Pregnancy as Punishment for Low-Income Sexual Assault Victims: An Analysis of South Dakota's Denial of Medicaid-Funded Abortion for Rape and Incest Victims and Why the Hyde Amendment Must Be Repealed

*Brooke McGee**

Introduction

Beginning at dawn, Jane drives over 450 miles from her small town of Buffalo, South Dakota to Sioux Falls, South Dakota to obtain an abortion for an unintended pregnancy. Spending over seven hours in her car without a break, Jane arrives at the only clinic that offers abortion services in the state. Once there, she meets with the doctor scheduled to perform the abortion. Under state law, the doctor and Jane discuss several items before she can obtain the abortion. The doctor warns Jane that the "abortion will terminate the life of a whole, separate, unique, living human being," "that by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated," and that the medical risks associated with the procedure include suicide and infertility.[1] Once the doctor confirms Jane has not been coerced into having an abortion and performs an exam, Jane must wait seventy-two hours before she is allowed to return to the clinic for the procedure.[2]

During the seventy-two-hour waiting period, Jane debates whether to make the 450 mile drive back home, in which case she would have to turn around in two days to make the same long drive,

* George Mason University, J.D. Candidate, December 2016; University of Nebraska at Kearney, M.A. History, 2011, B.A. Political Science, *magna cum laude*, 2008. I would like to thank Pablo for his love and encouragement while I wrote this Comment. I would also like to thank everyone on the Civil Rights Law Journal for their feedback and support.

[1] S.D. Codified Laws §34-23A-10.1 (1980; last amended 2005); Guttmacher Inst., *State Facts About Abortion: South Dakota* (2015), https://www.guttmacher.org/pubs/sfaa/pdf/south_dakota.pdf [hereinafter *State Facts About Abortion: South Dakota*]; *see also* Maria L. La Ganga, *The Abortion Wars: Doctor Goes to Great Lengths to Keep Abortion Accessible*, L.A. Times, (Oct. 14, 2014) http://www.latimes.com/nation/la-na-abortion-south-dakota-20141014-story.html.

[2] S.D. Codified Laws §34-23A-56 (1980; last amended 2005); *State Facts About Abortion: South Dakota, supra* note 1; *see also* La Ganga, *supra* note 1.

or spend the waiting period in a rundown hotel in Sioux Falls. Not wanting to make the 900-mile round-trip drive in the same week, Jane decides to stay in the hotel for $50 each night. On Thursday, Jane returns to the clinic for the procedure. The doctor informs Jane that, because she is now ten weeks pregnant, she must have a surgical abortion rather than a medication abortion.[3] A surgical abortion costs up to $1,500 in the first trimester.[4] Conversely, a medication abortion, which is available to women who are under nine weeks pregnant, costs up to $800.[5] Once the procedure is complete, Jane begins her journey back home. In total, Jane spends nearly a week's time obtaining an abortion, not to mention the travel, lodging, medical, and food expenses, plus time taken off work.

Jane's story is not unlike the stories of other middle-class women who seek to terminate an unintended pregnancy. Despite South Dakota's restrictive abortion laws, Jane's job as an accountant enables her to take vacation time to have the procedure performed and to pay for it out-of-pocket. But, consider Jane's story from the perspective of an impoverished woman, Rosie. Rosie, unlike Jane, is a struggling, part-time community college student, a waitress at a local restaurant, and a mother to a toddler.[6] Because Rosie is a single mom in college

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[3] In March 2016, the Food and Drug Administration released guidance stating the abortion pill can be taken to terminate a pregnancy up to ten weeks gestation. *See* Am. College of Obstetricians and Gynecologists, ACOG Statement on Medication Abortion, (Mar. 30, 2016), http://www.acog.org/About-ACOG/News-Room/Statements/2016/ACOG-Statement-on-Medication-Abortion. *See also* U.S. Food and Drug Administration, Mifeprex (mifepristone) Information, http://www.fda.gov/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm111323.htm (last visited June 23, 2016).

[4] The price of a surgical abortion varies based on the state and gestational time. This is an estimate from Planned Parenthood. *See* Planned Parenthood, *In-Clinic Abortion Procedures*, https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures (last visited May 30, 2016); *see also* Planned Parenthood of Western Pennsylvania, *Fees for Services*, https://www.plannedparenthood.org/planned-parenthood-western-pennsylvania/patients/fees-services (last visited May 30, 2016); Planned Parenthood of the St. Louis Region and Southwestern Missouri, *Abortion Services*, https://www.plannedparenthood.org/planned-parenthood-st-louis-region-southwest-missouri/shadow-pages/health-services/abortion-services (last visited May 30, 2016).

[5] The price of a medication abortion (sometimes referred to as the "abortion pill") varies based on the state and other factors. This is an estimate from Planned Parenthood. *See* Planned Parenthood, *The Abortion Pill*, https://www.plannedparenthood.org/learn/abortion/the-abortion-pill (last visited May 30, 2016); *see also* Planned Parenthood of Western Pennsylvania, *Fees for Services*, *supra* note 4; Planned Parenthood of the St. Louis Region and Southwestern Missouri, *Abortion Services*, *supra* note 4.

[6] Fifty-nine percent of women seeking an abortion to terminate a pregnancy previously had given birth to a child. This statistic is important to note as women often seek abortions to termi-

relying on tips from her waitressing job, she receives support from the federal government, namely Medicaid health care for her child and herself.

Rosie, unlike Jane, becomes pregnant a second time after she was raped. Not wanting to relive the trauma of the rape every day of her pregnancy, Rosie seeks an abortion after learning she is seven weeks pregnant. Upon calling the abortion clinic to schedule the procedure, Rosie learns Medicaid will not cover her abortion in South Dakota, even though every other state in the country provides an exception for Medicaid-dependent women seeking to terminate pregnancies after being victims of rape or incest. Distraught, Rosie is unsure of what to do. She decides to sell valuable possessions, pick up extra shifts at her job, and eat one meal a day to save money for the abortion. Despite her best efforts, Rosie is unable to raise the hundreds of dollars she needs for either a medication or surgical abortion, on top of the other expenses she would incur, including childcare for her toddler, travel costs, and time taken off work to obtain the abortion.

Because Rosie is unable to raise the money she needs, she seeks help from an unlicensed midwife. The midwife agrees to perform the abortion for one-third of the clinic's price, so Rosie schedules the procedure. Following the procedure, Rosie begins to have extreme abdominal pain. Eventually, she is rushed to the hospital after she begins hemorrhaging. Once at the hospital, the doctors discover Rosie has a bacterial infection in her uterus. Even after the doctors perform a hysterectomy, the infection spreads to other organs and, within a few days, Rosie dies. Rosie's inability to pay for a safe, legal abortion, a procedure that should have been covered under federally funded Medicaid health care, ends up costing Rosie her life.[7] Despite abortion's legality in the United States, many states pass restrictions yearly that limit low-income women's access to abortion, forcing these

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nate unintended pregnancies because they know they cannot afford to raise another child. *See* Jenna Jerman, Rachel K. Jones & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST., (May 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

[7] Rosie's story is based on actual events. Rosie Jiménez tragically died after she sought out an illegal abortion because she was too poor to pay for an abortion in a clinic after the Hyde Amendment took effect. *See* Alexa Garcia-Ditta, *Reckoning with Rosie*, TEXAS OBSERVER (Nov. 3, 2015), http://www.texasobserver.org/rosie-jimenez-abortion-medicaid/. *See generally* ELLEN FRANKFORT, ROSIE: THE INVESTIGATION OF A WRONGFUL DEATH (1978).

women to take extreme measures to receive necessary medical procedures.[8]

In 1973, the Supreme Court held in *Roe v. Wade* that a woman has a fundamental right to terminate a pregnancy.[9] Since the *Roe* decision, abortion opponents have successfully chipped away at abortion rights through both state and federal legislative processes and court cases.[10] Notably, during the federal appropriations process in 1976, Congress passed a rider now widely known as the Hyde Amendment,[11] which prohibited the use of federal Medicaid funds for abortion, with the exception of endangerment to the woman's life.[12] In 1993, the Hyde Amendment was expanded to add exceptions for rape and incest victims.[13] Although many states initially refused to comply with these newly added exceptions, every state except South Dakota currently complies with the Hyde Amendment's three exceptions to Medicaid-funded abortion.[14] South Dakota continues to allow only Medicaid-funded abortion in cases where the woman's life is endangered, but it provides no exceptions for rape or incest victims.[15]

First, this Comment will discuss the legalization of abortion. Second, this Comment will analyze the Hyde Amendment's trajectory

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[8] In 2015, lawmakers introduced 396 provisions that sought to restrict access to abortion services, enacting fifty-seven of these restrictions. *See generally* Rachel Benson Gold & Elizabeth Nash, *Attacks on Abortion Rights Continued in 2015, Ensnaring Family Planning Funding and Fetal Tissue Research*, REWIRE (Jan. 4, 2016), http://rewire.news/article/2016/01/04/attacks-abortion-rights-continued-2015-ensnaring-family-planning-funding-fetal-tissue-research/ [hereinafter *Attacks on Abortion Rights Continued in 2015*]. In 2014, lawmakers considered 335 provisions that sought to restrict access to abortion services, enacting twenty-six of these restrictions. Moreover, from 2010 through 2014, lawmakers in states across the country adopted 231 new abortion restrictions. *See* GUTTMACHER INST., *In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions* (Jan. 5, 2015), https://www.guttmacher.org/article/2015/01/just-last-four-years-states-have-enacted-231-abortion-restrictions [hereinafter *In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions*].

[9] *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

[10] *See generally Gonzales v. Carhart*, 550 U.S. 124 (2007); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In *Carhart*, the Supreme Court upheld the Partial-Birth Abortion Ban Act. In *Casey*, the Supreme Court upheld a state law restricting abortion that included mandatory waiting periods, parental consent, and biased information. *See also supra* note 8 and accompanying text.

[11] This Comment refers to the Hyde Amendment as "Hyde" or "the Amendment" interchangeably.

[12] The Hyde Amendment, Pub. L. No. 94–439, 90 Stat 1418 (1976).

[13] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103–112, 107 Stat. 1082 (1993).

[14] S.D. Codified Laws § 28-6-4.5 (1978).

[15] *Id.*

through Congress and subsequent challenge at the Supreme Court. Third, this Comment will discuss the Hyde Amendment's evolution from its original language and expansion beyond Medicaid. Fourth, this Comment will examine South Dakota's refusal to comply with these exceptions by analyzing how other states initially implemented the original Amendment and later complied with the added exceptions. Fifth, this Comment will analyze how the Amendment harms low-income women, particularly women of color, in South Dakota and the United States generally. Lastly, this Comment will propose two different solutions.

The first and superior solution is to repeal the Hyde Amendment because it inherently discriminates against low-income women. Because Medicaid-dependent women often lack the financial resources to fund abortion services independently, South Dakota's version of the Hyde Amendment further victimizes sexual assault victims by forcing them to carry unintended pregnancies to term.

The alternate solution is for abortion providers and Medicaid-dependent women in South Dakota to file a lawsuit against the state in order to force South Dakota to comply with the Hyde Amendment's rape and incest exceptions. A reform is desperately needed, as rape and incest victims in South Dakota are entitled to the same reproductive choices as women in other states.

I. BACKGROUND

A. *The Legalization of Abortion*

In *Roe v. Wade*, the Supreme Court struck down a Texas law that prohibited abortion except in cases where necessary to save the woman's life.[16] Finding the Texas statute unconstitutional, the Court held that a woman's right to terminate a pregnancy is found in the constitutional right to privacy.[17] When *Roe* was decided in 1973, nearly two-thirds of the states had already banned abortion.[18] As a result of these pre-*Roe* laws, it is estimated that 1.2 million women each year sought out illegal abortion[19] "despite the known hazards of

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16 *See* Roe v. Wade, 410 U.S. 113, 155.

17 *See id*.

18 *See id.* at 118-19 n.2.

19 *See* NARAL Pro-Choice America Fact Sheet on *Roe v. Wade* and the Right to Choose, http://www.prochoiceamerica.org/media/fact-sheets/government-federal-courts-scotus-roe.pdf

frightening trips to dangerous locations in strange parts of town, of whiskey as an anesthetic, doctors who were often marginal or unlicensed practitioners, unsanitary conditions, incompetent treatment, infection, hemorrhag[ing] disfiguration, and death."[20]

In the *Roe* decision, the Court established the trimester framework for abortion regulation: during the first trimester of pregnancy, a woman may make the decision free from state interference.[21] After the first trimester, the state has a compelling interest in protecting the woman's health and may reasonably regulate abortion to promote that interest.[22] After the point of fetal viability—generally during the third trimester—the state has a compelling interest in protecting potential life and may ban abortion, except when necessary to preserve the woman's life or health.[23]

B. *Restrictions on Abortion Funding: Introduction of the Hyde Amendment*

After the Supreme Court decided *Roe*, abortion opponents worked to undermine the right to abortion.[24] One of the principal avenues abortion opponents pursued was eliminating federal funding for abortion.[25] Specifically, abortion opponents at the state and federal level fought to eliminate Medicaid[26] funding for abortion.[27] Prior to the introduction of the Hyde Amendment, Medicaid funded nearly

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[hereinafter NARAL Fact Sheet on *Roe v. Wade*] (citing Willard Cates, Jr. et al, *Comment: The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25 (2003); Willard Cates Jr., *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982); RICHARD SCHWARZ, SEPTIC ABORTION 7 (1968)).

20 *See* NARAL Fact Sheet on *Roe v. Wade*, *supra* note 19 (citing Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 117 (Nov. 1989)).

21 *See Roe*, 410 U.S. at 163.

22 *See id*.

23 *See id*. at 163-64.

24 *See* The Hyde Amendment, Pub. L. No. 94–439, 90 Stat 1418 (1976).

25 *See id.*

26 The Medicaid statute, found in Title XIX of the Social Security Act, is a federal government program administered by the states to provide health care funding for the impoverished. *See* 42 U.S.C. § 1396 (2010) (establishing Medicaid and CHIP Payment and Access Commission).

27 *See id*. *See also* FREDERICK S. JAFFE ET AL., ABORTION POLITICS: PRIVATE MORALITY AND PUBLIC POLICY 132 (1981); Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. 1 (2007), http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.pdf [hereinafter *The Heart of the Matter*].

one-fourth of abortions performed.[28] Although federal legislative efforts to restrict Medicaid-funded abortion proved unsuccessful for a few years, individual states passed legislation to restrict abortion in their states' Medicaid programs.[29]

After a few years of lobbying, in 1976, Congress passed the Hyde Amendment as a policy rider to the annual appropriations bill for the Department of Health, Education, and Welfare.[30] This rider prohibited federal funds from paying for abortion unless the woman's life was endangered.[31] The rider affects low-income women almost exclusively.[32] The late Henry Hyde (R-IL), the conservative congressman who proposed the amendment, acknowledged this reality during a Medicaid funding debate in 1977, when he told his colleagues: "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."[33] Although abortion rights activists obtained an injunction against the rider, this injunction was later vacated by the Supreme Court in the case of *Harris v. McRae*, paving the way for Congress to continue including the Hyde Amendment in annual appropriations bills.[34]

From 1977 through 1980, city, state, and federal funding restrictions for abortion were challenged at the Supreme Court. These cases, collectively known as the "abortion funding cases," are *Maher v. Roe*, *Poelker v. Doe*, *Beal v. Doe*, and *Harris v. McRae*.[35] Both *Beal* and *Maher* challenged state laws that prohibited Medicaid coverage for abortion unless the procedure preserved the woman's health

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28 *See* JAFFE, *supra* note 27 at 128.

29 *See* JAFFE, *supra* note 27 at 132. After the *Roe* decision and prior to the implementation of the Hyde Amendment, thirteen states restricted Medicaid funding for abortion services. *Id*. Just prior to the *McRae* decision in 1979, forty state legislatures restricted Medicaid funding for abortion services. *Id*.

30 The Hyde Amendment, Pub. L. No. 94–439, 90 Stat 1418 (1976).

31 *Id*. The statute's language stated, "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

32 *See* Jessica Arons, *Unhappy Birthday to the Amendment That Started the War on Women*, THE DAILY BEAST, (Sept. 30, 2012), http://www.thedailybeast.com/articles/2012/09/30/unhappy-birthday-to-the-amendment-that-started-the-war-on-women.html.

33 123 CONG. REC. 19,700 (1977).

34 *See* Harris v. McRae, 448 U.S. 297, 302-04 (1980).

35 *See McRae*, 448 U.S. at 302; Maher v. Roe, 432 U.S. 464, 465-66 (1977); Beal v. Doe, 432 U.S. 438, 440 (1977); Poelker v. Doe, 432 U.S. 519, 519-20 (1977).

and was deemed medically necessary.[36] *Maher*, *Poelker*, and *Beal* served as a precursor for the Court's analysis in the critical *McRae* decision concerning the constitutionality of the Hyde Amendment. Incorporating the *Maher*, *Poelker*, and *Beal* decisions, the *McRae* decision serves as the Supreme Court's most recent stance on the Hyde Amendment.[37]

The Court first introduced a nontherapeutic treatment rationale for denying federal funding for abortion in *Maher v. Roe*. In this case, the plaintiffs argued the Connecticut regulation violated the Fourteenth Amendment's Equal Protection Clause[38] because the regulation required the state's Medicaid program to cover childbirth expenses for poor women, but refused to cover elective abortion services.[39] The Court held the Equal Protection Clause did not require Connecticut to pay for abortions that were "nontherapeutic"[40] or not "medically necessary," even where the state's Medicaid program paid for labor and delivery services.[41] Justice Powell determined Connecticut's regulation did not fundamentally prevent or restrict a low-income woman from accessing abortion.[42] He noted, "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."[43] Justice Powell also stated although Connecticut "may have made childbirth a more attractive alternative, thereby influencing the woman's decision, . . . [the state] imposed no restriction on access to abortion services that was not already there."[44]

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[36] *See Maher*, 432 U.S. at 465-66; *Beal*, 432 U.S. at 440-41.

[37] *See McRae*, 448 U.S. at 304, 324.

[38] The Equal Protection Clause of the Fourteenth Amendment states, "All persons . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which . . . shall *deny to any person within its jurisdiction the equal protection of the law*s" (emphasis added). U.S. CONST. amend. XIV. The Court also noted that poor women are not a protected class under the Equal Protection Clause. *See Maher*, 432 U.S. at 470-71.

[39] *See Maher*, 432 U.S. at 467-68.

[40] A nontherapeutic abortion is an abortion that is deemed not medically necessary—in other words, an elective procedure. On the other hand, a therapeutic abortion is an abortion that is medically necessary to save the mother's life or health. *See Medically necessary abortion* (also termed *therapeutic abortion*), BLACK'S LAW DICTIONARY (10th ed. 2014).

[41] *Maher*, 432 U.S. at 474.

[42] *Id*.

[43] *Id*.

[44] *Id*.

After rejecting the equal protection argument, the Court then applied the rational basis test,[45] holding the distinction between abortion and childbirth services as "rationally related to the constitutionally permissible" state interest in encouraging childbirth.[46] Furthermore, the Court determined the plaintiffs demanded "nontherapeutic" abortions, whereas the labor and delivery services provided were considered "medically necessary."[47]

After *Maher*, the Court heard other abortion funding cases that furthered the nontherapeutic treatment rationale for withholding Medicaid funding from women seeking abortion. For instance, in *Poelker v. Doe*, the Court held the city of St. Louis's refusal to provide publicly funded hospital services for nontherapeutic abortions did not deny equal protection, even though the city provided maternal-related services to pregnant women who carried their pregnancies to term.[48] Furthermore, in *Beal v. Doe*, the Court held Pennsylvania was not required to provide funding for nontherapeutic abortions as a condition of the state's participation in the Medicaid program.[49] The Court reasoned the statute was not unreasonable because the state has a "strong and legitimate interest in encouraging normal childbirth."[50] The Court clarified the State's interest when it stated, "[I]t is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary though perhaps desirable medical services."[51]

Finally, in 1980, the Supreme Court in *Harris v. McRae* upheld the Hyde Amendment's federal Medicaid funding restriction on abortion.[52] In this case, the Court held the funding restriction did not violate a woman's right to an abortion because it was not the restriction that prevented a woman from accessing abortion, but rather the woman's preexisting poverty.[53] The Court rejected the plaintiffs'

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45 The rational basis test is a standard of review used for analyzing a statute not implicating a fundamental right or a suspect or quasi-suspect classification under the Equal Protection Clause. Under rational basis review, a court will uphold a law if it bears a reasonable relationship to a legitimate governmental interest. Rational basis is the most deferential of the standards of review courts utilize in analyzing claims under the Equal Protection Clause of the Fourteenth Amendment. *See Rational-basis test*, BLACK'S LAW DICTIONARY (10th ed. 2014).

46 *Maher*, 432 U.S. at 478-79.

47 *Id*.

48 Poelker v. Doe, 432 U.S. 519, 520-21 (1977).

49 Beal v. Doe, 432 U.S. 438, 444-46, 447 (1977).

50 *Id*. at 445-46.

51 *Id.* at 444-45.

52 Harris v. McRae, 448 U.S. 297, 326 (1980).

53 *Id.* at 316.

argument that the State had to ensure women could access their reproductive health choices, stating "[T]he liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[54]

Having decided the funding restriction did not interfere with a fundamental right and was not based on a suspect classification, the Court applied the rational basis test to the plaintiffs' equal protection argument.[55] As in *Maher*, the Court held restricting funding for abortions was not "wholly irrelevant" to the governmental objective of encouraging childbirth over abortion.[56] The Court declared, "A woman's freedom of choice [does not carry] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[57] According to the Court, because the government did not cause a Medicaid-dependent women's impoverishment, the government is not obligated to remove financial obstacles for poor women, noting, "Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation, and indigency falls within the latter category."[58] Furthermore, the *McRae* majority determined when Congress "enacted [Medicaid], they did not intend for a participating State to assume a unilateral funding obligation for any health service in an approved Medicaid plan."[59] Thus, Congress cannot force states participating in Medicaid to fund services for which the federal government withholds funding.[60]

Still, the Court in *McRae* was sharply divided on the question of whether to uphold the Hyde Amendment. In a scathing dissent, Justice Brennan determined the Court misconceived "the manner in which the right to abortion is infringed by state and federal funding bans."[61] He noted it is not whether the State has an "affirmative obligation to ensure access to abortions," but rather, the issue is whether "the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to

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54 *Id.* at 317-18.

55 *Id.* at 321-22.

56 *Id.* at 322.

57 *Id.* at 316.

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

59 *Id.* at 309.

60 *Id.* at 309-10.

61 *McRae*, 448 U.S. at 329 (Brennan, J., dissenting).

choose an abortion."[62] Justice Brennan focused on "the coercive impact of the congressional decision to fund one outcome of pregnancy—childbirth—while not funding the other—abortion," and considered the restriction's consequence, which is "to leave sick women without treatment simply because of the medical fortuity that their illness cannot be treated unless their pregnancy is terminated."[63] In other words, the restriction "intrudes upon [the right to abortion] both by design and in effect it serves to coerce indigent pregnant women to bear children that they would otherwise elect not to have."[64] Justice Brennan explained, "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."[65] He further stated, "[T]he fundamental flaw in the Court's due process analysis, then, is its failure to acknowledge that the discriminatory distribution of . . . [governmental benefits] can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions."[66]

In addition to Justice Brennan, each of the other three dissenting justices on the *McRae* Court had a different take on the equal protection argument against the Hyde Amendment. In Justice Stevens's dissent, he objected to the majority's "sterile" equal protection analysis.[67] Stevens noted the question was "whether certain persons who satisfy [the Medicaid] criteria may be denied access to benefits solely because they must exercise the constitutional right to have an abortion in order to obtain the medical care they need."[68] The government, he argued, "Must use neutral criteria in distributing benefits. It may not deny benefits to a[n otherwise eligible] person simply because he is a Republican, [or] a Catholic . . . or because he has spoken against a program the government has a legitimate interest in furthering."[69] Furthermore, Stevens determined, the funding restriction violated the government's duty to govern impartially.[70] Justice Stevens also criticized the majority for its failure to consider the restriction's impact on

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62 *Id.* at 330.
63 *Id.* at 330 n.4.
64 *Id.* at 330.
65 *Id.* at 337.
66 *Id.* at 334.
67 Harris v. McRae, 448 U.S. 297, 351 (1980) (Stevens, J., dissenting).
68 *Id.* at 349.
69 *Id.* at 356.
70 *Id.* at 357.

women's health in its rationality argument.[71] Stevens concluded that the opinion was "doubly erroneous" because *Roe* "held that the individual interest in the freedom to elect an abortion and the state interest in protecting maternal health *both* outweigh the State's interest in protecting potential life prior to viability."[72] Justice Marshall penned a separate dissent to criticize the majority's "rigid two-tiered" equal protection approach, noting that the "Constitution requires a more exacting standard of review than mere rationality in cases such as this one."[73] Justice Marshall stated, "The Hyde Amendment cannot pass constitutional muster even under the rational basis standard of review."[74] Finally, Justice Blackmun, in a short dissent, labeled the majority's view that a low-income woman "may go elsewhere for her abortion" as "disingenuous and alarming," as the majority failed to acknowledge the realities a low-income woman faces when trying to terminate an unintended pregnancy.[75]

C. *Evolution and Expansion of the Hyde Amendment*

1. The Hyde Amendment's Evolution

Since being introduced in 1976, the Hyde Amendment has evolved from its original wording, which included only an exception for the woman's life being endangered.[76] In 1978, Congress added exceptions for "'promptly reported' rape and incest, as well as, 'severe and long-lasting physical . . . damage' to a woman's health."[77] These exceptions were a compromise for Congress, as the Senate wanted to fund all "medically necessary" abortions, while the House of Representatives wanted to eliminate all publically funded abortions with no exceptions.[78] Devastatingly, Congress dropped the health exception a year later in 1979, a detriment to poor women to this day.[79] Congress

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71 *Id.* at 351.

72 Harris v. McRae, 448 U.S. 297, 352 n.4 (1980) (Stevens, J., dissenting).

73 *Id.* at 341 (Marshall, J., dissenting).

74 *Id.*

75 *Id.* at 348-49 (Blackmun, J., dissenting).

76 JESSICA ARONS & MADINA AGÉNOR, CTR. FOR AM. PROGRESS, SEPARATE AND UNEQUAL: THE HYDE AMENDMENT AND WOMEN OF COLOR, at 7-9 (2010), https://www.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf [hereinafter SEPARATE AND UNEQUAL].

77 SEPARATE AND UNEQUAL, *supra* note 76 at 7.

78 *The Heart of the Matter*, *supra* note 27, at 12-13.

79 *See id.* at 13.

also removed the rape and incest exceptions in 1981, but fortunately reinstated them in 1993.[80] In 1997, Congress effectively narrowed the life endangerment exception.[81] The life endangerment exception definition is now applied solely to "physician-certified cases where a woman is in danger of dying as a result of a physical disorder, injury, or illness unless she obtains an abortion."[82] Today, the Hyde Amendment affects the nearly 16 million women who rely on Medicaid for health care services.[83]

2. The Hyde Amendment Expands Beyond Medicaid

In addition to the one in ten women of reproductive age enrolled in Medicaid,[84] the Hyde Amendment restrictions have also been applied to other forms of federally funded health care through either the annual appropriations process or permanent law.[85] Federal government employees and their dependents, Peace Corps volunteers, military servicewomen and veterans, federal prison inmates, immigrant detainees, and Medicaid, Medicare, Children's Health Insurance Program, and Indian Health Service beneficiaries are all prohibited from seeking abortion services funded by the federal government, with exceptions for rape, incest, and life endangerment for some, but not all, of these women.[86] Millions of women rely on health care administered through many types of non-Medicaid federally funded programs, and consequently millions of women are denied access to abortion through their health care programs because of the Hyde

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[80] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103–112, 107 Stat. 1082 (1993); *see The Heart of the Matter*, *supra* note 27 at 13.

[81] SEPARATE AND UNEQUAL, *supra* note 76 at 7.

[82] *Id.*

[83] *See* THE HENRY J. KAISER FAM. FOUND., DISTRIBUTION OF NONELDERLY ADULTS WITH MEDICAID BY GENDER, http://kff.org/medicaid/state-indicator/distribution-by-gender-4/ (last visited May 24, 2016).

[84] Alina Salganicoff, Usha Ranji & Laurie Sobel, *Medicaid at 50: Marking a Milestone for Women's Health*, 25-3 WOMEN'S HEALTH ISSUES 198, 198 (2015), http://www.whijournal.com/article/S1049-3867(15)00032-8/pdf.

[85] *See The Heart of the Matter*, *supra* note 27 at 14.

[86] *See id.*; NARAL PRO-CHOICE AM., BANS ON ABORTION COVERAGE IN GOV'T-RUN HEALTH-CARE PROGRAMS FACT SHEET, http://www.prochoiceamerica.org/media/fact-sheets/bans-on-abortion-coverage-goverment-programs.pdf [hereinafter NARAL Fact Sheet on Abortion Coverage in Government-Run Health-Care].

Amendment restrictions.[87] Discussed below, based on the year Hyde language was added to them, are the federally funded government health care programs that deny women access to their full-range of reproductive health services because of Hyde Amendment restrictions.

The Peace Corps program, funded through the Foreign Operations appropriations bill, provides health care coverage to its volunteers and trainees.[88] Nevertheless, from 1979 until late 2014, appropriations provisions prohibited the use of funds to provide abortion services for volunteers and trainees, *even in cases where a woman's life would have been endangered by carrying the pregnancy to term* (emphasis added).[89] Moreover, more than 4,300 Peace Corp volunteers are women, most of whom are single and of reproductive age.[90] After decades of going without full reproductive services, in December 2014, the federal government allowed Peace Corp volunteers to seek abortion services in cases of rape, incest, or life endangerment.[91]

Unlike the Peace Corps, the Department of Defense provides abortion services to women serving in the military and female military dependents as part of TRICARE, its health-insurance plan, but only in three instances: life endangerment, rape, or incest.[92] TRICARE—or other forms of military health care—cover approximately 1.1 million women of reproductive age.[93] Similarly, civilian federal government employees and their dependents are prohibited from using their

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[87] *See generally* ALL* ABOVE ALL, THE EQUAL ACCESS TO ABORTION COVERAGE IN HEALTH INSURANCE (EACH WOMEN) ACT: GROUNDBREAKING LEGISLATION FOR REPRODUCTIVE JUSTICE FACT SHEET, http://allaboveall.org/wp/wp-content/uploads/2016/06/EACH-Woman-Act-Fact-Sheet.pdf (noting that the restrictions affect 1 in 6 women enrolled in Medicaid, as well as over 3 million other women enrolled in federally funded health care programs).

[88] *Peace Corps Leadership*, PEACE CORPS, https://www.peacecorps.gov/about/leadership/ (last visited June 24, 2016).

[89] Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009); *see* NARAL Fact Sheet on Abortion Coverage in Government-Run Health-Care, *supra* note 86 at 10.

[90] *See Peace Corps Fast Facts*, PEACE CORPS, http://www.peacecorps.gov/about/fastfacts/ (last visited August 21, 2016).

[91] Press Release, Champions of Global Reproductive Rights ("PAI"), Peace Corps Volunteers Win Better Reproductive Health Coverage (Dec. 10, 2014), http://pai.org/press-releases/peace-corps-volunteers-win-better-reproductive-health-coverage-with-omnibus-appropriations-bill/.

[92] 10 U.S.C. § 1093 (2012).

[93] JESSICA ARONS, LINDSAY ROSENTHAL & DONNA BARRY, OUT OF RANGE OBSTACLES TO REPRODUCTIVE AND SEXUAL HEALTH CARE IN THE MILITARY. CTR. FOR AM. PROGRESS at

insurance benefits to cover abortion, except in cases of life endangerment, rape, or incest.[94] Over 1 million women are federal government employees, and the Federal Employees Health Benefits Program covers even more women who are federal government employee dependents.[95]

The Department of Health and Human Services provides funding for Indian Health Service (IHS) facilities, the health-service delivery system of over 2 million Native Americans and Alaska Natives.[96] IHS clinics are often the only health care facilities that are accessible for many Native American women.[97] Notably, from 1988 until 1993, the authorizing IHS legislation barred these facilities from providing abortion services unless the woman's life was endangered, even if the woman paid for the abortion out-of-pocket.[98] Even after IHS adopted the rape and incest exceptions in the 1993 version of the Hyde Amendment, Native American women were still denied abortion services if they were rape or incest victims.[99] According to a Native American Women's Health Education Resource Center survey of IHS, "[85 percent] of the IHS Service Units contacted were not in compliance with the official IHS abortion policy, which states that IHS will provide abortion services in cases where the woman's life is physically endangered, or where the pregnancy is the result of an act of rape or incest."[100] This lack of compliance is concerning, as IHS

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6 (July 2014), https://cdn.americanprogress.org/wp-content/uploads/2014/07/Arons_OutOfRange-report1.pdf.

94 U.S. OFFICE OF PERS. MGMT., THE FACT BOOK, FEDERAL CIVILIAN WORKFORCE STATISTICS 82 (2007), http://www.opm.gov/feddata/factbook/; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2010).

95 *See The Heart of the Matter*, *supra* note 27 at 14.

96 *Indian Health Disparities*, INDIAN HEALTH SERV. (Jan. 2015), http://www.ihs.gov/newsroom/includes/themes/newihstheme/display_objects/documents/factsheets/Disparities.pdf.

97 *See* Samantha Artiga, et al., *Health Coverage and Care for American Indians and Alaska Natives*, THE HENRY J. KAISER FAM. FOUND. at 8 (Oct. 2013), https://kaiserfamilyfoundation.files.wordpress.com/2013/10/8502-health-coverage-and-care-for-american-indians-and-alaska-natives.pdf.

98 42 C.F.R. § 136.54 (1988); *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 8.

99 KATI SCHINDLER, ET AL., NATIVE AM. WOMEN'S HEALTH EDU. RESOURCE CTR., INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT at 4 (Oct. 2002), https://www.prochoice.org/pubs_research/publications/downloads/about_abortion/indigenous_women.pdf [hereinafter INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT]; *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 8.

100 *See* INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT, *supra* note 99 at 6.

provides health care to nearly 1 million Native American and Alaska Native women.[101]

Women who rely on the Veterans Health Administration for their health insurance have also been barred from abortion coverage.[102] The Veterans' Health Care Act of 1992, which provided women veterans with health care, including reproductive health care services like pap smears, breast examinations, and mammography,[103] explicitly excluded abortion coverage, with no exceptions.[104] Approximately 2 million women veterans rely on health care from the Veterans Health Administration.[105]

The Hyde Amendment also impacts women in correctional facilities.[106] Since 1995, female inmates housed at correctional institutions operated by the Federal Bureau of Prisons have been prohibited from using federal funds for abortion services, except in cases where the inmate's life was endangered or the pregnancy was the result of rape.[107] Federal prisons house approximately 13,000 women.[108] The majority of these women are of reproductive age.[109]

In 1998, Congress applied the Hyde Amendment to Medicare, restricting publicly funded abortion services for disabled women except in cases of life endangerment, rape, or incest.[110] Unlike the

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101 *See The Heart of the Matter*, *supra* note 27 at 14.

102 Veterans Health Care Act of 1992, Pub. L. No. 102-585, § 106, 106 Stat. 4943 (1992).

103 Reproductive health care services, including pap smears, breast examinations, and mammography, are sometimes referred to as "well-woman's care services."

104 Veterans Health Care Act of 1992 § 106; SIDATH VIRANGA PANAGALA & ERIN BAGALMAN, CONG. RESEARCH SERV., RL42747, HEALTH CARE FOR VETERANS: ANSWERS TO FREQUENTLY ASKED QUESTIONS at 11 (2014), https://www.fas.org/sgp/crs/misc/R42747.pdf.

105 National Center for Veterans Analysis and Statistics, U.S. DEP'T OF VETERANS AFFAIRS, Veteran Population, http://www.va.gov/VETDATA/Veteran_Population.asp (last visited May 23, 2016). Downloading the population table from the Nation section and sorting for gender indicates the number of women veterans.

106 Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3129 (2010); *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 8.

107 Consolidated Appropriations Act, 2010, 123 Stat. 3034; *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 8.

108 *Statistics, Inmate Gender*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp (last visited August 27, 2016).

109 Janice F. Bell et al., *Jail Incarceration and Birth Outcomes*, 81 J. URB. HEALTH: BULL. N.Y. ACAD. MED., No. 4, 630, 630 (2004). *See also* E. Ann Carson, *Prisoners in 2014*, BUREAU OF JUSTICE STATS., OFFICE OF JUST. PROGRAMS, U.S. DEP'T. OF JUSTICE 1, 15, Table 10 (Sept. 2015), http://www.bjs.gov/content/pub/pdf/p14.pdf.

110 Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, § 509, 112 Stat. 2681, 2681-385 (1998); *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 7-8.

joint state-federal Medicaid program, the federal government solely funds Medicare.[111] Thus, Medicare beneficiaries in every state are denied access to publicly funded abortion services.[112] Over 28 million disabled and elderly women rely on Medicare.[113] Approximately one in six individuals who rely on Medicare are under age 65 and have a permanent disability.[114] Additionally, the Children's Health Insurance Program (CHIP), which provides health care to children, is also subject to the Hyde Amendment with exceptions for rape, incest, and life endangerment.[115] Over 8 million children rely on CHIP.[116]

In March 2010, Congress passed landmark health-reform legislation known as the Patient Protection and Affordable Care Act (ACA).[117] Although the law makes health care more accessible for many Americans, to pass the legislation, Nebraska Senator Ben Nelson added several abortion restrictions, including Hyde Amendment language.[118] The ACA explicitly restricted federal funds from paying for abortion services, with exceptions for life endangerment, rape, and incest.[119] Additionally, "under the ACA, an issuer opting to cover abortion care in marketplace plans must follow particular administrative requirements to ensure that no federal funds go toward abortion. Moreover, states retain the option to ban abortion coverage in marketplace plans outright, and half of states have already done so."[120] In

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111 42 U.S.C.A. § 1395 (2012); *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 7-8.

112 42 U.S.C.A. § 1395(f) (2012); *see also* NARAL Fact Sheet on Abortion Coverage in Government-Run Health-Care, *supra* note 86 at 8.

113 *See* THE HENRY J. KAISER FAM. FOUND., DISTRIBUTION OF MEDICARE BENEFICIARIES BY GENDER, http://kff.org/medicare/state-indicator/medicare-beneficiaries-by-gender/ (last visited May 23, 2016).

114 *See* THE HENRY J. KAISER FAM. FOUND., AN OVERVIEW OF MEDICARE, http://kff.org/medicare/issue-brief/an-overview-of-medicare/ (last visited June 24, 2016).

115 42 U.S.C.A. § 1397ee(c)(7)(A), (B) (2010); *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 4.

116 *See* THE HENRY J. KAISER FAM. FOUND., TOTAL NUMBER OF CHILDREN EVER ENROLLED IN CHIP ANNUALLY, http://kff.org/other/state-indicator/annual-chip-enrollment/ (last visited May 23, 2016).

117 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, (2010).

118 Susan A. Cohen, *Insurance Coverage of Abortion: The Battle to Date and the Battle to Come*, 13 GUTTMACHER POL'Y REV. no. 4 at 2, 3 (Fall 2010), https://www.guttmacher.org/pubs/gpr/13/4/gpr130402.html.

119 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303(b)(2), 124 Stat. 119, (2010).

120 Kinsey Hasstedt, *Abortion Coverage Under the Affordable Care Act: Advancing Transparency, Ensuring Choice and Facilitating Access*, 18 GUTTMACHER POL'Y REV. no. 1, at 14, 14 (Winter 2015), https://www.guttmacher.org/sites/default/files/article_files/gpr1801415.pdf [hereinafter *Abortion Coverage Under the Affordable Care Act*].

the states that allow for insurers to cover abortion care beyond the rape, incest, and life endangerment exceptions, "the ACA requires the issuer to follow special accounting mechanisms . . . to ensure that federal subsidies are segregated from the private funds used to cover abortion."[121]

For the 2016 enrollment period, over 6 million women signed up for health insurance through the ACA's marketplace exchange.[122] For women who reside in states that restrict abortion coverage outright (like South Dakota), these women are subsequently prevented from using their health insurance through the state marketplace exchange to pay for abortion services, unless the pregnancy is due to rape, incest, or life endangerment.[123] Unfortunately, even states without restrictions on abortion coverage failed to offer marketplace plans that covered abortion in all circumstances.[124] In 2015, seven states still did not have marketplace plans that covered abortion beyond cases of rape, incest and life endangerment, leaving women in these states without access to abortion care through their insurance plans.[125]

Recently, the U.S. House of Representatives passed spending bills for the Department of Homeland Security in fiscal years 2013 and 2014 that included Hyde Amendment language.[126] These bills included amendments prohibiting the U.S. Immigration and Customs Enforcement (ICE) from funding abortion services for women held in immigration detention facilities, except in cases of life endangerment,

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121 *Abortion Coverage Under the Affordable Care Act*, *supra* note 120 at 14-15. These accounting mechanisms are as follows: "The issuer must establish two separate accounts into which enrollees' premium payments are deposited: one from which abortion claims (beyond instances of rape, incest or life endangerment) are paid and another comprising the vast majority of enrollees' premium dollars from which all other claims are paid." *Id*.

122 OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., ASPE ISSUE BRIEF, HEALTH INSURANCE MARKETPLACES 2016 OPEN ENROLLMENT PERIOD: JANUARY ENROLLMENT REPORT FOR THE PERIOD: NOVEMBER 1 – DECEMBER 26, 2015, Appendix Table A1 (2016), https://aspe.hhs.gov/sites/default/files/pdf/167981/MarketPlaceEnrollJan2016.pdf.

123 *See Abortion Coverage Under the Affordable Care Act*, *supra* note 120 at 16-17.

124 *See* Alina Salganicoff & Laurie Sobel, *Abortion Coverage in Marketplace Plans, 2015*, THE HENRY J. KAISER FAM. FOUND. at 2 (Jan. 2015), http://files.kff.org/attachment/issue-brief-abortion-coverage-in-marketplace-plans-2015; *see also Abortion Coverage Under the Affordable Care Act*, *supra* note 120 at 19;

125 *See Abortion Coverage Under the Affordable Care Act*, *supra* note 120 at 19.

126 Department of Homeland Security Appropriations Act, H.R. 5855, §§ 566-67, 112th Cong. (2012); Department of Homeland Security Appropriations Act, H.R. 2217, §§ 563-64, 113th Cong. (2013).

rape, or incest.[127] Even though ICE already self-imposed this funding restriction, these amendments codified the restriction in federal law.[128]

D. *The States' Implementation of the Hyde Amendment*

1. How Every State Except South Dakota Has Implemented the Hyde Amendment

Aside from South Dakota, every state follows the current Hyde Amendment exceptions and provides Medicaid-funded abortion.[129] Twenty-six "Hyde states" provide Medicaid-funded abortion for life endangerment to the woman, rape, and incest, in accordance with the exceptions imposed by the Hyde Amendment.[130] Two "Hyde-plus" states, or states that have "slightly expanded coverage of medical care and health-related services" for low-income women,[131] provide Medicaid-funded abortion for fetal abnormality and in cases where the pregnant woman's physical health is endangered, in addition to the Hyde exceptions.[132] Four Hyde-plus states provide Medicaid-funded abortion for threats to the woman's physical health, in addition to the Hyde exceptions.[133] Thirteen "non-discrimination states," or states that elect to use state-funded Medicaid to provide abortion coverage for low-income women,[134] provide medically necessary Medicaid-

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127 Department of Homeland Security Appropriations Act, H.R. 5855, §§ 566-67 112th Cong. (2012); Department of Homeland Security Appropriations Act, H.R. 2217, §§ 563-64 113th Cong. (2013).

128 U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, 1, 307 (2011), http://www.ice.gov/doclib/detention-standards/2011/medical_care_women.pdf.

129 CTR. FOR REPROD. RTS., WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN (2010), http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf [hereinafter WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN]; GUTTMACHER INST., STATE FUNDING OF ABORTION UNDER MEDICAID 1, 1-2, (Sept. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf [hereinafter STATE FUNDING OF ABORTION UNDER MEDICAID].

130 The twenty-six Hyde states include: Alabama, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, and Wyoming. *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 21.

131 *See id.* at 21.

132 These two states include: Iowa and Mississippi. *See id.* at 19-21.

133 These four states include: Indiana, South Carolina, Utah, and Wisconsin. *See id*.

134 Non-discrimination states do not distinguish between abortion services and other health care services. *See id.* at 9.

funded abortion pursuant to court orders.[135] Finally, four non-discrimination states provide medical necessity Medicaid-funded abortion voluntarily.[136]

To understand how the Hyde Amendment varies from state-to-state, it is necessary to review how a few states apply, or have been court-ordered to apply, the law in vastly different ways. Analyzing the various ways different states have applied and expanded the Hyde Amendment also provides a valuable point of comparison to analyze the South Dakota statute against Medicaid-funded abortion.

a. Hyde States

Hyde state Colorado provides Medicaid-funded abortion for life endangerment to the woman, rape, and incest, in accordance with the Hyde Amendment exception.[137] In the 1990s, Colorado, like present-day South Dakota, refused to provide Medicaid-funded abortion services even for rape or incest exceptions.[138] In the case of *Hern v. Beye*, an abortion doctor and three clinics sought to enjoin the Executive Director of Colorado's Department of Social Services from refusing to fund abortions in rape or incest cases.[139] The U.S. District Court for the District of Colorado granted an injunction for the doctor and clinics, which the Executive Director appealed.[140] The Tenth Circuit Court of Appeals held the state of Colorado, as a Medicaid program participant, could not deny Medicaid-funded abortions for rape or incest victims.[141]

The court gave three reasons for affirming the lower court's decision.[142] First, Colorado's restriction on Medicaid-funded abortions "impermissibly discriminates in its coverage of abortions on the basis of a patient's diagnosis and condition."[143] Second, Colorado's restriction on Medicaid-funded abortions violated federal laws governing

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135 These thirteen states include: Alaska, Arizona, California, Connecticut, Illinois, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, Oregon, Vermont, and West Virginia. *See id.* at 20-21.

136 These four states include: Hawaii, Maryland, New York, and Washington. WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 20-21.

137 *See id.* at 21.

138 Hern v. Beye, 57 F.3d 906, 907 (10th Cir. 1995).

139 *Id.*

140 *Id.* at 908.

141 *Id.* at 910.

142 *Id.* at 910-12.

143 *Id.* at 910.

Medicaid "because it is inconsistent with the basic objective of [Medicaid] to provide qualified individuals with medically necessary care."[144] Third, the court looked to congressional intent of the 1994 Hyde Amendment.[145] The court determined, "The floor debates in the Senate and the House of Representatives reveal Congress's understanding that participating states must fund those abortions for which federal funds are available."[146] Furthermore, the court cited *Maher*, noting that if Colorado decided not to participate in Medicaid, it could choose not to fund any abortion.[147] The court stated, ". . .because Colorado has decided to participate and accept federal Medicaid funds, it must do so on the terms established by Congress. So long as Colorado continues to participate in Medicaid, it cannot deny Medicaid funding for abortion services to qualified women who are the victims of rape or incest."[148]

b. Hyde-Plus States

Hyde-plus state Utah provides Medicaid-funded abortion for life endangerment to the woman, rape, and endangerment of physical health.[149] In *Utah Women's Clinic, Inc. v. Graham*, abortion clinics, reproductive rights groups, and a Medicaid-dependent woman impregnated as the result of rape, filed suit.[150] The plaintiffs alleged Utah's abortion funding statute violated the federal Medicaid statute, because the statute did not provide public funding for abortions for rape and incest victims, and was therefore invalid under the Supremacy Clause of the United States Constitution.[151] Relying heavily on the Tenth Circuit *Hern v. Beye* case, the district court held the

144 Hern v. Beye, 57 F.3d 906, 910-11 (10th Cir. 1995).

145 *Id.* at 912.

146 *Id.*

147 *Id.* at 913 (citing Maher v. Roe, 432 U.S. 464, 469 (1977)).

148 *Id.* at 913.

149 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 8, 21. In Utah, the health endangerment exception means a woman may receive a Medicaid-funded abortion when her health is severely compromised. *See* GUTTMACHER INST., *State Facts About Abortion: Utah* (2015), https://www.guttmacher.org/sites/default/files/factsheet/utah_1.pdf. Because Utah allows Medicaid funds to be used "both in cases of life endangerment and to safeguard a woman's physical health, there appears to be some confusion about where one ends and the other begins." *See* Sarah Erdreich, *The Fallacy of Rape, Incest, and Life Endangerment Clauses,* REWIRE (May 22, 2013), https://rewire.news/article/2013/05/22/the-fallacy-of-rape-incest-and-life-endangerment-clauses/.

150 Utah Women's Clinic v. Graham, 892 F. Supp. 1379, 1380 (D. Utah 1995).

151 *Id.* at 1380-81.

Hyde Amendment strictly related to funding and did not affect states' obligations under federal Medicaid.[152] The court also determined that based on *Hern*, Utah could not enforce a statute that conflicted with federal Medicaid law by denying Medicaid funded abortions for rape and incest victims.[153] The court stated, "So long as Utah continues to accept federal Medicaid funds, the Supremacy Clause requires the state to participate on the terms established by Congress."[154]

c. Non-Discrimination States

Non-discrimination state Minnesota provides medically necessary Medicaid-funded abortion pursuant to court orders.[155] In the case of *Doe v. Gomez*, women and abortion providers sought declaratory and injunctive relief against the state of Minnesota.[156] The plaintiffs challenged Minnesota statutes that restricted Medicaid funds to when the woman's life was endangered and in cases of pregnancy caused by rape or incest, while simultaneously using public funds for childbirth and other maternity-related health care.[157] The district court found the statutes unconstitutional and granted an injunction.[158] On appeal, the Minnesota Supreme Court held statutes that permitted public funds to be used for childbirth-related medical services, but prohibited public funds to be used for medically necessary abortions, infringed on women's fundamental right of privacy under the Minnesota Constitution.[159]

The court determined, "[A] pregnant woman, who is eligible for medical assistance and is considering an abortion for therapeutic reasons, cannot be coerced into choosing childbirth over abortion by a legislated funding policy."[160] To come to this conclusion, the court stated under Minnesota law, the right to privacy encompasses the right to decide to terminate a pregnancy.[161] The court noted any legis-

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152 *Id.* at 384.
153 *Id.*
154 *Id.*
155 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 21.
156 Doe v. Gomez, 542 N.W.2d 17, 18, 20 (Minn. 1995).
157 *Id.* at 20.
158 *Id.* at 21.
159 *Id.* at 32.
160 *Id.* at 19.
161 *Id.* at 27.

lation, like the statutes at hand, that infringes on a woman's decision to terminate a pregnancy, violates this right.[162] Here, "the infringement is the state's offer of money to women for health care services necessary to carry the pregnancy to term, and the state's ban on health care funding for women who choose therapeutic abortions."[163] Rejecting the *McRae* decision, the court continued, "Faced with these two options . . . 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."[164] The court concluded that because low-income women are likely significantly impacted by state-funded health care if they continue with their pregnancies, the statutes infringe on the right of privacy.[165]

Non-discrimination state West Virginia provides medical necessity Medicaid-funded abortion pursuant to court orders.[166] In the case of *Women's Health Center of West Virginia, Inc. v. Panepinto*, abortion clinics, on behalf of themselves and all Medicaid-eligible West Virginian women, filed suit challenging the state statute that restricted Medicaid-funded abortions except in limited cases.[167] The circuit court upheld the statute and the abortion clinics and Medicaid-eligible West Virginia women appealed.[168] They argued that the court should not follow the Supreme Court's *McRae* decision because West Virginia's state constitution provided its citizens more extensive protections, and thus the state constitutional protections should prevail.[169] The Supreme Court of Appeals determined that the statute "constitutes undue government interference with the exercise of a federally-protected right to terminate pregnancy."[170]

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162 Doe v. Gomez, 542 N.W.2d 17, 31 (Minn. 1995).

163 *Id.*

164 *Id.*

165 *Id.*

166 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 21.

167 Women's Health Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658, 660-62 (W. Va. 1993).

168 *Id.* at 661.

169 *Id.* at 663.

170 *Id.* at 667.

2. South Dakota's "No Public Funds for Abortion" Statute

In 1978, South Dakota codified the Hyde Amendment's original language into state law.[171] Since then, the state has failed to update the statute to comply with the Hyde Amendment's expansion for rape and incest victims.[172] Despite the federal law requiring states to provide Medicaid-funded abortion services to low-income rape and incest victims, the state of South Dakota refuses to provide Medicaid-funded abortions to women in its state except for when women's lives are endangered. This refusal is codified in South Dakota law—the statute's language states:

> No funds of the State of South Dakota or any agency, county, municipality, or any other political subdivision thereof and no federal funds passing through the state treasury or any agency of the State of South Dakota, county, municipality, or any other political subdivision thereof, shall be authorized or paid to or on behalf of any person or entity for or in connection with any abortion that is not necessary for the preservation of the life of the person upon whom the abortion is performed.[173]

As discussed in detail above,[174] South Dakota is the only state that does not follow all the Hyde Amendment exceptions; specifically, the state fails to provide Medicaid-funded abortion for rape or incest victims.[175] By not providing rape and incest exceptions to Medicaid-dependent women seeking abortion, South Dakota directly violates federal law. Although other states have tried to avoid providing Medicaid-funded abortions for Hyde Amendment exceptions, after losing lawsuits, all states but South Dakota have implemented the Hyde exceptions.[176]

To date, neither a patient nor an abortion provider has challenged South Dakota's statute restricting federal funds for abortion even in rape and incest cases, even though the state's statute directly

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171 S.D. Codified Laws § 28-6-4.5 (1978).

172 *Id.*

173 *Id*.

174 *Supra* PART I; *see generally* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 21.

175 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 21.

176 *See id.*

violates the Hyde Amendment.[177] It is highly probable that abortion doctors and Medicaid-dependent women in South Dakota would have standing to file suit. Abortion doctors would have standing as they very likely have Medicaid-dependent women as patients who struggle to pay for abortion services out-of-pocket and are rape or incest victims.[178] Likewise, relying on case precedent, low-income Medicaid-dependent women who become pregnant after being sexually assaulted would also have standing to challenge the statute, as the state of South Dakota is denying these women health care they are entitled to by federal law.[179]

II. ANALYSIS

A. *Harmful Effects of the Hyde Amendment*

1. The Hyde Amendment Was Designed to Prevent Low-Income Women from Exercising Their Right to Terminate Unintended Pregnancies

The Hyde Amendment's principal goal was to limit low-income women's ability to terminate unintended pregnancies through Medicaid.[180] Acknowledging that he would not be able to prevent all women from obtaining abortion services after the *Roe* decision, Representative Hyde sought to reduce low-income women's access to abortion through the Amendment, and did so successfully.[181] As is apparent through Representative Hyde's own comments on the rider, his goal was not to protect taxpayer money from funding abortion.[182] Rather, his words suggest that his goal was to prevent the most financially vulnerable women from affording abortion.[183] At the time the Amendment passed, Representative Hyde achieved his goal to reduce

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177 As of September 6, 2016, the author has not found a lawsuit in either Westlaw or LexisNexis legal research databases that challenges this statute.

178 *See generally* Utah Women's Clinic v. Graham, 892 F. Supp. 1379, 1380 (D. Utah 1995); Women's Health Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658, 661-62 (W. Va. 1993).

179 *See generally* Hern v. Beye, 57 F.3d 906, 910-12 (10th Cir. 1995); Utah Women's Clinic v. Graham, 892 F. Supp. 1379, 1380 (D. Utah 1995).

180 123 CONG. REC. 19700 (statement of Rep. Henry J. Hyde).

181 *See* 123 CONG. REC. 19700 (statement of Rep. Henry J. Hyde); RICKIE SOLINGER, REPRODUCTIVE POLITICS: WHAT EVERYONE NEEDS TO KNOW 30 (2013).

182 *See* 123 CONG. REC. H6083 (daily ed. June 17, 1977) (statement of Rep. Henry J. Hyde).

183 *See* 123 CONG. REC. 19700 (statement of Rep. Henry J. Hyde); *see also* SEPARATE AND UNEQUAL, *supra* note 76 at 3.

access to abortion services almost immediately, as the average cost of an abortion in the 1970s was $280, or $42 more than the average monthly welfare check issued to support a family, thus making abortion inaccessible for low-income women.[184]

The Hyde Amendment's restrictions on Medicaid-funded abortions continue to harm low-income women decades later. For instance, in 2009, nearly all Medicaid-funded abortions (more than 99 percent) were performed in the seventeen non-discrimination states.[185] This telling statistic indicates that restrictive policies on Medicaid-funded abortions do not reduce the demand for abortion; rather, these restrictions reduce low-income women's ability to access critical reproductive health care. Therefore, the Hyde Amendment violates women's equal protection rights guaranteed by the U.S. Constitution's Fourteenth Amendment by ensuring that low-income women cannot realistically afford to access abortion services. By effectively eliminating access, the Hyde Amendment prevents women from exercising their right to reproductive freedom and bodily autonomy. Thus, the *McRae* decision should be overturned and Hyde Amendment language removed from all the legislative provisions on women's health care noted above.[186]

By eliminating Medicaid funding for abortion, the Amendment created considerable financial and health-related obstacles for women attempting to personally finance their own abortions. Like Rosie, many low-income women seeking to terminate pregnancies will try many ways to finance the procedure.[187] Some women might work extra shifts or perform odd jobs, pawn valuable items, forgo paying for basic necessities like rent, utilities, and groceries, or even pursue sex work to raise the money needed.[188] Unfortunately, abortion costs increase exponentially the longer the procedure is delayed.[189] For instance, in 2006, the average amount women paid for a first-trimester

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184 *See* SOLINGER, *supra* note 181 at 30.

185 *See* Adam Sonfield & Rachel Benson Gold, *Public Funding for Family Planning, Sterilization and Abortion Services, FY 1980–2010*, GUTTMACHER INST., (Mar. 2012), http://www.guttmacher.org/pubs/Public-Funding-FP-2010.pdf.

186 *Supra* notes 84-128 and accompanying text.

187 Heather Boonstra & Adam Sonfield, *Rights Without Access: Revisiting Public Funding of Abortion for Poor Women*, 3 GUTTMACHER REP. ON PUBLIC POL'Y 2 (Apr. 2000), http://www.guttmacher.org/pubs/tgr/03/2/gr030208.html [hereinafter *Rights Without Access*].

188 *Rights Without Access, supra* note 187.

189 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 11.

abortion was $413; at twenty weeks, the cost of an abortion was roughly three times as much.[190] To help low-income women finance their abortions, organizations like the National Network for Abortion Funds (the "Network") provide financial assistance.[191] However, the demand for abortion funding for low income women far exceeds the need, as the Network received 89,000 calls for support alone in 2010, but was only able to partially finance the procedure for about 20,000 women.[192] Ultimately, many "women and families have been pushed into greater poverty as they struggle to find the money for an abortion," perpetuating a vicious cycle that many low-income women are unable to overcome.[193]

While raising money for an abortion pushes low-income women further into poverty, the time used to raise money for the procedure has its own risks. Namely, while women delay abortions to raise money to fund them, the procedures not only become more expensive, but also riskier, as some women are forced to have abortions in the second trimester.[194] It typically takes a low-income woman two or three weeks longer than a wealthier woman to obtain an abortion because of lack of funds.[195] Tellingly, over a third of women who obtained second trimester abortions stated they wanted to have the procedure sooner, but because of financial hardship, were unable to do so.[196] Although some low-income women delay the procedure, others seek out dangerous, but seemingly more affordable means, to terminate their pregnancies. Low-income women like Rosie seek out unlicensed midwives to perform the procedures at reduced prices.[197]

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190 *See id.* (citing Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services*, 40 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 24 (2008), http://www.guttmacher.org/pubs/journals/4000608.pdf).

191 *See* SEPARATE AND UNEQUAL, *supra* note 76 at 2.

192 *See id*.

193 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 4.

194 *Rights Without Access*, supra note 187.

195 WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 15.

196 NAT'L WOMEN'S LAW CTR., THE HYDE AMENDMENT CREATES AN UNACCEPTABLE BARRIER TO WOMEN GETTING ABORTIONS, (July 2015), http://www.nwlc.org/sites/default/files/pdfs/the_hyde_amendment_creates_an_unacceptable_barrier.pdf [hereinafter THE HYDE AMENDMENT CREATES AN UNACCEPTABLE BARRIER TO WOMEN GETTING ABORTIONS] (citing Lawrence B. Finer et al., *Timing of Steps and Reasons for Delays in Obtaining Abortions in the United States*, 74 CONTRACEPTION 334, 335, 341-42 (2006)).

197 *See* SEPARATE AND UNEQUAL, *supra* note 76 and accompanying text.

Even more dangerous, some low-income women attempt to self-induce their abortions.[198]

Furthermore, as a result of the Hyde Amendment, low-income women suffer reduced bodily autonomy when they are not able to choose whether to terminate a pregnancy. Rather, the choice is made for them—they must carry the pregnancy to term or find a way to either self-finance the procedure or attempt to self-abort the pregnancy. The Hyde Amendment has denied more than a million women the "ability to make their own decisions about bringing a child into the world in the context of their own circumstances and those of their families."[199] Approximately one in four Medicaid-dependent women who want an abortion are forced to continue their pregnancies because they cannot afford to pay for the procedure.[200] This estimate is based on a number of studies published since the Hyde Amendment went into effect in 1977, which found that between 18 to 37 percent of women who would have obtained abortions if Medicaid funding had been available, instead continued their pregnancies to term.[201] In other words, low-income women are effectively punished for their poverty and are forced into carrying their pregnancies to term as a result.

The Hyde Amendment has created many obstacles for low-income women who seek abortion services.[202] Because of the financial obstacles low-income women confront in paying for abortion services, the increased risk of health problems they face by delaying the procedure, and the inability to make their own reproductive choices, some scholars have called the Hyde Amendment Congress's "back-door

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198 A Texas study revealed up to 240,000 women have attempted to self-induce an abortion. *See* Hannah Levintova, *Up to 240,000 Women Have Tried to Give Themselves Abortions in Texas*, MOTHER JONES (Nov. 17, 2015), http://www.motherjones.com/politics/2015/11/thousands-texas-women-are-trying-self-induce-abortions*; see also* SEPARATE AND UNEQUAL, *supra* note 76 at 9*;* LAURA KATZ OLSON, THE POLITICS OF MEDICAID 124-25 (2010).

199 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 4.

200 Stanley K. Henshaw et al., *Restrictions on Medicaid Funding for Abortions: A Literature Review*, GUTTMACHER INST., (June 2009), http://www.guttmacher.org/pubs/MedicaidLitReview.pdf.

201 *See Rights Without Access, supra* note 187; *see also* KATZ OLSON, *supra* note 198, at 124-25.

202 *See generally Rights Without Access, supra* note 187.

method" of limiting women's right to choose under *Roe v. Wade*.[203] As discussed further below, this back-door method of limiting low-income women's ability to access safe and affordable abortion violates the Fourteenth Amendment's Equal Protection Clause.[204]

2. Because Women of Color Rely on Medicaid at Higher Rates than White Women, the Hyde Amendment Disproportionately Harms Women of Color

The Hyde Amendment also violates the Equal Protections Clause because it unconstitutionally disparages women of color. In *Harris v. McRae*, Justice Marshall noted that the Hyde Amendment was "designed to deprive poor and minority women of the constitutional right to choose abortion."[205] Over thirty-five years later, Justice Marshall's analysis remains true, as restrictions on Medicaid-funded abortion through the Hyde Amendment disproportionately harm women of color.[206]

According to census data, in the United States, 25 percent of black women, 25 percent of Hispanic women, 34 percent of Native American women, and 11 percent of Asian American and Pacific Islander ("AAPI") women live in poverty, compared to 10 percent of white women.[207] As a result of their higher rates of impoverishment, black, Hispanic, and Native American women are more likely to depend on Medicaid for health care,[208] and thus, these women are more likely to face financial obstacles when seeking abortion services.

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[203] *See* Sandra Berenknopf, *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 (1997).

[204] *Infra* notes 205-244 and accompanying text.

[205] Harris v. McRae, 448 U.S. 297, 344 (1980) (Marshall, J., dissenting).

[206] *See* SEPARATE AND UNEQUAL, *supra* note 76 at 19.

[207] Joan Entmacher, et al., *Insecure & Unequal: Poverty and Income Among Women and Families 2000-2012*, NAT'L WOMEN'S LAW CTR., http://www.nwlc.org/sites/default/files/pdfs/final_2013_nwlc_povertyreport.pdf. Furthermore, the poverty rate for single mothers is even more telling, as forty-seven percent of black women, forty-eight percent of Hispanic women, fifty-seven percent of Native American women, and twenty-six percent of AAPI women are impoverished, compared to thirty-three percent of white women. *Id*.

[208] In 2012, twenty percent of Medicaid enrollees were black, twenty-nine percent were Hispanic, and nine percent were Asian-American, Native Hawaiian, Pacific Islander, American Indian, Aleutian or Eskimo. *See* THE HYDE AMENDMENT CREATES AN UNACCEPTABLE BARRIER TO WOMEN GETTING ABORTIONS, *supra* note 196 (citing THE HENRY J. KAISER FAM. FOUND., *Distribution of the Nonelderly with Medicaid by Race/Ethnicity*, http://www.statehealthfacts.org/comparebar.jsp?ind=158&cat=3).

As a result, the Hyde Amendment's limitations on Medicaid funding for abortions disproportionately harm women of color.

Additionally, women of color are more likely to experience unintended pregnancy, because of racial, ethnic, gender, and economic health care inequalities.[209] These inequities lead black women to seek abortion services at nearly five times the rate of white women, while the abortion rate among Hispanic women is double that of white women.[210] Consequently, because low-income women of color are more likely to have unintended pregnancies and therefore are more likely to seek abortion services, they are disproportionately harmed by the Hyde Amendment's elimination of Medicaid funding for abortion.[211]

a. Native American Women Are Particularly Harmed

Because a large Native American population resides in South Dakota,[212] it is important to analyze the Hyde Amendment's unconstitutional implications for Native Americans in that state. Native American women make up only nine percent of South Dakota's population, and yet forty percent of the state's reported sexual assaults are committed against Native American women.[213] Equally unnerving, the U.S. Department of Justice provided data showing that 34 percent of Native American women reported being sexually assaulted during

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209 THE HYDE AMENDMENT CREATES AN UNACCEPTABLE BARRIER TO WOMEN GETTING ABORTIONS, *supra* note 196 (citing GUTTMACHER INST., *Unintended Pregnancy in the United States* 1 (Dec. 2013) http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf). Specifically, black women are three times as likely, and Hispanic women are twice as likely, as white women to experience an unintended pregnancy. *See* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 GUTTMACHER POL'Y REV. no. 3 at 2, 3 (2008), https://www.guttmacher.org/sites/default/files/article_files/gpr110302.pdf [hereinafter *Abortion and Women of Color: The Bigger Picture*].

210 *See Abortion and Women of Color: The Bigger Picture*, *supra* note 209 at 2.

211 *See* Julie F. Kay, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under A National Health Care Plan*, 60 BROOK. L. REV. 349, 365 (1994).

212 Native Americans account for nearly nine percent of South Dakota's population. Non-Hispanic whites account for nearly eighty-six percent of the population, while Hispanics and blacks account for nearly four percent and two percent of the population, respectively. *See* U.S. Census Data for South Dakota, http://www.census.gov/quickfacts/table/PST045215/00,46 (last visited May 30, 2016) [hereinafter U.S. Census Data for South Dakota].

213 U.S. Census Data for South Dakota, *supra* note 212; s*ee* Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES, (May 22, 2012); *see also* Rebecca A. Hart, *No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Healthcare Services*, 25 WIS. J.L. GENDER & SOC'Y 209, 239 (2010) [hereinafter *No Exceptions Made*].

their lifetime, nearly double the percentage of non-Hispanic white women and black women.[214] Although the federal government must provide Native American women health care, including reproductive health care, the reality is that obtaining an abortion at an Indian Health Service (IHS) clinic, even after a sexual assault, is incredibly difficult for Native American women.[215] As discussed above, the Native American Women's Health Education Resource Center survey found most IHS facilities fail to comply with official IHS abortion policy, noting that most facilities do not even mention abortion as an option for a woman seeking health care services after being sexually assaulted.[216] To put this in context, a Medicaid-dependent Native American woman in South Dakota who becomes pregnant as a result of rape or incest, and is unable to receive an abortion through IHS, would not be able to receive an abortion through Medicaid because of South Dakota's refusal to comply with the Hyde Amendment.[217]

Because of lack of resources, the failure to enforce policies at IHS clinics, and the state's refusal to comply with the law, pregnant Native American sexual assault victims often have no choice but to carry unintended pregnancies to term.[218] Absent another choice, carrying unintended pregnancies is damaging to women in many ways—psychologically, emotionally, physically, and financially. Justice Stevens poignantly stated this notion in his dissent in *Harris v. McRae*: "Because a denial of benefits for medically necessary abortions inevitably causes serious harm to the excluded women, it is tantamount to severe punishment."[219] Not providing Native American women with all reproductive health care options after rape or incest limits their bodily autonomy, is unconscionable, and is a human rights violation. The Hyde Amendment is particularly harmful to women in South Dakota, as Native American women are doubly impacted by South Dakota's lack of exceptions through Medicaid and lack of compliance

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214 *See No Exceptions Made, supra* note 213 at 209-12 (citing NAT. INST. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T. OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY, 14 exh. 8 (2006), http://www.ncjrs.gov/pdffiles1/nij/210346.pdf).

215 *See No Exceptions Made, supra* note 213 at 235 (noting that from 1981-2002, "the IHS [facilities] across the country had only provided 25 abortions").

216 *See* INDIGENOUS WOMEN'S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT, *supra* note 99 at 5.

217 *See id*. at 4.

218 *See No Exceptions Made*, *supra* note 213 at 244.

219 Harris v. McRae, 448 U.S. 297, 354 (1980) (Stevens, J., dissenting).

with the IHS abortion policy. Without access to abortion, Native American women are unable to exercise their right to an abortion, thus violating their constitutional rights under the Equal Protection Clause.

3. Women in South Dakota Are Even More Detrimentally Affected by the Hyde Amendment Because the State Does Not Follow the Minimum Hyde Exceptions, in Violation of Federal Law

Further supporting the argument that the Hyde Amendment unconstitutionally violates the Equal Protection Clause, the Amendment especially harms South Dakotan women. To limit women from obtaining abortion services, the South Dakota legislature has passed abortion restrictions affecting all South Dakotan women of reproductive age. The Guttmacher Institute compiled a list of restrictions on abortion currently in effect in South Dakota as of July 1, 2015, including the following seven restrictions.[220]

First, South Dakota preemptively passed a law banning abortion if *Roe v. Wade* were to ever be overturned.[221] Second, South Dakota requires women to receive state-directed counseling, which includes information designed to discourage them from having abortions.[222] These counseling requirements force doctors to tell women seeking abortions that obtaining the procedures lead to "an increased risk of suicide ideation and suicide," even though medical evidence does not support this claim.[223] This restriction also forces women to wait 72 hours before receiving the procedure.[224] South Dakota's waiting

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[220] *State Facts About Abortion: South Dakota, supra* note 1.

[221] S.D. Codified Laws § 22-17-5.1 (2005); *State Facts About Abortion: South Dakota*, *supra* note 1.

[222] S.D. Codified Laws §34-23A-10.1 (1980; last amended 2005); *State Facts About Abortion: South Dakota*, *supra* note 1.

[223] *See* Maya Manian, *Perverting Informed Consent: The South Dakota Court Decision*, REWIRE (Aug. 1, 2012), https://rewire.news/article/2012/08/01/perverting-informed-consent-south-dakota/. *See also supra* notes 1-2 and accompanying text. The American Psychological Association stated, "The best scientific evidence published indicates that among adult women who have an unplanned pregnancy the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy." *See* AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION, (2008), http://www.apa.org/pi/women/programs/abortion/mental-health.pdf.

[224] S.D. Codified Laws §34-23A-56 (2011; last amended 2015); *State Facts About Abortion: South Dakota*, *supra* note 1.

period is the longest in the nation, with four other states—Oklahoma, Missouri, Utah, and Louisiana—requiring a three-day waiting period.[225] Worse yet, South Dakota's waiting period does not include weekends or annual holidays.[226] Third, health insurance plans offered in South Dakota's health exchange under the ACA only cover abortion when the woman's life is endangered or her health is severely compromised.[227]

Fourth, doctors are prohibited from utilizing telemedicine to perform medication abortions.[228] Medication abortions are frequently used in states with large rural populations that rely on telemedicine to provide health care to people who live far from medical providers.[229] Fifth, minors must notify a parent before an abortion is performed.[230] Sixth, South Dakota imposes targeted regulations on abortion providers (commonly known as "TRAP" laws).[231] These TRAP restrictions limit where abortion services are performed and require abortion facilities to comply with unnecessary regulations that are not required

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225 *Oklahoma Joins South Dakota, Two Other States, Passes 72-Hour Abortion Wait Time Legislation*, ASSOC. PRESS, (May 1, 2015), http://ksoo.com/oklahoma-joins-south-dakota-two-other-states-passes-72-hour-abortion-wait-time-legislation/. In May 2016, Louisiana became the fifth state to require a 72-hour waiting period for an abortion. *See* Teddy Wilson, *Louisiana Legislators Force Three-Day Wait on Patients Seeking Abortion Care*, REWIRE (May 20, 2016), https://rewire.news/article/2016/05/20/louisiana-legislators-three-day-wait-abortion-care/.

226 S.D. Codified Laws §34-23A-56 (2011; last amended 2015); *see also* Robin Marty, *South Dakota Governor Signs 72-Hour, No Weekends Waiting Period Into Law*, REWIRE (Mar. 8, 2013), http://rewire.news/article/2013/03/08/south-dakota-governor-signs-72-hour-no-weekends-waiting-period-into-law/.

227 S.D. Codified Laws § 58-17-147 (2012) (defining the term 'elective abortion' for purposes of implementing the ACA's restriction on coverage for elective abortions as "an abortion performed for any reason other than a medical emergency"); *see State Facts About Abortion: South Dakota*, *supra* note 1.

228 Telemedicine means a patient consults with a doctor via video or phone, rather than in person. *See* Heather D. Boonstra, *Medication Abortion Restrictions Burden Women and Providers—and Threaten U.S. Trend Toward Very Early Abortion*, 16 GUTTMACHER POL'Y REV. 1 at 18, 20 (2013), https://www.guttmacher.org/sites/default/files/article_files/gpr160118.pdf [hereinafter *Medication Abortion Restrictions Burden Women and Providers*]. *See also* S.D. Codified Laws § 22-17-5.1 (2005); *State Facts About Abortion: South Dakota*, *supra* note 1.

229 S*ee Medication Abortion Restrictions Burden Women and Providers*, *supra* note 228 at 20.

230 SD Codified Laws § 34-23A-7 (Enacted 1973; last amended 2005); *State Facts About Abortion: South Dakota*, *supra* note 1.

231 *See* S.D. Codified Laws §§ 34-23A-48, -49 (2006); *see also Targeted Regulation of Abortion Providers (TRAP)*, NARAL PRO-CHOICE SOUTH DAKOTA, http://www.prochoicesd.org/what-is-choice/abortion/trap.shtml (last visited May 21, 2016) [hereinafter *Targeted Regulation of Abortion Providers (TRAP)*].

of other medical providers.[232] Finally, in March 2016, South Dakota added a seventh restriction that prevents women from obtaining an abortion 20 weeks post-fertilization, with exceptions for life endangerment or severe health complications.[233]

In addition to these restrictions on abortion, accessing abortion is also very problematic for South Dakotan women. Currently, there is only one abortion clinic in the entire state of South Dakota,[234] and 98 percent of the state's counties do not have abortion service providers.[235] The lack of abortion providers is particularly problematic considering the geographical size of the state[236] and because Medicaid-dependent women generally cannot afford to visit providers in one of the four non-discrimination states that provide medical necessity Medicaid-funded abortions voluntarily.[237] Further, state law prevents physician assistants, nurse practitioners, or licensed midwives from administering medication abortions.[238] Only physicians are allowed to administer medication abortions, a relatively simple process where a woman takes a combination of pills to empty her uterus and terminate a pregnancy.[239] Even more problematic is that the doctors who pro-

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232 *See* S.D. Codified Laws, §§ 34-23A-4, -49, -51. Some of the medically unnecessary regulations include dictating the size of procedure and recovery rooms and the type of flooring and lighting that similar medical providers are not required to comply. S.D. Admin. R. 44:67:05:02, 44:67:05:03 (2006); *see also Targeted Regulation of Abortion Providers (TRAP)*, *supra* note 231.

233 *See* S.B. 72, 2016 Leg. Assemb., 91st Sess. (S.D. 2016); *Abortion at or About 20 Weeks Postfertilization Restricted*, GUTTMACHER INST., https://www.guttmacher.org/state-policy (last visited May 24, 2016); *see also S.D. Gov. Signs 20-Week Abortion Ban*, NAT'L P'SHIP FOR WOMEN & FAMILIES, (Mar. 14, 2016), http://www.womenshealthpolicyreport.org/articles/sd-20-week-signed.html.

234 *See* Rachel Jones & Jenna Jerman, *Abortion Incidence and Service Availability In the United States, 2011*, 46 PERSPECTIVES ON SEXUAL AND REPROD. HEALTH 1 at 6 (Mar. 2014), https://www.guttmacher.org/pubs/journals/psrh.4630414.pdf [hereinafter *Abortion Incidence and Service Availability In the United States*]; *see also* NARAL PRO-CHOICE AM., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 67 (25th ed., 2016), http://www.prochoiceamerica.org/assets/download-files/2016-wd-report.pdf [hereinafter WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES].

235 *See Abortion Incidence and Service Availability In the United States*, *supra* note 234 at 9; *see also* WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES, *supra* note 234.

236 La Ganga, *supra* note 1.

237 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN *supra* note 129 at 33*;* STATE FUNDING OF ABORTION UNDER MEDICAID, *supra* note 129.

238 S.D. Codified Laws §§ 36-4A-20.1, 36-9A-17.2 (2000).

239 S.D. Codified Laws §§ 34-23A-1(7), -3, -4, -5 (1973); *see also*, *Targeted Regulation of Abortion Providers (TRAP)*, *supra* note 231.

vide abortions in South Dakota currently do not reside in the state.[240] For the past decade, no doctors residing in South Dakota have been willing to provide abortion services in the state due to South Dakota's restrictive laws and hostile political climate surrounding abortion.[241] Instead, doctors fly in from a Minnesota abortion clinic twice weekly to see patients in South Dakota.[242] Only time will tell if South Dakota legislators attempt to limit this practice as well.[243]

Even though these restrictions and accessibility issues are harmful to all women in South Dakota, the state's refusal to provide Medicaid-dependent women access to abortion in cases of rape or incest is especially detrimental to low-income women in the state. For instance, middle-class or wealthy women in South Dakota often have more financial flexibility to obtain abortion services early in their pregnancies when the service is drastically less expensive. Additionally, wealthier women also often have the ability to travel to other states with less restrictive abortion laws. On the other hand, Medicaid-dependent women often do not have these same financial resources to access abortion in other states or to pay for the procedure out-of-pocket on demand. Thus, the state's restrictions on Medicaid-funded abortion have a disparate impact on low-income women. South Dakota's restrictive abortion laws also significantly reduce low-income women's personal autonomy. "This reduction in low-income women's autonomy presents a serious imbalance of equality and justice by unconstitutionally reducing their rights to choose whether to terminate their pregnancies."[244] This reduction in rights violates the Fourteenth Amendment's Equal Protection Clause.

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240 La Ganga, *supra* note 1.

241 *Id.*

242 *Id.*

243 In the South Dakota Task Force to Study Abortion Report, the task force questions the physician-patient relationship between an abortion doctor at Planned Parenthood in South Dakota and the pregnant woman. The task force's report implied that because the doctor only sees the patient immediately before the procedure is performed (this is no longer accurate because of the mandatory waiting period), that the physician-patient relationship is not "traditional" or "healthy." *See* REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, SUBMITTED TO THE GOVERNOR AND LEGISLATURE OF SOUTH DAKOTA at 18 (Dec. 2005).

244 Julia Lichtman, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 GEO. J. ON POVERTY L. POL'Y 345, 347 (2003).

B. *Potential Solutions to the Devastating Impacts of the Hyde Amendment on Low-Income Women*

After identifying the detrimental ways in which the Hyde Amendment harms low-income women, particularly women of color and South Dakotan women, it is clear that repealing the Hyde Amendment is the best solution to remedy its devastating impacts. In fact, three Congresswomen introduced legislation in 2015 to repeal the Hyde Amendment.[245] Although repealing the Hyde Amendment is the best solution, as it would make abortion accessible to all women regardless of their income, insurance coverage, or state of residence, it is unlikely this legislation will pass through Congress in the near future because of the current political climate.[246] Therefore, it is necessary to examine other solutions that will prevent low-income rape and incest victims in South Dakota from being forced to carry pregnancies to term because of the state's refusal to follow the Hyde Amendment's exceptions.

1. The Hyde Amendment Should Be Repealed

The best solution to South Dakota's unconstitutional restriction on Medicaid-funded abortions for low-income rape and incest victims is to repeal the Hyde Amendment altogether. The Hyde Amendment should be repealed nationwide because it is haphazardly implemented across all fifty states, with the worst possible implementation in the state of South Dakota.[247] This haphazard application leaves low-income South Dakotan women with significantly less reproductive rights and bodily autonomy than women in other states, creating an argument the Hyde Amendment as applied by the South Dakota legislature violates the Fourteenth Amendment's Equal Protection Clause.[248] This solution would vindicate Stevens's *McRae* dissent that

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245 The Equal Access to Abortion Coverage in Health Insurance [EACH Woman] Act of 2015, H.R. 2972, 114th Cong. (2015). The EACH Woman Act was proposed by Congresswoman Barbara Lee (D-CA), Congresswoman Jan Schakowsky (D-IL), and Congresswoman Diana DeGette (D-CO) and introduced to the U.S. House of Representatives on July 8, 2015. The EACH Woman Act seeks to repeal the Hyde Amendment.

246 *See generally Attacks on Abortion Rights Continued in 2015, supra* note 8.

247 *See* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 19, 21 (noting that South Dakota only pays for abortion in cases of life endangerment, which is a violation of the Hyde Amendment).

248 *See id*.

vehemently disagreed with the majority's "sterile" equal protection rationale.[249]

Furthering the equal protection argument, the Hyde Amendment inherently discriminates against low-income women, especially women of color, and is particularly harmful to women in South Dakota. It is necessary to repeal the Hyde Amendment because states like South Dakota have reduced women's ability to choose whether to carry an unintended pregnancy to term by creating laws that essentially make abortion inaccessible and unaffordable. Particularly, South Dakota has crafted laws that not only deny Medicaid-funded abortion to rape and incest victims, but the state also has made abortion difficult for all women to access through the restrictions discussed above.[250] Denying abortion services to Medicaid-dependent rape and incest victims, and making abortion nearly impossible to access for low-income women, including those who self-finance the procedure, violates the Fourteenth Amendment's Equal Protection Clause.

Although repealing the Hyde Amendment is the best solution, it is unlikely the Amendment will be entirely repealed in the near future because of the political divide surrounding abortion.[251] Many conservative politicians do not believe that any level of government should provide Medicaid-funded abortion to low-income women.[252] In 2015 alone, state legislatures altogether introduced 514 pieces of legislation related to abortion.[253] Even more discouraging, 396 of these legislative acts sought to restrict women's access to abortion, demonstrating the hostile political climate towards abortion.[254] Therefore, an alternate solution is proposed.

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249 Harris v. McRae, 448 U.S. 297, 351 (1980) (Stevens, J., dissenting).

250 *See supra* notes 220-244 and accompanying text.

251 *See generally* No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. (2011); *Attacks on Abortion Rights Continued in 2015, supra* note 8; *In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions*, *supra* note 8; *State Pays Millions to Bar Medicaid from Planned Parenthood in Missouri,* CHI. TRIB., (Apr. 24, 2016), http://www.chicagotribune.com/news/nationworld/midwest/ct-missouri-planned-parenthood-20160424-story.html (discussing that Missouri legislators passed a budget that spends millions in state money to block Planned Parenthood from receiving federal funding for family planning services, sexually transmitted infection testing, and cancer screenings services).

252 *See generally* No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. (2011).

253 *Attacks on Abortion Rights Continued in 2015, supra* note 8.

254 *Id*.

2. A Lawsuit Must Be Filed Against the State of South Dakota on Behalf of Low-Income Women in South Dakota

The alternate, but less satisfying, solution is to force South Dakota to comply with the Hyde Amendment exceptions by filing a lawsuit in the federal courts. Medicaid-dependent rape and incest victims in South Dakota are entitled to the same reproductive choices and bodily autonomy as women in every other state. Although South Dakota's unconstitutional restriction on Medicaid-funded abortions for rape and incest victims should be grounds for abortion providers and Medicaid-dependent women to bring suit for Equal Protection Clause violations, the abortion funding cases[255] complicate utilizing equal protection claims for Medicaid funded abortions for low-income women. Unfortunately, the Court in *Maher* determined women's equal protection rights were not violated when a state's Medicaid program refused to cover non-medically necessary abortions, but funded maternity-related services.[256] Moreover, the Court in *Beal* held that the government was not required to provide non-medically necessary abortions for low-income women in order for the state to participate in the Medicaid program.[257] Finally, in *McRae*, the Supreme Court determined the government was not required to remove financial barriers for women to access abortion.[258]

Because of the decisions in these abortion funding cases, making an equal protection argument in a case against South Dakota is likely very difficult, as Supreme Court precedent would have to be overturned. Rather than trying to overturn Supreme Court case law, abortion providers and Medicaid-dependent women in South Dakota may have to rely on other arguments[259] beyond an equal protection claim

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255 *See generally* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

256 *Maher*, 432 U.S. at 474.

257 *Beal*, 432 U.S. at 445-46.

258 *McRae*, 448 U.S. at 316-17.

259 One argument the challengers could make to repeal the South Dakota statute concerns preemption based on federalism. This Comment does not analyze the preemption issue at length, but notes the value this argument would have. Specifically, the challengers could rely on the *Utah Women's Clinic, Inc. v. Graham* case and argue that the South Dakota statue violates the Supremacy Clause of the U.S. Constitution. *See* Utah Women's Clinic v. Graham, 892 F. Supp. 1379, 1381 (D. Utah 1995). In simple terms, because the U.S. Constitution is the supreme law of the land, it preempts all other law, including state laws. The Supremacy Clause states, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

to compel the state to comply with the Hyde Amendment's rape and incest exceptions. Although other states attempted to avoid following the Hyde Amendment exceptions, every state that refused to comply with the Amendment's exceptions eventually lost in court.[260] These states were then court-ordered to provide Medicaid-funded abortions in accordance with the Hyde exceptions for rape and incest.[261] Because of case precedent grounded in other claims, a suit challenging South Dakota's "No Public Funds for Abortion" statute on similar grounds as these precedent cases would likely succeed in repealing the state statute.

Utilizing various arguments, plaintiffs in several states have successfully overturned restrictions for Medicaid-funded abortions. For instance, in *Hern v. Beye*, the court noted a state could not pick certain medical services to cover, and then restrict coverage for these services only to cases where a woman's life is at risk.[262] The *Hern* court further discussed that case law interpreted Medicaid regulations as "as imposing a general obligation on states to fund those mandatory coverage services that are medically necessary."[263] Relying on *Hern*, abortion providers and Medicaid-dependent women ("the challengers") could first argue South Dakota's statute discriminates how it covers abortion services based on the woman's condition and diagnosis. Additionally, relying on the *Hern* case, the challengers could argue South Dakota's statute is inconsistent with the Medicaid program's purpose and goals. Finally, the challengers could argue the

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and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2 (emphasis added). Therefore the challengers would argue that because the South Dakota statute does not follow the established Hyde Amendment exceptions, the statute is preempted by federal precedent and should be overturned.

260 *See, e.g.,* Hern v. Beye, 57 F.3d 906, 907-08 (10th Cir. 1995); Utah Women's Clinic v. Graham, 892 F. Supp. 1379, 1380-81, 1384 (D. Utah 1995); Women's Health Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658, 661, 667 (W. Va. 1993). *See generally* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 37; STATE FUNDING OF ABORTION UNDER MEDICAID, *supra* note 129.

261 *See, e.g.,* Hern v. Beye, 57 F.3d 906, 907-08 (10th Cir. 1995); Utah Women's Clinic v. Graham, 892 F. Supp. 1379, 1380-81, 1384 (D. Utah 1995); Women's Health Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658, 661, 667 (W. Va. 1993). *See generally* WHOSE CHOICE? HOW THE HYDE AMENDMENT HARMS POOR WOMEN, *supra* note 129 at 37; STATE FUNDING OF ABORTION UNDER MEDICAID, *supra* note 129.

262 Hern v. Beye, 57 F.3d 906, 911 (10th Cir. 1995).

263 *Id.*

Hyde Amendment exceptions should be deemed medically necessary under Medicaid and must be provided by South Dakota.

The challengers could also rely on the abortion providers' arguments made in *Doe v. Gomez*.[264] In *Gomez*, the Minnesota Supreme Court held statutes that permitted public funds to be used for childbirth-related medical services, but prohibited public funds to be used for medically necessary abortions, infringed on women's fundamental right of privacy.[265] Relying on *Gomez*, the challengers could argue South Dakota's statute interferes with a low-income woman's choice to carry or terminate a pregnancy by creating financial incentives, or in other words, providing Medicaid coverage for maternal-related health care and not abortion services. This argument might provide sufficient weight in federal court, especially because both Minnesota and South Dakota are located within the Eighth Circuit's appellate jurisdiction.[266]

The challengers could also utilize the West Virginian abortion providers' arguments in *Women's Health Center of West Virginia, Inc. v. Panepinto.* In *Panepinto*, abortion clinics and low-income women argued the state statute restricting Medicaid-funded abortions except in limited cases impinged on the health and safety of poor women.[267] To highlight the state's interference with low-income women's health and safety, the abortion clinics and low-income women identified specific diseases, like hypertension, severe bleeding disorders, and premature placenta separation, which might lead to a woman requiring an abortion.[268] They also illustrated diseases that might jeopardize a woman's health during pregnancy, including gestational diabetes, epilepsy, and phlebitis.[269] Adding further weight to the argument, they noted many of these diseases are more likely to occur among Medicaid-eligible low-income women.[270] Using an argument based on medical statistics might sway a judge to overturn the statute, as preg-

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264 Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995).

265 *Id*. at 31.

266 A map of the geographical boundaries of the United States Courts of Appeals shows the seven states (North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, and Arkansas) the Eighth Circuit Court of Appeals has jurisdiction over. *See About U.S. Federal Courts*, FEDERAL BAR ASS'N, http://www.fedbar.org/Public-Messaging/About-US-Federal-Courts_1.aspx, (last visited August 22, 2016).

267 Women's Health Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658, 665 (W. Va. 1993).

268 *Id.*

269 *Id*.

270 *Id.*

nant Medicaid-dependent women might need an abortion because they are at risk of diseases that severely jeopardize their health. Thus, presenting evidence that low-income women likely suffer from higher risk pregnancies due to pre-existing conditions provides more weight to the argument that low-income women need access to abortion services while pregnant due to the higher risk of low-income women's pregnancies. Providing Medicaid funds for abortion services to South Dakotan rape and incest victims would also protect the health and safety of low-income women whose health might be at risk by carrying a pregnancy to term.

Another argument the challengers could make is to point out that the state's Medicaid funding is contingent on following the established Hyde Amendment exceptions as laid out by Congress.[271] The federal government could allow South Dakota to continue to not provide Medicaid-funded abortion services for rape and incest victims. However, by doing so, the state should forfeit all of its federal Medicaid funding, as the state is not providing Medicaid-funded abortion services in accordance with congressional mandate.[272] Relying on the *Hern* case, the challengers should argue that to keep the state's Medicaid funding, South Dakota must comply with all Medicaid regulations as determined by Congress, rather than creating their own standards.[273] In *Hern*, citing congressional intent, the court determined the state must provide publicly funded abortions pursuant to Medicaid regulations, or lose federal funding.[274] Utilizing this argument could potentially force the state to finally comply with the Hyde Amendment's rape and incest exceptions, especially considering the state of South Dakota's reliance on federal funding.[275]

With these arguments supported by case precedent, a case filed by abortion providers in South Dakota would likely repeal the state's statute that denies Medicaid-funded abortion services for rape and incest victims. Even if the district court upheld the state statute, the Eighth Circuit Court of Appeals would likely find the statute unconstitutional. More than likely, the Court of Appeals would determine

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271 Hern v. Beye, 57 F.3d 906, 912-13 (10th Cir. 1995).

272 *Id.* at 913.

273 *Id.*

274 *Id*.

275 *See* Niraj Chokski, *Some of the Most Conservative States Rely Most on Federal Government Aid*, WASH. POST, (Jan. 6, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/01/06/some-of-the-most-conservative-states-rely-most-on-federal-government-aid/?tid=sm_fb.

the statute is preempted by federal law under the Supremacy Clause and is also inconsistent with Medicaid's goals and provisions. Case law is on the side of the challengers, and for the health and wellbeing of Medicaid-dependent and Native American and other women of color in South Dakota, hopefully the challenge is filed in the near future.

CONCLUSION

Low-income sexual assault victims in South Dakota are constitutionally entitled under the Fourteenth Amendment's Equal Protection Clause to affordable, accessible abortion services through the state's Medicaid program. To force South Dakota to comply with the Hyde Amendment's rape and incest exceptions, abortion providers and Medicaid-dependent women in South Dakota should file a lawsuit against the state. The lawsuit should utilize arguments previously used against states that had statutes restricting Medicaid-funded abortions, like those in Colorado, Minnesota, West Virginia, and Utah.[276] A lawsuit on behalf of Medicaid-dependent women is desperately needed, as rape and incest victims are entitled to the same reproductive choices as women in other states. Low-income South Dakotan women deserve freedom from discriminatory laws that disproportionally harm them. Until the Hyde Amendment is repealed in its entirety nationwide, the least that can be done for South Dakotan women is for the state to comply with the Hyde Amendment exceptions, as Medicaid-dependent rape and incest victims deserve equal treatment when seeking abortion services.

[276] *See supra* notes 260-275 and accompanying text.