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# The New Negative Rights: Abortion Funding and Constitutional Law After *Whole Woman's Health*

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## I. INTRODUCTION

More than forty years after it passed, the Hyde Amendment, a ban on the Medicaid funding of abortion, is once again at the center of the abortion wars.[1] Hillary Clinton ran in the 2016 Presidential election



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1. For coverage of the amendment's legacy and anniversary, see, for example, Kate Bahn & Jamila Taylor, *The Hyde Amendment Punishes Poor Women—and It's Bad for the Economy*, NATION (Sept. 30, 2016), https://www.thenation.com/article/

on a platform calling for the reversal of the Amendment,[2] and a proposal to overturn the Amendment has well over one hundred co-sponsors.[3] Following the election of Donald Trump and Republican majorities in both houses of Congress, the odds that the Hyde Amendment will be repealed have declined considerably; indeed, Trump has promised to make the Hyde Amendment a permanent law rather than an appropriations bill.[4] The amendment remains at the epicenter of abortion conflict.

For the most part, critics of the Hyde Amendment argue that it authorizes discrimination against poor women. Using original archival research, this Article argues that the impact of the Hyde Amendment has been much further reaching. Champions of the Hyde Amendment defined a right of conscience-based objection that increasingly defines conflicts over same-sex marriage, contraceptive access, and abortion.[5] During the fight for the amendment, pro-lifers refocused debate about conscience on the symbolic, rather than tangible, burden placed on believers with moral objections—a move that

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the-hyde-amendment-punishes-poor-women-and-its-bad-for-the-economy [https://perma.unl.edu/5YZG-X84E]; *Forty Years Later, 2 Million Children Saved Because of the Hyde Amendment*, NAT'L RIGHT TO LIFE NEWS (Sept. 30, 2016), http://www.nationalrighttolifenews.org/news/2016/09/40-years-later-2-million-children-saved-because-of-the-hyde-amendment/#.WBDxIOArLb0 [https://perma.unl.edu/KH9G-KT5D]; Michael J. New, *The Hyde Amendment's Lasting Legacy*, HILL (Sept. 30, 2016), http://origin-nyi.thehill.com/blogs/congress-blog/healthcare/298618-the-hyde-amendments-lasting-legacy [https://perma.unl.edu/NU2U-9RB8].

2. On Clinton's call for putting an end to the Hyde Amendment, see Emma Green, *Democrats Are Pushing to Use Tax Dollars to Support Abortion*, ATLANTIC (Oct. 3, 2016), http://www.theatlantic.com/politics/archive/2016/10/hyde-repeal/502568 [https://perma.unl.edu/TNL6-W3KH]; Nina Liss-Schultz & Hannah Levintova, *Today Is the Fortieth Anniversary of a Dark Day in Abortion-Rights History*, MOTHER JONES (Sept. 30, 2016), http://www.motherjones.com/politics/2016/09/supreme-court-hyde-abortion-federal-funding-mcrae [https://perma.unl.edu/WE3A-HBD8].

3. On the new proposal in Congress, see, for example, Erin Corbett, *How to Help Repeal the Hyde Amendment—and Why It's Time*, BUSTLE (Sept. 30, 2016), https://www.bustle.com/articles/186908-how-to-help-repeal-the-hyde-amendment-and-why-its-time [https://perma.unl.edu/37QC-ZE4N]; Green, *supra* note 2.

4. *See* Dave Andrusko, *On Fortieth Anniversary: Trump Vows Support for Hyde Amendment, Clinton Pledges to End Hyde Amendment*, NAT'L RIGHT TO LIFE NEWS (Sept. 30, 2016), http://www.nationalrighttolifenews.org/news/2016/09/on-40th-anniversary-trump-vows-support-for-hyde-amendment-clinton-pledges-to-end-hyde-amendment/#.WC8Cr_krLb0 [https://perma.unl.edu/7YP9-R9QG].

5. On the importance of conscience politics in constitutional dialogue, see, for example, Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703 (2014); Reva B. Siegel & Douglas NeJaime, *Conscience Wars: Complicity-Based Claims in Law and Politics*, 124 YALE L.J. 2516 (2015); Robin Fretwell Wilson, *When Governments Insulate Dissenters from Social Change: What* Hobby Lobby *and Abortion Conscience Clauses Teach Us About Specific Exemptions*, 48 U.C. DAVIS L. REV. 703 (2014).

laid the foundation for the expansion of conscience-based arguments in later years.[6]

Constitutionally, the fight for the Hyde Amendment also revamped the right–privilege distinction (or the distinction between positive and negative rights) in constitutional law. Proponents of the amendment recognized that in a series of cases about welfare benefits, the Supreme Court had viewed the distinction with skepticism. Pro-lifers tried to revive the distinction by urging the Court to focus on whether the obstacles facing a woman seeking abortion were created or controlled by the government rather than by outside forces. This approach has influenced both abortion doctrine and constitutional law more broadly.

Although the Hyde Amendment seems to be a permanent feature of the political landscape, the Court's recent decision in *Whole Woman's Health v. Hellerstedt* makes a challenge to the Amendment both realistic and compelling.[7] The Court explained that *Casey*'s "undue burden" test requires a balancing of the benefits and burdens created by any abortion law, including a fetal-protective regulation.[8] As importantly, the Court's decision rejects the formalism that once defined abortion jurisprudence.[9] In determining whether a law burdens abortion, the Court looks beyond the formal terms of a law to the way it interacts with forces beyond the government's control.[10] *Whole Woman's Health* undermines the core premises of both the Hyde Amendment and the Supreme Court decisions upholding it.

The Court's approach to the undue burden test casts doubt on the constitutionality of the Hyde Amendment and a new generation of abortion restrictions patterned on it, including bans on malpractice insurance for abortion providers, limits on private-insurance coverage for abortion, and laws defunding organizations that advocate or provide abortions. *Whole Woman's Health* requires a court to scrutinize the claimed benefit of an abortion regulation. Proponents of the amendment have argued that it benefits taxpayers by ensuring they are not complicit in facilitating a procedure that many find morally objectionable.[11] However, even when it comes to standing, taxpayers challenging a law need to show that they have "sustained or [are] immediately in danger of sustaining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally."[12] There is no proof that the Hyde

6. *See infra* Part II.
7. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
8. *See id.* at 2309–10.
9. *See id.*
10. *See id.*
11. *See infra* Part I.
12. Hein v. Freedom from Religion Found., 551 U.S. 587, 599 (2007) (citing Massachusetts v. Mellon, 262 U.S. 447, 448 (1923)).

Amendment protects individuals with conscience-based objections from a direct burden or injury more than any other spending measure would.

*Whole Woman's Health* also casts the effect of the Hyde Amendment in a new light. The Court defines impermissible burdens far more broadly, dignifying the impact of delays, significant cost increases, and declines in the quality of care.[13] Moreover, *Whole Woman's Health* also instructs courts to stop looking at the formal terms of a law in isolation. By exploring how a law interacts with market forces, hospital policies, and individuals' economic circumstances,[14] the Court rejected the approach long used to justify the Hyde Amendment and a variety of new laws based on it.

The remainder of this Article proceeds in four parts. Parts II and III trace the influence of the Hyde Amendment on key dimensions of contemporary constitutional dialogue. Part II considers how proponents of the Hyde Amendment redefined conscience-based objection, dropping any requirement for direct injury or involvement on the part of taxpayers. Part III traces the deployment of formal distinctions between positive and negative rights in the Hyde Amendment debate. Drawing on this history, Part IV reconsiders the constitutional case against the Hyde Amendment and similar laws under *Whole Woman's Health*, and Part V offers a brief conclusion.

## II. THE HYDE AMENDMENT AND THE REDEFINITION OF CONSCIENCE

Conscience-based objections seem to be everywhere in contemporary constitutional debate. States have introduced exemptions for cake bakers, ministers, government workers, counselors, and many others who object to same-sex marriage.[15] Conscience is at the center of attacks on the contraceptive mandate of the Affordable Care Act.[16]

13. *Hellerstedt*, 136 S. Ct. at 2309–10.
14. *See id.*
15. On the wide variety of conscience-based objections introduced by state lawmakers for those with objections to same-sex marriage, see, for example, Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1169–72 (2012); Sepper, *supra* note 5, at 704–08.
16. *See, e.g.*, Lara Cartwright-Smith & Sara Rosenbaum, *Controversy, Contraception, and Conscience: Insurance Coverage Standards Under the Patient Protection Affordable Care Act*, 127 PUB. HEALTH RPT. 541, 541–45 (2012); Siegel & NeJaime, *supra* note 5, at 2516–30; Robin Abcarian, *At Supreme Court, Baffling Decision Follows Awful* Hobby Lobby *Ruling*, L.A. TIMES (July 7, 2014), http://www.latimes.com/local/abcarian/la-me-ra-supreme-court-baffling-decision-20140707-column.html [https://perma.unl.edu/7HZM-ML9S]; N.Y. Times Editorial Bd., *Limiting Rights: Imposing Religion on Workers*, N.Y. TIMES, June 30, 2014, at A20, http://www.nytimes.com/2014/07/01/opinion/the-supreme-court-imposing-religion-on-workers.html.

Antiabortion groups use the idea of conscience in justifying new legal restrictions, including bans on private-insurance coverage for abortion.[17]

While the omnipresence of conscience arguments is new, the particular claims that now attract so much attention developed decades earlier as part of the campaign for the Hyde Amendment. The effort to ban public funding for abortion began almost before the ink had dried on the *Roe v. Wade* opinion.[18] To be sure, before the Hyde Amendment passed, opponents of abortion focused on a fetal-protective constitutional amendment, not a funding ban.[19] Nevertheless, between 1973 and 1976, conscience-based arguments—forged in the battle for a funding ban—became a central dimension of pro-life advocacy. At first, in state battles about funding bans, supporters primarily emphasized that nonmedical abortions fell outside the scope of Medicaid, a law designed to cover only needed health procedures.

By the mid-1970s, as this Part next demonstrates, the issue of conscience had moved to the forefront. Abortion-rights supporters prioritized a challenge to efforts on the part of Catholic hospitals to deny abortions, convincing some pro-lifers that an attack on believers' religious objections to abortion was underway. But as this Part establishes next, the ideas of conscience developed in the context of defending Catholic hospitals spread far more broadly. Pro-lifers' claims about conscience departed from the ones that had defined protest against the Vietnam War. Rather than looking at the degree of involvement a believer had, pro-lifers urged lawmakers to focus on the symbolic result of a spending bill: absent a funding ban, pro-lifers would be compelled to pay for abortion and thereby speak a message about the morality of abortion that they could not stomach. This idea of conscience has cast a lasting shadow. No matter how indirect a believer's involvement, symbolic complicity has served as a powerful tool for those seeking an exemption from otherwise applicable obligations.

### A. Pro-Lifers Develop an Argument for Public-Funding Bans

Conscience-based arguments for funding bans were not initially a major part of antiabortion strategy. Indeed, in the early years after the Court's decision in *Roe*, abortion opponents privileged an amendment to the Constitution that would ban abortion coast to coast.[20] In spite of the movement's preoccupation with a constitutional amend-

17. *See, e.g.*, Siegel & NeJaime, *supra* note 5, at 2554–55.
18. *See, e.g.*, MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 49 (2015).
19. *See, e.g.*, *id.* at 37–41.
20. *See, e.g.*, DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 4–8, 162, 229, 236 (2016); ZIEGLER, *supra* note 18, at 37–41.

ment, pro-lifers also considered a variety of incremental restrictions, including state or federal bans on the public funding of abortions.[21] At a 1973 meeting, members of the National Right to Life Committee (NRLC) framed a funding ban primarily as a way to protect poor, minority women from abuse.[22] This argument, honed in the lead-up to *Roe*, tied the movement for abortion rights to past campaigns for population control or eugenic legal reform.[23] While this argument glossed over differences in the membership and goals of these movements, pro-lifers took advantage of the fact that some supporters of abortion rights used the language of population control or had ties to racialist organizations.[24] For this reason, at the February meeting, pro-lifers presented the issue as one involving racism and "protection of the welfare client."[25]

After the *Roe* decision, supporters of abortion rights immediately became concerned about women's access to the procedure.[26] Many communities did not yet have freestanding clinics performing the procedure,[27] and many Planned Parenthood affiliates, the leading reproductive-health provider in many locales, remained reluctant to perform abortions in the 1970s.[28] While more hospitals performed abortions in the 1970s than would be the case in later decades,[29] smaller towns served by Catholic hospitals sometimes lacked access to abortion care.[30]

The application of Medicaid to abortion services also raised questions about access. Even before *Roe*, the New York State Commis-

21. On the incremental restrictions proposed in the 1970s, see, for example, ZIEGLER, *supra* note 18, at 230–37.
22. National Right to Life Committee Strategy Meeting Minutes (Feb. 11, 1973), *in* THE NATIONAL RIGHT TO LIFE COMMITTEE PAPERS (on file in Box 4, Gerald Ford Memorial Library, University of Michigan).
23. *See, e.g.*, JOHANNA SCHOEN, ABORTION AFTER *ROE*: ABORTION AFTER LEGALIZATION 175–76 (2015); ZIEGLER, *supra* note 18, at 115–16.
24. *See, e.g.*, Brief of Women for the Unborn as Amicus Curiae in Support of Appellee at 16, Roe v. Wade, 410 U.S. 113 (1973) (No. 70-18). For more on these arguments, see, for example, Mary Ziegler, Roe*'s Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1, 29–30 (2013).
25. National Right to Life Committee Strategy Meeting Minutes, *supra* note 22, at 3, 5.
26. *See, e.g.*, SCHOEN, *supra* note 23, at 11, 43.
27. *See* JENNIFER NELSON, MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN'S HEALTH MOVEMENT 58–59 (2015); SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 67 (1991).
28. SCHOEN, *supra* note 23, at 20.
29. Carol Joffe, Patricia Anderson & Jody Steinauer, *The Crisis in Abortion Provision and Pro-Choice Medical Activism in the 1990s*, *in* ABORTION WARS: A HALF-CENTURY OF STRUGGLE, 1950–2000, at 320–24 (Rickie Solinger ed., 1998).
30. *See, e.g.*, TAMAR CARROLL, MOBILIZING NEW YORK: AIDS, ANTIPOVERTY, AND FEMINIST ACTIVISM 154 (2015); LAURENCE TRIBE, ABORTION: THE CLASS OF ABSOLUTES 145 (1992).

sioner of Welfare Services took the position that elective abortions were "not medically indicated" and therefore not covered by the state's Medicaid program.[31] Other states and cities passed laws specifically ruling out the use of public dollars or facilities for abortion,[32] and Solicitor General Erwin Griswold took the position that Medicaid should exclude at least elective abortion.[33]

In states from Utah to New Jersey, in the mid-1970s, Planned Parenthood, the ACLU, and other abortion-rights organizations challenged these laws, arguing that they violated the right to abortion recognized in *Roe*.[34] These early cases emphasized that under *Roe*, abortion already counted as a necessary medical procedure that could not be properly excluded from a state Medicaid program or prohibited in certain hospitals.[35] Moreover, according to the ACLU and Planned Parenthood, *Roe* had made it unconstitutional to restrict access to abortion in the first trimester, regardless of whether that restriction took the form of a direct prohibition or a funding limitation.[36] What mattered was the effect of a law. As one ACLU officer reasoned: "The combination of the only hospitals in the area refusing to perform abortions on demand, and the State's refusal to pay Medicaid for the procedure, effectively denies them the right to abortion in the first three months of pregnancy."[37]

Before 1975, federal courts generally sided with supporters of abortion rights. In *Doe v. Wohlgemuth*, the court reasoned that *Roe* had already "recognized that abortion is a necessary medical service for it may prevent specific and direct harm which is medically diagnosable (e.g. psychological harm), may protect the woman's future mental and physical health, and may prevent the distress associated with the unwanted pregnancy and child."[38] Even if a Medicaid regulation covered only necessary services, abortion would qualify.[39]

The court also emphasized that *Roe* had ruled out any regulation that interfered with a woman's abortion decision in the first trimester.[40] By putting a thumb on the scale in favor of childbirth, the State

31. *See, e.g.*, Edith Evans Asbury, *Plans to Ban Abortion Medicaid Expected to Increase City's Cost*, N.Y. TIMES, Apr. 3, 1971, at 26; Peter Kihss, *City Sues State over Order that Limits Abortion Payments*, N.Y. TIMES, Apr. 13, 1971, at 43.
32. On the spread of Medicaid funding bans after *Roe*, see, for example, TRIBE, *supra* note 30, at 151.
33. *Right to Medicaid Voluntary Abortions Denied*, ATLANTA J. CONST., May 18, 1973, at 2B.
34. *See, e.g.* SCHOEN, *supra* note 23, at 43; Joffe et al., *supra* note 29, at 346–49.
35. *See, e.g.*, Michael Boylan, *Suit Demands State Permit Abortions Under Medicaid*, N.Y. TIMES, June 27, 1973, at 114.
36. *See, e.g.*, *id.*
37. *Id.*
38. Doe v. Wohlgemuth, 376 F. Supp. 173, 190 (W.D. Pa. 1974).
39. *See id.*
40. *Id.* at 192.

had crossed a line.[41] Other courts looked to the Equal Protection Clause in striking down funding bans, relying on a line of cases involving welfare and the right to travel.[42] "Once the state has undertaken to provide general short-term hospital care," one court explained, "it may not constitutionally draw the line at medically indistinguishable surgical procedures that impinge on fundamental rights."[43]

Heartened by these results, the ACLU distributed a handbook on how to sue both public and private hospitals, including those with religious objections to abortion.[44] When it came to private hospitals, the organization insisted that Catholic hospitals should be treated as state actors because they had assumed powers of the public hospitals and accepted so much aid from the government, including tax exemptions and federal funding.[45]

The threat of an attack on Catholic health care providers prompted pro-lifers to refine conscience arguments. Eugene Schultz, the director of legal services of the Catholic Hospital Association, warned his members that the ACLU was working to force them to perform abortions against their conscience.[46] At first, movement members primarily made these arguments in court.[47] A New Jersey trial judge sympathetic to pro-lifers ruled that no hospital should be forced to violate the conscience of its physicians.[48] Requiring a hospital "to act contrary to the community conscience, as well as the conscience of its management, would itself be contrary to the public good," opined Superior Court Judge Herbert Horne in the mid-1970s.[49] Early on, the ACLU responded that this idea of conscience swept far too broadly. For example, in addressing Judge Horne's ruling, the legal director of the New Jersey ACLU maintained that while individual practitioners could refuse to perform abortions for religious or moral reasons, hospitals did not have the same level of direct involvement.[50]

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41. *See, e.g.*, *id.*

42. *See, e.g.*, Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), *aff'd sub nom*. Singleton v. Wulff, 428 U.S. 106 (1976); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Doe v. Westby, 383 F. Supp. 1143 (D.S.D. 1974), *vacated*, Westby v. Doe, 420 U.S. 968 (1975); *Wohlgemuth*, 376 F. Supp. 173; Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

43. *Wohlgemuth*, 376 F. Supp. at 191 (quoting Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973)).

44. *See, e.g.*, James Pearre, *Warn Hospitals on Abortion*, CHI. TRIB., Oct. 22, 1974, at 1.

45. *See, e.g.*, *id.*

46. *See, e.g.*, *id.*

47. For an example of these arguments, see *infra* note 48 and accompanying text.

48. *See, e.g.*, Ronald Sullivan, *Appeal Due in Abortion Ruling*, N.Y. TIMES, Dec. 15, 1974, at 88.

49. *Id.*

50. *See, e.g.*, *id.*

However, as pro-lifers defended new restrictions on Medicaid funding, they began pointing to an expanded idea of conscience, one that included not only hospitals but rather any taxpayer. In Congress, in September 1974, the Senate passed an appropriations bill sponsored by Senator Dewey Bartlett (R-OK) that banned the Medicaid funding of abortion unless a woman's life was in danger.[51] Bartlett initially presented a Medicaid funding ban as a way for members of Congress to express their own religious or moral beliefs.[52] "Each member of Congress must decide for himself whether or not permitting the use of federal funds for abortions aids in the taking of a human life."[53]

Later, pro-life state legislators began presenting themselves as champions of the conscience of taxpayers.[54] As one explained: "[T]axpayers who believe that abortion-on-request is a crime against humanity . . . should not be compelled to become unwilling accessories to these self-avowed, private, personal acts of abortion, which are grossly offensive to their social consciences."[55]

### B. More Complex Conscience Arguments Emerge

In April 1975, when the Bartlett Amendment failed by a vote of fifty-four to thirty-six, pro-lifers recognized the need for more elaborate arguments about conscience.[56] Opponents of the bill, including Senator Edward Kennedy (D-MA), argued that it would discriminate against poor women, denying them abortion rights that everyone else could exercise.[57] Others insisted that the bill was vague, potentially covering some forms of contraception, including intrauterine devices.[58] Still others, including Senator Jacob Javits (R-NY), presented Bartlett's proposal as the beginning of an incremental attack on *Roe*.[59]

Senator John Pastore (D-RI) raised the issue of conscience in a last-ditch attempt to save Bartlett's plan.[60] "If I do not believe in an abortion," he asked, "why should my money be paid for that purpose, any more than I would support an amendment that said federal funds

51. *See, e.g.*, John D. Morris, *Senate Votes Bill Curbing Abortion Aid*, N.Y. TIMES, Sep. 19, 1974, at 37.
52. *See* Alice Hartle, *Senator Bartlett to Pursue HEW Abortion Funding Ban*, NAT'L RIGHT TO LIFE NEWS, Jan. 1975, 1, 10.
53. *Id.*
54. *See, e.g.*, James Ford, Letter to the Editor, *Medicaid Abortions*, L.A. TIMES, Oct. 15, 1974, at C4.
55. *Id.*
56. *See, e.g.*, *Abortion Fund Ban Rejected,* ATLANTA J. CONST., Apr. 15, 1974, at 2A; Marjorie Hunter, *Senate Upholds U.S. Abortion Funds*, N.Y. TIMES, Apr. 11, 1975, at 28.
57. *See* Hunter, *supra* note 56, at 28.
58. *See, e.g.*, *id.*
59. *See, e.g.*, *id.*
60. *See, e.g.*, Alice Hartle, *Debate Hot as Bartlett Amendment Fails*, NAT'L RIGHT TO LIFE NEWS, May 1975, at 1.

should be used in order to propagate and advance the idea of the Right to Life?"[61]

Pastore's argument offered the beginnings of an approach that antiabortion activists would develop in the next two years. He tried to draw the conversation away from the degree of involvement that taxpayers would have in an abortion. Instead, he emphasized the expressive function of money, describing it as a form of speech. By spending taxpayer money in a way of which some would strongly disapprove, Congress would act in flagrant violation of the moral beliefs of voters.

Over the course of the next several years, members of NRLC refined this idea of conscience. Reverend Phillip Reilly, an NRLC member, wrote the Internal Revenue Service that he had deducted from his taxes an amount that he believed would reflect his support of abortion funding.[62] Dexter Duggan, another NRLC leader, elaborated much more on Reilly's theory.[63] In a letter to *National Right to Life News* in the mid-1970s, Duggan laid out a theory that other abortion opponents could use.[64] The principle of freedom of conscience underlying *Roe*, Duggan argued, should mean that a funding ban was necessary as well as just.[65] "We hear frequently about freedom of choice for abortion," he wrote.[66] "So I must conclude that there should be freedom of choice not to be forced to pay for this repugnant practice of permissive abortions."[67]

To be sure, the principle of freedom of conscience was the same: people should have the freedom to make important decisions without government compulsion. However, Duggan ignored potentially important distinctions between the two situations. Women forced to bear children against their will faced serious consequences, some of them highlighted by the *Roe* Court, including the physical impact of pregnancy and childbirth. The burden on Duggan and other taxpayers was far less grave in financial, physical, or emotional terms. Second, the degree of complicity or involvement on the part of the objecting individual distinguished taxpayers and women seeking an abortion. Taxpayers did not have to receive or perform abortions. Nor did taxpayers literally put the money to pay for an abortion in women's hands; the government acted as an intermediary. Nevertheless, in Duggan's view, the idea of conscience carried equal weight in both scenarios.

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61. *Id.*

62. *See Pro-Lifers Deny Government's Right to Tax for Abortions*, NAT'L RIGHT TO LIFE NEWS, May 1976, at 5.

63. *See id.*

64. *See id.*

65. *See id.*

66. *Id.*

67. *Id.*

The analogy Duggan drew suggested that conscience as a constitutional principle required absolute neutrality on the part of the government.[68] "We also hear that the U.S. Supreme Court did not make abortion mandatory," he explained.[69] "So it seems obvious that neither should it be mandatory for U.S. citizens to have to pay for this callous, inhumane practices through their tax dollars."[70] As Duggan saw it, *Roe* relied on the abstract importance of liberty in important decisions and the constitutional problems with governmental coercion.[71] When it came to taxpayer funding, the Constitution and public policy should always favor those seeking freedom from coercion.[72]

Duggan recognized that his analogy was not perfect, explaining that the federal taxing power "sanitized" pro-lifers' involvement.[73] Nevertheless, because of the expressive power of money, he insisted that the injury suffered by objecting taxpayers was as serious as any other.[74] Forcing those with moral objections to pay for something against their conscience made these abortion opponents look "stupid and not deeply committed . . . [or] like utter hypocrites."[75]

In 1976, when Representative Henry Hyde (R-IL) presented a rider to an appropriations bill, these ideas of conscience became an important part of the debate. Senator Pastore again picked up on the idea of conscience honed by activists like Duggan.[76] "[W]hat we are actually doing here is sanctifying with public money something that other people morally have an objection to," he argued.[77]

Opponents of Hyde's proposal noted that antiabortion lawmakers wanted an exemption for taxpayers that would not extend to others with equally forceful objections to government spending.[78] Senator Birch Bayh (D-IN) argued that Hyde's amendment would lead the nation down a slippery slope whereby taxpayers could stop almost any form of federal spending:

> This argument is very closely related to an argument that I found great sympathy with. Why should my tax dollars be used to dump napalm on defenseless civilians in Vietnam? I am opposed to the war so why should I not be able to opt out? Once we make that exception, I do not know where it stops.[79]

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68. *See id.*
69. *Id.*
70. *Id.*
71. *See id.*
72. *See id.*
73. *Id.*
74. *See id.*
75. *Id.*
76. *See, e.g.*, Alice Hartle, *HEW Funding Abortion Rider in Conference*, NAT'L RIGHT TO LIFE NEWS, Aug. 1976, at 15.
77. *Id.*
78. *See infra* notes 78–79 and accompanying text.
79. TRIBE, *supra* note 30, at 158.

Senator Robert Packwood (R-OR) also pressed Pastore on the similarities between those who objected to the Vietnam War and those who opposed Medicaid funding for abortion.[80] Pastore insisted that the Hyde Amendment was different, and his colleagues emphasized that abortion took the life of an innocent who was not an enemy combatant or hostile party.[81]

Nevertheless, Packwood and Bayh spotlighted one of the ways in which the Hyde Amendment reconceptualized conscience. The Amendment defined a form of complicity based on the symbolic value of money. Taxpayers forced to contribute to a practice that they found abhorrent were in some way compelled to speak in favor of that practice. But in addition to broadening the definition of conscience, prolifers also called for an exemption asserting that objection to abortion was different from and more legitimate than other forms of protest, including opposition to the Vietnam War. In reassuring members of Congress that the Hyde Amendment would not lead to exemptions for other objecting taxpayers, lawmakers and antiabortion activists suggested that moral opposition to the taking of innocent fetal life was entitled to more deference than other forms of dissent would be.

Other members of Congress argued that the Hyde Amendment looked only at the burdens imposed on those objecting to abortions.[82] Representative Herman Badillo (D-NY) argued that the law would impose the beliefs of one group of Americans on everyone else.[83] The Amendment ignored the burdens placed on women who wished to have abortions, providers who would have to bear higher costs, Americans who disagreed with Hyde's view of the moral stakes of the abortion question, and even taxpayers with moral objections to other policies that the rider suggested deserved less weight than those embodied in the Hyde Amendment.[84] Nevertheless, supporters of the bill had a clear, simple idea of conscience that resonated with members of Congress.[85] "We are talking here about the right of the people, because of their religious and moral beliefs, do [sic] not support the taking the life of a human being," explained one supportive member.[86]

Following the passage of the Hyde Amendment, President Gerald Ford approved of the idea of a Medicaid funding ban but nevertheless vetoed the appropriations bill for reasons of "fiscal integrity."[87] Ulti-

80. *See* Hartle, *supra* note 76, at 15.
81. *See id.*
82. *See* Janet Grant, *Pro-Life Strength Shown in Hyde Amendment Vote*, NAT'L RIGHT TO LIFE NEWS, Sept. 1976, at 1, 12–13.
83. *See id.* at 13.
84. *See id.*; Hartle, *supra* note 76, at 10.
85. *See infra* note 86 and accompanying text.
86. Grant, *supra* note 82, at 12.
87. *See, e.g.*, DONALD CRITCHLOW, INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA 202 (1999).

mately, Congress overrode the veto, and some members opposed to the Amendment joined the override effort.[88] The reasons for the initial success of the Amendment were complex. Arguments about discrimination against poor women rang hollow at a time when hostility to broad welfare programs was intensifying.[89] Furthermore, many opponents of the Hyde Amendment believed that the courts would strike down the rider, leaving intact parts of the appropriations bill of which they approved.[90]

In the 1970s and beyond, the political appeal of the Hyde Amendment seemed clear. The idea of conscience appealed to a large cross section of voters and politicians, particularly when moral objections intersected with anger about the size and cost of the welfare state. Proponents of the Amendment also successfully made conscience into a far more effective weapon. Antiwar protestors and other conscientious objectors had had to justify their protest by foregrounding the degree of involvement the draft would require. Champions of the Hyde Amendment made no effort to justify taxpayers' objections on the same grounds. Taxpayers were complicit enough in abortions simply by virtue of the message sent by allowing their dollars to pay for abortions, however indirectly.

Proponents of the Hyde Amendment also suggested that some forms of conscience-based objection deserved more support than others. By prioritizing the rights of the innocent, pro-lifers claimed a form of conscience-based protest that could be easily distinguished from other objections raised by taxpayers. The Amendment set the stage for later efforts to explain how conscience-based protest should trump other governmental interests or even constitutional liberties.

### C. Conscience Arguments Multiply

In the years since the Hyde Amendment, conscience-based exemptions have spread rapidly. After Oregon legalized a limited form of physician-assisted suicide in 1997, the State passed a conscience-based protection for physicians who did not want to participate in the

88. On the veto override, see, for example, Donald T. Critchlow, *When Republicans Became Revolutionaries: Conservatives in Congress*, *in* THE AMERICAN CONGRESS: THE BUILDING OF DEMOCRACY 703, 710 (Julian E. Zelizer ed., 2004).

89. *See, e.g.*, NICOLE MELLOW, THE STATE OF DISUNION: REGIONAL SOURCES OF MODERN AMERICAN PARTISANSHIP 218 n.32 (2008); TRIBE, *supra* note 30, at 153. On the growing unpopularity of the welfare state in the period, see, for example, NEIL GILBERT, THE TRANSFORMATION OF THE WELFARE STATE: THE SILENT SURRENDER OF PUBLIC RESPONSIBILITY 21–23 (2002); THEODORE R. MARMOR, JERRY L. MASHAW & PHILIP L. HARVEY, AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 14–16 (1990).

90. *See, e.g.*, CRITCHLOW, *supra* note 87, at 205–06; *Ford Makes a Point of Supporting Hyde Provision in Veto Message*, NAT'L RIGHT TO LIFE NEWS, Nov. 1976, at 1.

procedure.[91] Another battle about the expanding boundaries of conscience came in the context of abortion when a pharmacist was fired for refusing to sell Plan B, an emergency contraceptive.[92] Marketed as Plan B or Preven, the emergency contraceptive had been for sale since 1998, and sales averaged twelve to fifteen million dollars in the early- to mid-2000s.[93] Controversy about the pill grew in January 2004 when the Eckerd chain of pharmacies in Texas terminated a pharmacist who refused to prescribe the drug to a rape victim because he believed that it caused an abortion by preventing a fertilized egg from implanting in the uterus.[94]

The firing made legislation protecting pharmacists' conscience-based objections a priority for abortion opponents.[95] After South Dakota passed such a law, five other states considered doing the same.[96] While no two bills were identical, most shielded pharmacists from legal liability or loss of their jobs because they refused to prescribe Plan B for reasons of conscience.[97] Some laws went further, protecting those who refused to prescribe the birth-control pill.[98] "Pharmacists are now on the front line of the abortion issue," stated Denise Burke of Americans United for Life (AUL).[99] "No one should ever be put in the position where they have to violate their conscience or risk losing their job."[100]

By the following year, pro-lifers began championing an approach whereby pharmacists neither filled prescriptions themselves nor took steps to ensure that customers could receive help elsewhere.[101] Some

91. *See, e.g.*, Jim Barnett & Dave Hogan, *Assisted Suicide Ban Advances*, OREGONIAN, Sept. 25, 1998, at A1; Erin Hoover Barnett, *Care Providers Seek More Control over Assisted Suicide*, OREGONIAN, Mar. 19, 1999, at B5; Brad Knickerbocker, *Oregon Escalates Its Heated Right-to-Die Debate*, CHRISTIAN SCI. MONITOR, Apr. 8, 1998, at 4.

92. *See, e.g.*, Stephanie Simon, *Pharmacists New Players in Abortion Debate*, L.A. TIMES, Mar. 20, 2004, at A18. For more on conscience and Plan B, see, for example, ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE 160–78 (2010); MARK R. WICCLAIR, CONSCIENTIOUS OBJECTION IN HEALTH CARE: AN ETHICAL ANALYSIS 145 (2011).

93. *See* Simon, *supra* note 92, at A18.

94. *See, e.g.*, *id.*

95. *See, e.g.*, *id.*

96. *See, e.g.*, *id.*

97. *See, e.g.*, *id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See, e.g.*, Jeanne Cummings, *Morning-After Pill Reshapes Debate over Abortion*, WALL ST. J., Jan. 9, 2006, at A3; Monica Davey & Pam Belluck, *Pharmacies Balk at Sex-Pill Fight and Widen Fight*, N.Y. TIMES, Apr. 19, 2005, at A1; Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASH. POST, Mar. 28, 2005, at A01.

pharmacists even took custody of prescriptions and refused to transfer them to another facility.[102]

While the FDA continued to refuse to address whether Plan B should be available without a prescription, states scrambled to pass laws either expanding or restricting access to the drug.[103] The "conscience clauses" still written into pharmacist-protection laws drew on the strategy forged during the Hyde Amendment. Unlike doctors who performed abortions themselves, pharmacists did not directly terminate any pregnancy, even if Plan B was properly considered an abortifacient. For some time, women required a physician's prescription, and even in later years, women retained the ultimate decision to take the drug.

However, the idea of the conscience that developed during the fight for the Hyde Amendment took the spotlight off the degree of complicity required by an objector. Some pharmacists borrowed from the idea that participating in an immoral or offensive act harmed an objector because it sent a message that the objector agreed with the act.[104] "I believe you have a right not to fill a prescription if you think it will harm the patient or the unborn child," reasoned one pharmacist in 2004.[105]

Like champions of the Hyde Amendment, supporters of pharmacist-protection acts also effectively argued that the only burdens that mattered were those affecting the objector. Women who refused Plan B prescriptions clearly faced concrete harms under certain circumstances. The drug worked only when taken within seventy-two hours after unprotected sex.[106] When pharmacists refused to fill a prescription, the window closed for many women, forcing them to consider more invasive abortion procedures or carrying a potential pregnancy to term.[107] Supporters of the pharmacist-protection laws effectively argued that burdens on moral and religious objectors were different and more deserving of deference, particularly when opposition to abortion was involved.[108]

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102. *See* Simon, *supra* note 92, at A18; Rob Stein, *Health Workers' Choice Debated*, WASH. POST, Jan. 30, 2006, at A1.

103. *See, e.g.*, Marc Kaufman, *Plan B Battles Embroil States*, WASH. POST, Feb. 27, 2006, at A1, A7; Jonathan D. Rockoff, *Plan B Battle Shifts to States*, SUN, Feb. 24, 2006, at 1A, 8A.

104. *See, e.g.*, *infra* note 105 and accompanying text.

105. Simon, *supra* note 92, at A18.

106. *See, e.g.*, Isabel Rodrigues et al., *Effectiveness of Emergency Contraceptive Pills Between 72 and 120 Hours After Unprotected Sexual Intercourse*, 184 AM. J. OBSTETRICS & GYNECOLOGY 531, 531–537 (2001).

107. *See* Simon, *supra* note 92, at A18; Stein, *supra* note 102, at A01.

108. *See, e.g.*, Davey & Belluck, *supra* note 101, at A1; Simon, *supra* note 92, at A18; Stein, *supra* note 102, at A01.

The most visible conscience-based demands arguably now apply in the context of same-sex marriage and abortion. Starting in 2009, religious conservatives and abortion opponents used the idea of conscience to explain the connection between the two issues.[109] The 2009 Manhattan Declaration, a manifesto endorsed by Catholic and evangelical-Protestant religious leaders and conservative activists, set forth three principles uniting conservatives with otherwise disparate aims: "the sanctity of human life, the dignity of marriage as a union of husband and wife, and the freedom of conscience and religion."[110]

Since 2009, in the courts and legislatures, organizations sympathetic to the aims of the Manhattan Declaration made no effort to hide their efforts to expand the idea of conscience. AUL's model legislation, the Health Care Freedom of Conscience Act, describes the "basic civil right the right of all health care providers, institutions, and payers to decline to counsel, advise, pay for, provide, perform, assist, or participate in providing or performing health care services that violate their consciences."[111] The bill, already on the books in several states, would expand on pharmacist-protection bills by reaching a wide variety of actors, including social workers, counselors, and students only peripherally involved in health care delivery.[112] The bill also explicitly expands the right not to pay for services to which one objects, protecting a class of "health care payers" that includes "health maintenance organizations, health plans, insurance companies, or management services organizations."[113] The Act would protect conscience by excusing objectors from legal liability and requiring the government to ignore purported protected acts in the allotting of grants and other forms of aid.[114]

The Health Care Freedom of Conscience Act draws on a vision of conscience that first emerged in the battle for the Hyde Amendment.

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109. *See, e.g.*, Michelle Boorstein & Hamil R. Harris, *Christian Leaders Take Issue with Laws*, WASH. POST, Nov. 21, 2009, at B1; Lillian Kwon, *Over 150,000 Americans Sign Manhattan Declaration*, CHRISTIAN POST (Nov. 26, 2009), http://www.christianpost.com/news/over-150-000-americans-sign-manhattan-declaration-42026 [http://perma.unl.edu/QL3T-WULM].

110. ROBERT GEORGE, TIMOTHY GEORGE & CHUCK COLSON, MANHATTAN DECLARATION INC., MANHATTAN DECLARATION: A CALL OF CHRISTIAN CONSCIENCE (2009), http://manhattandeclaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf [https://perma.unl.edu/5SVT-LTPV]. For more on the significance of the Declaration, see, for example, Siegel & NeJaime, *supra* note 5, at 2545–48; Laurie Goodstein, Christian Leaders Unite on Political Issues, N.Y. TIMES, Nov. 20, 2009, at A22, http://www.nytimes.com/2009/11/20/us/politics/20alliance.html.

111. AMS. UNITED FOR LIFE, HEALTH CARE FREEDOM OF CONSCIENCE ACT: MODEL LEGISLATION & POLICY GUIDE FOR THE 2011 LEGISLATIVE YEAR 4 (2010), http://www.aul.org/wp-content/uploads/2010/12/Health-Care-Freedom-of-Conscience-Act-2011-LG-_2_.pdf [https://perma.unl.edu/6ERQ-QJPJ].

112. *See id.* at 5.

113. *See id.*

114. *See id.* at 6.

For supporters of the Hyde Amendment, the degree of involvement in a supposedly objectionable act no longer matters if an objector finds a request offensive. Antiabortion taxpayers argued for the Hyde Amendment because the use of their tax money, in their view, sent an unacceptable message about pro-lifers' sincerity, credibility, and beliefs. AUL's model law would similarly protect anyone who feels that her conscience has been violated, regardless of what she is asked to do.

AUL also describes the relevant burdens in conscience analysis as the ones impacting religious or moral objectors. The introduction to AUL's 2011 model law equates an effort to "eviscerate conscience" with the "concerted campaign to force hospitals, health care institutions, health insurers, and individual health care providers to provide, refer, and pay for abortions."[115] Those burdened by a refusal to provide health care services, including patients, do not fall under this definition of conscience—nor, as was the case with the Hyde Amendment, do those who object to the kind of religious or moral beliefs defended by the Act.

The conscience claims raised in challenging the contraceptive mandate of the Affordable Care Act or same-sex marriage draw on a similar logic. In *Burwell v. Hobby Lobby*, the Supreme Court considered a challenge to the contraceptive mandate raised under the federal Religious Freedom and Restoration Act (RFRA), a federal statute restoring the more exacting constitutional test for cases involving the free exercise of religion that the Supreme Court discarded in 1990.[116] Conservative and religious organizations supporting the challenge built on the case made for the Hyde Amendment's protection of conscience, describing the degree of direct involvement as irrelevant and privileging the conscience-based objections of some believers over others.[117] One brief signed by the authors of the Manhattan Declaration and other religious and conservative groups made the common claim that "[t]he theological requirement that Christians comply with scriptural commands in their occupation prohibits not only direct and personal wrongdoing, but also the enabling, authorizing, or aiding of another in doing what the Christian believes to be sin."[118] Religious objections, in this analysis, deserved special solicitude. As importantly, objectors should be able to avoid any act that even tangentially implicates their beliefs, including indirect decisions that "enable[e], authoriz[e], or aid[ ]" behavior of which an objector disapproves.[119]

115. *Id.* at 2.

116. 134 S. Ct. 2751 (2014).

117. *See, e.g.*, *infra* notes 118, 124, and accompanying text.

118. Brief of 38 Protestant Theologians et al. as Amici Curiae Supporting Respondents at 4–5, *Hobby Lobby*, 134 S. Ct. 2751 (Nos. 13-354, 13-356).

119. *Id.* at 4.

Similar arguments figured centrally in *Zubik v. Burwell*, the most recent challenge to the contraceptive mandate.[120] *Zubik* involved a challenge to the "accommodation" provision of the Affordable Care Act regulations, which created an exemption for those with religious objections.[121] To get the accommodation, organizations had to fill out a form detailing their objections and provide a copy to an insurer or third-party administrator.[122] The challengers argued that the accommodation requirements created a substantial burden under RFRA, again using an idea of conscience with roots in the Hyde Amendment debate.[123] As one brief explained: "The courts, like the legislatures, recognize that one's religious beliefs may prevent believers from any attenuated authorization or complicity in conduct they consider to be wrong."[124]

Protests against the Supreme Court's decision legalizing same-sex marriage in *Obergefell v. Hodges* have also adopted a broad understanding of conscience. Consider the example of Mississippi's HB 1523, the Protecting Conscience from Government Discrimination Act.[125] The bill enumerates three beliefs entitled to protection: those involving the superiority of heterosexual marriage, the immorality of nonmarital sex, and the illegitimacy of gender identities based on anything other than "immutable biological sex."[126] The law covers those performing same-sex marriages, employers, public accommodations, counselors, adoption agencies, and a variety of other actors, protecting them against discrimination, a term defined to include almost any tax or benefit implication.[127] Just as was the case with the Hyde Amendment, the bill elevates some conscience-based objections over others and ignores the degree of involvement required of objectors.[128]

The Hyde Amendment struggle gave rise to a vision of conscience that has influenced political struggles ever since. It is worth noting how much this idea departed from the one that was arguably the most familiar at the time that Congress passed the Hyde Amendment. Starting in the late 1960s, the Supreme Court decided a series of cases

120. 136 S. Ct. 1557 (2016).
121. *See id.* at 1559.
122. *See id.*; *see also* 78 Fed. Reg. 39,870 (July 2, 2013) (codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pts. 147, 156) (simplifying and clarifying the religious-employer exemption under the Affordable Care Act).
123. *See Zubik*, 136 S. Ct. at 1559.
124. Brief for the Ethics and Religious Liberty Commission et al. as Amici Curiae Supporting Petitioners at 17, *Zubik*, 136 S. Ct. 1557 (No. 15-35).
125. H.R. 1523, 2016 Leg., Reg. Sess. § 2 (Miss. 2016).
126. *See id.*
127. *See id.* at §§ 3–4.
128. *See* Barber v. Bryant, 193 F. Supp. 3d 677, 717 (S.D. Miss. 2016) (reasoning that the bill suggested that those with contravening views "hold disfavored, minority beliefs" while privileging those who agree with section 2 and granting them "a broad array of special legal immunities").

on the scope of the conscientious-objector exemption of the Universal Military Training Service Act.[129] The first case, *United States v. Seeger*, expanded the exemption to cover objectors who did not believe in God in any orthodox sense.[130] In a second case, *United States v. Welsh*, the Court included those with ethical convictions that an objector held with the same conviction that a believer would maintain for religious beliefs.[131] The *Welsh* Court also emphasized the degree of involvement that war would require of conscientious objectors.[132] Welsh had refused participation in the war because he "believe[d] the taking of life—anyone's life—to be morally wrong."[133] The Court reasoned that denying Welsh an exemption would require him to act in direct violation of his beliefs, forcing him to become "an instrument of war."[134]

However, the Court refused to broaden the exemption further. In *Gillette v. United States*, the Court rejected the claim of objectors opposed to the war in Vietnam rather than to all wars.[135] While the Court relied primarily on the text and legislative history of the challenged statute, the majority also spotlighted the burdens that any exemption created for third parties.[136] The *Gillette* Court suggested that any conscience-based objection should involve a balancing of the beliefs of the objector, the threat that "the binding quality of democratic decisions" would be jeopardized, and the fortunes of those with other reasons for going to war or refusing to do so.[137] Privileging the conscience of some objectors raised the possibility that "those who go to war [would be] chosen unfairly or capriciously."[138]

The supporters of the Hyde Amendment defined conscience far more broadly. Pro-lifers first sought to excuse those only remotely involved in behavior that they found objectionable. Movement leaders also dismissed the concerns of those harmed by an exemption, including those with different ideas of conscience and those who benefitted from the enforcement of a law about which objectors complained. Finally, champions of the law suggested that it was reasonable to attach more value to some objections than others. All of these moves became a fundamental part of the political and legal argument for conscience that has become a familiar feature of political and constitutional debate.

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129. 50 U.S.C. § 3806 (2012).
130. 380 U.S. 163 (1965).
131. 398 U.S. 333 (1970).
132. *See id.* at 343.
133. *Id.*
134. *Id.* at 344.
135. 401 U.S. 437 (1971).
136. *See id.* at 459–61.
137. *Id.* at 459.
138. *Id.* at 460.

As Part III shows, the fight for the Hyde Amendment also helped to shape the constitutional distinction between a right and a privilege. Antiabortion attorneys distraught about the *Roe* decision began looking for a way to narrow its reach. In the funding context, AUL attorneys seized on the idea that *Roe* had recognized a right to privacy. Emphasizing that privacy involved freedom from state interference, AUL lawyers argued that the Constitution had nothing to do with whether women could actually exercise their abortion rights. The organization promoted a kind of abortion-law formalism that ultimately changed the direction of the Court's jurisprudence.

While the right–privilege distinction casts a shadow over much of constitutional law, the benefit–burden distinction pushed by AUL influenced both the Supreme Court's decisions on state and federal funding bans and on every dimension of abortion law. As Part III shows, the Hyde Amendment set the stage for the adoption of a formalist approach that has distorted abortion law and other aspects of constitutional law ever since.

## III. THE HYDE AMENDMENT AND THE REVIVAL OF THE RIGHT–PRIVILEGE DISTINCTION

The Court's decisions in *Maher v. Roe* and *Harris v. McRae* help to reinvigorate the right–privilege distinction in constitutional law.[139] Introduced in the nineteenth century, the distinction suggests that a law raises constitutional problems only when the government uses coercive force.[140] In practical terms, however, the distinction has long seemed problematic, particularly when the "government . . . more often exerts its power by withholding benefits than by threatening bodily harm."[141]

In the 1960s and 1970s, under pressure from critics, the right–privilege distinction became increasingly fragile.[142] In this pe-

139. *See, e.g.*, Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 722 (1981) ("The Court's decisions in McRae and Zbaraz [and *Maher*] clearly refine the contours of the constitutional right to terminate a pregnancy, but even more significantly, they provide a new analytical focus for all fundamental-rights cases."); *see also* Richard L. Rubin, *The Resurrection of the Right–Privilege Distinction? A Critical Look at* Maher v. Roe *and* Bordenkircher v. Hayes, 7 HASTINGS CONST. L.Q. 165 (1979) (stating that following *Roe v. Wade*, there has been a "definite shift in the Supreme Court's approach to direct and indirect burdens on constitutional rights, as reflected in [*Maher* and *Hayes*]").

140. *See, e.g.*, Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 383–384 (2010).

141. Seth Kreimer, *Allocational Rights: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1295 (1984).

142. *See, e.g.*, Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L.

riod, the Supreme Court no longer took for granted that the government's power to impose conditions on the receipt of benefits had no constitutional limits.[143] Indeed, in the late 1960s and early 1970s, the Court invalidated most limits on benefits under the Aid to Families and Dependent Children (AFDC) Program.[144] Following the decision of *Maher*, however, the Court began turning away most challenges to laws on welfare benefits.[145] In the aftermath of *Maher* and *Harris*, the Court increasingly presumed the constitutionality of laws that merely denied a benefit.[146] These cases helped to revive and legitimize the right–privilege distinction, creating a doctrinal approach that the Court has applied in a variety of arenas.

This Part explores the legal strategy abortion opponents used to restore a strong right–privilege distinction in constitutional law. In the mid-1970s, antiabortion attorneys concerned about the mainstream movement's reliance on a constitutional amendment began searching for a litigation strategy that could help advance their cause. Prior to *Roe*, lawyers had made the same fetal-rights arguments inside and outside of court, asserting that the Constitution recognized implied fundamental rights for unborn children. Convinced that this tactic had reached a dead end, AUL attorneys next worked to convince the Court that *Roe* permitted at least some restrictions on abortion. At first, this approach was scattershot, focusing almost entirely on the benefits supposedly achieved by individual regulations. For these at-

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REV. 1389, 1428–34 (2000) (describing the attacks that convinced "the Court [to] repudiate[ ] the rights/privileges distinction").

143. *See, e.g.*, *id.* at 1428–29.

144. *See, e.g.*, Youakim v. Miller, 425 U.S. 231 (1976) (invalidating exclusion of foster children in relatives' homes from AFDC-Foster Care benefits); Philbrook v. Glodgett, 421 U.S. 707 (1975) (invalidating exclusion of intact families from AFDC-UP benefits because of father's eligibility for unemployment benefits); Burns v. Alcala, 420 U.S. 575 (1975) (upholding exclusion of unborn children and their mothers from AFDC benefits); Carleson v. Remillard, 406 U.S. 598 (1972) (invalidating exclusion of military dependents from AFDC coverage); Townsend v. Swank, 404 U.S. 282 (1971) (invalidating eligibility distinction between school children attending vocational schools and those attending college); King v. Smith, 392 U.S. 309 (1968) (invalidating requirement that recipients not reside or have sexual relations with an able-bodied man, whether he is children's father or not). *But see* Heckler v. Turner, 470 U.S. 184 (1985) (upholding federal interpretation of consolidated work-incentive disregard, which included mandatory payroll taxes as part of lump-sum disregard); Quern v. Manley, 436 U.S. 725 (1978) (upholding state's limited Emergency Assistance).

145. *See, e.g.*, Marie A. Failinger, *An Offer She Can't Refuse: When Fundamental Rights and Conditions on Government Benefits Collide*, 31 VILL. L. REV. 834, 834–37 (1986).

146. *See, e.g.*, *id.* For recent examples of this position, see, for example, Planned Parenthood of Kan. & Mid-Mo. v. Moser, 747 F.3d 814, 826 (10th Cir. 2014) ("There is a qualitative difference between prohibiting an activity and refusing to subsidize it."); K.P. v. LeBlanc, 729 F.3d 427, 429 (5th Cir. 2013); Planned Parenthood of Greater Ohio v. Hodges, 201 F. Supp. 3d 898 (S.D. Ohio 2016).

torneys, however, the funding cases offered an important opportunity for the movement to create a master theory of abortion rights—one that would allow activists to defend most regulations and delegitimize *Roe* in the process.

As this Part shows next, in creating a more coherent plan of attack, antiabortion attorneys reinvented the right–privilege distinction. Without defending its pedigree in every case, antiabortion attorneys argued that at a minimum, the distinction had analytical force when applied to certain kinds of rights, especially those described as privacy interests. Focusing on the kind of right at issue in a case promised a much more modest change in constitutional law. At least superficially, the strategy also seemed more analytically rigorous than a superficial examination of whether a law involved a sanction or a benefit, which required courts to explore the nature of the constitutional interest in question.

This argument paid off in *Maher* and *Harris*. The Court reconceptualized the abortion right and constitutional privacy more broadly as pure freedoms from state interference. In this context, the Court also reintroduced a formal distinction between laws that burdened a constitutional interest and those that did not. Without much explanation of what a burden entailed or how one could be identified, the Court relied on the right–privilege distinction in evaluating abortion regulations.

Moreover, *Harris* and *Maher* offered a workable approach for courts seeking to distinguish negative and positive rights. Borrowing from the arguments of abortion opponents, the Court argued that a law did not burden constitutional rights if it had the practical effect of putting those rights off limits unless the state created or controlled the obstacles in an individual's way. This approach has resonated well beyond the abortion context.

### A. Pro-Lifers Look for a New Litigation Strategy

In the later 1970s, when antiabortion attorneys began work on the funding cases, the future of the right–privilege distinction seemed anything but certain.[147] In *Goldberg v. Kelly*, the Supreme Court rejected an argument that welfare benefits were a privilege rather than a right and held that certain procedural protections had to be in place before benefits were denied.[148] The Court consistently overturned limits on AFDC benefits for much of the 1960s and early 1970s.[149]

The antiabortion movement also saw little reason to be hopeful about the potential of litigation. In the late 1960s and early 1970s,

147. *See, e.g.*, Schiller, *supra* note 142, at 1429–34.
148. 397 U.S. 254 (1970).
149. *See, e.g.*, Failinger, *supra* note 145, at 834–837.

many movement lawyers had remained confident that the courts would recognize constitutional fetal rights if presented with the right evidence.[150] Martin McKernan, the head of the NRLC legal team, advised movement attorneys to play to their strengths—highlighting ultrasounds and other scientific evidence supporting the idea of fetal personhood and leveraging the recognition of fetal rights in contract, tort, and property law.[151] McKernan explained:

> All in all, the law has consistently established certain procedural safeguards around fundamental rights to which the unborn was entitled. That most fundamental of rights—not to be deprived of life without due process of the law—cannot be ignored. However, these arguments must be demonstrated to any court . . . through the intervention of interested state right-to-life groups. In one federal court challenge to a state abortion statute a doctor was allowed to enter the case as an intervenor on behalf of all unborn children in that state.[152]

As McKernan's comments suggested, prior to *Roe*, abortion opponents pursued a litigation strategy that closely tracked activists' political arguments about fetal humanity and fetal rights.[153] NRLC popularized slideshows of abortion to spread the movement's arguments about fetal personhood and the violence of abortion.[154] Both AUL and NRLC tied these images to an implied constitutional right that abortion opponents identified in the Declaration of Independence and the Fourteenth Amendment.[155]

Litigators looked to the Due Process and Equal Protection Clauses as vehicles for this idea of fetal life. To establish that the fetus deserved equal protection of the laws, movement lawyers hoped to demonstrate that "the unborn child [would] qualify as a person within the purview" of the Fourteenth Amendment.[156] The medical claims and fetal images that the movement had popularized in the political arena could convince judges "factually that abortion destroys an individuated and unique human life."[157] By exposing the courts to scien-

150. *See* ZIEGLER, *supra* note 18, at 42–43.

151. *See, e.g.*, Martin McKernan, Legal Report: Court Cases 1–4 (July 1972), *in* THE NATIONAL RIGHT TO LIFE COMMITTEE PAPERS (on file in Box 4, Gerald Ford Memorial Library, University of Michigan).

152. *Id.* at 4.

153. *See, e.g.*, Mary Ziegler, *Originalism Talk: A Legal History*, 2014 BYU L. REV. 869, 869.

154. *See, e.g.*, Carol Mason, *Minority Unborn*, *in* FETAL SUBJECTS, FEMINIST POSITIONS 145 (Lynn Marie M. Morgan & Meredith W. Michaels eds., 1999).

155. *See* Ziegler, *supra* note 153, at 869–75.

156. Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 997–1003 (1971); *see also* A. James Quinn & James A. Griffin, *The Rights of the Unborn*, 31 JURIST 577, 578 (1971) ("[T]he law imputes a legal personality to an unborn child for all purposes which would be beneficial to the child after its birth.").

157. Robert M. Byrn, *Abortion-on-Demand: Whose Morality?*, 46 NOTRE DAME L. REV. 5, 16 (1970).

tific proof, movement lawyers planned to establish that "the unborn child is a human being and it is difficult to conceive of a human being who is not a person."[158]

The movement's procedural due process strategy similarly relied on medical reasoning about fetal life. Movement attorneys like David Louisell argued that the unborn child could not be deprived of life without due process of law.[159] Again, this strategy attracted support because it allowed pro-lifers to draw on what they saw as scientific evidence of fetal personhood.[160]

A month after the Court decided *Roe*, NRLC affiliates went to work proposing laws that could limit the reach of the decision.[161] While activists invested some energy in the effort to "spell out at the local level . . . what the intention of the Supreme Court is," most abortion opponents believed that litigation would do very little good.[162] "[O]ne does not have to be a trained lawyer to recognize that increasingly 'the Constitution is what judges say it is,'" complained one antiabortion group in 1973.[163] While the Court seemed unreceptive to any antiabortion argument, the problem for the movement went further. The legal strategies that antiabortion lawyers had been honing for decades had failed in the Court. It was not obvious what movement lawyers should do next.

Nevertheless, Dennis Horan, an AUL leader, worried that the movement had placed too much hope in an Article V constitutional amendment.[164] Horan and some of his colleagues recognized that such an amendment would be hard to pass.[165] Moreover, Horan understood that even if abortion opponents managed to introduce a successful constitutional amendment, the courts would have the power to interpret it.[166] As a result, Horan argued for the usefulness of "a National Public Interest law firm, which would provide a spearhead for litigation toward the ultimate goal of reversing *Roe v. Wade*."[167]

158. Robert M. Byrn, *Abortion in Perspective*, 5 DUQ. L. REV. 125, 134 (1966).

159. *See, e.g.*, David Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233, 234 (1969).

160. *See id.* at 251.

161. *See* National Right to Life Committee Strategy Meeting Minutes, *supra* note 22, at 5.

162. *Id.*

163. Celebrate Life Committee, Booklet 33 (1973), *in* THE NATIONAL RIGHT TO LIFE COMMITTEE PAPERS (on file in Box 4, Gerald Ford Memorial Library, University of Michigan).

164. Memorandum from Dennis Horan to Public Policy Comm., NRLC 2 (Sept. 5, 1973) (on file in Box 4, 1973 Folder, Gerald Ford Memorial Library, University of Michigan).

165. *See id.*

166. *See id.*

167. *See id.*

AUL began working on a new litigation strategy in the mid-1970s. The organization's first major case, *Planned Parenthood of Central Missouri v. Danforth*, was the first to arrive at the Supreme Court since *Roe* came down.[168] *Danforth* involved the kind of multirestriction statute passed in many states in the mid-1970s to test the boundaries of *Roe*.[169] In *Danforth*, AUL lawyers did not fully distance themselves from the strategies that had failed in *Roe*.[170] Indeed, the organization's brief highlighted "the constitutional unsoundness of *Roe v. Wade* as a primary reason . . . not to extend *Roe v. Wade* beyond its narrowest perimeters."[171]

AUL still built on existing strategies, insisting that *Roe* allowed for at least some regulations of abortion.[172] Consider, for example, the organization's analysis of the Missouri informed-consent regulation.[173] The AUL brief suggested that *Roe* had already limited abortion rights in a way that allowed the state to require women to sign an informed-consent form.[174] "In enunciating some of the factors the doctor will necessarily consider in consultation with the woman contemplating an abortion, the court further regulated the physician's right to practice medicine in a way he might see fit," AUL argued.[175] "Thus it may be seen that *Roe v. Wade* teaches that the right to practice medicine, just as any other right, is a limited one at best."[176]

While AUL argued that *Roe* allowed Missouri to pass all of the challenged restrictions, the justification for each one was unique. When defending a parental-consent restriction, AUL lawyers stressed that Missouri law had already mandated the consent of a parent before minors could get an abortion.[177] The AUL brief argued that for this reason, the state law added no "extra layer of regulation" and placed no further burden on young women seeking an abortion.[178] The brief identified an entirely different rationale for a spousal-consent regulation.[179] "The state thus purports to find a sufficient compelling interest in the integrity of marriage and family life to preclude unconsented abortion where the life of the wife is not endangered," the brief

168. 428 U.S. 52 (1976).
169. *See id.* at 52–60.
170. *See infra* note 171 and accompanying text.
171. Motion for Leave to File Brief and Brief for Dr. Eugene Diamond & Ams. United for Life as Amicus Curiae Supporting Danforth at 17–18, *Danforth*, 428 U.S. 52 (Nos. 74-1151, 74-1419) [hereinafter Motion and Brief].
172. *See id.* at 31–81.
173. *See id.* at 81–89.
174. *Id.*
175. *Id.* at 88.
176. *Id*
177. *See id.* at 89–96.
178. *Id.* at 96–97.
179. *See id.* at 98–104.

reasoned.[180] "To protect this interest, the state acknowledges a joint interest and power of disposition of the married parties in their unborn child."[181]

*Danforth* was not a complete loss for AUL. The Court upheld Missouri's informed-consent law and took seriously the State's arguments in favor of other regulations, including limited access to abortion in the first trimester.[182] Nevertheless, the problems with AUL's strategy in the case seemed evident. Much of the organization's brief foregrounded the need to overrule *Roe* altogether.[183] *Danforth* made it apparent that the Court was unwilling to reconsider *Roe* at any point in the near future.[184] Moreover, when rationalizing each individual regulation, AUL attorneys had assumed for the sake of argument that the Court viewed abortion as a fundamental right.[185] While arguing that there was a compelling state purpose behind every part of the law, the brief conceded that strict scrutiny applied to every abortion regulation because of *Roe*.[186]

AUL began developing a more comprehensive plan when the group became involved in a series of funding cases. *Maher v. Roe*, the lead case, addressed the constitutionality of a Connecticut ban on Medicaid funding for most abortions.[187] *Poelker v. Doe* concerned a St. Louis law prohibiting the use of public hospitals for abortions.[188] *Beal v. Doe*, the third of the series, asked whether compliance with the federal Social Security Act required Pennsylvania's Medicaid program to cover nontherapeutic abortions.[189] Working with state and local governments defending their own restrictions, AUL developed a new approach focused on the nature of the right at issue in *Roe.* First, AUL's brief in *Poelker* separated the right to make decisions about abortion—an interest that the organization admitted was protected under *Roe*—from the ability to actually obtain an abortion.[190] AUL argued that because *Roe* dealt with a woman's decisional autonomy, "the abortional act . . . enjoys no constitutional protection in itself."[191]

AUL attorneys also emphasized the fact that *Roe* had described the decision to have an abortion as a matter of constitutional privacy.

180. *Id.* at 98–99.
181. *Id.*
182. *Danforth*, 428 U.S. at 65–68.
183. *See* Motion and Brief, *supra* note 171, at 17–30.
184. *See Danforth*, 428 U.S. at 40–68.
185. *See* Motion and Brief, *supra* note 171, at 13–15 (arguing that Missouri's law served several compelling state interests).
186. *See id.*
187. 432 U.S. 464 (1977).
188. 432 U.S. 519 (1977).
189. 432 U.S. 438 (1977).
190. *See* Brief for Americans United for Life as Amicus Curiae Supporting Petitioner at 15, *Poelker*, 432 U.S. 519 (No. 75-442).
191. *Id.* at 15.

Here, AUL borrowed from arguments for government neutrality made in the context of the Hyde Amendment.[192] If abortion involved freedom from government interference, state governments and physicians with objections to abortion should have been free from compulsion to help women have abortions.[193] A right to choose abortion meant that women could expect nothing from the government but neutral treatment.[194] "If the abortion decision is so private," AUL argued, "it follows that government shall not itself be compelled to respond to the demand of the exercise of that right."[195]

Working with AUL, the State of Connecticut reinforced this idea of privacy rights, arguing that it provided a window into the nature of all constitutional protections.[196] Connecticut distinguished *Maher* from a series of earlier cases involving the right to travel, many of which had served as the foundation for abortion-rights victories in the lower courts.[197] First, Connecticut argued that the Court had never recognized a right to effectuate a constitutionally protected decision.[198] Instead, at most, the Court had censured states for discriminating against protected decisions or acts.[199] Connecticut claimed that any such discrimination was lacking in *Maher*: the state had chosen to fund all medically necessary services, and elective abortion, like many other treatments, fell outside the scope of coverage.[200]

Connecticut made a more influential argument that built on the logic of AUL's privacy reasoning. The State argued that the Constitution prohibited only laws that restricted or burdened constitutional rights.[201] Returning to the right-to-travel cases, Connecticut reinterpreted the Court's jurisprudence.[202] The Court had decided a trio of cases that had convinced some that funding restrictions could be unconstitutional.[203] *Memorial Hospital v. Maricopa County* struck down an Arizona statute requiring one year's residence in a county before an indigent person could receive publicly funded, nonemergency medical care.[204] In *Shapiro v. Thompson,* the Court invalidated a Connecticut statute imposing a one-year requirement before welfare recipients could receive public benefits.[205] In *Dunn v. Blumstein*, the

192. *See id.*
193. *See id.*
194. *See id.*
195. *Id.*
196. *See* Brief of the Appellant, Maher v. Roe, 432 U.S. 464 (1977) (No. 75-1440).
197. *See id.* at 11–19.
198. *See id.*
199. *See id.*
200. *See id.*
201. *Id.* at 13–14.
202. *See id.*
203. *See id.*
204. 415 U.S. 250 (1974).
205. 394 U.S. 618 (1969).

Court held that Tennessee may not burden the right to travel by imposing a durational residency requirement of one year in the state and three months in the county in order to be eligible to vote.[206]

Connecticut argued that the Court had never departed from a formal distinction between laws restricting action and laws providing benefits.[207] The durational residency requirements in *Shapiro*, *Dunn*, and *Maricopa County* violated the Constitution because they prevented the plaintiffs "from receiving nonemergency medical care, . . . public welfare benefits, . . . [or] the right to vote."[208] Because the Connecticut law neither created nor controlled such a burden, it was constitutional.[209] "There is nothing in the Connecticut regulation which prevents a woman from making a choice to have an abortion," Connecticut insisted.[210]

In June 1977, the Court issued a decision in *Maher*, and AUL attorneys concluded that their new approach to *Roe* had made progress.[211] When it came to the nature of the constitutional interest in *Roe*, the Court emphasized that the Constitution guarded against "governmental intrusion, physical coercion, and criminal prohibition of certain activities."[212] The Court seemed to accept AUL's argument that *Roe* involved only the freedom to make a decision, not the ability to effectuate any choice.[213] As the *Maher* Court put it, "the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[214]

The Court also adopted the formalist approach proposed by Connecticut.[215] "There is a basic difference," the Court explained, "between direct state interference with a protected activity and state encouragement of an alternative activity."[216]

### B. The Court Considers the Constitutionality of the Hyde Amendment

Between 1977 and 1980, when the Court heard a constitutional challenge to the Hyde Amendment itself in *Harris*, it was far from clear how far the Court's embrace of the right–privilege distinction would go. The new attack on the Hyde Amendment called into ques-

206. 405 U.S. 330 (1972).
207. *See* Brief of the Appellant, *supra* note 196, at 13–14.
208. *Id.* at 14.
209. *See id.*
210. *Id.*
211. For the Court's decision in *Maher*, see Maher v. Roe, 432 U.S. 464, 469–76 (1977). On AUL's reaction to *Maher*, see ZIEGLER, *supra* note 18, at 68.
212. *Maher*, 432 U.S. at 471–72.
213. *See id.*
214. *Id.* at 473–74.
215. *See id.* at 474–75.
216. *Id.* at 475.

tion the limits of the constitutional approach announced in *Maher* and its companion cases. First, the Connecticut regulation in *Maher* was arguably distinguishable from the Hyde Amendment: while Connecticut excluded only elective abortions from coverage, the Hyde Amendment denied payment for all but a handful of medically necessary abortions.[217] Those challenging the Hyde Amendment argued that for this reason, the rider created an unconstitutional burden.[218] However, the ACLU and its allies also rejected formalism and asked the Court to look at the purpose of the Hyde Amendment and its effect on poor women.[219] "[T]he ultimate test of whether constitutionally protected interests are being impinged upon," the appellees argued, "is not simply the form that the state interference takes but the effect."[220]

Those challenging the Hyde Amendment also responded to the complicity-based idea of conscience so effectively deployed by pro-lifers.[221] "The Hyde Amendment . . . destroy[s] not only the guarantee of comprehensive medical care for the poor, but also the universal guarantee of liberty of conscience," explained the ACLU brief challenging the amendment.[222]

In the ACLU's analysis, Medicaid equally respected the beliefs of those who objected to abortion and those for whom "conscience may dictate the necessity of terminating an unwanted and health-threatening pregnancy."[223] True neutrality required the government not to take sides rather than favoring those who identified as pro-life.[224] Those challenging the Hyde Amendment argued that the rider thus violated the Free Exercise Clause of the First Amendment, heavily burdening the religious liberty of women who believed that an abortion was morally or religiously compelled.[225] Moreover, the ACLU argued that because the Hyde Amendment privileged some conscience-based beliefs over others, the rider violated the Establishment Clause of the First Amendment:

> [T]he absence of clearly secular advocacy in the "right to life" movement for the abortion restrictions is decisive. Its constituency, support and orientation are largely religious and, more importantly, it asserts no independent secular justification for the evils of abortion. Where legislation rooted in sectarian religious beliefs not widely shared is claimed to serve a secular purpose, and is supported in the legislature and in the society at large by a predominantly

217. Brief of Appellees at 113–34, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268).
218. *See id.*
219. *See id.* at 117–18.
220. *Id.* at 116 (quoting Reproductive Health Servs. v. Freeman, 614 F.2d 585, 595 (8th Cir. 1980)).
221. *See infra* note 222 and accompanying text.
222. Brief of Appellees, *supra* note 217, at 151.
223. *Id.* at 155.
224. *See id.* at 151–55.
225. *See id.* at 167–84.

> and pervasively religious constituency, the claim of secular purpose must fail.[226]

Those defending the Hyde Amendment not only had to answer these arguments but also had to justify the *Maher* Court's formalist turn. Some lawyers fell back on the separation of powers, arguing that the courts should not second-guess Congress's exercise of its appropriation powers.[227] Intervening on behalf of Representative Hyde and other federal defendants, AUL doubled down on the right–privilege distinction that the organization had emphasized in *Maher*, insisting that it made no difference whether the Amendment denied funding for medically necessary procedures.[228] "This is neither an 'abortion case' nor a right to privacy case," AUL reasoned.[229] "This case does not involve any substantive constitutional rights of persons; it involves appropriations made by the Congress for use in an economic and social welfare program."[230] AUL maintained that all constitutional protections, including privacy, were "'non-interference' rights—freedoms or immunities from governmental restraint or interference."[231] If a law addressed a benefit rather than a burden, the Constitution should play no role in the analysis.[232]

AUL also defended the vision of conscience that abortion opponents had developed during the fight for the Hyde Amendment. First, the organization argued that it was fair to privilege the conscience-based beliefs of some over those of others because the Free Exercise Clause would sweep far too broadly without any kind of limiting principle.[233] AUL argued that if women felt compelled by conscience to terminate a pregnancy, that should not matter unless their beliefs were "mandated by specific and affirmative corporate tenets of some religious group."[234] Moreover, even if women had a religious objection to carrying a pregnancy to term, the government still had no obligation to pay for anything.[235] A constitutional right at most prevented the government from burdening a woman's decision.[236]

*Harris* embraced AUL's argument. First, the Court concluded that it made no difference that the Amendment excluded both therapeutic and nontherapeutic abortions.[237] "Although the liberty protected by

226. *See id.* at 174–75.
227. *See* Brief of Intervening Defendants-Appellees at 28–30, Harris v. McRae, 448 U.S. 297 (1980) (No. 79-1268).
228. *See id.* at 7–10.
229. *Id.* at 8.
230. *Id.*
231. *Id.*
232. *See id.* at 8–10.
233. *See id.* at 48–51.
234. *Id.* at 50.
235. *See id.* at 48–51.
236. *See id.*
237. *Harris*, 448 U.S. at 317–318.

the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom," the Court concluded.[238]

When it came to the Free Exercise Clause, the Court found that none of those challenging the Hyde Amendment had standing to raise the issue because none of them had sought an abortion for reasons of religious compulsion.[239] Nor did the Court believe that the Hyde Amendment violated the Establishment Clause.[240] Rejecting the idea that antiabortion beliefs were necessarily religious or sectarian, the Court reasoned that the Amendment represented "a reflection of 'traditionalist' values towards abortion, as much as it is an embodiment of the views of any particular religion."[241]

*Harris* became a foundational part of the Court's right–privilege canon, bolstering the idea that only constitutional "burdens" triggered meaningful judicial scrutiny. The Court's decision serves as a reminder of how the Hyde Amendment continues to shape contemporary constitutional politics.

If there is no doubt about the ongoing relevance of the Hyde Amendment, the fate of any challenge to it remains open to question. Efforts to challenge the Amendment have fallen short before.[242] The Supreme Court has never shown any willingness to reconsider *Maher* or *Harris*. In the 1990s, when Bill Clinton had pro-choice majorities in both houses of Congress, Clinton's effort to overturn the Amendment failed.[243] In today's sharply partisan climate,[244] the hope for any challenge to the Hyde Amendment may be just as dim.

However, as Part IV argues, *Whole Woman's Health* provides crucial new tools for challenging the Hyde Amendment. Part IV turns next to the implications of the Court's decision for the Hyde Amendment and the arguments underlying it.

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238. *Id.*

239. *Id.* at 320–322.

240. *See id.* at 319–320.

241. *Id.*

242. *See infra* note 243 and accompanying text.

243. *See, e.g.*, David Rosenbaum, *Clinton's Health Plan; Defying President, Senate Votes to Keep Medicaid Abortion Limit*, N.Y. TIMES (Sept. 29, 1993), http://www.nytimes.com/1993/09/29/us/clinton-s-health-plan-defying-president-senate-votes-keep-medicaid-abortion.html. On Clinton's plan to repeal the Hyde Amendment, see, for example, Philip J. Hilts, *Clinton and Abortion: Limited Expectations*, N.Y. TIMES (Dec. 13, 1992), http://www.nytimes.com/1992/12/13/us/clinton-and-abortion-limited-expectations.html.

244. *See Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016 [https://perma.unl.edu/VR7S-ST3C].

## IV. THE HYDE AMENDMENT AFTER *WHOLE WOMAN'S HEALTH*

The precise impact of the Supreme Court's recent decision in *Whole Woman's Health* remains contested. This Part argues that the Court's decision means something significant for the Hyde Amendment and for the right–privilege distinction. Without formally abandoning the idea of a line between burdens and benefits, the Court rejected the basic method used in *Maher* and *Harris* to draw that distinction. After *Whole Woman's Health*, it no longer matters whether the government exclusively controls and creates a disputed burden if it means that women lose access to have an abortion.

This Part begins with an exploration of the background and holding of *Whole Woman's Health*. Next, this Part shows how the Court's decision makes a challenge to the Hyde Amendment more realistic and compelling.

### A. *Whole Woman's Health* Redefines the Undue Burden Test

*Whole Woman's Health* involved two parts of Texas's HB 2, a law requiring doctors performing abortions to have admitting privileges at a hospital within thirty miles and a measure mandating that abortion clinics comply with the regulations governing ambulatory surgical centers (ASCs).[245] However, the strategy underlying HB 2 went much further. For much of the 1970s and the 1980s, abortion opponents had prioritized fetal-protective laws and arguments, but after 1992, the movement's focus shifted to laws claimed to harm both women and fetal life.[246] Moreover, *Casey* itself seemed to signal the Court's receptiveness to woman-protective arguments.[247]

The Court's 1992 decision declined an invitation to overrule *Roe* but set aside the trimester framework that had governed earlier abortion cases.[248] In its place, *Casey* imposed the undue burden test, a standard that required the invalidation of any regulation that had the purpose or effect of placing a substantial obstacle in the path of a woman's abortion decision.[249] When applying the new standard, the

245. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1) (West 2013); 25 TEX. ADMIN. CODE §§ 139.53–.56 (2014). For the ASC provision, see TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2015); 25 TEX. ADMIN. CODE § 139.40 (2014).

246. *See, e.g.*, Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1707–12 (2008).

247. For pro-life perceptions to this effect, see, for example, Americans United for Life, Legal and Education Highlights (1992), *in* THE WILCOX COLLECTION (on file in Box 3, AUL Briefing Memo Folder, University of Kansas).

248. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872–873 (1992) (plurality opinion).

249. *Id.* at 877.

Court upheld an informed-consent regulation, using language that echoed abortion opponents' claims that abortion hurt women.[250] "In attempting to ensure that a woman apprehend the full consequences of her decision," the Court stated, "the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[251]

*Casey* energized abortion opponents committed to arguing that abortion hurt women.[252] Abortion opponents first expanded on the mandated-counseling model upheld in *Casey*.[253] While *Casey* said nothing about the regulation of abortion clinics, abortion opponents also wanted to push laws designed to protect women's physical and mental health.[254] Targeted-clinic regulations like HB 2 were advertised as a way of guaranteeing women a higher quality of care and putting substandard providers out of business.[255]

Texas lawmakers patterned HB 2 on the Women's Health Protection Act and the Abortion Providers Privileging Act, model laws crafted by AUL.[256] In July 2013, Governor Rick Perry signed into law both parts of HB 2.[257] The following September, a group of abortion providers sought the facial invalidation of the admitting-privileges measure.[258] Although the district court enjoined enforcement of the

250. *See id.* at 881.

251. *Id.* at 882.

252. *See infra* notes 253, 255, and accompanying text.

253. On the push for these laws, see Americans United for Life, *supra* note 247, at 3.

254. *See infra* note 255 and accompanying text.

255. For an example of an argument of this kind, see, for example, Americans United for Life, Fundraising Letter (Oct. 18, 2000), *in* THE MILDRED F. JEFFERSON PAPERS (on file in Box 13, Folder 6, Schlesinger Library, Harvard University). On the spread of these arguments, see, for example, *Targeted Regulation of Abortion Providers*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers [https://perma.unl.edu/5DRQ-64CY] (last updated Aug. 1, 2017).

256. On the AUL model legislation, see, for example, AMS. UNITED FOR LIFE, ABORTION PROVIDERS' ADMITTING PRIVILEGES ACT: MODEL LEGISLATION & POLICY GUIDE FOR THE 2015 LEGISLATIVE YEAR (2014), http://www.aul.org/downloads/2015-Legislative-Guides/Abortion/Abortion_Providers_Admitting_Privileges_Act_-_2015_LG.pdf [https://perma.unl.edu/4VCK-WNCE]; AMS. UNITED FOR LIFE, WOMEN'S HEALTH PROTECTION ACT (ABORTION CLINIC REGULATIONS): MODEL LEGISLATION & POLICY GUIDE FOR THE 2013 LEGISLATIVE YEAR (2012), http://www.aul.org/wp-content/uploads/2012/11/Womens-Health-Protection-Act-Abortion-Clinic-Regulations-2013-LG.pdf [https://perma.unl.edu/KQ44-FSEE].

257. On the filibuster and the signing of the law, see Jayme Fraser & Kolten Parker, *Perry Signs Abortion Bill as Opponents Vow to Battle On*, HOUS. CHRON., July 19, 2013, at A1.

258. Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 951 F. Supp. 2d 891 (W.D. Tex. 2013).

law, the Fifth Circuit reversed only days later, and the admitting-privileges provision went into effect.[259]

A week after the Fifth Circuit's decision, providers challenged the ambulatory-surgical-center provision and argued that the admitting-privileges provision was unconstitutional, at least as applied to facilities in McAllen and El Paso.[260] At trial, the parties stipulated that only seven facilities in major cities would be able to comply with the ASC provision.[261] Texas offered several expert witnesses in support of HB 2.[262] State witnesses claimed that the ASC provision was justified because any abortion required entry into the uterus, a matter best performed in sterile facilities like hospitals.[263] State witnesses reiterated that an admitting-privilege requirement would improve the credentialing of abortion providers and guarantee women better continuity of care.[264]

Following the trial, the district court enjoined enforcement of the two provisions, and the Fifth Circuit again reversed.[265] Because that court had already rejected a challenge to the admitting-privilege regulation, the court held that the district court had directly violated the rule of res judicata.[266] Texas also argued that res judicata barred the challenge to the ASC requirement because the providers could have challenged it in 2013 and opted not to do so.[267] While holding that res judicata did stand in the way, the court nevertheless reached the merits of the challenge to the ASC restriction.[268] Concluding that the law ensured that women received only the best medical care, the court rejected any suggestion that the law was designed to restrict abortion access.[269]

Nor, according to the Fifth Circuit, did the ASC measure have an impermissible effect under *Casey*.[270] The court found that even if the law would require seventeen percent of women in the state to travel 150 miles or more, that number was not high enough to satisfy the "large fraction" test set out in *Casey*.[271] Here, the Fifth Circuit invoked the logic of *Maher* and *Harris*: if poor, young, or minority wo-

259. For the Fifth Circuit's decision reversing the injunction, see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 734 F.3d 406 (5th Cir. 2013).
260. Whole Woman's Health v. Lakey, 46 F. Supp. 3d 673, 680–84 (W.D. Tex. 2014).
261. *See id.*
262. *See id.*
263. *See id.*
264. *See id.*
265. For the district court's decision on the merits, see *id.* For the Fifth Circuit's decision, see Whole Woman's Health v. Cole, 790 F.3d 563, 581–92 (5th Cir. 2015).
266. *See Cole*, 790 F.3d at 581–84.
267. *See id.*
268. *See id.*
269. *See id.* 582–83.
270. *See id.* at 581–90.
271. *See id.*

men would struggle to obtain an abortion after HB 2, their problems came from their existing circumstances, not from HB 2.[272] When it came to the small number of ASCs currently operating in the state, the Fifth Circuit found that plaintiffs had failed to meet their burden of showing that ASCs could not expand and serve a larger clientele.[273]

When the Supreme Court agreed to hear *Whole Woman's Health*, AUL and other antiabortion groups relied on *Harris* in defending HB 2. AUL compared HB 2 to a Louisiana statute, upheld by the Fifth Circuit, that exempted abortion providers from a state statute limiting medical practice liability.[274] According to AUL, the constitutionality of HB 2 and the Louisiana law flowed directly from *Harris*.[275] While Louisiana's law might make it impossible for providers to obtain liability insurance, providers did not face a state-created, formal obstacle.[276] Similarly, "any claimed inability of Plaintiffs to comply with the ambulatory surgical center requirement is not of the State's creation, and cannot be counted an 'undue burden.'"[277]

An amicus brief on behalf of the United States Conference of Catholic Bishops and other antiabortion organizations made *Harris* and *Maher* the centerpiece of their defense of HB 2.[278] All of the reasons that it would be hard for clinics to comply with HB 2 had nothing to do with the government.[279] If "a private leasing opportunity fell through due to hostility to abortion" or "poverty makes it difficult for some women to obtain an abortion," the government could not be blamed.[280] The United States Conference of Catholic Bishops explained: "Casey only forbids an undue burden by the government on the decision whether to have an abortion."[281]

Texas relied on *Harris* both in leaning on the right–privilege distinction and in justifying the singling out of objections to abortion.[282] *Harris* had made clear that "[a]bortion is inherently different from other medical procedures" and that the state had more latitude in sin-

272. *See id.*

273. *See id.* at 584–89.

274. *See* Amicus Curiae Brief of 44 Texas Legislators in Support of Defendant-Appellants and Reversal of the District Court at 20–22, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274) [hereinafter Brief of 44 Texas Legislators].

275. *See id.* at 22–23.

276. *See id.*

277. *Id.* at 23.

278. *See* Brief of United States Conference of Catholic Bishops et al. as Amici Curiae Supporting Respondents, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274).

279. *See id.* at 22–24.

280. *Id.* at 24.

281. *Id.*

282. *See* Brief for Respondents at 43–44, *Hellerstedt*, 136 S. Ct. 2292 (No. 15-274).

gling it out.[283] Moreover, *Harris* had announced a formalist approach that legitimized laws that did not "burden" the abortion decision, regardless of their actual impact.[284] If HB 2 made it harder for women to get abortions, the government was not at fault.[285] "The State here has no due-process (or equal-protection) obligation to affirmatively subsidize abortion," Texas contended.[286]

Texas and sympathetic antiabortion groups described *Casey's* undue burden test as an extension of *Maher* and *Harris*. *Casey* prohibited laws that created an undue burden, but Texas argued that when discerning whether such a burden existed, courts should look no further than the surface of a law. The undue burden test required this kind of formalism, ignoring any question about the real-world impact of a statute.

Decided in June 2016, the Supreme Court issued an opinion in *Hellerstedt* that rejected the logic used by Texas and its allies in the antiabortion movement. Writing for a 5–3 majority, Justice Stephen Breyer dedicated much of his opinion to the issue of res judicata, rejecting the Fifth Circuit's analysis as to both parts of the Texas law.[287] Justice Breyer then took up the most divisive question in the case: what *Casey's* undue burden test actually required.[288] The Court first took issue with the Fifth Circuit's conclusions about the purpose of the law.[289] The Fifth Circuit had reasoned that if Texas claimed that a law benefitted women's health, the courts should defer to that judgment rather than take an independent look at the medical evidence.[290] The Court rejected this conclusion, explaining: "The rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."[291]

Nor did the Court find convincing the argument that legislators alone should determine the impact of a law.[292] Styling a law a benefit or a burden did not determine the outcome of the undue burden analysis, and lawmakers' conclusion that a law helped women did not resolve the issue.[293] "The Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable

283. *Id.* at 43 (alteration in original) (quoting Harris v. McRae, 448 U.S. 297, 325 (1908)).
284. *See id.* at 51–54.
285. *See id.*
286. *Id.* at 54.
287. *Hellerstedt*, 136 S. Ct. at 2302–09.
288. *See id.* at 2309–11.
289. *See id.*
290. *See id.*
291. *Id.* at 2309.
292. *See id.* at 2310.
293. *See id.*

weight upon evidence and argument presented in judicial proceedings," Justice Breyer explained.[294]

The majority offered a few additional clues about the undue burden test involved in its analysis of both *Casey* and *Gonzales v. Carhart*, the Court's most recent abortion decision before *Hellerstedt*.[295] As his majority in *Hellerstedt* included the author of *Carhart*, Justice Anthony Kennedy, Justice Breyer carefully explained how *Carhart* had already performed the balancing detailed in *Hellerstedt*.[296] While acknowledging that *Carhart* seemed to require deferential review of legislative fact-finding, Justice Breyer reasoned that *Carhart* did nothing to change the Court's "constitutional duty to review factual findings where constitutional rights are at stake."[297] According to the majority, *Carhart* had weighed Congress's findings on dilation-and-extraction abortion against record evidence that conflicted with lawmakers' conclusions. Thoughtful analysis, not "uncritical deference," was the hallmark of *Carhart*.[298]

Breyer maintained that *Casey* had also balanced the burdens and benefits of a spousal-notification and parental-involvement law, relying "heavily on the District Court's factual findings and the research-based submissions of amici in declaring a portion of the [spousal-notification measure] unconstitutional."[299] As Breyer described it, the undue burden test required a similarly thorough consideration of any legislative findings, as well as evidence in the record, particularly expert testimony.[300]

The Court's application of the undue burden test was also revealing. First, the Court rejected a formalist approach to analysis of HB 2's benefits.[301] Carefully reviewing the record evidence, the Court found no proof that the admitting-privileges requirement would improve health outcomes for women.[302] When it came to the effect of the admitting-privileges law, the Court attributed the closure of most of the clinics in the state to HB 2, notwithstanding the fact that the law's sting depended partly on surrounding circumstances that the state did not control.[303] The Court acknowledged that many hospitals would not grant clinics admitting privileges for reasons outside the power of the government, including requirements that an "applicant has treated a high number of patients in the hospital setting in the past

294. *Id.*
295. *See id.*
296. *See id.*
297. *Id*.
298. *Id.* (quoting Gonzales v. Carhart, 550 U.S. 124, 166 (2007)).
299. *Id.*
300. *See id.*
301. *See id.* at 2311–13.
302. *See id.*
303. *See id.*

year, clinical data requirements, [or] residency requirements."[304] Nevertheless, when HB 2 interacted with these background factors, a significant number of women lost access to abortion services.[305]

Nor did it change the Court's analysis that the problems women encountered after HB 2 resulted partly from other factors outside the government's control. The Court insisted that HB 2 would create an undue burden by ensuring that women confronted "fewer doctors, longer waiting times, and increased crowding."[306] That women faced more expense, inconvenience, and lost access stemmed partly from factors unrelated to HB 2, including a woman's economic status or place of residence.[307] Nonetheless, the Court recognized that the real-world impact of HB 2 was the same as a regulation that more formally restricted abortion.[308]

The Court's analysis of the ASC provision was also in tension with the formalism of *Harris* and *Maher*. In those cases, the Government claimed (and the Court accepted with little question) that the law encouraged childbirth over abortion. By contrast, in *Hellerstedt*, the Court did not accept at face value the argument that the ASC provision guaranteed better outcomes for women.[309] After looking at the record evidence, the Court instead reasoned that the regulation had no tangible health benefit at all.[310] In assessing the effect of the ASC regulation, the Court emphasized that existing facilities might not be able to accommodate the demand that would arise if more clinics closed.[311] Moreover, the majority suggested that HB2 would create an undue burden even if ASCs could serve more patients.[312] "Patients seeking these services [would be] less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered," the Court explained.[313]

*Hellerstedt* attracted attention because it rejected the idea that the undue burden standard was no different than rational basis review. By putting teeth in the standard, *Hellerstedt* ensured that more abortion regulations were constitutionally questionable. However, as this Part argues next, the transformation of the undue burden standard may be particularly relevant to potential challenges to the Hyde Amendment and to the very distinction between negative and positive rights.

304. *Id.* at 2312.
305. *See id.*
306. *Id.* at 2313.
307. *See id.*
308. *See id.*
309. *See id.* at 2314–16.
310. *See id.*
311. *See id.* at 2316–18.
312. *See id.* at 2315–18.
313. *See id.* at 2318.

### B. Reexamining the Hyde Amendment

*Hellerstedt* casts doubt on the constitutionality of core justifications for the Hyde Amendment and laws like it, including those involving private-insurance coverage for abortion. *Hellerstedt* first requires a consideration of the benefit achieved by a law—something that must be established using tangible record evidence.[314] The purposes set forth for the Hyde Amendment have varied, but three command the most attention. First, supporters of the bill echoed the claim made in *Maher* and *Harris* that the Hyde Amendment was designed to encourage childbirth rather than abortion.[315] Second, proponents emphasized that the Amendment vindicated the complicity-based objections of those who believed that paying tax to support abortion would violate their conscience.[316] Finally, some proponents of the Hyde Amendment have presented it as a cost-saving mechanism, emphasizing that budgetary constraints limit what kind of services the state can guarantee.[317]

None of these purposes would obviously fare well under *Hellerstedt*. States may argue that *Hellerstedt* applies only to laws involving the protection of women's health, not to fetal-protective laws like the Hyde Amendment. However, this argument fails based on the reasoning of *Hellerstedt* itself. The majority emphasized that the balancing approach had already applied to fetal-protective laws, including those in *Casey* and *Carhart*.[318] The Court has not clearly indicated that *Hellerstedt* will apply to woman-centered laws like HB 2.[319]

How would *Hellerstedt* deal with the purposes set forth for the Hyde Amendment? First, there is no compelling evidence that the Hyde Amendment actually encourages more women to carry pregnancies to term. Starting in 1981, studies have suggested that the Amendment discouraged relatively few women—roughly four to six percent—from terminating their pregnancies.[320] Research suggests instead that the Hyde Amendment has shifted the expense of abortions for poor women from the public to the private sector, placing a financial burden on poor women themselves or on abortion provid-

314. *See id.* at 2308–10.

315. *See* Harris v. McRae, 448 U.S. 297, 324–25 (1980); Maher v. Roe, 432 U.S. 464, 478–79 (1977).

316. *See supra* Part I.

317. *See, e.g.*, IRVING B. HARRIS, CHILDREN IN JEOPARDY: CAN WE BREAK THE CYCLE OF POVERTY? 204 (1996).

318. *See Hellerstedt*, 136 S. Ct. at 2309–10.

319. *See id.*

320. *See, e.g.*, Willard Cates, *The Hyde Amendment in Action*, 246 J. AM. MED. ASS'N 1109, 1109–14 (1981).

ers.[321] The evidence on state funding restrictions suggests a similarly modest effect: a 1.9–2.4% increase in reported live births.[322]

While the Hyde Amendment may have resulted in some increase in the number of women carrying pregnancies to term, it is far from clear that the effect has been significant. Nor is it even obvious that increasing the number of live births would qualify as the same kind of obvious benefit set out by Texas in *Hellerstedt*. Those on opposing sides of the abortion conflict would agree that making abortion safer for women is desirable. The same consensus would not apply to the idea that an increase in live births is always better, regardless of the underlying circumstances of a woman carrying a pregnancy to term.

What about the interest in protecting the conscience-based objections of taxpayers who disapprove of abortions? To be sure, the Hyde Amendment sends a message that taxpayer monies will not fund Medicaid abortions. However, the impact of the Amendment is more attenuated, particularly if it is framed as protection for those who feel that they have wrongly been forced to support abortion. The recent push to deny any state and federal funding for organizations that perform abortions relies on the idea that taxpayers are still wrongly obligated to subsidize abortions.[323] A recent Forbes study estimated that taxpayers subsidize roughly twenty-four percent of the annual costs of abortions, but the majority of the burden falls on state taxpayers, a group unaffected by the Hyde Amendment.[324] The Amendment cannot remove any indirect subsidy for abortion or assure those who define their complicity in idiosyncratic or unusually broad ways. As a result, the Hyde Amendment is not a particularly effective way of guaranteeing that no taxpayer feels complicit in abortion.

Even the evidence on the cost-saving benefits of the Hyde Amendment is somewhat dubious. Supporters of the Hyde Amendment point to the relatively high cost of an abortion procedure, particularly after

321. *See id.*

322. *See, e.g.*, Carol Korenbrot, Claire Brindis & Fran Priddy, *Trends in Rates of Live Births and Abortions Following State Restrictions on Public Funding of Abortion*, 105 PUB. HEALTH REP. 555, 555 (1990).

323. For complicity arguments used in the effort to defund Planned Parenthood, see, for example, *Are My Tax Dollars Paying for Abortion?*, RIGHT TO LIFE MICH. (2011), https://rtl.org/RLMNews/09editions/AreMyTaxDollarsPayingForAbortion.htm [https://perma.unl.edu/866T-T7XE]; Janell Ross, *How Planned Parenthood Actually Uses Its Funding*, WASH. POST (Aug. 4, 2015) https://www.washingtonpost.com/news/the-fix/wp/2015/08/04/how-planned-parenthood-actually-uses-its-federal-funding [https://perma.unl.edu/BXD7-FGED].

324. For the Forbes study, see Chris Conover, *Are American Taxpayers Paying for Abortions?*, FORBES (Oct. 5, 2015), http://www.forbes.com/sites/theapothecary/2015/10/02/are-american-taxpayers-paying-for-abortion/#60083d0c7709 [https://perma.unl.edu/PKL9-8PNB].

the first trimester.[325] Even if the Amendment has led to only modest reductions in the abortion rate, that reduction could mean significant savings for taxpayers.[326]

However, any savings may be more than offset by added costs. Research indicates that Medicaid recipients seeking to terminate a pregnancy have to make painful financial choices, often putting off bills for food, rent, and other necessities to assemble adequate funds for abortion.[327] In turn, these delays tend to only increase the cost of an abortion, particularly after the second trimester begins.[328] As the cost of a procedure increases, the financial burden on poor women also climbs, suggesting that the Hyde Amendment requires more women to seek supplementary forms of public assistance, particularly if they are unable to end a pregnancy.[329]

Even if a court found some evidence that the Hyde Amendment achieved its stated goals, it would be hard for defenders of the law to maintain that those benefits outweigh the Amendment's costs. Opponents of the Hyde Amendment point to several kinds of burdens created by the law: delays in obtaining access to abortion, additional financial strain, and practical obstacles to receiving any abortion whatsoever.[330]

Abortion opponents once successfully defended the Hyde Amendment against these charges in two ways. First, the Amendment's proponents insisted that these burdens result not from the Hyde

325. For antiabortion arguments about the savings created by the Hyde Amendment, see, for example, Arina Grossu, *The Hyde Amendment Has Saved 2 Million Lives. Democrats Want to Kill It*, FEDERALIST (Sept. 30, 2016), http://thefederalist.com/2016/09/30/hyde-amendment-saved-2-million-lives-democrats-want-end [https://perma.unl.edu/5AGT-CRUC]; Chris Smith, *The Life-Saving Amendment*, WASH. TIMES (Sept. 29, 2016), http://www.washingtontimes.com/news/2016/sep/29/hyde-amendment-has-saved-two-million-americans-fro [https://perma.unl.edu/R54A-9YTU].

326. *See supra* note 325 and accompanying text.

327. *See, e.g.*, STANLEY K. HENSHAW ET AL., GUTTMACHER INST., RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW (2009), https://www.guttmacher.org/sites/default/files/report_pdf/medicaidlitreview.pdf [https://perma.unl.edu/9EN8-HKX7]; JENNA JERMAN ET AL., GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008 (2016), http://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf [https://perma.unl.edu/9SCU-2DMY].

328. *See, e.g.*, Jenna Jerman & Rachel K. Jones, *Secondary Measures of Access to Abortion Services in the United States, 2011 and 2012: Gestational Age Limits, Cost, and Harassment*, *in* 24 WOMEN'S HEALTH ISSUES 419, 419–424 (2014); Sarah C.M. Roberts et al., *Out-of-Pocket Costs and Insurance Coverage for Abortion in the United States*, 24 WOMEN'S HEALTH ISSUES 211, 211–214 (2014).

329. *See, e.g.*, Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL'Y REV. 46 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf [https://perma.unl.edu/V985-MFMS].

330. *See, e.g.*, *id.*; Bahn & Taylor, *supra* note 1.

Amendment but from women's personal circumstances.[331] If a woman requires time to put together the money for an abortion, her limited financial circumstances cannot be blamed on the state. Similarly, if she fails to find adequate funds and has to carry a pregnancy to term, her difficult financial situation cannot be traced back to a state law.

A related argument might suggest that any burden created by the Hyde Amendment is not onerous enough to raise constitutional concerns.[332] If a law like the Amendment merely creates delays or increased expenses for women seeking abortions, the argument goes, that alone would not create an undue burden. After all, the twenty-four-hour waiting period upheld in *Casey* increased expense, travel times, and delays for women, particularly poor, young, and nonwhite women, but the Supreme Court nevertheless upheld it.[333]

*Hellerstedt* raises questions about whether either of these defenses will remain convincing. First consider the argument that the burdens created by the Hyde Amendment result from a woman's poverty rather than from state intervention. The *Hellerstedt* Court explicitly rejected this logic as applied to HB 2.[334] Texas and AUL both argued that clinics could not comply with HB 2 for reasons having nothing to do with the state, including the reasons that hospitals chose to grant admitting privileges, the resources available to clinics seeking to expand their capacity or comply with ASC regulations, and the place of residence of women seeking abortions.[335]

The majority found this claim unpersuasive.[336] In tracing the effect of the law, the Court considered how HB 2 intersected with existing political, financial, and medical trends rather than analyzing the law in isolation.[337] The fact that hospitals often refused to grant abortion providers admitting privileges because of low admission rates from clinics did nothing to undermine the challenge to HB 2.[338] Ac-

331. *Cf.* Brief Amicus Curiae of Texas Eagle Forum et al., 20–21, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016) (No. 15-274); Brief of 68 Texas State Legislators et al. as Amici Curiae Supporting Appellants, 14 & n.15, Whole Woman's Health v. Lakey, 135 S. Ct. 399 (2014) (No. 14-50928).

332. *Cf.* Brief Amicus of Texas Eagle Forum et al., *supra* note 331, at 19–20 ("To the contrary, when a state 'law . . . serves a valid purpose' (as HB2 does) and 'has the incidental effect of making it more difficult or more expensive to procure an abortion,' the added difficulty or expense 'cannot be enough to invalidate it.'" (alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992))).

333. *See, e.g.*, *Casey*, 505 U.S. at 874.

334. *See Hellerstedt*, 136 S. Ct. at 2309–18.

335. *E.g.*, Brief for Respondents, *supra* note 282, at 51–54; *see* Brief of 44 Texas Legislators, *supra* note 274 at 20–22; Brief of United States Conference of Catholic Bishops et al., *supra* note 278, at 21–24.

336. *See Hellerstedt*, 136 S. Ct. at 2313–18.

337. *See id.*

338. *See id.*

cording to the Court, the law was unconstitutional because of its interaction with other factors shaping access to abortion care.[339]

The same reasoning applies to the Hyde Amendment. The Amendment devastates poor women neither because they are poor nor because the law, on its face, creates formal sanctions. Instead, the interplay between the Amendment and poor women's financial struggles creates the kind of delays and increased health risks so often highlighted by the Amendment's critics. *Hellerstedt* departs from existing precedent by looking beyond the text of a law to its impact in the real world. Such an analysis would make it much harder to justify the Hyde Amendment.

The second justification for the Hyde Amendment—that any burden it creates is minimal—may not hold up well under *Hellerstedt.* The Court defined constitutionally problematic burdens far more broadly than the ones laid out in *Casey*.[340] *Hellerstedt* dignifies increased expenses, long travel distances, and delays in access as burdens that matter under *Casey*.[341] Indeed, the Court suggests that a law might create an undue burden if it guarantees that women will receive a lower quality of care, even if the procedure remains available.[342]

*Hellerstedt* might also spell trouble for recent laws that expand on the Hyde Amendment model. Recently, abortion opponents have pushed model legislation based on AUL's Abortion Coverage Prohibition Act, a law that would prohibit private insurance plans from covering abortion.[343] Some variations of the law, like one passed by Michigan, allow consumers to purchase an "abortion rider" with an additional premium.[344] Ten states have passed laws blocking abortion coverage in any private insurance plan, while an additional twenty-five prohibit abortion coverage in any policy offered through insurance exchanges.[345] Even the theoretical availability of abortion riders may mean very little, given that only a limited number of insurers make them available.[346]

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339. *See id.*

340. *Compare id.* at 2318, *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 874 (1992).

341. *See Hellerstedt*, 136 S. Ct. at 2318.

342. *See id.*

343. *See* AMS. UNITED FOR LIFE, ABORTION COVERAGE PROHIBITION ACT: MODEL LEGISLATION & POLICY GUIDE FOR THE 2016 LEGISLATIVE YEAR (2015), http://aul.org/downloads/2016-Legislative-Guides/Defunding-Abortion-Industry/Abortion_Coverage_Prohibition_Act_-_2016_LG.pdf [https://perma.unl.edu/7YUD-UUVN].

344. *See Restricting Insurance Coverage of Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion [https://perma.unl.edu/X677-XLBM] (last updated Aug. 1, 2017).

345. *See, e.g.*, *id.*

346. After Michigan passed its insurance ban, for example, only seven insurers stated that they would offer an abortion rider and promised to do so only for those with

The defense of these laws relies heavily on *Maher* and *Harris*. Much like Medicaid prohibitions, insurance bans do not prevent women from obtaining abortion care; any obstacle stems instead from the market price of abortion and women's personal financial circumstances.[347] *Hellerstedt* makes this argument less effective. The Court defines a broader category of cognizable burdens, including delays, increased costs, and a decline in the quality of services.[348] The kind of increased expense or obstacle to access created by insurance-coverage bills—totaling hundreds to tens of thousands of dollars—seems no less serious than the travel distances, delays, or declines in personalized care emphasized by *Hellerstedt*. The Court's recent decision also makes it much harder to rely on the funding cases in defending an insurance ban. The defense of insurance bans also invokes the claim that a woman's inability to pay for an abortion without insurance stems from factors outside the control of the government.[349] But in *Hellerstedt*, the Court found no merit in this argument.[350]

When explaining why HB 2 had an impermissible effect, the Court emphasized how the law interacted with hospital policies, market prices, and providers' budgets.[351] Insurance bans promise to limit access to abortion in similar ways. While the state may not have a say about which private insurance plans offer abortion riders, an insurance ban would sharply increase the costs of abortion for many women partly because such riders are rarely available. HB 2 also troubled the Court because it created a perfect storm—one based on the details of the law, the financial circumstances of clinics in the state, and the nature of hospital admitting policies. Michigan's recent insurance restriction could have a similar effect: the paucity of insurance riders and the rising costs of abortion could put the procedure out of reach for many women.

*Hellerstedt* may also create problems for those defending state and federal proposals to defund care providers, like Planned Parenthood, that also offer abortion services. Starting in 2015, twenty-four states passed such laws. Of those twenty-four, seventeen would prevent family-planning organizations from receiving Medicaid reimbursement for other services if they performed or advocated abortions; fourteen introduced such a ban regarding state family-planning funding, and an

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employer-sponsored plans. *See, e.g.*, Ashley Woods, *Michigan's "Rape Insurance" Abortion Rider Law Goes into Effect Today*, HUFFINGTON POST (Mar. 14, 2014), http://www.huffingtonpost.com/2014/03/13/michigans-abortion-rider-_n_4958517.html [https://perma.unl.edu/LY25-H69L].

347. For an argument of this kind in defense of an insurance ban, see ACLU of Kan. & W. Mo. v. Praeger, 917 F. Supp. 2d 1179, 1188–89 (D. Kan. 2013).

348. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016).

349. *See Praeger*, 917 F. Supp. 2d at 1188–89.

350. *See Hellerstedt*, 136 S. Ct. at 2313–18.

351. *See id.*

additional ten blocked such organizations from receiving other state monies, including those for sexually transmitted-infection or breast-cancer testing.[352] While the courts have sometimes enjoined enforcement of these laws,[353] they still represent an important part of antiabortion strategy.

The case state lawmakers make for these laws relies heavily on *Harris* and *Maher*. In advocating for its recent defunding law, for example, Ohio stressed that "state legislatures have 'wide latitude in choosing among competing demands for limited public funds.'"[354] The challenge to such laws generally relies on the unconstitutional-conditions doctrine, arguing that such laws impermissibly condition receipt of a benefit on the surrender of the right to abortion or free speech.[355] When this argument has fallen short, courts have often relied on the idea, drawn from *Maher* and *Harris*, that "a federal subsidy program is fundamentally different from 'direct state interference' with a particular activity."[356]

Even laws excluding abortion providers from laws limiting malpractice liability seem less constitutionally acceptable after *Hellerstedt*. Louisiana passed a law in 2010 that prohibited doctors from receiving medical-malpractice insurance if they performed elective abortions.[357] The Fifth Circuit looked to the funding cases in upholding the law:

> This exemption may make it difficult—perhaps prohibitively difficult—for those providers to obtain the relevant insurance. But . . . [the law] is merely a "means of unequal subsidization of abortion and other medical services." And while "government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those" obstacles, like Louisiana's dearth of affordable insurance, that are "not of [the government's] own creation." Of course, in some sense, Louisiana's healthcare market is a function of the laws operative in that state. But that is also true, in some sense, of the "[i]ndigency" described in Harris v. McRae as an obstacle for which the government is not responsible.[358]

352. Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2016*, GUTTMACHER INST. (July 2016), https://www.guttmacher.org/article/2016/07/laws-affecting-reproductive-health-and-rights-state-trends-midyear-2016 [https://perma.unl.edu/XMY5-ELZA].

353. For a sample of these decisions, see Planned Parenthood Ass'n of Utah v. Herbert, 828 F.3d 1245 (10th Cir. 2016); Planned Parenthood of Greater Ohio v. Hodges, 201 F. Supp. 3d 898 (S.D. Ohio 2016); Planned Parenthood of Sw. and Cent. Fla. v. Phillip, 194 F. Supp. 3d 1213 (N.D. Fla. 2016).

354. *Hodges*, 201 F. Supp. 3d at 902 (quoting Maher v. Roe, 432 U.S. 464, 479 (1977)).

355. *See id.* at 903.

356. *Id.* at 911 (quoting *Maher*, 432 U.S. at 475).

357. *See* LA. STAT. ANN. § 1231.2 (2015) (originally enacted as LA. REV. STAT. § 40:1299.42(B)(1)).

358. K.P. v. LeBlanc, 729 F.3d 427, 442–43 (5th Cir. 2013) (second and third alterations in original) (quoting Harris v. McRae, 448 U.S. 297, 316–17 (1980)).

*Hellerstedt* cannot easily be reconciled with the Fifth Circuit's reasoning. When considering the effect of a challenged regulation, the decision requires a court to consider how a law interacts with obstacles that are not of the government's creation. It is no defense that the government took advantage of surrounding circumstances to create a restriction with the same practical impact as a formal ban.

*Hellerstedt* did not directly involve a subsidy program. However, the Court's reasoning is in obvious tension with the formalism of *Harris* and *Maher*. *Hellerstedt* should create an important opening for those who criticize the right–privilege distinction in its entirety. The framers of HB 2 had relied on *Maher* and *Harris* to explain that their proposal would not directly restrict abortions. As they presented it, HB 2 put in place neutral regulations intended to protect women's health. If abortion clinics could not comply or if women could not travel to a facility that remained open, Texas did not shoulder any responsibility. By rejecting this logic, the Court undermined one of the core rationales for distinguishing between benefit programs and "direct state interference."

## V. CONCLUSION

Challenges to the Hyde Amendment have recently come to the forefront of political debate. Hillary Clinton announced plans to challenge the Amendment after her arrival, and then-President Elect Donald Trump pledged to make the Amendment a permanent feature of American law.[359] All Above All, a coalition of reproductive-justice organizations, has launched a nationwide initiative to build opposition to the Hyde Amendment using social media and visits to college campuses.[360] The Equal Access to Abortion Coverage in Health Insurance Act (EACH Woman Act), a proposed bill with well over one hundred cosponsors, would reverse the Hyde Amendment and other federal bans, and outlaw bans in the context of private insurance.[361]

The history of the Hyde Amendment helps to explain the importance of these new campaigns. The Amendment helped to give rise to complicity-based ideas of conscience that have shaped contemporary battles about same-sex marriage, sexual-orientation discrimination, contraception, and abortion. Supporters of the Hyde Amendment insisted on conscience-based exemptions regardless of the degree of direct involvement a law required. Abortion opponents argued that if a law subsidized something to which taxpayers object, the message alone of that law created an onerous burden on the taxpayer's conscience. The same reasoning shapes the conscience-based claims of

359. *See supra* note 2 and accompanying text.
360. *See, e.g.*, Green, *supra* note 2.
361. *See supra* note 3 and accompanying text.

those seeking to refuse service to same-sex couples, challenge the contraceptive mandate of the Affordable Care Act, or defend new abortion restrictions.

The battle for the Hyde Amendment also helped to create a constitutional right–privilege distinction that has had considerable influence ever since. Supporters of the Hyde Amendment revived the distinction and gave it more doctrinal heft, urging the courts to ignore burdens not formally created by state law.

*Hellerstedt* has put both the Hyde Amendment and the right–privilege distinction on shakier ground. The Court's decision requires proof that a law actually delivers on the promises of its sponsors—a requirement that may be hard to meet for those relying on cost saving, discouraging abortion, or protecting conscience-based objections. *Hellerstedt* also upends the Court's analysis of what counts as an impermissible constitutional effect. Far from ordering a court to disregard the background circumstances and to focus on the formal text of a law, *Hellerstedt* makes those circumstances a central part of *Casey*'s undue burden analysis. The Hyde Amendment has been a prominent feature of American constitutional jurisprudence for decades, but the outcome of an attack on it may now be as realistic as it is important.