



The Hyde Amendment Has Perpetuated Inequality in Abortion Access for 40 Years

By Heidi Williamson and Jamila Taylor September 29, 2016

Access to abortion is an essential piece of allowing women to be in control of their own health and reproductive decisions. In 2010, the Center for American Progress published a comprehensive report on the Hyde Amendment’s impact on women of color. “Separate and Unequal” made a contribution to the body of work around reproductive health, rights, and justice—contextualizing the intersection of race and ethnicity, economic disadvantage, reproductive discrimination, and access to abortion.¹ Since the report’s publication, the landscape of abortion access has changed. There has been real progress with the passage of the Affordable Care Act, or ACA. A record number of women have health insurance coverage and are able to access well women’s care and preventive services at no cost. Additionally, the *Whole Woman’s Health v. Hellerstedt* U.S. Supreme Court decision was an important victory in solidifying the unconstitutional nature of certain targeted regulation of abortion providers, or TRAP, laws. Yet, due to 40 years of Hyde and an unprecedented number of additional funding and coverage bans, women still struggle not only to pay for an abortion but also to access abortion safely. An onslaught of laws targeting the regulation of abortion providers have been introduced since 2011; a total of 212 such laws have been enacted.² And while abortion restrictions can affect all women—regardless of income, race and ethnicity, or geography—low-income women and women of color are the most harshly affected.

Restrictions on abortion harm the most vulnerable women

Restrictions on abortion have a disproportionate impact on low-income women, young women, and women of color. According to the Guttmacher Institute, 75 percent of U.S. abortion patients live in poverty or are low income. Sixty percent of them are in their 20s.³ While 39 percent of U.S. abortion patients are white, 28 percent are black, 25 percent are Hispanic, and 6 percent are Asian/Pacific Islander.⁴ Furthermore, these populations experience health disparities that are largely the result of social, economic, and environmental factors that ultimately contribute to barriers in health care access.

Health coverage, provider availability, quality of care, and provider cultural competency interconnect with other factors—such as employment, income, education, housing, and hunger—to create a perfect storm for substandard health outcomes.⁵ When abortion is added into the mix, the equation becomes even more complicated.

Access to abortion is tantamount to the legal right to the procedure. But the Hyde Amendment and similar restrictions perpetuate a system of inequality in which access to safe, legal abortion care is dependent on social factors such as income and race and ethnicity. Because low-income women and women of color are more likely to access their health care through government-sponsored health insurance programs such as Medicaid, they bear the brunt of the limitations imposed on certain health services.⁶ These women are also more likely to lack access to modern contraception, experience unintended pregnancy, and experience poor maternal health outcomes.⁷ When it comes to the exorbitant costs that can be associated with obtaining an abortion, low-income women and women of color are least likely to have the funds to cover out-of-pocket costs or to work in jobs that allow flexible schedules and paid leave if they need to take time off for the procedure.

A brief history of the Hyde Amendment

In 1973, the U.S. Supreme Court declared the constitutional right to abortion in its landmark *Roe v. Wade* decision.⁸ This decision meant that millions of women could access safe, legal abortion in all 50 states, U.S. territories, and the District of Columbia without jeopardizing their health or fertility. For low-income women, however, this constitutional right was short-lived. Three years after the *Roe* decision, Congress passed the Hyde Amendment—named after its author and sponsor Rep. Henry Hyde (R-IL)—which was appended to the annual appropriations bill that provided funding for the U.S. Department of Health and Human Services.⁹ The amendment restricts the use of federal funds for abortion coverage through the Medicaid program, except to preserve the life of the woman or in cases of rape or incest. Rep. Hyde and other anti-abortion opponents used the provision to undermine the impact of *Roe*, as it specifically targeted low-income women who access reproductive health services through Medicaid.

In 1980, the Supreme Court upheld the Hyde Amendment in *Harris v. McRae*, ruling that “a woman’s freedom of choice [does not carry] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.”¹⁰ In his dissenting opinion, Justice William Brennan wrote, “the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly.”¹¹ Justice Thurgood Marshall concurred and wrote that the Hyde Amendment was “designed to deprive poor and minority women of the constitutional right to choose abortion.”¹² Indeed, by restricting the Medicaid program from covering this vital service, abortion is unaffordable and therefore inaccessible for many of the nation’s most vulnerable women.

Since its enactment in 1976, the Hyde Amendment has ranged from allowing no exceptions to allowing exceptions including rape, incest, and the health of the woman.¹³ In 1993, the Clinton administration expanded the Hyde Amendment to include exceptions for rape and incest, in addition to protecting the life of the mother.¹⁴ In 1997, however, Congress tightened the life exception to only when a woman's life was threatened by "physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself."¹⁵

The Hyde Amendment and similar restrictions

For 40 years, the Hyde Amendment has been approved annually in the federal appropriations process, preventing abortion coverage for the millions of women enrolled in the Medicaid program. To make matters worse, the amendment has become the basis for additional bans on federal funding that affect millions more women who are not Medicaid enrollees.

The additional women affected by these funding bans include:

- **Military personnel and their dependents.** Since 1979, the U.S. Department of Defense has prohibited coverage of abortion for military personnel and their dependents except to preserve the life of the mother.¹⁶ In 2013, that policy changed when an amendment to the National Defense Authorization Act was enacted that allowed support for abortion coverage in cases of rape and incest for women in the military.¹⁷ Eventually, the ban would expand its reach by prohibiting access to abortion care in health facilities on U.S. military bases overseas—even if women pay for the procedure with their own money. The restriction affects more than 1 million women of reproductive age who access health care through TRICARE or other military health coverage.¹⁸
- **Federal employees.** Since 1983, the Federal Employees Health Benefits Program, or FEHBP—the largest employer-sponsored health insurance plan in the country—has prevented abortion coverage for federal employees with an exception for rape, incest, and life endangerment. The FEHBP covers more than 9 million employees and dependents. More than 1 million of the enrollees are women of reproductive age.¹⁹
- **Women insured by the Indian Health Service.** Currently, the Indian Health Service, or IHS, provides health care for nearly 2 million Native Americans and Alaskan Natives.²⁰ Since 1996, IHS has covered abortion care in cases of rape and incest and to preserve the life of the woman. This restriction affects more than 400,000 Native women of reproductive age.²¹

- **Washington, D.C., residents.** Women in the District of Columbia have been denied abortion coverage through the Medicaid program since 1979.²² Congress must approve—and thus effectively controls—all of the District’s government spending and operations, including locally raised revenue. As such, Congress has prevented the District from paying for abortion care except in accordance with the Hyde Amendment.²³ The funding ban that prevents the District of Columbia from using its own money to cover abortion for low-income women has been briefly lifted twice allowing women to get city-funded care.²⁴ Nearly 150,000 women of reproductive age residing in Washington, D.C., are currently subject to this rule.²⁵
- **Incarcerated women.** Under U.S. Department of Justice appropriations legislation, women detained in federal prisons are banned from having abortion services paid for with federal dollars except in cases of life endangerment or rape.²⁶ Incarcerated women using private funds may obtain an abortion outside of the prison system and must be provided an escort “at no cost.”²⁷ Still, the ban on public funding affects nearly 14,000 women of reproductive age.²⁸
- **Peace Corps volunteers.** Women in the Peace Corps are overwhelmingly of reproductive age and often work in developing countries where health care in general is difficult to access. In 1979, Congress passed a prohibition on federal funding of abortion for these women without exception.²⁹ In 2014, however, another amendment was passed through the federal appropriations process that allows abortion coverage in cases of rape or incest for more than 4,000 women serving as Peace Corps volunteers.³⁰

Bans on federal funding and coverage of abortion also affect veterans, women in detention centers, and enrollees of the Children’s Health Insurance Program and Medicare.³¹

Restricting access to abortion through U.S. foreign aid

The U.S. international policy on accessing abortion is just as harmful as its domestic one. The Helms Amendment to the U.S. Foreign Assistance Act—named after its sponsor, the late Sen. Jesse Helms (R-NC)—was enacted in 1973, three years before the Hyde Amendment.³² It restricts foreign assistance from paying for “the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions.”³³ Like its domestic counterpart the Hyde Amendment, the Helms Amendment has spawned additional restrictions on U.S. global reproductive health programs that harm women’s health. These include bans on federal funding for biomedical research and a measure that prohibits U.S. family planning providers from lobbying for or against abortion, also known as the global gag rule.³⁴

Beyond passage of the Affordable Care Act

The ACA—landmark health care reform legislation enacted in 2010—has helped expand coverage of health care and other preventive services to 47 million women in the United States.³⁵ Under the law, insurance providers in the marketplace can offer plans that cover abortion care, but no plan is required to cover it.³⁶ During negotiations for the bill, Congress passed a provision, often referred to as the Nelson Amendment, named after its author former Sen. Ben Nelson (D-NE).³⁷ This provision requires insurance plans in the marketplace to segregate funds that pay for abortion from funds that pay for all other care.³⁸ This compromise not only extended the Hyde Amendment beyond the appropriations process but it also imposed its restrictions on plans in the new marketplaces created in the ACA.³⁹ Also after the ACA was signed into law, President Barack Obama signed Executive Order 13535 to ensure the enforcement of the Hyde Amendment in the Medicaid program and newly formed health exchanges in the ACA.⁴⁰

Soon after the ACA's implementation, states began to enact restrictions similar to the Hyde Amendment for insurance plans regulated under state law. This compounded confusion about which plans actually offer abortion coverage in the marketplace, despite the ACA's requirement that plans with abortion coverage must inform individuals in their Summary of Benefits and Coverage explanation upon enrollment.⁴¹ These plans must also disclose any major coverage exclusions. And while many marketplaces offer riders to accompany plans that do not cover abortion, there is little or no data available on how many women purchase them. The Obama administration is working on new guidelines for insurers designed to tackle the lack of transparency in the availability of abortion coverage in marketplace plans. Yet, barriers to coverage will continue to exist in many states.⁴²

The Hyde Amendment at the state level

Nineteen states have not yet expanded Medicaid under the ACA and continue to restrict abortion coverage in accordance with the Hyde Amendment.⁴³ Of the 32 states that have expanded Medicaid, 15 restrict abortion coverage in accordance with the Hyde Amendment.⁴⁴ Twenty-three states restrict abortion coverage except in extreme circumstances in plans participating in the marketplace, while 10 states limit abortion coverage in private insurance plans.⁴⁵ Twenty-one states restrict abortion coverage in state-sponsored insurance plans for government employees.⁴⁶

Despite widespread efforts to further restrict abortion coverage at the state level, some states are striving to ensure coverage of abortion services in the face of funding bans. Seventeen states currently use state funds to cover abortion care for low-income women.⁴⁷ Implementation of restrictions similar to the Hyde Amendment at the state level has created a patchwork of restrictions that transcend Medicaid.

TRAP laws

Targeted regulation of abortion providers, or TRAP, laws are restrictions imposed on abortion providers that place complicated and burdensome requirements on abortion care.⁴⁸ These laws not only curtail the ability of providers to ensure safe, timely care but they also jeopardize women's health.

In June 2016, the Supreme Court ruled in a 5-3 decision that two provisions of Texas' TRAP law created an undue burden for women seeking an abortion in the state.⁴⁹ The success of the case, *Whole Woman's Health v. Hellerstedt*, was a monumental victory for Texas women's reproductive health and rights. The decision declared that the stipulations that abortion clinics meet the same requirements as ambulatory surgical centers—medical facilities associated with hospitals that can perform outpatient surgery—and that abortion providers hold admitting privileges at local hospitals are unconstitutional.⁵⁰ When the law was implemented, the state went from having 40 abortion clinics to only 19.⁵¹ Other states have also enacted severe TRAP laws: Michigan, Missouri, Pennsylvania, Tennessee, and Virginia.⁵² Touted under the guise of making the procedure safe, these restrictions actually drive safe abortion care out of reach for women and are a violation of their reproductive rights.

Policy recommendations

Access to safe, legal abortion should not be a privilege that is easily obtainable by women who happen to live in a state that covers abortion care or who possess the financial means to pay for the service out of pocket. While the promise of *Roe* still stands, the Hyde Amendment and countless other abortion restrictions have put safe abortion care out of reach for women who already experience structural inequality in society. Both Congress and the Obama administration can take steps to lessen the burden of these draconian restrictions.

The following policy advancements are being championed by the reproductive health, rights, and justice community in order to ensure that safe abortion is affordable and accessible for all women:

- **Pass the Equal Access to Abortion Coverage in Health Insurance, or EACH Woman, Act.** This comprehensive legislation is aimed at ensuring coverage of abortion through all government-sponsored health insurance plans, including Medicaid. It would also prohibit politicians from interfering with the ability of private health insurance plans to offer abortion coverage.

- **Pass the Women’s Health Protection Act.** This legislation would prohibit federal, state, or local government from imposing limitations on abortion care—specifically, limitations that are medically unnecessary and that have a critical impact on women’s safety and the availability of abortion services.
- **Repeal restrictions on federal funding of abortion through U.S. foreign aid.** As a first step, the Helms Amendment must be interpreted to allow support for safe abortion in the limited cases of rape, incest, and life endangerment.

Recent campaigns have highlighted how the Hyde Amendment obstructs economic justice and racial justice for women. It disproportionately affects low-income women and women of color who already have limited financial resources, difficulty accessing health insurance, and who experience a host of other societal disadvantages. A number of reproductive justice campaigns have helped successfully bring this issue to the forefront of U.S. political discourse.

All* Above All

All* Above All is a network of reproductive health, rights, and justice organizations that engage in grassroots activities, social media, and advocacy campaigns to increase awareness about the impact of the Hyde Amendment.⁵³

1 in 3 Campaign

This storytelling project encourages women to share their abortion experiences to destigmatize the procedure and increase support for abortion access.⁵⁴

We Testify

We Testify is an abortion storyteller leadership program created to expand the voices of color, rural women, and lesbian, gay, bisexual, and transgender, or LGBT, people in the media regarding their abortion experiences and the barriers they face.⁵⁵

Conclusion

Since 1976, the long-standing legacy of Sen. Hyde's amendment has been the barriers it has imposed on low-income women and women of color seeking to exercise their constitutional right to an abortion. For 40 years, the Hyde Amendment has denied millions of women the reproductive autonomy to determine when and if they have a child. And unfortunately, its effects stretch far beyond the provision of abortion care.

The momentum gained through efforts to secure federal funding and abortion coverage is also indicative of the need to protect all women, regardless of race and ethnicity or socioeconomic status, from harmful restrictions. These restrictions are rooted in stigma and only serve to shame and punish women for practicing their legal right to access abortion. In order to ensure that all women enjoy the reproductive health, rights, and justice they deserve, policymakers must do away with abortion restrictions and empower women to make their own reproductive choices.

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