

Finding a Right to Abortion Coverage: The PPACA, Intersectionality, and Positive Rights

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INTRODUCTION

During a floor debate in 1976, Representative Henry Hyde explained, “I would certainly 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.*”¹ For a short time after the Supreme Court of the United States established the right to abortion in *Roe v. Wade*,² Medicaid did not distinguish between coverage for abortion and other medical services.³ That all changed when Congress passed the Hyde Amendment to the Medicaid Act in 1976.⁴

Under the Medicaid Act,⁵ a state may choose to receive federal funding to administer a Medicaid program.⁶ Although a state’s participation in the program is completely voluntary, the state’s program must comport with various federal requirements and meet with the

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1. CTR. FOR REPROD. RIGHTS, WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN 14 (2010) (emphasis added) (quoting Representative Henry Hyde (R-IL)), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf [<https://perma.cc/DW8A-JPW6>].

2. *See Roe v. Wade*, 410 U.S. 113, 114 (1973). Specifically, the Court held that state criminal abortion laws that only provide exceptions for abortion procedures necessary to save the life of the mother are unconstitutional because they violate the Due Process Clause of the Fourteenth Amendment, which “protects against state action the right to privacy.” *See id.*

3. Marissa Spalding, *How Hyde Hurts Women*, CONSCIENCE (Dec. 3, 2015), <http://consciencemag.org/2015/12/03/how-hyde-hurts-women/> [<https://perma.cc/L4W4-FG42>].

4. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) (codified as amended at 42 U.S.C. § 1396a (2012)).

5. 42 U.S.C. § 1396 (2012).

6. Sandra Berenknopf, Comment, *Judicial and Congressional Back-Door Methods That Limit the Effect of Roe v. Wade: There is No Choice if There is No Access*, 70 TEMP. L. REV. 653, 655–56 (1997).

approval of the Secretary of Health and Human Services.⁷ Congress passed the Hyde Amendment to limit Medicaid funding of abortions to only those Congress deemed medically necessary—where the life of the mother would be endangered if the fetus were carried to term.⁸ In 1994, Congress expanded the Hyde Amendment's reach by also allocating funding for abortions when the pregnancy is the result of an act of rape or incest.⁹

For low-income women who rely on Medicaid—and for those who lack the funds to pay an extra premium for an insurance plan that covers abortion—the abortion right is no right at all if their state's Medicaid program does not fund abortion to the same degree it funds other general health services. Unless these women have savings or another source of money available, their inability to pay for an abortion precludes them from accessing one. Thus, Hyde renders the abortion right meaningless for women who cannot otherwise gather the funds required to exercise the right.

This Note will argue that a right to abortion coverage for women who lack the means to access the right can be accomplished not only through the recognition of an intersectional suspect classification but also an interpretation of the Patient Protection and Affordable Care Act (PPACA)¹⁰ as conferring positive rights. In *Harris v. McRae*, the Court established the Hyde Amendment's constitutional validity.¹¹ In doing so, the Court maintained that because Congress did not impinge on a substantive right or purposefully detriment a suspect class through Hyde, the rational relation standard applied.¹² Recognizing a suspect classification that accounts for the intersection of race, sex, and socioeconomic status would be the first step towards triggering a strict scrutiny analysis of Hyde due to the disproportionate impact Hyde has on disadvantaged women of color. Additionally, understanding the PPACA as conferring a positive right to health care could eventually favor a finding of a positive right to abortion coverage, thus changing the Court's due process analysis in *Harris*.

The first section of this Note will introduce the Hyde Amendment, the PPACA, and the role the PPACA has played in worsening Hyde's impact on low-income women.¹³ The second section will introduce the

7. *Id.* at 656.

8. *Id.* at 657.

9. *Id.* at 656–57.

10. Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended at 42 U.S.C. § 18001 (2012)).

11. *See generally* *Harris v. McRae*, 448 U.S. 297 (1980).

12. *Id.* at 322–24.

13. *See infra* Part I.

equal protection and due process problems presented in *Harris* and *Maier v. Roe*,¹⁴ explain the importance of recognizing an intersectional suspect classification in equal protection analysis, and explain how the PPACA can be read as conferring a positive health care right.¹⁵ The third section will explain how recognizing a positive health care right (and positive constitutional rights, generally), though a drastic change from the Court's current reading of the Constitution and unlikely to take place at this time, could change the due process analysis for Hyde and actually guarantee a woman's right to an abortion.¹⁶ The fourth section will address the fate of Hyde, the PPACA, and abortion rights under the Trump administration.¹⁷ This Note will conclude by encouraging further research into two avenues to find a better-protected abortion right—recognizing an intersectional suspect classification and, pending the Trump administration's further treatment of the PPACA, reading the PPACA as conferring a positive health care right.

I. THE HYDE AMENDMENT AND THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA)

The impact of the Hyde Amendment falls particularly hard on women of color, who are disproportionately likely to be insured by the Medicaid program; thirty percent of black women and twenty-four percent of Hispanic women aged fifteen to forty-four are enrolled in Medicaid, compared with fourteen percent of white women.¹⁸ To afford an abortion, many low-income women lacking coverage forgo paying utility bills, rent, or buying food for themselves and their children.¹⁹ Others rely on family members for financial help, receive financial assistance from clinics, or sell their personal belongings.²⁰ In addition, in a 2009 literature review, the Guttmacher Institute found that one-fourth of women who would have Medicaid-funded abortions instead give birth when this funding is unavailable.²¹ As Justice Marshall noted in his dissenting opinion in

14. See generally *Harris*, 448 U.S. at 297; *Maier v. Roe*, 432 U.S. 464 (1977).

15. See *infra* Part II.

16. See *infra* Part III.

17. See *infra* Part IV.

18. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46, 49 (2016), <https://www.guttmacher.org/about/gpr/2016/07/abortion-lives-women-struggling-financially-why-insurance-coverage-matters> [https://perma.cc/4DAG-DV6C].

19. *Id.*

20. *Id.*

21. See STANLEY K. HENSHAW ET. AL, GUTTMACHER INST., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW 1 (2009), https://www.guttmacher.org/sites/default/files/report_pdf/medicaidlitreview.pdf [https://perma.cc/2V2Z-RSKS].

Harris, “[t]he 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 legal abortion altogether.”²²

The PPACA not only follows Hyde’s restrictions but also worsens Hyde’s impact on low-income women and women of color. Both the PPACA and an Executive Order issued by President Obama apply Hyde’s funding restrictions to insurance policies offered on state insurance exchanges.²³ States or insurers offering plans in a state marketplace are not required to offer abortion coverage, and the PPACA explicitly prohibits states from including abortion in any essential benefits package.²⁴ As a result, women who receive subsidies from the federal government to help them purchase private health insurance through state-based exchanges have to pay two premiums for their insurance—one to pay for the cost of the plan related to covering abortion, regardless of whether it is ever utilized, and one to cover all the other costs of their health plan.²⁵

The PPACA also stipulates that at least one multi-state plan must limit abortion coverage to the coverage permitted by current federal law—pregnancies that endanger the life of the woman or are the result of rape or incest.²⁶ While state Medicaid programs continue to have the option to cover abortion in other circumstances using only state funds, states can pass laws that bar all plans participating in the state marketplace from covering abortions; at least twenty-five states have done so since the PPACA was signed into law.²⁷

At a minimum, states must cover those abortions that meet the federal exceptions in the Hyde Amendment;²⁸ they have the right to fund more than federal law permits, but they may not fund less.²⁹ Most state

22. *Harris v. McRae*, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting).

23. 42 U.S.C. § 18023(b)(1)(B) (2012); Exec. Order No. 13,535, § 1, 75 Fed. Reg. 15,599 (Mar. 29, 2010).

24. Alina Salganicoff et. al., *Coverage for Abortion Services and the ACA*, HENRY J. KAISER FAM. FOUND. (Sept. 19, 2014) [hereinafter *Abortion and the ACA*], <http://kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-and-the-aca/> [<https://perma.cc/YWQ4-99N7>].

25. JESSICA ARONS & MADINA AGÉNOR, CTR. FOR AM. PROGRESS, *SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR* 4 (Dec. 2010), https://www.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf [<https://perma.cc/Q2A3-3KUE>].

26. *Abortion and the ACA*, *supra* note 24.

27. *Id.*

28. *State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Nov. 1, 2016), <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid> [<https://perma.cc/4RZK-GLT9>].

29. *Access Denied: Origins of the Hyde Amendment and Other Restrictions on Public Funding for Abortion*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/access-denied-origins-hyde-amendment-and-other-restrictions-public-funding-abortion> [<https://perma.cc/EMF6-SJB7>].

legislatures have imposed restrictions on public funding for abortion and, at present, only fifteen states fund abortions for low-income women on the same or similar terms as other pregnancy-related and general health services.³⁰ Of these states, ten provide the funding under court orders.³¹ Of women aged fifteen to forty-four enrolled in Medicaid, sixty percent live in the thirty-five states and the District of Columbia that do not cover abortion except in limited circumstances; this amounts to about seven million women of reproductive age, including 3.4 million who are living below the federal poverty level (FPL).³²

Even though the number of women gaining access to health insurance is rising under the PPACA, an increasing share of women are facing limitations in the scope of that coverage when it comes to abortion services.³³ Coverage restrictions disproportionately affect poor and low-income women with limited ability to pay for abortion services with out-of-pocket funds.³⁴ Women of color are disproportionately likely to be insured by Medicaid,³⁵ and over half of all women on Medicaid have abortion coverage limited to pregnancies that endanger their lives or are a result of rape or incest.³⁶ As Professor Cynthia Soohoo notes, the Supreme Court's abortion funding cases allowed the federal government to use Medicaid "to create, as a practical matter, a different set of rights for the rich and the poor."³⁷ Rather than expanding coverage for medically necessary abortions, "health care reform is likely to result in the largest expansion of the Hyde restrictions since the amendment went into effect in 1977."³⁸

30. Spalding, *supra* note 3.

31. *Id.*

32. Boonstra, *supra* note 18.

33. Alina Salganicoff et. al., *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, HENRY J. KAISER FAM. FOUND. (Jan. 20, 2016) [hereinafter *Abortion in Medicaid*], <http://kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/> [https://perma.cc/Q67M-ZCWU].

34. *Id.*

35. Boonstra, *supra* note 18.

36. *Abortion in Medicaid*, *supra* note 33.

37. Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions Under Health Care Reform*, 15 CUNY L. REV. 391, 441 (2012).

38. *Id.*

II. FINDING A RIGHT TO ABORTION COVERAGE UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

A. *Maher v. Roe* and *Harris v. McRae*

In two decisions within three years, the Supreme Court upheld the constitutional validity of (1) states limiting the use of their own Medicaid benefits to medically necessary abortions,³⁹ and (2) the Hyde Amendment.⁴⁰ The result is a negative abortion right with little utility for women without health insurance or other resources to access that right.

In *Maher*, the Court determined indigent women seeking abortions did not come within the limited category of disadvantaged classes previously recognized by its cases.⁴¹ Two indigent women had attacked the validity of a Connecticut regulation limiting state Medicaid benefits for first trimester abortions to those that were “medically necessary.”⁴² While the district court held that the Equal Protection Clause of the Fourteenth Amendment forbid the exclusion of nontherapeutic abortions from a state welfare program that generally subsidizes the medical expenses incident to pregnancy and childbirth,⁴³ the Court held that the district court erred in its decision.⁴⁴ The Court explained it had never held that financial need alone identifies a suspect classification for purposes of equal protection analysis.⁴⁵

Additionally, the Court found that unlike the law in *Roe*, the regulation did not interfere with a woman’s fundamental right to privacy in making the decision to have an abortion because it placed no obstacles in a pregnant woman’s path to accessing one.⁴⁶ The Court wrote that “[t]he indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.”⁴⁷ The Court also found that “a State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education.”⁴⁸ As a result, the Court determined the Connecticut regulation at issue was rationally related to a

39. See *Maher v. Roe*, 432 U.S. 464, 464–65 (1977).

40. See *Harris v. McRae*, 448 U.S. 297, 298–99 (1980).

41. See *Maher*, 432 U.S. at 470–71.

42. *Id.* at 466–67.

43. *Id.* at 468.

44. *Id.* at 470.

45. *Id.* at 471.

46. *Id.* at 472–74.

47. *Id.* at 475.

48. *Id.* at 477.

constitutionally permissible purpose—a state’s strong and legitimate interest in encouraging normal childbirth—and was therefore constitutionally valid.⁴⁹

Moreover, the Court in *Harris* declared it “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.”⁵⁰ The Court directly addressed the question of whether the Hyde Amendment, by denying public funding for certain medically necessary abortions, contravenes the liberty or equal protection guarantees of the Due Process Clause of the Fifth Amendment.⁵¹ The plaintiffs included four Medicaid recipients who wished to have medically necessary abortions but did not qualify for federal funds under the versions of Hyde in 1977 and 1978.⁵² The district court found that when an abortion is medically necessary to safeguard the pregnant woman’s health, the disentanglement to Medicaid assistance impinges directly on the woman’s right to decide, in consultation with her physician, whether to terminate her pregnancy.⁵³ Thus, the district court held that Hyde violated the Fifth Amendment’s equal protection guarantee because Congress’s decision to fund medically necessary services generally, but only certain medically necessary abortions, served no legitimate governmental interest.⁵⁴ However, the Court did not agree. It explained that although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.⁵⁵

After determining Hyde violated no constitutionally protected substantive rights, the Court followed its determination in *Maier* that poverty is not a suspect class and that the limitation of federal Medicaid funds to certain medically necessary abortions is rationally related to the legitimate governmental objective of protecting potential life.⁵⁶ The Court declared that Hyde, like the regulation in *Maier*, places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.⁵⁷ Rather, by means of unequal subsidization of abortion and other medical

49. *See id.* at 478 (citing *Beal v. Doe*, 432 U.S. 438, 446 (1977)).

50. *Harris v. McRae*, 448 U.S. 297, 316 (1980).

51. *Id.* at 301.

52. *Id.* at 304.

53. *Id.* at 305–06 (citing *McRae v. Califano*, 491 F. Supp. 630, 737 (E.D.N.Y. 1980)).

54. *Id.* at 306.

55. *Id.* at 316–17.

56. *Id.* at 323–24.

57. *Id.* at 315.

services, Hyde “encourages alternate activity deemed in the public interest.”⁵⁸ The Court further stated “[t]he 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*.”⁵⁹ Accordingly, it determined Congress must answer whether freedom of constitutionally protected choice warrants federal subsidization and held that Hyde does not impinge on the due process liberty recognized in *Roe*.⁶⁰

B. An Intersectional Suspect Classification

Poor and low-income women of color are represented disproportionately among Medicaid recipients,⁶¹ consequently, Hyde affects large numbers of women who live at the intersection of various lines of subordination, including race, gender, and class.⁶² Professor Kimberlé Crenshaw argues for judicial recognition of the way sex and race discrimination intersect to operate against black women in a unique way.⁶³ She points out that black women often experience double discrimination—the combined effects of practices which discriminate on the basis of race and on the basis of sex.⁶⁴ She further declares that courts and feminist and civil rights thinkers have treated black women “in ways that deny both the unique compoundedness of their situation and the centrality of their experiences to the larger classes of women and Blacks.”⁶⁵ For example, someone can experience discrimination as a person of color, a woman, and a low-income individual simultaneously.⁶⁶ Madeline Gomez similarly argues that since *Roe*, an over-zealous, under-inclusive focus on the “right to choose” within abortion litigation has helped to facilitate the development of legal doctrine that fails to consider the intersectional

58. *Id.*

59. *Id.* at 316 (emphasis added).

60. *Id.* at 318.

61. Boonstra, *supra* note 18.

62. Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting Harris v. McRae*, 21 WM. & MARY J. WOMEN & L. 5, 50–51 (2016).

63. See 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, 149–50 (1989), <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf> [https://perma.cc/GLJ4-9556].

64. *Id.* at 149.

65. *Id.* at 150.

66. Hailey K. Flynn, Note, *A Postal Code Lottery: Unequal Access to Abortion Services in the United States and Northern Ireland*, 39 FORDHAM INT’L L.J. 629, 681 (2016).

subordination experienced by Latina immigrant women and other marginalized women, especially those of color.⁶⁷

Rather than recognizing that women of color are a suspect classification due to the intersectionality of their characteristics and subsequent experiences, “Supreme Court jurisprudence has insisted on evaluating the discriminatory purpose and effect of a statute based on a *single identity or condition*”⁶⁸ The Court then “tends to apply an analysis commensurate with that which falls the lowest in its hierarchy of suspect classifications.”⁶⁹ By doing so, the Court ignores violations of equal protection “that are based on a group’s multiple, intersecting characteristics.”⁷⁰ In *Maier*, and again in *Harris*, the Court did exactly that by determining the failure to provide Medicaid funds for both nontherapeutic abortions and some medically necessary abortions did not discriminate against a suspect classification:

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. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.⁷¹

In *Maier* and *Harris*, the Court ignored the race and sex of the population most impacted by the Hyde restrictions, characteristics that would trigger heightened scrutiny in equal protection analysis. Justice Marshall pointed out this lack of recognition in his dissenting opinion in *Harris*:

The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races. As I observed in *Maier*, nonwhite women obtain abortions at nearly double the rate of whites In my view, the fact that the burden of the

67. Madeline M. Gomez, Note, *Intersections at the Border: Immigration Enforcement, Reproductive Oppression, and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84, 112–13 (2015).

68. Adams & Arons, *supra* note 62, at 52 (emphasis added).

69. *Id.*

70. *Id.*

71. *Maier v. Roe*, 432 U.S. 464, 470–71 (1977) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970)).

Hyde Amendment falls exclusively on financially destitute women suggests 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.”⁷²

The Court should account for the intersectionality of factors like race, sex, and socioeconomic status when determining whether a law disproportionately impacts a certain minority group to the extent that strict scrutiny analysis is triggered. The implementation of the PPACA has worsened the effects of Hyde on women who experience discrimination on multiple fronts.⁷³ A majority of state Medicaid programs fail to cover nontherapeutic abortions, and at least twenty-five states have barred all plans participating in the state’s marketplace from covering abortions.⁷⁴ However, “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.”⁷⁵ As a result, the abortion right—a negative right—is meaningless to women without the adequate resources to exercise it.

Although the PPACA has worsened the impact of Hyde’s restrictions on low-income, minority women living in states that fail to provide Medicaid coverage for nontherapeutic abortions, the Act carries a silver lining: its potential reading as a declaration of positive rights. The PPACA’s seeming declaration of a positive health care right could call into question the Court’s argument in *Harris* that the right to an abortion is not a positive one.⁷⁶

C. The PPACA and Positive Rights

The Hyde Amendment’s constitutionality rests upon an understanding of the right to an abortion as a negative right. The Court in *Harris* determined that the federal government’s failure to subsidize certain medically necessary abortions was not a violation of the due process liberty recognized in *Roe* because recognizing a privacy right to abortion does not confer an entitlement to the funds necessary to access

72. *Harris v. McRae*, 448 U.S. 297, 343–44 (1980) (Marshall, J., dissenting) (citing *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938)).

73. See *supra* Part I.

74. See Boonstra, *supra* note 18; *Abortion and the ACA*, *supra* note 24.

75. Adams & Arons, *supra* note 62, at 53.

76. See *Harris*, 448 U.S. at 317.

one.⁷⁷ It further reasoned that “[t]o translate the limitation on governmental power 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.”⁷⁸ Thus, the Court seemed to indicate that only a *direct* interference with a fundamental right would constitute an infringement.⁷⁹

The Court’s due process analysis in *Harris* is in line with our constitutional system’s treatment of rights as “individual, alienable, and *negative*.”⁸⁰ Constitutional rights are usually understood to impose on government “only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another’s needs.”⁸¹

Negative rights “forbid the state from taking action of some kind”;⁸² for example, *Roe* forbids any state interference with a woman’s choice to have an abortion during the first trimester of her pregnancy.⁸³ On the other hand, positive rights are generally defined as legally enforceable claims to food, shelter, health care, education, and sometimes employment.⁸⁴ These rights are called “positive” “because they require the state to take initiatives” and, more importantly, “appropriate funds.”⁸⁵ Recognition of positive health care rights would thus call into question the understanding of abortion as a negative right.

A negative right to abortion is no right at all for low-income women without appropriate health insurance or other means to cover the cost. Women in this situation can only access this “right” if it is treated as positive—if the state takes the initiative to appropriate funds for its

77. *Id.* at 316–18.

78. *Id.* at 318.

79. See Larry P. Boyd, *The Hyde Amendment: New Implications for Equal Protection Claims*, 33 BAYLOR L. REV. 295, 299 (1981).

80. Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330 (1985) (emphasis added).

81. *Id.*

82. Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639, 1687 (2012); see also Helen Hershkoff, Foreword, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 809 (2002) (“Negative rights comprise defensive claims against invasion by the state; the citizen can assert a negative right against the government, which then may be barred from invading aspects of the individual’s liberty or property.”).

83. See *Roe v. Wade*, 410 U.S. 113, 164 (1973).

84. Rubin, *supra* note 82, at 1686; see also Hershkoff, *supra* note 82, at 809 (“If negative rights provide a shield, positive rights extend a sword, entailing affirmative claims that can be used to compel the state to afford substantive goods or services as an aspect of constitutional duty.”).

85. Rubin, *supra* note 82, at 1686–87.

fulfillment. Professor Aditi Gowri critiques the dichotomy of negative and positive rights, arguing that prioritizing negative rights—or “leave me alone rights”—is “effectively to have decided that it is more important to expend public resources on increasing the range of *choices* available to those who already have more power, money, and knowledge than to increase opportunities for those who have less resources.”⁸⁶ She argues that the dichotomy between both types of rights is politically suspect because granting only negative rights “augments the freedom of those with greater power, money, and other resources, while constraining those with less.”⁸⁷ With regard to reproductive rights, she adds that “those constrained by a negative right will more often be women than men.”⁸⁸ This concern has rung true in the realm of abortions rights; women with the appropriate means are able to choose whether or not to exercise their abortion right, while those lacking such means effectively have no choice.

Although constitutional rights are commonly understood as negative, there are some exceptional rights within the Constitution that could be given an affirmative reading and bestow “at least contingent affirmative burdens on government—for example, the Fourteenth Amendment right that no state ‘deny any person within its jurisdiction the equal protection of the laws.’”⁸⁹ Additionally, “there is growing international recognition that respect for civil and political rights may require affirmative government action.”⁹⁰ A number of nations have codified positive rights into their own constitutions, and these rights are also on display in the United Nations Universal Declaration of Human Rights.⁹¹ Although the Court in 1989 explicitly declared it would not recognize positive rights,⁹² Professor Edward Rubin critically points out that another institution also interprets the Constitution—the Legislature.⁹³

Professor Rubin suggests that if we want to know the current state of constitutional thinking about positive rights, we need to look to statutes as

86. Aditi Gowri, *Reproduction, Rights and Public Policy: A Framework for Assessment*, 35 TEX. INT’L L.J. 13, 20 (2000) (emphasis added).

87. *Id.* at 14.

88. *Id.*

89. Tribe, *supra* note 80, at 332.

90. Soohoo, *supra* note 37, at 428.

91. Rubin, *supra* note 82, at 1685–86. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

92. *See DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195–96 (1989) (holding that although the Due Process Clause forbids a state itself from depriving individuals of life, liberty, or property without due process of law, its language cannot fairly be extended to impose an affirmative obligation on a state to ensure that those interests do not come to harm through other means).

93. Rubin, *supra* note 82, at 1694.

well as decided cases: “[S]tatutes affect judicial interpretation of the Constitution because the statutes themselves are interpretations.”⁹⁴ He argues that “statutory law is moving toward the implementation of positive rights . . . toward the idea that every American has a right to food, shelter, health care, and education”—and the PPACA is a “dramatic acceleration” of this trend.⁹⁵

According to Professor Rubin, the PPACA’s universality, uniformity, and strong normativity all point to its possession of the characteristics of a positive constitutional right to health care.⁹⁶ Rather than applying only to a particular segment of the population, the Act applies to nearly everyone and appears to avoid the stigma of a welfare program.⁹⁷ The Act is also uniform in putting wage earners and the poor in the same boat; instead of a program directed only at wage earners (like Social Security), or only the poor (like food stamps), the PPACA combines both groups and is perceived as minimizing the difference between them.⁹⁸ Lastly, the PPACA has been presented not merely as a social program but as a moral imperative.⁹⁹

Professor Rubin offers the right of free speech as an example of a constitutional right that shares the same three features of universality, uniformity, and normativity that the PPACA possesses: The right applies to everyone, operates for everyone in the same essential way, and is regarded as a moral imperative.¹⁰⁰ As a result, he concludes the PPACA simultaneously challenges the courts to think about establishing positive rights as a matter of constitutional law and facilitates any effort by the courts to do so. “It encourages judges to reverse *DeShaney* and hold [that] the Due Process Clause guarantees minimal levels of safety and security.”¹⁰¹

III. A FUNDAMENTAL RIGHT TO ABORTION COVERAGE

Even if the PPACA was interpreted as conferring a positive health care right on Americans, the Executive Order applying Hyde’s restrictions to the PPACA¹⁰² warrants further analysis in finding a positive right to

94. *Id.*

95. *Id.* at 1701–02.

96. *Id.* at 1704.

97. *Id.* at 1702.

98. *Id.* at 1703.

99. *Id.*

100. *Id.* at 1704.

101. *Id.*

102. 42 U.S.C. § 18023(b)(1)(B) (2012); Exec. Order No. 13,535, § 1, 75 Fed. Reg. 15,599 (Mar. 29, 2010).

abortion through this interpretation. Although reclaiming the abortion right as a health care right instead of a “choice” “has the potential to offer greater protection for access to abortion-related healthcare[,]”¹⁰³ applying the PPACA’s recognition of positive constitutional rights to the Court’s due process analysis in *Harris* is another way to accomplish this result.

Any reversal of the principle in *DeShaney*, where the Court explicitly held the Due Process Clause does not impose an affirmative obligation on a state,¹⁰⁴ would call into question the Court’s due process analysis regarding the federal government’s obligations in *Harris*. Professor Rubin indicated a positive-rights reading of the PPACA could encourage judges to reverse *DeShaney*,¹⁰⁵ and the Court’s due process analysis in *Harris* rests upon his finding that the liberty protected by the Due Process Clause imposes no affirmative obligation on the government.¹⁰⁶ The Court in *Harris* affirmed that the liberty protected by the Clause affords protection against unwarranted government interference.¹⁰⁷ A transition toward understanding our constitutional rights as positive would thus expand the federal government’s role. Contrary to the Court’s reasoning, a woman’s freedom of choice *would* “carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices”¹⁰⁸ under this new understanding of the liberty protected under the Clause. Rather than blaming a woman’s indigency for her inability to enjoy the full range of her constitutionally protected freedom of choice,¹⁰⁹ a positive understanding of our rights would require the federal government to remove the restrictions placed on her by the Hyde Amendment. Accordingly, the *government*, not the woman, would bear the responsibility for her inability to enjoy the full range of her freedom of choice.

The PPACA’s seeming grant of a positive health care right is a vehicle for finding Hyde unconstitutional. Although the recognition of positive constitutional rights would represent a major and highly controversial development for American constitutional law,¹¹⁰ and the current makeup of the Court “seems to prefer retrenchments and

103. Yvonne Lindgren, Note, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385, 421 (2013).

104. *DeShaney v. Winnebago Cty. Dep’t of Soc. Serv.*, 489 U.S. 189, 195 (1989).

105. Rubin, *supra* note 82, at 1704.

106. *See Harris v. McRae*, 448 U.S. 297, 318 (1980).

107. *Id.* at 317.

108. *Id.* at 316.

109. *Id.*

110. Rubin, *supra* note 82, at 1686.

clarifications to major innovations,”¹¹¹ the PPACA presents a unique challenge to the Court to consider positive rights as a part of constitutional law.¹¹² A movement toward positive rights, with the PPACA as the vehicle, would present an opportunity for the Court to not only reconsider its *DeShaney* holding¹¹³ but also revisit its due process analysis in cases like *Harris*. Reversing the *DeShaney* holding and revisiting *Harris* would force the Court to grapple with its affirmation that freedom of choice does not carry a constitutional entitlement to the resources necessary to exercise that freedom,¹¹⁴ thus opening the door to finding Hyde unconstitutional.

IV. THE FATE OF HYDE AND THE PPACA UNDER THE TRUMP ADMINISTRATION

The search for a right to abortion coverage—a right that is meaningful for low-income, minority women that lack adequate health insurance or other means to cover the cost—appears fruitless under the current administration. President Trump has suggested he will preserve Planned Parenthood’s federal funding only if the organization discontinues providing abortion services;¹¹⁵ has signed a bill rolling back an Obama administration rule barring states from denying family planning grants to Planned Parenthood and other abortion providers;¹¹⁶ has vowed to nominate anti-choice justices to the Supreme Court;¹¹⁷ and nominated Justice Neil Gorsuch to the Court, who “voted with a majority of the

111. *Id.* at 1693.

112. *See id.* at 1704.

113. *Id.*

114. The Court in *Harris* held that (1) the liberty protected by the Due Process Clause “affords protection against unwarranted government interference with freedom of choice” in personal decisions, but “does not confer an entitlement” to the funds necessary to exercise that freedom, and (2) poverty is not a suspect classification, and the limitation of federal Medicaid funds to certain medically necessary abortions is “rationally related to the legitimate governmental objective of protecting potential life.” *Harris*, 448 U.S. at 317–18, 323–24.

115. Maggie Haberman, *Trump Tells Planned Parenthood Its Funding Can Stay if Abortion Goes*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/planned-parenthood.html?_r=0 [<https://perma.cc/4FQJ-F734>]. Of course, the Hyde Amendment already bars the use of federal funds to pay for abortions that are not medically necessary or not the result of rape or incest. Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) (codified as amended at 42 U.S.C. § 1396a (2012)).

116. Juliet Eilperin, *Behind Closed Doors, Trump Signs Bill Allowing States to Strip Federal Family Planning Funds From Abortion Providers*, WASH. POST (Apr. 13, 2017, 2:43 PM), https://www.washingtonpost.com/news/powerpost/wp/2017/04/13/behind-closed-doors-trump-signs-bill-allowing-states-to-strip-federal-family-planning-dollars-from-abortion-providers/?utm_term=.9b315d067c33 [<https://perma.cc/82GD-RHAV>].

117. Letter from Donald J. Trump, Donald J. Trump for President, Inc., to Pro-Life Leader (Sept. 2016), <https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf> [<https://perma.cc/R8XR-DTRV>].

[Tenth Circuit] in favor of privately held for-profit secular corporations . . . who raised religious objections to paying for contraception for women covered under their health care plans.”¹¹⁸ Additionally, on January 24, 2017, the House passed the No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act.¹¹⁹ If the Act passes the Senate, the Hyde Amendment, which has always functioned as a budget rider attached to individual federal appropriations bills, would become a permanent rule.¹²⁰ Thus, the Internal Revenue Code and the PPACA would be amended to prohibit qualified health plans from including coverage for abortions.¹²¹ This potential codification of Hyde and complete bar of abortion coverage in health plans under the PPACA would render the negative abortion right even more inaccessible for low-income women.

While the Trump Administration and Congress’s anti-choice stance does not bode well for low-income women seeking meaningful access to abortion—and the confirmation of Justice Gorsuch yields no shift in a Court already unlikely to recognize positive rights—the PPACA will likely remain in place. In July 2017, the Senate rejected a Republican plan to repeal the PPACA requirements that most people have health coverage and that large employers offer coverage to their workers.¹²² According to the CBO, the plan would have increased the number of uninsured people to 15 million by next year, and would have increased premiums by around twenty percent for people buying insurance on their own.¹²³ More recently, Majority Leader McConnell called off a vote on a PPACA-repeal bill after Senate Republicans could not garner the votes to meet the fifty-one-vote threshold required for passage.¹²⁴ The bill was a last-ditch effort to repeal

118. *Hobby Lobby Case Among Supreme Court Nominee Neil Gorsuch’s Notable Opinions*, CHI. TRIBUNE (Jan. 31, 2017, 7:57 PM), <http://www.chicagotribune.com/news/nationworld/politics/ct-supreme-court-nominee-neil-gorsuch-notable-opinions-20170131-story.html> [http://perma.cc/A66A-VQ7N].

119. H.R. 7, 115th Cong. (as passed by House, Jan. 24, 2017), <https://www.congress.gov/bill/115th-congress/house-bill/7/text/eh> [https://perma.cc/U67N-J2RW].

120. H.R. 7, 115th Cong. § 101 (2017).

121. H.R. 7, 115th Cong. § 201 (2017). “Currently, qualified health plans may cover abortion, but the portion of the premium attributable to abortion coverage is not eligible for subsidies.” *All Bill Information (Except Text) for H.R. 7 - No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/7/all-info> [https://perma.cc/A2U2-8MFX].

122. Robert Pear & Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html?mcubz=0>.

123. *Id.*

124. See Lauren Fox et al., *Senate Won’t Vote on GOP Health Care Bill*, CNN (Sept. 26, 2017), <http://www.cnn.com/2017/09/26/politics/health-care-republican-senate-vote/index.html> [http://perma.cc/8VVK-4VEL].

the PPACA before the budget rules expired and sixty votes are required to overcome a Democrat (or Republican) filibuster of a bill.¹²⁵

Despite the Trump administration's demonstrated hostility toward abortion rights and the PPACA, Congress's failure to repeal it allows for a potential positive rights understanding of the Act to persist. The possibility does exist that the Trump administration may stop defending the PPACA's cost-sharing reductions (CSRs) in court,¹²⁶ which "would cause health insurers to hike premiums or leave the Obamacare market altogether."¹²⁷ The federal government pays CSRs to health insurers to lower cost sharing (i.e., deductibles and copays) for the poorest Obamacare enrollees, paying out \$7 billion through this program last year.¹²⁸ House Republicans filed a lawsuit in July 2014, arguing that because Congress did not actually appropriate the money for these funds, the administration should not continue making these payments.¹²⁹ A federal judge agreed with the House members and ordered a halt to the payments, but suspended the order to allow the government to appeal.¹³⁰ The case is currently pending before the Federal Circuit.¹³¹ While the Trump administration has not committed to paying the PPACA's CSRs in 2018, it has been paying the subsidies on a month-to-month basis since President Trump assumed office.¹³²

Lastly, barring any major shifts on the bench during the administration's tenure, abortion jurisprudence is unlikely to change. As a

125. See Lisa Mascan, *Why Republicans Are Racing to Pass Healthcare by Sept. 30 and What's Next for Obamacare Repeal*, L.A. TIMES (Sept. 25, 2017), <http://www.latimes.com/politics/la-na-pol-healthcare-deadline-qa-20170925-story.html> [<http://perma.cc/D5LU-SXVP>]. However, Senate Republicans have vowed to take another crack at repealing the PPACA through the 2019 budget reconciliation process, which would only require fifty votes for passage (assuming Vice President Pence casts the tiebreaking vote). See Fox et al., *supra* note 124.

126. Sarah Kliff, *Insurance Regulators Are Panicked About Obamacare's Future*, VOX (Apr. 10, 2017, 2:50 PM), <http://www.vox.com/policy-and-politics/2017/4/10/15247724/obamacare-future-marketplaces> [<https://perma.cc/CP2E-J55Q>].

127. *Trump Threatens to Cut Obamacare Payments*, BBC NEWS (Apr. 13, 2017), <http://www.bbc.com/news/world-us-canada-39591989> [<https://perma.cc/CS8P-D5RD>]. Unfortunately, the Trump administration's refusal to commit to paying the PPACA's CSRs is already causing insurers to hike the cost of premiums in several states. See Jayne O'Donnell, *Obamacare Rates Soar as White House Refuses to Make Long Term Commitment to Subsidies*, USA TODAY (Sept. 27, 2017), <https://www.usatoday.com/story/news/politics/2017/09/27/obamacare-rates-soar-uncertawhite-house-but-hill-action-makes-insurers-more-likely-keep-selling-plan/705838001/> [<http://perma.cc/B9LM-9W76>].

128. Kliff, *supra* note 126.

129. *Id.*

130. Robert Pear & Thomas Kaplan, *Trump Threat to Obamacare Would Send Premiums and Deficits Higher*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/cbo-obamacare-cost-sharing-reduction-trump.html> [<https://perma.cc/4NZ2-H7RX>].

131. *Id.*

132. *Id.*

result, repealing Hyde still remains the next hurdle in achieving a right to abortion for *all* women, not just those with the means to access that right. The PPACA's likely permanence under the Trump administration thus allows for a positive-rights understanding of the Act to persist.

CONCLUSION

Hyde's 1976 passage severely curtailed the abortion right, preventing a woman who receives Medicaid benefits from using those benefits to pay for an abortion. Hyde's burden, which functionally denies the abortion right to Medicaid recipients who cannot pay out-of-pocket for the procedure, disproportionately falls on poor and low-income women of color, who are most likely to receive Medicaid benefits.¹³³ The PPACA's 2010 passage worsened Hyde's impact on these women, strengthening the equal protection arguments against Hyde's constitutional validity; the Act continues to disproportionately impact a group based on the intersectionality of sex, race, and socioeconomic status.¹³⁴

While the Act's effects have strengthened the argument for the recognition of an intersectional suspect classification,¹³⁵ the PPACA's features also seemingly confer a positive health care right on the American people.¹³⁶ In doing so, the Act opens the door to finding other kinds of positive rights—rights that require the government to take the initiative to appropriate funds for their fulfillment.¹³⁷ Further research on the constitutionality of Hyde should explore potential means for recognizing both an intersectional suspect classification and positive rights. While the Court's eventual recognition of an intersectional suspect classification may be more likely than its recognition of positive constitutional rights, more scholarship on using the PPACA to recognize positive rights could eventually pave the way for an abortion right that is meaningful and protected for all women. The PPACA creates an avenue for the Court to find a positive abortion right that not only protects a woman from state interference in exercising her right but also ensures she has the resources necessary to access this due process liberty.

133. *See supra* Part I.

134. *Id.*

135. *See supra* Part II(B).

136. *See supra* Part II(C).

137. *See supra* Part III.