VIEWPOINT

The Hyde Amendment at 40 Years and Reproductive Rights in the United States
Perennial and Panoptic

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On September 30, 1976, in the waning months of the 94th Congress, freshman Representative Henry J. Hyde (R-IL) witnessed his namesake amendment enacted into law via the Departments of Labor and Health, Education, and Welfare Appropriation Act of 1977 (PL 94-439).[1] All of one sentence, the amendment stipulated that "None of the [Medicaid] funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."[1] For the past 40 years, the Hyde Amendment, an appropriation rider (annually renewed provision), has been unfailingly extended and frequently reworded.[2] Moreover, its blueprint for the dissociation of federal funds from abortion services has been progressively applied to multiple public, as well as private, health insurance plans.[2] Today, the Hyde Amendment remains controversial, and the subject of opposing partisan calls for its nullification or codification. This Viewpoint traces the evolution of the Hyde Amendment, explores its unremitting expansion, and discusses its likely future.

Efforts to eliminate the funding for abortions by Medicaid date back to the 1973 resolution of *Roe v Wade* and to the affirmation of abortion as a constitutional right. However, it was only after a pair of false legislative starts that the Hyde Amendment came to pass following a contentious 3-month–long debate that included dozens of compromise proposals. No sooner had the newly enacted amendment been finalized that legal action (*McRae v Mathews* in 1976) was brought to enjoin its implementation. In that case, grounds for a stay alleged violation of the First Amendment (Establishment Clause) and Fifth Amendment (Due Process Clause) as well as of the federal Medicaid statute. A 4-year legal battle ensued. It was not until June 30, 1980, in *Harris v McRae*, that the Supreme Court held that the Hyde Amendment did not "violate the Establishment Clause" nor "impinge on the 'liberty' protected by the Due Process Clause."[3] The court further held that Medicaid-participating states were not obligated by Title XIX of the Social Security Act to provide funding for abortions "for which federal reimbursement is unavailable under the Hyde Amendment."[3]

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In the years since the enactment of the Hyde Amendment, its blueprint for the dissociation of federal funds from abortion services has been applied to an increasing number of public health insurance plans other than the Medicaid program.[2] In a series of targeted initiatives, the "Hyde" blueprint was extended to appropriation statutes of the Peace Corps, the Federal Employees Health Benefits Program, the Federal Bureau of Prisons, the Medicare program, the Immigration and Customs Enforcement agency, and the District of Columbia.[2] Similar, if permanent, constraints were extended to authorizing statutes of the Department of Defense, the Indian Health Service, the Veterans Health Administration, and the Children's Health Insurance Program.[2] In so doing, the Hyde Amendment, now a government-wide imperative, all but eliminated federally funded abortion services. More recently, coincident with the enactment of the Affordable Care Act, the Hyde Amendment was extended to federally subsidized private health insurance plans offered through the exchanges.[4] As detailed in Executive Order 13535, federal premium assistance in the form of "tax credits and cost-sharing reduction payments" are to be wholly "segregated" and precluded from underwriting "abortion services."[4] In addition, the Hyde blueprint was emulated by multiple states intent on precluding state funds and private health insurance plans from underwriting abortion services. Thirty-two states and the District of Columbia prohibit the utilization of state funds toward abortion care. Yet other states constrain abortion coverage by private health insurance plans both on and off the online marketplaces.

Unsuccessful legislative endeavors to codify the Hyde Amendment into statutory permanence date back to the Child Health Assurance Act of 1979 (HR 4962). Statutory codification of the Hyde Amendment would have eliminated the need for its annual renewal. Multiple subsequent initiatives met with a similar fate. Recent developments, however, suggest a renewed interest in this legislative goal. In a first, the 2016 Republican Party platform called for "codification of the Hyde Amendment and its application across the government, including Obamacare."[5] The Trump-Pence campaign similarly pledged to "making the Hyde Amendment permanent law to protect taxpayers from having to pay for abortions."[6] It was in this context that the House has recently passed the No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure

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Act of 2017 (HR 7).[7] True to its title, the bill, first introduced in 2011, amends Title 1 of the US Code to ensure that "no funds authorized or appropriated by [f]ederal law…shall be expended for any abortion."[7] In addition, the bill amends the Internal Revenue Code to disallow federal premium assistance for the purchase of private health insurance plans that provide "coverage for abortion."[7] Moreover, the bill revises the private health insurance plan disclosure requirements to include the extent of "coverage of abortion and abortion premium surcharges."[7]

Attempts to nullify the Hyde Amendment via a dedicated statute have been few and far between. In a sign of renewal, the 2016 Democratic Party platform resolved "to oppose—and seek to overturn—federal and state laws and policies that impede a woman's access to abortion, including by repealing the Hyde Amendment."[8] Hillary R. Clinton, then the Democratic presidential nominee, offered that "laws…like the Hyde Amendment" preclude low-income women from exercising "their full rights."[9] The recently introduced Equal Access to Abortion Coverage in Health Insurance (EACH Woman) Act of 2017 (HR 771) is in keeping with this world view.[10] First sponsored in 2015, the bill aims "[t]o ensure affordable abortion coverage and care for every woman."[10] The bill further requires that the federal government guarantee coverage for abortion services "in its role as an insurer, employer, or health care provider."[10] In addition, the bill specifies that the "[f]ederal [g]overnment shall not prohibit, restrict, or otherwise inhibit insurance coverage of abortion care by [s]tate or local government or by private health plans."[10]

Durable and incessantly expansive, the Hyde Amendment has cast a long shadow over the public and private funding of elective abortions. Still, its codification by a federal statute remains elusive. The latest such effort, the No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act of 2017, could well trigger a Democratic filibuster in the Senate, the outcome of which cannot be reliably forecasted.[7] President Trump has indicated that he would sign the bill subject to a bicameral consensus. Nullification via the EACH Woman Act of 2017 is deemed highly improbable given its unlikely passage by the Republican-dominated House.

It would thus appear that the Hyde Amendment is destined to persist for some time as an annually renewed appropriation rider unless codified through No Taxpayer Funding for Abortion and Abortion Insurance Full Disclosure Act or health care reform statutes yet to be enacted. It follows that low-income, reproductive-age women—especially women of color—cannot expect access to abortion services to improve anytime soon. Lamenting this very same reality several decades earlier, Justice Thurgood Marshall offered that "the class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races" for whom "denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether."[3]

ARTICLE INFORMATION

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