no mandate that a state provide entitlements such as welfare, a state may not extend or refuse to extend such entitlements in a constitutionally impermissible manner.<sup>131</sup> Not only are fundamental freedoms protected from overt attacks, the court wrote, but also from being stifled by more subtle government interference.<sup>132</sup> The court held that the state's Medicaid scheme constituted a *de facto* ban on abortion for low-income women and that such a ban amounted to an impermissible penalty for being poor.<sup>133</sup>

The practical effect of the Hyde policy is that some Medicaid-eligible women who want to terminate their pregnancies will end up carrying to term.<sup>134</sup> Under the Hyde Amendment, Medicaid recipients who do as the government wants, relinquish their right to abortion, and carry a pregnancy to term are compensated with coverage for all of their prenatal care and labor and delivery services.<sup>135</sup> Those who act against the government's wishes, and exercise their right to abortion, are punished. Their medical care is not covered, so they must beg, borrow, sell, and sacrifice to pull together the money to pay for their care—often at great detriment to both themselves and their families.<sup>136</sup>

Under the unconstitutional conditions doctrine, it should be no more acceptable for the government to condition a poor woman's receipt of Medicaid assistance for pregnancy-related care on the abrogation of her abortion right than it would be for the government to outlaw abortion directly.

131. *Id.*

132. *Id.* at 151–52.

133. *Id.* at 152 (“[T]he regulation impinges upon those constitutional rights to the same practical extent as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion.”).

134. STANLEY K. HENSHAW ET AL., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW 21 (2009), available at <http://www.guttmacher.org/pubs/MedicaidLitReview.pdf>, archived at <http://perma.cc/8ESS-XSH9>; Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL. REV. 1, 16 (2007) [hereinafter *Heart of the Matter*] (“Studies published over the course of two decades looking at a number of states concluded that 18–35% of women who would have had an abortion continued their pregnancies after Medicaid funding was cut off.”).

135. However, should these women live in one of sixteen states with welfare family caps, the child they are forced to carry may not be eligible for cash aid; thus, the woman and her family will be driven deeper into poverty, suffering the repercussions of food insecurity, housing instability, struggles paying for diapers and clothing, and health problems stemming from these social determinants. ELENA R. GUTIÉRREZ, CTR. ON REPROD. RIGHTS & JUST., BRINGING FAMILIES OUT OF ‘CAP’TIVITY: THE NEED TO REPEAL THE CALWORKS MAXIMUM FAMILY GRANT RULE 3 (2013), available at [https://www.law.berkeley.edu/files/bccj/CRRJ\\_Issue\\_Brief\\_MFG\\_Rule\\_FINAL.pdf](https://www.law.berkeley.edu/files/bccj/CRRJ_Issue_Brief_MFG_Rule_FINAL.pdf), archived at <http://perma.cc/ZHC6-ZALX>.

136. See CTR. FOR REPROD. RIGHTS, WHOSE CHOICE? HOW THE HYDE AMENDMENT HURTS POOR WOMEN 28–29 (2010), available at [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Hyde\\_Report\\_FINAL\\_nospreads.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf), archived at <http://perma.cc/56BV-PNFL>.



### B. *Wrong Level of Review*

Only seven years after *Roe v. Wade* had been decided, the Court in *McRae* departed from its holding in *Roe* that abortion regulations be subject to strict scrutiny—indeed, one could argue this retreat began even earlier, with *Maher* and *Beal*. Under the strict scrutiny standard of review, the government must show that any abortion restriction is narrowly tailored to further a compelling governmental interest.<sup>137</sup> Within only a few years, the Court retreated from *Roe*'s watershed precedent in its series of abortion funding cases, which culminated in *McRae*.<sup>138</sup>

Justice Stewart acknowledged that *Roe* recognized “a freedom of personal choice in certain matters of marriage and family life,” including “the freedom of a woman to decide whether to terminate a pregnancy.”<sup>139</sup> However, he stated that *Roe* merely “protects the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy” and does not prevent the state from making “a value judgment favoring childbirth over abortion, and . . . implement[ing] that judgment by the allocation of public funds.”<sup>140</sup>

Justice Stewart's language presaged the “undue burden” standard articulated in *Planned Parenthood v. Casey* that formally replaced *Roe*'s strict scrutiny standard.<sup>141</sup> While many view *Casey* as the beginning of the undue burden standard, in fact the Court started to subtly employ it as early as 1977 in the companion cases of *Maher v. Roe* and *Beal v. Doe*, discussed above.<sup>142</sup> It later implicitly applied the standard to minors in *Hodgson v. Minnesota*.<sup>143</sup> In other words, the Court initially tested out the undue burden standard on poor women, then applied it to minors, and eventually extended it to all women.

Stewart reasoned in *McRae* that the Hyde Amendment “places no governmental obstacle in the path of a woman who chooses to

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137. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

138. *Harris v. McRae*, 448 U.S. 297, 316–18 (1980) (distinguishing unwarranted government interference from entitlement).

139. *Id.* at 312.

140. *Id.* at 314 (emphasis added) (quoting *Maher v. Roe*, 432 U.S. 464, 473–74 (1977)).

141. *Planned Parenthood v. Casey*, 505 U.S. 833, 835–37 (1992).

142. “The Supreme Court first explicitly used the undue standard within the abortion context in a line of cases concerning government funding of abortions.” Valerie J. Pacer, *Salvaging the Undue Burden Standard—Is It a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L.Q. 295, 297 (1995).

143. *Hodgson v. Minnesota*, 497 U.S. 417, 449, 461 (1990) (stating that a forty-eight hour waiting period “imposes only a minimal burden” on a minor's right to an abortion and that the judicial bypass procedure avoids “unduly burdening” a minor's right to abortion).

terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.”<sup>144</sup> Again, Stewart’s language foreshadowed *Casey*’s definition of an undue burden as a restriction that has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>145</sup>

The Court took pains in both *Maher* and *McRae* to draw a distinction between *inserting* an obstacle into, versus *removing* an obstacle from, a woman’s path to obtaining an abortion. The Court concluded that while the state was prohibited from pursuing the former, it was not obligated to undertake the latter.<sup>146</sup> According to Justice Stewart, because the government did not create a poor woman’s indignity, it was not obligated to remedy it when she was in need of an abortion.<sup>147</sup>

Having made this distinction, Stewart easily found that, regardless of the liberty interest recognized in *Roe*, “it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”<sup>148</sup>

The dissenting justices, however, recognized the majority’s opinion as a stark departure from precedent. As Justice Marshall observed, “The Court’s decision today marks a retreat from *Roe v. Wade* and represents a cruel blow to the most powerless members of our society.”<sup>149</sup> He dispensed with the false dichotomy drawn by the majority by stating that for the women involved, it was a distinction without a difference.<sup>150</sup>

Justice Stevens’s dissent pointed out that *Roe* allowed for no burden whatsoever on the right to an abortion before viability:

[T]he Court explicitly held that prior to fetal viability [the government’s interest in potential human life] may not justify *any governmental burden* on the woman’s choice to have an abortion . . . . In effect, the Court held that a woman’s freedom to elect to have an abortion prior to fetal viability has *absolute constitutional protection*, subject only to valid health regulations. . . . We have a duty to respect that holding. The Court simply shirks that duty in this case.<sup>151</sup>

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144. *McRae*, 448 U.S. at 315.

145. *Casey*, 505 U.S. at 877.

146. *McRae*, 448 U.S. at 316.

147. *Id.* at 316–17.

148. *Id.* at 316.

149. *Id.* at 338 (Marshall, J., dissenting).

150. *Id.* at 347.

151. *Id.* at 350–51 (Stevens, J., dissenting) (emphasis added).

Justice Brennan agreed that *Roe* at a minimum imposed a complete prohibition on the regulation of a first-trimester abortion: “*Roe* and its progeny established that the pregnant woman has a right to be free from state interference with her choice to have an abortion—a right which, at least prior to the end of the first trimester, *absolutely prohibits any governmental regulation* of that highly personal decision.”<sup>152</sup>

Under the precedent that existed at the time—i.e., *Roe* and the Court’s apparent commitment to a health exception in *Maher* and *Beal*—many believed that the Hyde Amendment violated the Constitution: it regulated pre-viability abortion without furthering a valid health interest—and indeed it contravened the health interests of pregnant women; it amounted to an outright prohibition on abortion for many poor women who could not afford to pay for an abortion out of pocket; and it used the state’s power and the public purse to influence a woman’s decision whether to continue or end a pregnancy.<sup>153</sup> Only by disregarding precedent—and the conditions of poor women’s lives—could the Court come to a contrary conclusion.

Nor is it a cure to say that *Casey*’s undue burden standard is now the law of the land and therefore the Hyde Amendment is valid under current doctrine even if it should not have been upheld in *McRae*. Despite the many encroachments on *Roe* over the years, its central tenet still stands—the right to decide to have an abortion is fundamental.<sup>154</sup> As such, it should be treated like any other fundamental right: any regulation that burdens it should be subject to heightened scrutiny.<sup>155</sup>

Before *Casey*, the Supreme Court consistently defined fundamental rights as those that remain insulated from the continually shifting political majority. The undue burden standard, however, subtly undermines the protective barrier surrounding any fundamental right. It allows the current political majority to actively interfere with its citizens’ exercise of their fundamental rights, so long as such interference does not amount to an undue burden. Because it allows such interference, the undue burden standard appears irreconcilable with traditional fundamental rights protection.<sup>156</sup>

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152. *Harris v. McRae*, 448 U.S. 370, 330 (1980) (Brennan, J., dissenting) (emphasis added).

153. *Id.* at 329–34.

154. *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992) (“[A] state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability.”).

155. *See Roe v. Wade*, 410 U.S. 113, 170 (1973) (Stewart, J., concurring) (arguing for “particularly careful scrutiny” for personal liberties).

156. Pacer, *supra* note 142, at 313.

Indeed, states across the country have correctly recognized the right to abortion as fundamental. While states are bound by federal precedent when interpreting federal law, states are free to interpret their own constitutional guarantees to provide greater protection of rights.<sup>157</sup> Alaska, Arizona, California, Connecticut, Massachusetts, Minnesota, New Jersey, New Mexico, and New York courts, among others, have all recognized the privacy right, which includes abortion, to be a fundamental one warranting some form of heightened review, if not strict scrutiny.<sup>158</sup> Accordingly, these state courts balanced a pregnant Medicaid recipient's interest in obtaining an abortion against the state's interest in protecting fetal life and, in some cases, the state's fiscal interests. In all but one case, the courts found that a woman's fundamental right to abortion cannot be so impinged by the state without a more compelling state interest.<sup>159</sup>

Simply put, because *McRae* failed to treat the abortion decision as the fundamental right it was declared to be in *Roe*, the case was wrongly decided at the time. Though the Court has loosened its standards for abortion protections over the years, strategies should be developed for reinstating abortion as a fundamental right and ensuring that women have the means to pay for abortion care.

### C. *The Right to Health*

In the course of articulating a fundamental right to choose abortion, the *Roe* Court identified a governmental interest in maternal health so strong that at no point in pregnancy is it outweighed by an interest in the potential life of the fetus.<sup>160</sup> Whereas *Roe* required

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157. See, e.g., *Danforth v. Minnesota*, 552 U.S. 264, 295 (2008).

158. *Dept. of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 909–10 (Alaska 2001); *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 56 P.3d 28, 34–35 (Ariz. 2002); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 781 (Cal. 1981); *Moe v. Sec'y of Admin. & Fin.*, 417 N.E.2d 387, 402 (Mass. 1981); *Women of Minn. v. Gomez*, 542 N.W.2d 17, 31 (Minn. 1995); *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982); *Hope v. Perales*, 634 N.E.2d 183, 187 (N.Y. 1994); *Doe v. Maher*, 515 A.2d 134, 150–51 (Conn. Super. Ct. 1986); *Vanzi, supra* note 67, at 452 (citing *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991)) (stating that the New Mexico court determined the right to privacy to be a fundamental one and includes a “legally protected interest in limiting the size” of one’s family).

159. See, e.g., *Byrne*, 450 A.2d at 935 (holding that the restriction was subject to strict scrutiny; that the state must demonstrate a compelling state interest; that there was no less restrictive alternative available; and that while the protection of potential life is a legitimate state interest, at no point in pregnancy may it outweigh the superior interest in the life and health of mother). *But cf. Hope v. Perales*, 634 N.E.2d 183, 187 (N.Y. 1994) (recognizing the abortion right as fundamental, but finding that the state’s Medicaid program did not burden the exercise of that right).

160. *Roe*, 410 U.S. at 163–65. The National Organization for Women (NOW) and fellow amici expounded on the primacy of the health interest in their brief in the case of *Harris v. McRae*:

states to make exceptions to restrictions on abortion when the pregnant woman's health is at stake, the Hyde Amendment does not.<sup>161</sup> As noted above, the Hyde Amendment prohibits federal Medicaid coverage for all abortions, except for those necessary to save the life of the pregnant woman or for pregnancies resulting from rape or incest.<sup>162</sup> There is no federal coverage for abortion in cases where a pregnancy threatens, causes, or exacerbates a physical or psychological health problem for the woman. An undeniable effect of the amendment, then, is to threaten or even worsen women's health with no guarantee of ultimately protecting fetal life. Nevertheless, the *McRae* Court ignored the government's interest in maternal health in favor of its interest in the fetus. In doing so and in upholding an abortion restriction without a health exemption, the Court implicitly overrode one of the most fundamental tenets of *Roe*.<sup>163</sup>

The ramifications of the Hyde Amendment are well documented. A woman with a medically compromised pregnancy who lacks the necessary resources to pay for an abortion out of pocket must carry the pregnancy longer in order to cobble together the funds to pay for the procedure.<sup>164</sup> She thus suffers additional pain, discomfort, and debilitation, increasing the risk of permanent injury.<sup>165</sup> If she is able to obtain an abortion, it will be at a later gestational stage, increasing both the financial costs and physical risks of the procedure.<sup>166</sup> If

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Moreover, the pregnant woman's health is the *only* factor that overrides the state's interest in protecting fetal life after viability. At this time the state may regulate and even prohibit some abortions; however, even after viability this broad power is subordinated to the woman's interest in her health. . . . Thus, even in the last trimester of pregnancy when the woman's right to privacy has been ruled to be the weakest, the state may not restrict access to abortion in a manner dangerous to the woman's health.

Brief for Nat'l Org. of Women et al. as Amici Curiae Supporting Appellees, *Harris v. McRae*, 448 U.S. 297 (1980) (No. 79-1268) 1980 WL 339661 (internal citations omitted).

161. See CTR. FOR REPROD. RIGHTS, *supra* note 136, at 15; see also Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331 (1985).

162. See *supra* note 32 and accompanying text.

163. It was not until *Ayotte v. Planned Parenthood*, 546 U.S. 320, 330-32 (2006), that the Court formally held that, while state restrictions on abortion ought to include protections for women's health, the lack of a health exception would not necessarily render a law facially invalid.

164. Brief for Planned Parenthood Fed'n of America et al. as Amici Curiae Supporting Appellees, *Williams v. Zbaraz*, 448 U.S. 358 (1980) (Nos. 79-4, 79-5, 79-491), 1980 WL 339465 [hereinafter Brief for Planned Parenthood].

165. There are a variety of physical conditions that can worsen during pregnancy or increase other pregnancy-related risks, including heart disease, diabetes, cancer, blood clots, and sickle cell anemia. Pregnancy can also aggravate mental health conditions, particularly when women are forced to carry pregnancies under duress. *Harris v. McRae*, 448 U.S. 297, 339 (1980) (Marshall, J., dissenting).

166. It bears mention that, while abortion is an extremely safe medical procedure with an overall complication rate of 0.05% during the first trimester, the risks increase as a

she is unable to obtain an abortion, because she cannot procure the needed funds or because she has surpassed the time limits for when abortion care is available, she will be forced to carry a dangerous pregnancy to term, give birth, and risk permanent disability or death.<sup>167</sup> Another unfortunate possibility for a poor pregnant woman with a high-risk pregnancy is that she will seek the least expensive abortion option available, possibly exposing herself to substandard care, again increasing the risks to her health and life.<sup>168</sup>

Justice Marshall illustrated the gravity of the Hyde prohibition when drawn out to its logical conclusion: “Federal funding is thus unavailable even when severe and long-lasting health damage to the mother is a virtual certainty.”<sup>169</sup> State courts have echoed Justice Marshall’s concerns. The California Supreme Court, in examining the state’s limitation on Medi-Cal funding for abortion, noted that the primary purpose of the state’s welfare program was to promote health.<sup>170</sup> The restriction, the court stated, did just the opposite: “The restrictions at issue here directly impede this fundamental purpose. Even when an abortion represents the appropriate medical treatment for

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pregnancy continues. *Facts on Induced Abortion in the United States*, GUTTMACHER INST. (July 2014), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html), archived at <http://perma.cc/85KM-M8XZ>. Thus an early abortion is always safer than a later abortion, even for pregnancies that do not otherwise pose a risk to the health of the woman or the fetus. At the same time, abortion at any stage of pregnancy is statistically safer than carrying a pregnancy to term—maternal mortality and morbidity rates are an average of fourteen times lower for women who terminate pregnancies than for those who carry to term and deliver. See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012).

167. *Zbaraz* amici noted the dangers of delay in their briefs:

By definition, Medicaid-eligible women do not have sufficient income and resources to meet the costs of necessary medical services. The denial of funding leaves these women with few courses of action other than forgoing needed abortions or procuring the additional funds necessary to finance legal abortions. Because an abortion is medically necessary only when it is likely that pregnancy or childbirth will entail excessive risks, forgoing such an abortion necessarily exposes a woman to a significant possibility of health damage or death. Even if a woman ultimately is able to secure the funds to pay for an abortion, the delay that occurs while she collects the funds itself involves health risks and also magnifies the risks inherent in the abortion procedure.

Brief for Planned Parenthood, *supra* note 164 (citations omitted).

168. For example, the Hyde Amendment was a factor facilitating the predatory practices of Dr. Kermit Gosnell, a Philadelphia physician who preyed upon poor and low-income women in providing gravely substandard and illegal abortions, which resulted in the death of at least one of his patients. See Jessica Arons, *Anti-Abortion Movement Made Gosnell’s Crimes Possible: Making Abortion Accessible and Affordable Will Make It Safer Too*, POLITIX (May 1, 2013), <http://politix.topix.com/story/5854-anti-abortion-movement-made-gosnells-crimes-possible>, archived at <http://perma.cc/9GZD-577J>.

169. *McRae*, 448 U.S. at 339 (Marshall, J., dissenting).

170. *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 790 (Cal. 1981).

a poor pregnant woman, the statute virtually bars payment for that treatment and thus subjects the poor woman to significant health hazards and in some cases to death.”<sup>171</sup>

In practice, the line between a condition that threatens a pregnant woman’s health and one that threatens her life is blurry and ever-changing. As Justice Marshall observed, “By the time a pregnancy has progressed to the point where a physician is able to certify that it endangers the life of the mother, it is in many cases too late to prevent her death, because abortion is no longer safe.”<sup>172</sup> Moreover, there are serious ethical considerations about any policy that forces doctors to withhold medical treatment until a condition becomes life-threatening.<sup>173</sup>

The Court in *Roe* noted that a pregnant woman’s interest in protecting her health is prominent and central to the fundamental right to choose abortion articulated therein.<sup>174</sup> The *McRae* ruling acknowledged as much: “[I]t 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 [*Roe v. Wade*].”<sup>175</sup> Even so, the Court maintained that this interest does not impose upon the government an obligation to finance the abortions that women need to protect themselves from known or foreseeable harms to their health.<sup>176</sup>

And while the Court at least recognized the *pregnant woman’s* own interest in protecting her health, it did not concern itself with the established *governmental* interest in a woman’s health, nor in the paramount nature of the health interest when weighed against other governmental interests in the abortion context.<sup>177</sup> But it is hard to imagine how the policy in question could be perceived as furthering the state’s interest in the pregnant woman’s health when it so clearly interfered with her own interest in the same.<sup>178</sup>

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171. *Id.*; see also *Right to Choose v. Byrne*, 450 A.2d 925, 935 (N.J. 1982) (stating that New Jersey’s restriction “gives priority to potential life at the expense of maternal health”); *id.* at 941 (Pashman, J., concurring in part and dissenting in part) (writing that “[t]he right to choose whether or not to bear a child is partly grounded on the constitutional right to health” and agreeing with the lower court’s proclamation that New Jersey recognizes a fundamental right to health).

172. *McRae*, 448 U.S. at 339–40 (Marshall, J., dissenting).

173. *Id.*

174. *Id.* at 316 (majority opinion).

175. *Id.*

176. *Id.*

177. “[T]he premise underlying the Hyde Amendment was repudiated in *Roe v. Wade*, where the Court made clear that the state interest in protecting fetal life cannot justify jeopardizing the life or health of the mother.” *Id.* at 338 (Marshall, J. dissenting).

178. Illinois does not and cannot argue that . . . its denial of Medicaid funding for medically necessary abortions promotes the health of women. Instead, . . . the Illinois statute can serve only to interfere substantially with the woman’s

Instead, the Court focused exclusively on the government's interest in protecting fetal life, as though it existed in isolation and not in relationship to other interests.<sup>179</sup> Justice Stevens pointed out the origin and nature of the relational interests in his dissent:

[I]t is misleading to speak of the Government's legitimate interest in the fetus without reference to the context in which that interest was held to be legitimate. For *Roe v. Wade* squarely held that the States may not protect that interest when a conflict with the interest in a pregnant woman's health exists.<sup>180</sup>

With this isolated focus, the Court determined that the Hyde Amendment was rationally related to the government's legitimate interest in potential life.<sup>181</sup> In so holding, the Court effectively overruled its own precedent—which required the state's interest in the health of the pregnant woman to trump its interest in the potential life of the fetus throughout pregnancy—to allow for the converse, where the state could favor its interest in fetal life over its interest in a woman's health.

Had the Court appropriately applied the balancing test established in *Roe* and respected that precedent, it would have found the lack of a health exception to be unconstitutional and struck down the Hyde Amendment accordingly.<sup>182</sup> Justice Stevens was perplexed by the Court's silence about contradicting its own precedent:

It is thus perfectly clear that neither the Federal Government nor the States may exclude a woman from medical benefits to which she would otherwise be entitled solely to further an interest in potential life when a physician, "in appropriate medical judgment," certifies that an abortion is necessary "for the preservation of the life or health of the mother." The Court totally fails to explain why this reasoning is not dispositive here.<sup>183</sup>

When the Court has declared that women seeking abortion care have a liberty interest in protecting their health, that the government shares that interest, and that it trumps the state's interest in potential fetal life throughout pregnancy, it is inconsistent for the Court to determine that the state's interest in potential fetal life could

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interest in her health and to thwart rather than advance the state's interest in her health.

Brief for Planned Parenthood, *supra* note 164.

179. *See* Tribe, *supra* note 161, at 338–39.

180. *McRae*, 448 U.S. at 351 (Stevens, J., dissenting).

181. *Id.* at 324 (majority opinion).

182. *Id.* at 351 (Stevens, J., dissenting).

183. *Id.* at 351–52 (citation omitted).



justify a policy that predictably harms women's health and only facilitates childbirth in a minority of cases.

#### *D. Novel Equal Protection Claims*

In this section, we offer a handful of nascent Equal Protection Clause theories that might merit further exploration and development. While several state courts have applied state equal protection laws to protect against sex discrimination to great effect,<sup>184</sup> the federal court system has not yet followed suit. Thus, we have tried to tease out areas in federal law that could be further expanded. We recognize that the current jurisprudence in support of these theories is far from robust, at least in the context of abortion funding and coverage. Nevertheless, we hope to encourage further scholarship that might unearth some creative thinking, which, over time, would become persuasive.

##### *1. Suspect Classification*

While racial classifications are inherently suspect and therefore always subject to strict scrutiny,<sup>185</sup> the factors in the infamous

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184. More than a third of states now have explicit constitutional gender equality guarantees that ban sex discrimination. Kolbert & Gans, *supra* note 49, at 1166. In addition, thirty-five states have ratified the Equal Rights Amendment passed by Congress in 1972, which reads that "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex." *The Equal Rights Amendment: Unfinished Business for the Constitution*, THE ALICE PAUL INST., <http://www.equalrightsamendment.org/faq.htm>, archived at <http://perma.cc/M2JV-65U3>.

"In construing these guarantees, several state courts have subjected laws that discriminate against women to a higher standard of review than afforded under the Federal Constitution." Kolbert & Gans, *supra* note 49, at 1166–67. In particular, some state courts have held that Medicaid coverage restrictions on abortion amount to impermissible gender discrimination. *Id.* at 1167–68. Because only women obtain abortions, the effect of the restriction falls only on women, whereas the government does not similarly interfere with men's reproductive decisions. *Id.* This line of reasoning has successfully dismantled abortion coverage restrictions in states such as Connecticut, New Mexico, and Oregon. See *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 855–56 (N.M. 1998); *Planned Parenthood Ass'n v. Dep't of Human Res.*, 663 P.2d 1247, 1259, 1261 (Or. Ct. App. 1983); *Doe v. Maher*, 515 A.2d 134, 158–62 (Conn. Super. Ct. 1986).

Perhaps the Connecticut court stated it best when it recognized that throughout history: [W]omen's biology and their ability to bear children have been used as a basis for discrimination against them. . . . Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination. "Pregnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus any classification which relies on pregnancy as the determinative criterion is a distinction based on sex."

*Maher*, 515 A.2d 159 (citations omitted) (footnotes omitted).

185. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978).

Footnote 4 of *United States v. Carolene Products Co.*<sup>186</sup> and its progeny have been used to admit or deny entry to the somewhat nebulous category of “suspect classifications” sufficient to trigger heightened scrutiny of a law that disadvantages other groups of people. We posit here that perhaps women who seek abortions,<sup>187</sup> especially low-income women who seek abortions, are a class meriting suspect status under the criteria laid out in *Carolene* Footnote 4 and subsequent jurisprudence.<sup>188</sup>

*Carolene* held that restrictions on economic activity were presumptively valid but observed that other types of regulations might be subject to closer scrutiny:

It is unnecessary to consider now . . . Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>189</sup>

Justice Marshall specifically cited this language, noting that “the fact that the burden of the Hyde Amendment falls exclusively on financially destitute women suggests” exactly the type of special condition identified in the *Carolene* footnote that deserves more attention.<sup>190</sup>

While it could be debated whether low-income women who seek abortions are a “discrete and insular minority,” having that status

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186. 304 U.S. 144, 152 n.4 (1938).

187. While we use the phrase “women who seek abortions” in order to draw a legal classification with sufficient specificity, we are mindful of the propaganda used by the anti-abortion movement to suggest that only certain women are “abortion-minded” or that there is an artificial division between the women who have children and those who have abortions. The reality is that one in three women in the United States will have an abortion by the age of forty-five and that 60% of women who terminate a pregnancy already have one child or more at the time they have an abortion. HEATHER D. BOONSTRA ET AL., GUTTMACHER INST., ABORTION IN WOMEN’S LIVES 20 (2006), available at <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf>, archived at <http://perma.cc/EU7Q-4QVE>. Therefore, “women who seek an abortion” are more likely than not also women who have children, just at different stages of their lives. Nevertheless, it is when women seek an abortion that they are most likely to be targeted by lawmakers and singled out for disparate treatment.

188. We recognize that the *Maier* Court stated that “an indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases.” *Maier*, 432 U.S. at 470–71. But we would submit that such a finding be revisited for the reasons outlined in this subsection. Indeed, the lower court opinion in *McRae* in the Eastern District of New York found that young, poor women seeking abortion care were a suspect class. See *McRae v. Califano*, 491 F. Supp. 630, 738 (E.D.N.Y. 1980); see also Rhonda Copelon & Sylvia Law, “*Nearly Allied to Her Right to Be*”—*Medicaid Funding for Abortion: The Story of Harris v. McRae*, in *WOMEN & THE LAW STORIES* 207 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

189. *Carolene Products Co.*, 304 U.S. at 152 n.4.

190. *Harris v. McRae*, 448 U.S. 297, 343–44 (1980) (Marshall, J., dissenting).

is not a prerequisite for proving a suspect classification: "Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious."<sup>191</sup>

At its core, the *Carolene* standard is one that was designed (though not always applied) to protect politically unpopular minorities who have been unable to protect themselves through the political process. In other words, it is a countermajoritarian backstop against the prejudices that can hold sway in majority rule. As Bruce Ackerman has noted, "the [post-*Lochner*] New Court would accord special protection to those who had been deprived of their fair share of political influence."<sup>192</sup>

Nevertheless, it was evident to the *McRae* dissenters, and to anyone aware of the lived experiences of low-income women, that the women directly affected by the Hyde Amendment are politically powerless.<sup>193</sup> A key section of Justice Brennan's dissent bears repeating:

[T]he Hyde Amendment is a transparent attempt by the Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual. Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather it imposes that viewpoint only upon that segment of society which, *because of its position of political powerlessness*, is least able to defend its privacy rights from the encroachments of state-mandated morality.<sup>194</sup>

Justice Marshall likewise referred to the class affected as "the most powerless members of our society,"<sup>195</sup> noting that the "cruel impact" of the legislation "falls exclusively on indigent pregnant women."<sup>196</sup>

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191. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 (1978).

192. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985).

193. It is important here to draw a distinction between people who support abortion rights and women who seek an abortion, as the two groups are not interchangeable. Some women who will seek or have sought an abortion may consider themselves to be "Pro-Life" and may support political candidates who oppose abortion; others may base their vote on issues other than a candidate's position on abortion; still others may not exercise their right to vote at all; and some (i.e., unnaturalized immigrants and some women convicted of felonies) do not possess the right to vote. Low-income women in particular may be less likely or able to vote. Thus, the "political influence" of the group of women who seek abortion is not always easy to discern, and where the group has influence, that influence is not always brought to bear in ways that will benefit the group's access to abortion care.

194. *McRae*, 448 U.S. at 332 (Brennan, J., dissenting) (emphasis added).

195. *Id.* at 338 (Marshall, J., dissenting).

196. *Id.* at 342.

The *Carolene* footnote was first applied in *Graham v. Richardson* to recognize aliens as a suspect classification and strike down two statutes that denied welfare benefits to non-citizens.<sup>197</sup> The Court later relied on similar factors without referencing *Carolene* specifically.<sup>198</sup> For instance, in rejecting a claim of poverty as a suspect classification, the Court wrote in *San Antonio Independent School District v. Rodriguez*:

[T]he class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.<sup>199</sup>

Presumably, then, a class that could meet criteria such as purposefully unequal treatment or extreme political powerlessness would qualify for heightened protection. Indeed, Justice Marshall referred to these same factors in *McRae* when making the case that the women affected by the Hyde Amendment were entitled to enhanced protections.<sup>200</sup> He went on to say:

[W]hile it is now clear that traditional “strict scrutiny” is unavailable to protect the poor against classifications that disfavor them . . . I do not believe that legislation that imposes a crushing burden on indigent women can be treated with the same deference given to legislation distinguishing among business interests.<sup>201</sup>

*Frontiero v. Richardson*, in which the Court struck down a sex-based classification, is another case that implicitly relied on and

197. *Graham v. Richardson*, 403 U.S. 365, 372–76 (1971).

198. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (plurality opinion) (according heightened scrutiny to classifications based on sex); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (declining to recognize poverty as a suspect classification); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) (finding that Mexican Americans are a suspect classification).

199. 411 U.S. at 28. *But cf.* *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 792–93 (Cal. 1981). There, the California Supreme Court recounted its history of protecting low-income communities from “statutory mechanisms that restrict the constitutional rights of the poor more severely than those of the rest of society.” *Id.* at 796. In doing so, the court asserted that the indigent poor are often not “adequately protected from discriminatory treatment by the general safeguards of the legislative process.” *Id.* Recognizing this truth, the court found that the state’s abortion coverage restriction violated the equal protection guarantees of the state constitution. *Id.* at 793 n.22.

200. *McRae*, 448 U.S. at 342 (Marshall, J., dissenting). The lower court opinion in *McRae* in the Eastern District of New York also found that young, poor women seeking abortion care were a suspect class. *See McRae v. Califano*, 491 F. Supp. 630, 738 (E.D.N.Y. 1980); *see also Copelon & Law, supra* note 188, at 240.

201. *McRae*, 448 U.S. at 342 (Marshall, J., dissenting) (citation omitted).

possibly expanded the *Carolene* factors.<sup>202</sup> A close reading of *Frontiero* reveals five possible factors that are relevant to whether a classification is suspect: (1) a history of discrimination; (2) a defining characteristic that bears no relationship to the group members' ability to contribute to society; (3) that such a characteristic is immutable; (4) political powerlessness; and (5) another branch of government has already recognized such classifications as suspect.<sup>203</sup> A federal district court, ruling on same-sex marriage, noted that the first two factors were of primary importance.<sup>204</sup> Indeed, "[i]mmutability and lack of political power are not strictly necessary factors to identify a suspect class."<sup>205</sup>

State courts have already looked to the *Carolene* factors in assessing whether women constitute a suspect classification and, consequently, which level of scrutiny should be applied to abortion funding restrictions.<sup>206</sup> Upon examination of the first two factors identified in *Frontiero* alone—a history of discrimination and a characteristic unrelated to societal contributions—a case can be made for the proposition that heightened scrutiny should be applied to laws that target women, particularly low-income women, who seek abortions.

#### *a. History of Discrimination*

While it is true that, as a general rule, women who have sought or had abortions have not been subject to discrimination in exercising their right to vote, pursuing their education, or seeking employment, they have faced discrimination time and again in their access to health insurance and health care. Abortion care has been explicitly deemed unworthy of government subsidization, carved out from private and public health insurance plans, and subjected to interference with the doctor-patient relationship far beyond any other health service.

Abortion was not illegal at the founding of the U.S., but it was banned in most states by the end of the Nineteenth Century.<sup>207</sup> Those bans, however, did not emerge from a sweeping compulsion to protect the fetus; rather they were largely part of a backlash against efforts

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202. 411 U.S. at 690–91.

203. *Id.* at 684–88.

204. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 987 (S.D. Ohio) (2013).

205. *Id.* (quoting *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012)).

206. *See, e.g.*, Comm. to Defend Reprod. Rights v. Myers, 625 P.2d 779, 792–93 (Cal. 1981) (stating that the indigent poor share many characteristics of other insular minorities); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 841 (N.M. 1998) (discussing the immutability of gender); Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (lamenting the long history of discrimination against women).

207. *U.S. Abortion History*, OUR BODIES OURSELVES (Mar. 28, 2014), <http://www.ourbodiesourselves.org/health-info/u-s-abortion-history>, archived at <http://perma.cc/5D49-STWG>.

by women to gain suffrage and access to birth control and thus directly tied to stereotypes about women and their “natural” role in society as mothers.<sup>208</sup>

Once restrictions on abortion were put in place, abortion did not cease to exist.<sup>209</sup> Wealthy women could travel to a country where the procedure was legal, obtain a clandestine abortion from a legitimate doctor for a large sum, or take advantage of loopholes in the law.<sup>210</sup> But less privileged women were forced to try dangerous home remedies (such as forcing sharp objects into the uterus) or seek care from untrained and often unethical and predatory “back alley abortionists.”<sup>211</sup>

Countless numbers of women died, were rendered infertile, or were gravely injured as a result of illegal and unsafe abortions.<sup>212</sup> And all women who sought an illegal abortion were subject to the desperation and indignity that came with having to go outside of the legitimate healthcare system to end an unwanted pregnancy, as well as the threat of prosecution.<sup>213</sup> Nor was that threat insubstantial. Indeed, prosecutions for performing or procuring illegal abortions were in process at the time *Roe* was decided in 1973.<sup>214</sup>

Once abortion was legalized throughout the country, women in need of abortion care enjoyed a brief period of time when they could access that care safely and with relative ease, regardless of their income level or where they lived.<sup>215</sup> But political opponents of abortion, who had lost the fight to recriminalize it, quickly commenced a strategy to make abortion as difficult as possible to obtain.

As noted above, one of their first strikes was against low-income women enrolled in Medicaid, passing the Hyde Amendment for the first time in 1976.<sup>216</sup> And it was during this debate that the bill’s sponsor, Henry Hyde, acknowledged that he was targeting low-income women with the legislation precisely because they were the most

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208. *Id.*; see also KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 66–91 (1984) (noting that the criminalization of abortion was also spurred by physicians—who were in many cases allowed to perform abortions under the criminal statutes—professionalizing themselves through the burgeoning American Medical Association and attempting to eliminate competition from midwives who were not exempt from the laws that criminalized abortion).

209. See BOONSTRA ET AL., *supra* note 187, at 13.

210. *Id.*

211. See, e.g., LINDA GREENHOUSE & REVA B. SIEGEL, *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING* 22–24 (2010) (describing deaths and injuries from illegal abortion before *Roe*).

212. *Id.* at 23.

213. See BOONSTRA ET AL., *supra* note 187, at 13.

214. See LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973* 225 (1997).

215. HENSHAW ET AL., *supra* note 134, at 3.

216. See discussion *supra* Part I.

politically vulnerable: “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.”<sup>217</sup>

Encouraged by the success of the Hyde Amendment (including its validation by the Supreme Court in *McRae*), the anti-abortion movement went on to pass hundreds (perhaps thousands) of laws against abortion over the past four decades.<sup>218</sup>

While many of these laws were initially struck down by federal and state courts, the majority ultimately were allowed to stand, especially after *Casey* formally lessened the standard of review from strict scrutiny to “undue burden.”<sup>219</sup> Indeed, since 2010 alone, 30 states have passed 205 measures to restrict abortion care.<sup>220</sup>

Most popular among this recent spate of legislative activity are Targeted Regulations of Abortion Providers (TRAP) laws.<sup>221</sup> Passed under the pretense of making abortion safer for women, these measures involve the imposition of unnecessary, arbitrary, and burdensome standards that have led to a number of clinics shutting down because they cannot comply with the costly—and often impossible—requirements.<sup>222</sup> Despite the lip service given to women’s health and safety by these bills’ proponents, the real purpose of these measures is to close down abortion clinics.<sup>223</sup>

The most marginalized people—poor women, rural women, young women, women of color, and immigrant women—bear the greatest burden of such restrictions. For instance, women in the Rio Grande Valley in Texas have seen the only two abortion clinics in the region close their doors as a result of the state’s TRAP laws,

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217. *Heart of the Matter*, *supra* note 134, at 12 (quoting Henry Hyde).

218. See Arons & Rosenthal, *supra* note 72.

219. See *supra* text accompanying note 141.

220. Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—And the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POL. REV. 9, 9 (2014).

221. Tara Culp-Ressler, *The Dangerous Abortion Restriction That’s Sweeping The Nation*, THINKPROGRESS (July 8, 2014, 2:00 PM), <http://thinkprogress.org/health/2014/07/08/3457688/trap-laws-sweep-nation/>, archived at <http://perma.cc/JRR4-H54R>; see also Amy Allina et al., *Pre-Existing Conditions: How Restrictions on Abortion Coverage and Marginalization of Care Paved the Way for Discriminatory Treatment of Abortion in Health Reform and Beyond*, CENTERWOMENPOLICY.ORG 10–15 (Aug. 2012), [http://centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO\\_PreExistingConditions\\_Allina-Arons-Barajas-RomanFINAL.pdf](http://centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO_PreExistingConditions_Allina-Arons-Barajas-RomanFINAL.pdf), archived at <http://perma.cc/A3AQ-S3HG>.

222. Allina et al., *supra* note 221; see also Boonstra & Nash, *supra* note 220, at 10.

223. For example, see comments by Mississippi Governor Phil Bryant on a 2012 state law requiring hospital admitting privileges for providers at the state’s only abortion clinic: “My goal of course is to shut it down.” Ross Adams, *Deadline Day for Jackson Abortion Clinic*, WJTV.COM (Jan. 10, 2013), <http://www.wjtv.com/story/21270984/deadline-day-for-jackson-abortion-clinic>, archived at <http://perma.cc/7FHQ-Z35P>.

leaving them without access to a provider within 240 miles.<sup>224</sup> This area, where more than thirty percent of people live under the federal poverty level, is home to the largest concentration of low-wage farmworkers in the country.<sup>225</sup> Already cut off from health care generally (in part because of Texas's concomitant defunding of family planning clinics<sup>226</sup>) and experiencing some of the largest health disparities in the country, these women now face a public health crisis of monumental proportions.<sup>227</sup>

With fewer clinics, the additional costs involved in obtaining an abortion increase as well—in transportation, lodging, time off work (often unpaid), and child care.<sup>228</sup> TRAP laws, especially in combination with abortion funding and coverage bans like the Hyde Amendment, render abortion care unaffordable for the women who need it most.<sup>229</sup> Just as poll taxes made voting unaffordable for African Americans, so too is this toxic combination of abortion restrictions putting abortion care out of reach for the women in this country who are already struggling to get by.<sup>230</sup>

Many other abortion restrictions, or the justifications for them, are rooted in stereotypes about women as inherently maternal, and about abortion as contrary to that maternal instinct.<sup>231</sup> Some of these

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224. Manny Fernandez, *Abortion Law Pushes Texas Clinics to Close Doors*, N.Y. TIMES (Mar. 6, 2014), <http://www.nytimes.com/2014/03/07/us/citing-new-texas-rules-abortion-provider-is-shutting-last-clinics-in-2-regions.html>, archived at <http://perma.cc/4398-LQKU>.

225. See Martha Hostetter, *Profile: Rio Grande Valley ACO Health Providers*, COMMONWEALTH FUND (June 27, 2014), <http://www.commonwealthfund.org/publications/newsletters/quality-matters/2014/June-July/profile-rio-grande-valley#3>, archived at <http://perma.cc/7GS6-Q9XF>; CTR. FOR REPROD. RIGHTS & NAT'L LATINA INST. FOR REPROD. HEALTH, NUESTRA VOZ, NUESTRA SALUD, NUESTRO TEXAS: THE FIGHT FOR WOMEN'S REPRODUCTIVE HEALTH IN THE RIO GRANDE VALLEY 14–55 (2013), available at [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/NT\\_SpanishExecSumm\\_11-5-13.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/NT_SpanishExecSumm_11-5-13.pdf), archived at <http://perma.cc/K9v-REGB>.

226. Kari White et al., *Cutting Family Planning in Texas*, 367 NEW ENG. J. OF MED. 1179, 1179–81 (2012).

227. CTR. FOR REPROD. RIGHTS & NAT'L LATINA INST. FOR REPROD. HEALTH, *supra* note 225, at 9.

228. Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 CONTRACEPTION 334, 335, 341–44 (2006).

229. Allina et al., *supra* note 221, at 11–13.

230. See *Planned Parenthood Se. Inc. v. Strange*, No. 2:13cv405-MHT, 2014 WL 3809403, at \*47–48 (M.D. Ala. Aug. 4, 2014) (imagining how the right to possess a firearm could be similarly undermined if gun shops were as regulated as abortion clinics).

231. In America, restrictions on abortion have much (although not all) to do with views on how it is “natural” and appropriate for a woman to respond to a pregnancy. If the two had little to do with each other, legislatures that sought to coerce childbirth in the name of protecting life would bend over backwards to provide material support for the women who are required to bear—too often alone—the awesome physical, emotional, and financial costs of pregnancy, childbirth, and childrearing. Only by viewing pregnancy and



laws require abortion providers to read state-dictated scripts to women who are contemplating abortion that detail the development of the fetus, make assertions about when life begins, and make claims about the nature of the relationship between a woman and her fetus (much of which is medically inaccurate).<sup>232</sup> Others require a woman to wait a minimum amount of time (usually at least 24 hours) between an initial abortion consultation and the procedure.<sup>233</sup> Still others require a woman to have an ultrasound and hear a description of the fetus or view the ultrasound.<sup>234</sup> Underlying all of these laws is the notion that if a woman “really understood what she was doing,” there is no way she would choose to have an abortion—because doing so is so counter to her nature. And, like TRAP laws, they all compound the financial costs of having an abortion, thereby putting the procedure even more out of reach for low-income women.

Even the Supreme Court has sanctioned discrimination against women who have abortions based on stereotypes about women’s nature. Justice Kennedy, for instance, echoed the above sentiment in validating the federal “Partial-Birth Abortion Ban Act.”<sup>235</sup> “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>236</sup>

Implicit in his assumption is the idea that women are maternal, that having an abortion or a particular abortion procedure is anti-maternal, and that no woman would choose abortion without being seriously uninformed, misled, or confused.

Compounding the discrimination inherent in these statutes and case law, women who seek abortions are also stigmatized in popular culture,<sup>237</sup> shamed in their houses of worship,<sup>238</sup> and subjected to

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motherhood as the natural order of things can a legislature dismiss these costs as modest in size and private in nature.

Neil S. Siegel, *The New Textualism, Progressive Constitutionalism, and Abortion Rights: A Reply to Jeffrey Rosen*, 25 YALE J.L. & HUMAN. 55, 65 (2013) (emphasis and citation omitted).

232. See, e.g., Zita Lazzarini, *South Dakota’s Abortion Script—Threatening the Physician-Patient Relationship*, 359 NEW ENG. J. MED. 2189, 2191 (2008).

233. Laura Bassett, *Anti-Abortion Laws Take Dramatic Toll on Clinics Nationwide*, HUFFINGTON POST (Aug. 26, 2013, 7:30 AM), [http://www.huffingtonpost.com/2013/08/26/abortion-clinic-closures\\_n\\_3804529.html](http://www.huffingtonpost.com/2013/08/26/abortion-clinic-closures_n_3804529.html), archived at <http://perma.cc/72N7-25QT>; *State Policies in Brief*, supra note 12.

234. See, e.g., WIS. STAT. ANN. § 253.10(3)(c) (West 2014) (requiring an ultrasound before a woman can access an abortion and requiring the doctor to describe the fetus’s “anatomical and physical characteristics”).

235. 18 U.S.C. § 1531 (2014).

236. *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

237. See Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN’S HEALTH ISSUES S49 (2011).

238. See FAITH ALOUD, 2011 ANNUAL REPORT 4 (2011), available at <http://www>

intimidation, stalking, and harassment by “sidewalk counselors.”<sup>239</sup> Moreover, their doctors are threatened daily by violence—several have even been murdered by zealous anti-abortion advocates.<sup>240</sup> These circumstances are not likely to change soon, given that the Supreme Court just struck down a Massachusetts law that created a buffer zone to protect women from harassment when entering an abortion clinic.<sup>241</sup>

The record is quite clear that there has been a history in this country of invidious and purposeful discrimination against abortion services and the women who seek them, with low-income women and women of color typically as the initial and primary targets and the ones who are disproportionately affected.

*b. No Relationship to an Ability to Contribute to Society*

It should be evident that desiring or obtaining an abortion does not hamper a woman’s ability to contribute to society. Given that fact, laws that disadvantage women who seek abortions should be subjected to heightened scrutiny.

If anything, not getting the abortion she needs may diminish a woman’s capacity to make societal contributions.<sup>242</sup> Among the most common reasons women cite for seeking an abortion are a lack of resources to afford a child at that time and the need to care for other dependents.<sup>243</sup> In addition, a woman’s ability to control her fertility has a clear impact on her potential to complete her education and participate in the workforce.<sup>244</sup>

One can presume that for low-income women, these considerations are doubly true. In fact, confirming that women know best whether or not they can afford to raise a(nother) child, a recent study found that women who tried to obtain an abortion but could not because they were too far along in their pregnancy were three times

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.faithaloud.org/faith/documents/2011AnnualReport.pdf, archived at <http://perma.cc/R4EA-AQ69>.

239. See, e.g., Molly Redden, *12 Horror Stories Show Why Wednesday’s Big Supreme Court Abortion Case Matters*, MOTHER JONES (Jan. 14, 2014), <http://www.motherjones.com/politics/2014/01/abortion-horror-stories-supreme-court-massachusetts-mccullen-coakley>, archived at <http://perma.cc/A7AG-TAQJ> (describing how defining some protesters as “sidewalk counselors” glosses over the violence and intimidation tactics of abortion opponents).

240. Allina et al., *supra* note 221, at 7–8.

241. See *McCullen v. Coakley*, 573 U.S. \_\_\_, 139 S. Ct. 2518, 2535–37 (2014).

242. This is not to suggest that carrying a pregnancy to term would reduce a woman’s ability to contribute to society. Rather, it is simply to say that women often choose abortion in response to an unintended or medically complicated pregnancy for reasons that are highly correlated with their ability to make societal contributions.

243. BOONSTRA ET AL., *supra* note 187, at 28–29.

244. Jessica Arons & Dorothy Roberts, *Sick and Tired: Working Women and Their Health*, in *THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING* 133–34 (2009).

more likely to fall into poverty than women who were able to get the abortion they sought.<sup>245</sup>

While the *McRae* majority failed to address this reality, many state courts have. The California Supreme Court, for instance, in striking down its abortion coverage restriction, wrote that a woman's ability to choose an abortion is

central to a woman's control not only of her own body, but also to the control of her social role and personal destiny. . . . "The implications of an unwanted child for a woman's education, employment opportunities and associational opportunities (often including marriage opportunities) are of enormous proportion."<sup>246</sup>

In fact, it is perhaps for the very reason that abortion enables women to pursue educational, financial, and civic opportunities and otherwise determine the course of their own lives that it triggers such intense legal and societal discrimination against the women who have abortions.

## 2. *Animus*

Closely related to the question of whether women seeking abortion have been subject to a history of invidious discrimination is the question of whether restrictions on abortion have been motivated by animus against the women who seek abortions. For when the Court has declined to recognize a classification as suspect and apply a heightened level of scrutiny, it has nevertheless at times struck down laws under rational review with the reasoning that any law motivated by animus against a class of people is inherently irrational.<sup>247</sup>

The first such case of the application of this so-called "rational[] review with bite" was in *City of Cleburne v. Cleburne Living Center*, where the Court refused to recognize the mentally disabled as a suspect or quasi-suspect class but still struck down a city ordinance that would have prohibited the construction of a group home for the "feble-minded."<sup>248</sup>

Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination.

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245. Joshua Lang, *Unintentional Motherhood*, NEW YORK TIMES SUNDAY MAGAZINE, Jun. 16, 2013, at 42L.

246. *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779, 792–93 (Cal. 1981) (citation omitted).

247. *See Romer v. Evans*, 517 U.S. 620, 635–36 (1996).

248. 473 U.S. 432, 442–48 (1985).

To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives—such as “a bare . . . desire to harm a politically unpopular group”—are not legitimate state interests.<sup>249</sup>

The Court pulled that last factor—an intent to disadvantage a marginalized group—from *Department of Agriculture v. Moreno*, a case in which a federal food stamp program was restricted so as to weed out “hippies.”<sup>250</sup>

The legislative history . . . indicates that that amendment was intended to prevent so-called “hippies” and “hippie communes” from participating in the food stamp program. The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of “equal protection of the laws” means anything, it must, at the very least, mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.<sup>251</sup>

The Court again applied this concept in *Romer v. Evans*, where a state constitutional amendment prohibited any protections from discrimination based on “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”<sup>252</sup> The Court found that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>253</sup>

Although *Romer* involved a “status-based enactment divorced from any factual context” and a “classification of persons undertaken for its own sake,”<sup>254</sup> and thus might be somewhat distinguishable from the more specifically drawn class of women who seek abortion care, the recent case of *United States v. Windsor*, which struck down

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249. *Id.* at 446–47 (citations omitted).

250. 413 U.S. 528, 534 (1973).

251. *Id.* at 534 (emphasis and citations omitted).

252. 517 U.S. 620, 624 (1996).

253. *Id.* at 634.

254. *Id.* at 635.

Section 3 of the Defense of Marriage Act, may be more apposite.<sup>255</sup> In *Windsor*, Congress denied to same-sex couples “the benefits and responsibilities that come with the federal recognition of their marriages. . . . *The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma* upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”<sup>256</sup>

Likewise, the “avowed purpose and practical effect” of the Hyde Amendment are to “impose a disadvantage, a separate status, and so a stigma” on all pregnant women enrolled in Medicaid who choose to end rather than continue their pregnancy, just as most laws that regulate abortion intend to disadvantage and stigmatize abortion care and the women who seek it.<sup>257</sup> As demonstrated above, the Hyde Amendment is intended as a deterrent for low-income women who would consider abortion and operates as a punishment for those who ultimately choose abortion.<sup>258</sup>

As Justice Marshall declared, “the purpose of the legislation was to discourage the exercise of [a] fundamental right. In such circumstances the Hyde Amendment must be invalidated because it does not meet even the rational-basis standard of review.”<sup>259</sup>

Justice Brennan also equated the law’s malevolent intent with its irrationality, but in the reverse order:

[T]he congressional decision to fund all medically necessary procedures except for those that require an abortion is entirely irrational either as a means of allocating health-care resources or otherwise serving legitimate social welfare goals. And that irrationality in turn exposes the Amendment for what it really is—a deliberate effort to discourage the exercise of a constitutionally protected right.<sup>260</sup>

The punitive nature of the Hyde Amendment is especially apparent when one considers the fact that it denies abortion coverage even when a pregnancy endangers a woman’s health.<sup>261</sup> Justice Marshall echoed this theme:

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255. 570 U.S. \_\_\_, 133 S. Ct. 2675, 2682–83, 2695–96 (2013).

256. *Id.* at 2693 (emphasis added).

257. In fact, there is no meaningful distinction between a fetal-interest-furthering law intended to make abortions harder to obtain and one intended to promote the state’s preference for childbirth over abortion. The goals are too interrelated and too likely furthered by the same pieces of legislation. Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights After Casey and Carhart*, 31 *FORDHAM URB. L.J.* 675, 692 (2004).

258. See discussion *supra* Part II.A.3.

259. *Harris v. McRae*, 448 U.S. 297, 346 (1980) (Marshall, J., dissenting).

260. *Id.* at 330 n.4 (Brennan, J., dissenting).

261. *Id.* at 350, 352 (Stevens, J., dissenting); see also discussion *supra* Part II.C.

In these circumstances [of no health exception], I am unable to see how even a minimally rational legislature could conclude that the interest in fetal life outweighs the brutal effect of the Hyde Amendment on indigent women. . . .

. . . [T]he Government's interest in protecting fetal life is not a legitimate one when it is in conflict with "the preservation of the life or health of the mother," and . . . the Government's effort to make serious health damage to the mother "a more attractive alternative than abortion[]" does not rationally promote the governmental interest in encouraging normal childbirth.<sup>262</sup>

Justice Brennan may have made the point the most forcefully, finding that the consequence of a

legislative hostility to abortions . . . is to leave indigent sick women without treatment simply because of the medical fortuity that their illness cannot be treated unless their pregnancy is terminated. Antipathy to abortion, in short, has been permitted not only to ride roughshod over a woman's constitutional right to terminate her pregnancy in the fashion she chooses, but also to distort our Nation's health-care programs. As a means of delivering health services, then, the Hyde Amendment is completely irrational. As a means of preventing abortions, it is concededly rational—brutally so. But this latter goal is constitutionally forbidden.<sup>263</sup>

Moreover, Justice Stevens observed that the logic used by the majority to uphold the denial of abortion coverage to preserve a woman's health could be applied equally to allow for restrictions on abortion coverage even in cases of life endangerment.<sup>264</sup> And "that denial cannot be justified unless government may, in effect, punish women who want abortions."<sup>265</sup>

However, as noted above, Justice Marshall recognized that any law designed to discourage the exercise of the abortion right is irrational—not just those that fail to include adequate protections to preserve the woman's health or life.<sup>266</sup>

It is likewise not a persuasive rebuttal to say that abortion restrictions are motivated by animus toward the act of abortion rather than the women who seek abortions, for there are no abortions without the women who have them. Despite the anti-abortion rhetoric, women are not the pawns of a heartless "abortion industry." They

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262. *Id.* at 344–45 (Marshall, J., dissenting) (citations omitted).

263. *Id.* at 330 n.4 (Brennan, J., dissenting).

264. *Id.* at 354 (Stevens, J., dissenting).

265. *Harris v. McRae*, 448 U.S. 370, 354 (1980) (Stevens, J., dissenting).

266. *Id.* at 338 (Marshall, J., dissenting).

are morally competent agents making their own decisions about what is best for their circumstances and determining the course of their own lives. Indeed, it is likely the volitional nature of choosing to have an abortion that makes the act transgressive and strikes fear in the heart of social conservatives. Thus the decision to have an abortion cannot be disentangled from the women who make those decisions, and the “legislative hostility to abortions”<sup>267</sup> is steeped in animus for the women who have them.

### 3. *Intersectional Disparate Impact*

For a variety of socioeconomic reasons, poor and low-income women of color are represented disproportionately among Medicaid recipients<sup>268</sup> and abortion patients.<sup>269</sup> This was true at the time *McRae* was decided,<sup>270</sup> and it is true today. As Justice Marshall pointed out in his dissent, “The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races. . . . [N]onwhite women obtain abortions at nearly double the rate of whites.”<sup>271</sup> Today, the disparities have only increased: African-American women have abortions at almost five times the rate of white women,<sup>272</sup> and Latinas have unintended pregnancies at over twice the rate of white women.<sup>273</sup> Consequently, the Hyde Amendment

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267. *Id.* at 330 n.4 (Brennan, J., dissenting).

268. See Arons & Rosenthal, *supra* note 72.

In 2011, 40.9 percent of African American females and 36.3 percent of Latinas had government-based insurance, including 29.2 percent and 29.6 percent participation, respectively, in Medicaid. In contrast, 32.6 percent of white females and 24.4 percent of Asian American females got their insurance through a government program. While Asian and Pacific Islander women use Medicaid at lower rates for a variety of reasons—only 6 percent were enrolled in the program in 2004—participation is quite high among various subgroups. For example, 20 percent of women of Southeast Asian descent are covered by Medicaid.

*Id.*

269. In 2008, Black women comprised 30% and Latinas 25% of women who have abortions while representing 13% and 15% of the female population, respectively. Rachel K. Jones et al., *Characteristics of U.S. Abortion Patients, 2008*, GUTTMACHER INST. (2010), <http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf>, archived at <http://perma.cc/3C2N-ARSE>; U.S. CENSUS BUREAU, TABLE 6. RESIDENT POPULATION BY SEX, RACE, AND HISPANIC-ORIGIN STATUS: 2000 TO 2009 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0006.pdf>, archived at <http://perma.cc/GB8-72BF>.

270. *Harris v. McRae*, 448 U.S. 297, 343 (1980) (Marshall, J., dissenting).

271. *Id.*

272. Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL. REV. 2, 2 (2008), available at <https://www.guttmacher.org/pubs/gpr/11/3/gpr110302.pdf>, archived at <http://perma.cc/TG5E-FBUQ>. Reliable data are not available for Native Americans, Asian Americans, or Pacific Islanders. *Id.*

273. *Id.* at 3.

affects large numbers of women who live at the intersection of various lines of subordination, including race, gender, and class.

Intersectionality theory, as conceived by Professor Kimberlé Crenshaw,<sup>274</sup> suggests that judicial analysis of discrimination ought to adapt to identify and invalidate forms of discrimination that are experienced in a simultaneous and integrative manner. She analogizes efforts to determine the singular cause of discrimination experienced by someone living at the intersection of multiple forms of oppression with efforts to determine the driver responsible for a multi-car accident at a crossroads:

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in an intersection, her injury could result from sex discrimination or race discrimination. . . . But it is not always easy to reconstruct an accident: Sometimes the skid marks and the injuries simply indicate that they occurred simultaneously, frustrating efforts to determine which driver caused the harm.<sup>275</sup>

If the Court were to borrow from Crenshaw's analysis and investigate the Hyde Amendment's disparate impact<sup>276</sup> on poor women of color, taking seriously the intersecting factors of race (suspect), gender (quasi-suspect), and poverty (not suspect)—and treating them collectively as a suspect or compound-suspect classification—it would provide a framework to examine the policy in a manner that is more

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274. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) (discussing how the intersectionality theory operates).

275. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 149 (1989).

276. Thus far, equal protection analysis can proceed only on a claim of disparate *treatment*, which requires a showing of a purpose or intent to discriminate. Disparate *impact* theory, which does not require intent, is a form of discrimination analysis sometimes used to determine violations of Title VII of the Civil Rights Act of 1964. To date, the Court has not applied disparate impact theory in an equal protection analysis. The last time the Court considered disparate impact theory under the Equal Protection Clause was in *Washington v. Davis*, where the Court held that a law with racially discriminatory effects—but not purposes—did not violate the Constitution. 426 U.S. 229, 239 (1976). However, the Court *has* recognized that the discriminatory effects of a policy or practice can be so pervasive as to evince discriminatory purpose. See *Hernandez v. Texas*, 347 U.S. 475, 476–77, 482 (1954) (holding that the 100% nonselection of Mexican Americans from juries was a violation of the Equal Protection Clause).



reflective of the complex reasons and ways poor women of color experience discrimination.<sup>277</sup>

Instead, Supreme Court jurisprudence has insisted on evaluating the discriminatory purpose and effect of a statute based on a *single* identity or condition and then tends to apply an analysis commensurate with that which falls the lowest in its hierarchy of suspect classifications.<sup>278</sup> This practice ignores violations of equal protection that are based on a group's multiple, intersecting characteristics.<sup>279</sup> In so doing, the Court fails to accurately identify discriminatory policies that burden some of the most historically disenfranchised populations.

In *McRae*, the Court did just that by focusing exclusively on the affected population's indigent status, which does not trigger heightened scrutiny in equal protection analysis,<sup>280</sup> and by ignoring race and gender, the (largely)<sup>281</sup> immutable characteristics that do.<sup>282</sup> But as

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277. For an analysis of intersectional disparate impact theory as applied to African-American women affected by the Hyde Amendment, see Elizabeth Jones, *Looking Back to Move Forward: An Intersectional Perspective on Harris v. McRae*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 379, 380 (2009).

278. To date, the Supreme Court has not squarely addressed "intersectional discrimination," though lower courts have been much more willing to embrace the concept, often citing the Equal Employment Opportunity Commission's guidance. See, e.g., *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1561–62 (9th Cir. 1994) (holding lower court erred when it treated the claim of an Asian-American woman in terms of race or sex separately; lower court should have considered whether discrimination occurred because of the plaintiff's combined race and sex); *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1032–34 (5th Cir. 1980) (explaining that Title VII prohibits discrimination against African-American women even if the employer does not discriminate against white women or African-American men); *Kimble v. Wis. Dept. of Workforce Dev.*, 690 F. Supp. 2d 765, 770 (E.D. Wis. 2010) ("African-American men, like African-American women, may bring intersectional claims."); *Arnett v. Aspin*, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994) (recognizing a sex-plus-age employment discrimination claim under Title VII); see also *Intersectional Discrimination*, EEOC COMPL. MAN. §15, IV(c), EQUAL EMP'T OPPORTUNITY COMM'N (2011), available at <http://www.eeoc.gov/policy/docs/race-color.html>, archived at <http://perma.cc/H2YM-AWPD>. When the Supreme Court has acknowledged "sex-plus" claims, the cases typically have involved a characteristic more mutable than gender or race, such as parental status. See, e.g., *Tracy Bateman Farrell, Annotation, Sex-Plus Discrimination Claims Under Title VII of Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e et seq.)*, 51 A.L.R. FED. 2d 341 (2010) (stating that the most cited Supreme Court application of the "sex-plus" theory is the case of *Phillips v. Martin Marietta Corp.*); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding that the Civil Rights Act's prohibition against sex discrimination does not allow for one hiring policy for women and another for men, each having preschool-age children).

279. Jones, *supra* note 277, at 381–82.

280. *Harris v. McRae*, 448 U.S. 297, 323 (quoting *Maher v. Roe*, 432 U.S. 464, 470–71 (1977)) ("An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. . . . But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.")

281. We recognize that both race and gender are social constructs and can in some instances change.

282. See *McRae*, 448 U.S. at 323. We believe this argument is distinguishable from the one rejected by the Supreme Court in *Geduldig v. Aiello* because 1) we are positing an

Justice Marshall observed, any state action that has such a “‘devastating impact on the lives of minority racial groups must be relevant’ for purposes of equal protection analysis.”<sup>283</sup>

Unfortunately, when a law disproportionately affects women of color—and poor women at that—the Court ignores the disparate racial impact of the law, “downgrades” the standard of review applicable because it discounts the invidiousness of sex-based classifications, and then applies rational review based on their indigent status alone. The result is that, instead of being triply protected, poor women of color are rendered triply vulnerable. We echo the conclusion to Justice Marshall’s dissent: “I do not believe that a Constitution committed to the equal protection of the laws can tolerate this result.”<sup>284</sup>

### *E. Human Rights*

As Rhonda Copelon and Sylvia Law (Cora McRae’s lawyers) chronicled, human rights arguments were not ripe enough to bring at the time McRae’s case was filed.<sup>285</sup> However, in the thirty-four years since *McRae* was decided, international human rights law related to sexual and reproductive rights has developed substantially. For instance, the United Nations Family Planning Agency (UNFPA) has observed:

[T]he right to decide freely and responsibly the number and spacing of . . . children and to have the information, education and means to do so was first recognized as a human right in 1968. The right to reproductive health has been endorsed and strengthened in successive international forums, particularly at the 1994 International Conference on Population and Development (ICPD) in Cairo as well as at the Fourth World Conference on Women (Beijing, 1995), the World Summit for Social Development (Copenhagen, 1995) and the World Conference on Human Settlements (Istanbul, 1996). The right to reproductive health now includes the concept that individuals have the right to attain the highest standard of sexual and reproductive health and to make reproductive choices free from coercion.<sup>286</sup>

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analysis of disparate *impact*, whereas *Geduldig* applied disparate *treatment* theory, and 2) the Hyde Amendment does not exclude pregnancy from covered conditions as the disability insurance policy in California did. See *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974).

283. *McRae*, 448 U.S. at 344 (Marshall, J., dissenting) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 575–76 (1972) (Marshall, J., dissenting)).

284. *Id.* at 348 (Marshall, J., dissenting).

285. Copelon & Law, *supra* note 188, at 223–24.

286. *Reproductive Rights, Reproductive Health and Family Planning*, UNFPA (Oct. 12, 1999), <https://www.unfpa.org/6billion/populationissues/rh.htm>, archived at <http://perma.cc/J6L9-6BZE>.

In recent years, the high courts of some countries and regions have interpreted human rights laws to require affirmative obligations for their governments to ensure meaningful access to abortion care for women.<sup>287</sup> Additionally, elements of several human rights instruments to which the U.S. is a party or signatory<sup>288</sup> have been interpreted to apply to the protection, promotion, and fulfillment of reproductive rights, including abortion, by foreign courts or international bodies.<sup>289</sup>

Copelon and Law describe the progression of relevant international human rights law as follows:

A . . . claim that could be made today but was not yet ripe was based on international human rights norms. The notion of human rights as applicable to everyday life rather than to conditions of dictatorship was in its infancy, and there was no international movement for women's human rights. Although even today, women's right to abortion is not yet fully established in international law, abortion to save life and to protect physical and mental health including in cases of rape and incest and fetal abnormality is increasingly recognized by international human rights law. Moreover, in diametrical opposition to the position of the U.S. Supreme Court in the pregnancy cases, the international right to equality for women includes access to health services that only women need. And contrary to the negative rights approach of the U.S. Constitution, nations have not only an obligation to "respect" or not deny or interfere with the exercise of a fundamental civil right, but also a correlative duty to "ensure" or facilitate its exercise.<sup>290</sup>

The domestic framework of negative rights, which only protects individuals from government interference, often results in rights that exist on paper but not in practice for many individuals and communities who do not have the resources necessary to exercise them.<sup>291</sup> For

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287. Soohoo, *supra* note 20, at 427–35 (describing decisions by the European Court of Human Rights, Colombian Constitutional Court, and Nepalese Supreme Court that found affirmative governmental obligations were required to effectuate the right of women to access legal abortion).

288. The U.S. is a party to the International Covenant on Civil and Political Rights and is a signatory to both the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women (though these latter treaties have yet to be ratified by the U.S. Senate). *See, e.g.*, H.R. Res. 19, 113th Cong. (2013); H.R. Res. 582, 111th Cong. (2009). A party to a treaty has a positive obligation to fulfill the mandates of the treaty. A signatory to a treaty has the obligation to "refrain from acts which would defeat the object and purpose of the treaty." Vienna Convention on the Law of Treaties, Art. 18, Apr. 24, 1970, 1155 U.N.T.S. 331.

289. *See* CTR. FOR REPROD. RIGHTS, REPRODUCTIVE RIGHTS ARE HUMAN RIGHTS 5–7 (2009), available at [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RRRareHR\\_final.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RRRareHR_final.pdf), archived at <http://perma.cc/4LVJ-8MM5>.

290. Copelon & Law, *supra* note 188, at 223 (footnotes omitted).

291. Some of the most damaging restrictions on access to contraception and abortion, though, are the financial barriers caused by the denial of public funding.

example, as this Article makes clear, the legal right to abortion means little to a Medicaid recipient who cannot afford to have one and is forced to carry a pregnancy to term. “Liberty guards against government intrusion; it does not guarantee social justice.”<sup>292</sup>

As Professor Cynthia Soohoo detailed in an article advancing a positive legal framework for abortion funding, recent cases decided by the high courts of Colombia and Nepal drew on a bevy of human rights to affirm the right to abortion, paying particular attention to poor women and the need to secure their access to appropriate medical care.<sup>293</sup> In 2006, the Colombian Constitutional Court declared that poverty should not keep a woman from obtaining a constitutionally protected abortion<sup>294</sup> and charged its government with eliminating all obstacles to abortion care in instances where it was protected.<sup>295</sup> Three years later, the Court issued more detailed and prescriptive mandates about the Colombian government’s obligations to ensure meaningful access to constitutionally protected abortions.<sup>296</sup> Similarly, in 2009, the Nepalese Supreme Court required its government to take measures to ensure affordable access to the information and services needed to procure an abortion to all women regardless of class.<sup>297</sup>

These international legal norms and obligations are not enough to win the day with the Court as currently composed, but they merit a mention in any exploration of *McRae*’s potential reversal,<sup>298</sup> especially

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Low-income women cannot afford to exercise the decisional autonomy that is ostensibly safeguarded by *Roe* and *Casey*. A liberty-based equal protection argument will not likely establish a positive entitlement to government support of women’s reproductive rights.

Kim Shayo Buchanan, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1301 (2007).

292. ROBERTS, *supra* note 1, at 294.

293. Soohoo, *supra* note 20, at 428 (“[T]he cases from Colombia and Nepal invoked a broader range of rights including dignity, liberty and autonomy, health, non-discrimination, freedom from cruel, inhuman, and degrading treatment, freedom from sexual violence, and the benefit from scientific progress.”).

294. *Id.* at 429–31 (discussing Corte Constitucional [C.C.], Mayo 10, 2006, Sentencia C-355/06 (Colom.) Translation at 51–57). The Colombian Supreme Court decriminalized abortion in specific circumstances: when a woman’s life or health is threatened, when the pregnancy results from rape or incest, and when an anomaly renders the fetus non-viable. *Id.* at 430.

295. *Id.* at 430–31. This ruling stands in stark contrast to the U.S. Supreme Court’s statement that while the U.S. government may not place obstacles in a woman’s path to abortion, it need not remove those not of its creation. *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

296. Soohoo, *supra* note 20, at 431–32 (discussing Corte Constitucional [C.C.] [Constitutional Court], Mayo 28, 2009, Sentencia T-388/09 (Colom.)).

297. *Id.* at 432–34 (discussing *Lakshmi Dhikta v. Nepal*, Supreme Court of Nepal 2009, 6). Like the Colombian Supreme Court, the Nepalese Supreme Court stated women should not be denied abortion due to an inability to pay. The Court even suggested the Nepalese government consider capping fees and providing free services. *Id.*

298. Elizabeth M. Schneider, *Transnational Law as a Domestic Resource: Thoughts*

considering the Court's acknowledgment, albeit limited, of international legal trends in other constitutional settings.<sup>299</sup> Although the U.S. is not bound by other countries' jurisprudence, nor do its courts typically include international standards in their legal reasoning, as a party to the International Covenant on Civil and Political Rights, the U.S. government "has an obligation to protect, promote, and fulfill women's rights to physical integrity and equality under the law, without discrimination."<sup>300</sup> And insurance coverage bans on abortion undermine that obligation.<sup>301</sup>

### CONCLUSION

After reviewing the above arguments, it is our hope that the reader is as incensed as we are by the many injustices wrought by *Harris v. McRae*. Whether one considers the majority's callous disregard for the real-life impact of the Hyde Amendment on low-income women and their families, the speed and dismissiveness with which the Court retreated from *Roe*, or the multiple violations of established doctrine the ruling condoned, it ought to be clear that the *McRae* decision utterly failed to live up to the principles embodied by our Constitution.

There are many legal arguments that could be further developed to challenge conventional legal thinking about public insurance coverage of abortion and, eventually, prompt the Supreme Court to revisit its holding in *McRae*. We summarize the ones we have explored here: First, the Court ignored Congress's obligation to govern impartially, allowed Congress to coerce women into continuing unintended or compromised pregnancies through selective disbursement of funds, and permitted Congress to unconstitutionally condition the receipt of Medicaid benefits on the relinquishment of a fundamental right. Second, the Court applied an erroneously low level of review to the encumbrance of the fundamental right to choose abortion. Third, the Court reversed its own balancing test, prioritizing the state's interest in the potential life of the fetus over an interest in the woman's health. Fourth, the Court failed to recognize the population affected

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on the Case of Women's Rights, 38 NEW ENG. L. REV. 689, 701-04 (2003) (describing the importance of transnational law for the attainment of women's rights).

299. See, e.g., Lawrence v. Texas, 539 U.S. 558, 573 (2003) (citing a decision from the European Court of Human Rights as persuasive authority).

300. Marianne Mollman & Meghan Rhoad, *Letter to US Senate: Reject Abortion Coverage Restrictions*, HUMAN RIGHTS WATCH (Nov. 19, 2009), <http://www.hrw.org/news/2009/11/19/letter-us-senate-reject-abortion-coverage-restrictions>, archived at <http://perma.cc/UUY5-67PD>.

301. *Id.*

by the Hyde Amendment as a suspect class deserving heightened scrutiny, that the animus motivating the Hyde Amendment's abortion-funding ban renders it irrational, and that it has a disparate impact on poor women of color. Finally, the Court ought to apply human rights norms to prescribe affirmative governmental obligations, including insurance coverage and funding, to ensure all people's access to abortion care. In short, we have laid out many—though perhaps not all—of the reasons the *McRae* decision was and continues to be constitutionally infirm.

This collection of arguments is not meant to be exhaustive in scope or depth, nor is it primed for immediate application. These arguments (and others not discussed herein) require further investigation and conversation, as well as doctrinal development, in order to be used to maximum effect in active cases and controversies. In the meantime, it is imperative to continue to make the case in both scholarship and litigation for the funding and coverage of abortion care in order to challenge existing assumptions and shift legal thinking on the topic.

We also recognize that the current Supreme Court and much of the federal bench are by no means sympathetic to the above arguments. Success ultimately will depend on a receptive judiciary, which requires the confirmation of judges who will adhere to the high standards of the Court's original articulation of the right to abortion and who will assess the tangible effects of abortion restrictions on the most disadvantaged members of society.

The *McRae* decision has allowed the Hyde Amendment to deny poor women dignity and justice for far too long. But overturning *McRae* and declaring the Hyde Amendment unconstitutional is not only needed to secure the abortion rights of low-income women; it is the condition precedent for protecting the rights of all women. As we have seen, the proponents of the Hyde Amendment first targeted women enrolled in Medicaid but quickly turned to other populations of women. By the same token, the Court first loosened the *Roe* standard in the funding cases before lowering its scrutiny for other types of abortion restrictions. Thus, safeguarding the rights of the most powerless in our society is both a moral imperative and the best way to maintain the integrity of our Constitution.

It is far past time to “rethink[] the meaning of liberty so that it protects all citizens equally.”<sup>302</sup> By imagining what is possible, we create the potential, twenty years from now, for the government to meet its obligations to protect and ensure the rights of all women, regardless of their income.

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302. ROBERTS, *supra* note 1, at 294.