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Harris v. McRae: Indigent Women Must Bear the Consequences of the Hyde Amendment

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Harris v. *McRae:* Indigent Women Must Bear the Consequences of the Hyde Amendment

INTRODUCTION

The raging controversy over the abortion right[1] and the utilization of public funds to assert that right has inspired an abundance of legislative discord[2] and judicial decisions.[3] At the heart of this morass lie irreconcilable differences concerning the nature of life itself. To those who view abortion as the taking of a human life, government expenditures through Medicaid constitute a subsidization of murder.[4] Conversely, advocates of "freedom of choice" maintain that an indigent woman is entitled to Medicaid funds for the purpose of exercising her constitutionally protected right to procure an abortion.[5] These conflicting viewpoints collided with the enactment of the Hyde Amendment,[6] an appropriations restriction which drastically curtails the availability of federal funds for Medicaid abortions.

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1. The right to have an abortion was first recognized in the landmark decisions of Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973).

2. Legislative dissidence is apparent upon examination of the congressional debates surrounding the passage of the various versions of the Hyde Amendment. *See, e.g.*, 122 CONG. REC. H8632 (daily ed. Aug. 10, 1976) (remarks of Rep. Abzug); 122 CONG. REC. S16114 (daily ed. Sept. 17, 1976) (remarks of Senator Stevens); 123 CONG. REC. S19440 (daily ed. Dec. 7, 1977) (remarks of Senator Magnuson); 123 CONG. REC. H6083 (daily ed. June 17, 1977) (remarks of Rep. Hyde).

3. *See, e.g.*, Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

4. Proponents of the "right to life" movement find the granting of Medicaid funds for abortions untenable on moral grounds. Butler, *The Right to Medicaid Payments for Abortion*, 28 HAST. L.J. 931, 931 (1977) [hereinafter cited as Butler]. *See generally* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359 (1979).

5. The "freedom of choice" ideology supports the position that women have a constitutional right to obtain an abortion. It is argued that the government cannot curtail the access to abortion by denying Medicaid funds to indigent women. This movement rejects the proposition that abortion is a moral wrong because morality is an extremely volatile concept. "Freedom of choice" advocates point out that it was not until the early nineteenth century that laws prohibiting abortions were enacted. Butler, note 4 *supra*, at 931. *See also* Comment, *Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have To Pay The Bill*, 9 LOY. CHI. L.J. 288 (1977) [hereinafter cited as Comment, *Non-Therapeutic Abortions*]; Comment, *State Limitations Upon the Availability and Accessibility of Abortions after Wade and Bolton*, 25 KAN. L. REV. 87 (1976).

6. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418.

In *Harris* v. *McRae*,[7] the Supreme Court confronted the question of the constitutionality of the Hyde Amendment and its implications with regard to medically necessary abortions.[8] Attacked on the grounds that it violated the free exercise and establishment clauses of the first amendment and the due process and equal protection clauses of the fifth amendment, the Hyde Amendment withstood all constitutional challenges.[9] The Amendment was thus revitalized[10] as an influence over state abortion funding pursuant to Title XIX.[11]

This comment will trace the converging paths of pre-Hyde Amendment Medicaid legislation and the constitutional right of abortion. The Supreme Court's resolution in *Harris* v. *McRae* of the statutory issue as well as the constitutional issues raised by the Hyde Amendment will then be discussed and analyzed. Finally, this discussion will examine the catalytic effect the Hyde Amendment will have on curtailing the freedom of indigent women to choose abortion as an alternative to childbirth.

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7. 100 S. Ct. 2671 (1980).

8. In a trio of concurrent cases, the Supreme Court had earlier determined that those states participating in the Medicaid program are not required by Title XIX of the Social Security Act to fund *non-therapeutic* abortions. Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

9. The Hyde Amendment was also challenged on the grounds that it was unconstitutionally vague. *See* note 118 *infra*.

10. From the date of its passage, the enforcement of the Hyde Amendment has been impeded by preliminary injunctive orders. *See* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975); McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976); Doe v. Mathews, 420 F. Supp. 865 (D.N.J. 1976). Its basic purpose has also been circumvented by the procurement of abortions without guarantee of reimbursement. *See* Doe v. Westby, 483 F. Supp. 1143 (D.S.D. 1974).

The brief but checkered history of the Hyde Amendment includes the issuance of a nationwide injunction prohibiting its enforcement. McRae v. Mathews, 421 F. Supp. 533 (1976). Additionally, the status of several lower court decisions regarding the effect of the Hyde Amendment on Title XIX was questionable. *See* Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979); Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Klein v. Nassau County Medical Center, 409 F. Supp. 731 (E.D.N.Y. 1976) (per curiam), *vacated and remanded in light of* Beal v. Doe and Maher v. Roe, *mem. sub nom.* Coe v. Hooker, 406 F. Supp. 1072 (D.N.H. 1976); Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975), *prob. juris. noted sub nom.* Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

11. In Williams v. Zbaraz, 100 S. Ct. 2694 (1980), the Supreme Court relied on its simultaneously created precedent of Harris v. McRae, 100 S. Ct. 2671 (1980) in holding that a state participating in the Medicaid program is not obligated under Title XIX to fund those therapeutic abortions for which federal reimbursement has been withdrawn under the Hyde Amendment.

THE RIGHT TO TERMINATE PREGNANCY

A Fundamental Personal Right

In the landmark companion cases of *Roe* v. *Wade*[12] and *Doe* v. *Bolton*,[13] the Supreme Court determined that the constitutionally protected right of privacy[14] encompasses a woman's decision to obtain an abortion.[15] Although not absolute, the right of a woman to elect to terminate her pregnancy is recognized as a fundamental, personal right.[16] Consequently, a state abortion regulation is justifiable only upon the showing of a compelling state interest.[17]

In *Wade*, the Court recognized the privacy interest of the mother,[18] and the competing state interests in potential fetal life and maternal health.[19] The Court held that during the first trimester of pregnancy, a woman may exercise her right to secure an abortion free from any state interference because of the minimal risk abortion poses to her health at that time.[20] At the end of the first trimester, however, the state's compelling interest in the

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12. 410 U.S. 113 (1973). *Wade* invalidated Texas criminal abortion laws which prohibited the performance of an abortion unless it was necessary to save the life of the mother.

13. 410 U.S. 179 (1973). *Bolton* invalidated Georgia statutes which limited the availability of abortions.

14. Although a general privacy right is not explicit in the Constitution, protection is afforded on the ground that the Bill of Rights' specific guarantees have penumbras, formed by emanations of those guarantees that create zones of privacy. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). In *Griswold*, Justice Douglas regarded the sources of the right of privacy to be the first, third, fourth, fifth, and ninth amendments. *Id.* Justices Goldberg, Brennan and Chief Justice Warren believed the right sprang from the ninth amendment. *Id.* 499. The two remaining concurring Justices, Harlan and White, relied on the Fourteenth Amendment to support the newly-recognized right. *Id.* at 500, 502. *See* Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965). *See generally* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Comment, *Non-Therapeutic Abortions*, note 5 *supra*, at 290 n.5.

Further expansion of the right of privacy is illustrated by Carey v. Population Services International, 431 U.S. 678 (1977) (struck down a New York statute which prohibited the sale and distribution of contraceptives to individuals under sixteen years of age). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972).

15. Roe v. Wade, 410 U.S. 113, 153 (1973).

16. *Id.* at 152.

17. *Id.* at 155. *See* notes 118-23 *infra* and accompanying text; Kramer v. Union Free School District, 395 U.S. 621, 630 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942). *See generally* B. SCHWARTZ, CONSTITUTIONAL LAW (1972).

18. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

19. *Id.* at 163-64.

20. *Id.* at 164. The Court noted, however, that a state may require the physician performing the abortion to be currently licensed by the state. *Id.* at 165.

health of the mother is triggered.[21] Abortion regulations may then be implemented, provided they reasonably relate to the preservation and protection of maternal health.[22] At viability, the state's interest in potential human life becomes compelling.[23] At this time, stringent regulations on the abortion procedure, to the point of proscribing all but those abortions necessary to preserve the life or health of the mother, are permissible.[24]

Once the "fundamental" right to abortion was established, a variety of peripheral issues were raised in the courts.[25] Although the Supreme Court has attempted to avoid further entanglement in the abortion arena,[26] it has made significant strides in clarifying a woman's right to an abortion. For example, the Court has determined that a state may not precondition a married woman's right to obtain an abortion on spousal consent;[27] a state may not delegate an unmarried minor's abortion decision to a parent;[28] nor may it deny minors access to abortions.[29]

Public Funding of Abortions

The Supreme Court has adopted a more conservative stance, however, with respect to the public funding of abortions. In *Maher* v. *Roe*,[30] the Court held that a Connecticut statute restricting Medicaid funding to medically necessary first trimester abortions[31]

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21. *Id.* at 164.
22. *Id.* at 163.
23. *Id.*
24. *Id.* at 164-65.
25. *See, e.g.*, Singleton v. Wulff, 428 U.S. 106 (1976) (issue of whether physicians may assert the rights of their female patients with respect to governmental infringement on the right to choose abortion).
26. *See* Greco v. Orange Memorial Hosp. Corp., 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975); Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir.), *appeal dismissed and cert. denied*, 419 U.S. 891 (1974).
27. Planned Parenthood Ass'n of Missouri v. Danforth, 428 U.S. 52, 71 (1976).
28. *Id.* at 74.
29. Bellotti v. Baird, 443 U.S. 622 (1979).
30. 432 U.S. 464 (1977).
31. *Id.* at 466 n.2, *quoting* Connecticut Welfare Department, Public Assistance Program Manual, Vol. 3, c.III, § 275 (1975), which provides in relevant part:

> The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met: 1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity. 2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy. . . . 3. The written request for the abortion is submitted by the patient, and in the case of a minor, from [sic] the parent or guardian. 4. Prior authorization for the abortion is secured from the Chief of Medical Services,

did not violate the fourteenth amendment's due process and equal protection guarantees.[32] Selecting the rational basis test as the appropriate standard of review,[33] the Court found that the Connecticut regulation furthered the state's "strong and legitimate interest in encouraging normal childbirth."[34]

Employing the *Maher* rationale, the Court in *Poelker* v. *Doe*,[35] upheld a St. Louis, Missouri policy directive which prohibited the use of city hospital facilities for performing non-therapeutic abortions. In upholding the mayoral directive, the Court demonstrated its preference for deferring abortion-funding decisions to the voters.[36]

The Court had thus made it clear that an indigent woman's right to obtain an abortion does not encompass a corresponding right to Medicaid funds beyond the first trimester or to the use of public hospital facilities. Left undecided, however, was the question of whether funding for therapeutic[37] abortions may be denied Medicaid-eligible women.

MEDICAID AND THE HYDE AMENDMENT

Medicaid, established in 1965 by Title XIX of the Social Secur-

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Division of Health Services, Department of Social Services.

32. 432 U.S. 464, 470 (1977).

33. The Court determined that the abortion regulation did not infringe upon a fundamental right or create an invidious discrimination against a suspect class, and therefore the compelling interest standard was not applied. 432 U.S. at 478. *See* authorities cited in note 120 *infra*.

34. 432 U.S. at 478, *quoting* Beal v. Doe, 432 U.S. 438, 446 (1977).

35. 432 U.S. 519 (1977) (*per curiam*).

36. *Id.* at 521.

37. The definition of "therapeutic" or "medically necessary" lies at the core of the Hyde Amendment controversy. In its broadest version, the Hyde Amendment permitted the funding of Medicaid abortions "in those instances where severe and long-lasting physical health damage to the mother would result if the pregnency were carried to term when so determined by two physicians." Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977). Although this version of the Hyde Amendment does not set forth guidelines for determining the appropriate brand of medical necessity, it specifically excludes abortions performed for the psychological health of the mother.

The medical community applies a more liberal definition of "therapeutic": the care which is responsive to the problem for which it is offered. *See* Bunker, *Elective Hysterectomy: Pro and Con*, 295 N. ENG. J. MEDICINE 267 (1976); STAFF OF HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATION OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG. 2D SESS., COST & QUALITY OF HEALTH CARE: UNNECESSARY SURGERY 9 (1976). *See also* 42 U.S.C. § 1396a(a)(30) (1970), *as amended*, (Supp. V 1975).

Another interpretation of medical necessity may be gleaned from Roe v. Wade, which included physical, mental, and psychological factors as important considerations in a woman's decision to terminate her pregnancy. 410 U.S. 113, 153 (1973).

ity Act,[38] provides federal grants to those states implementing medical assistance programs for the needy.[39] Under this jointly funded governmental scheme,[40] once a state elects to participate, it must comply with the minimum federal requirements set forth in Title XIX.[41] A participating state is, however, afforded a great deal of latitude in the organization and administration of its individual health care plan[42] provided "reasonable standards"[43] are main-

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38. Act of July 30, 1965, Pub. L. No. 89-97 § 121(a), 79 Stat. 343 (codified at 42 U.S.C. §§ 1396-1396d (1970)), *as amended*, (Supp.V 1975).

39. The federal Medicaid plan distinguishes between two categories of "needy" persons: (1) the "categorically needy," which includes families with dependent children, eligible for welfare benefits under the Aid to Families with Dependent Children program (42 U.S.C. § 601-02 (1970)), and the aged, blind, and disabled, entitled to public assistance under the Supplemental Security Income program, 42 U.S.C. §§ 1381-83(c) (*see* 42 U.S.C. § 1396a(10)(A) (1970), *as amended*, (Supp.V 1975)); and (2) the "medically needy," which includes those who are ineligible for welfare because they have too many resources but whose medical expenses make them medically indigent within the meaning of the welfare laws. 42 U.S.C. § 1396a(10)(C) (1970), *as amended*, (Supp.V 1975).

40. A cohesive plan of "cooperative federalism" has emerged to promote the common goal of both state and federal governments. *See* Dandridge v. Williams, 397 U.S. 471, 491 (1970); King v. Smith, 392 U.S. 309, 316 (1968).

Depending on state income, the federal government furnishes between 50% and 83% of the funds required to support a particular state's medical assistance program. 42 U.S.C. § 1396(b) (1970).

41. A participating state must at the very least provide five broad areas of care for the "categorically needy":

(1) inpatient hospital services;
(2) outpatient hospital services;
(3) other laboratory and x-ray services;
(4) skilled nursing facility services, periodic screening and diagnosis of minors, and family planning services;
(5) physicians' services.

42 U.S.C. § 1396a(13)(B) (1970), *as amended*, (Supp.V 1975), (1)-(5) (1970), *as amended*, (Supp.V 1975).

In addition to these five categories, participating states are encouraged to fund another twelve types of medical services for the "categorically needy." 42 U.S.C. § 1396d(a) (1970), *as amended*, (Supp.V 1975). Should a state elect to include the "medically needy" in its program, these individuals are entitled either to the same minimum five areas of medical treatment that must be provided to the "categorically needy" or any seven of the twelve discretionary types of services. *See* Beal v. Doe, 432 U.S. 438 (1977).

42. *See* New York Dept. of Soc. Servs. v. Dublino, 413 U.S. 405 (1973) (New York requirement necessitating acceptance of employment as a precondition for receipt of assistance under Aid to Families with Dependent Children (AFDC) held valid as within a state's discretionary power under the Social Security Act); Dandridge v. Williams, 397 U.S. 471 (1970) (upheld Maryland regulation limiting AFDC benefits for any one family to less than their ascertained per capita need as consistent with the Social Security Act).

43. A state plan must "include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]. . . ." 42 U.S.C. § 1396a(17) (1970), *as amended*, (Supp.V 1975). *See also* Harris v. McRae, 100 S. Ct. 2671 (1980); Beal v. Doe, 432 U.S. 438 (1977).

tained for determining eligibility.

Abortion was not mentioned in either the original enactment of Title XIX[44] or the 1972 amendment,[45] which added family planning to the arsenal of available Medicaid services. Consequently, considerable speculation had arisen concerning the public funding of abortion. Adding to this funding dilemma, in 1976, Congress passed the first of three versions of the Hyde Amendment,[46] a "rider"[47] to the annual Department of Health, Education and Wel-

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44. "Title XIX does not . . . specify or limit the type or extent of medical assistance which the states must furnish." Coe v. Hooker, 406 F. Supp. 1072, 1079 (D.N.H. 1979).

45. Act of Oct. 30, 1972, Pub. L. No. 92-603, § 299E, 86 Stat. 1329, *amending* 42 U.S.C. § 1396d(a) (1970) (codified at 42 U.S.C. § 1396d(a)(4)(C) (1970), *as amended*, (Supp.V 1975)). The right to secure an abortion was not established until 1973 when the Supreme Court decided Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973). *See* note 1 *supra*. *But see* Doe v. Beal, 523 F.2d 611, 622-23 (3rd Cir. 1975), in which the court of appeals construed the 1972 amendment to include abortion services, since Congress did not expressly exclude them.

46. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418 (1976). The Hyde Amendment imposes severe restrictions on the use of federal funds for publicly funded abortions. Since its original enactment in 1976, the Hyde Amendment has been modified twice. In its original, most restrictive form, the amendment provided: "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term." *Id.*

The 1978 version lessened the restriction somewhat by providing:

> That none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Act of Dec. 9, 1977, Pub. L. No. 95-205 § 101, 91 Stat. 1460 (1977).

In its current form, the variation of the Hyde Amendment applicable for fiscal year 1980 provides:

> [N]one of . . . the funds provided by this joint resolution . . . shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.

Act of Nov. 20, 1979, Pub. L. No. 96-123 § 109, 93 Stat. 926. *See also* Act of Oct. 12, 1979, Pub. L. No. 96-86, § 118, 93 Stat. 662 (1979).

For the purposes of this Comment, because the version under consideration in *Harris* v. *McRae* was the restrictive, 1976 enactment, the term "Hyde Amendment" will refer to the original amendment.

47. It has been argued that the use of a "rider" as a means of substantively amending welfare legislation is inappropriate because thorough analysis and meaningful committee discussion is precluded by Congress' own procedural rules. *See* 122 CONG. REC. H8632 (daily ed. Aug. 10, 1976) (remarks of Rep. Abzug). *See also* Note, *The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions Only for the Rich?*, 6 FORDHAM URB. L.J. 687, 690 n.23 (1978). *See generally* Note, *Zbaraz* v. *Quern - Abortion and Medicaid: The*

fare[48] appropriations bill. This legislation, in its original and most restrictive form, prohibited the federal funding of abortions except in those situations "when the life of the mother would be endangered if the fetus were carried to term."[49]

A primary question[50] presented by the enactment of the Hyde Amendment concerned its substantive effect on Title XIX.[51] If construed to merely withdraw federal funds previously allocated

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Public Funding Dilemma, 12 J. MARSHALL J. PRAC. & PROC. 609 (1979).

48. The Department of Health, Education and Welfare has been renamed the Department of Health and Human Services. Act of Oct. 17, 1979, Pub. L. No. 96-98, Title III, §§ 301-07, 93 Stat. 677-681 (1979).

49. *See* note 46 *supra*.

50. In addition to the central issue, the circuitous manner in which the Hyde Amendment revised the Medicaid statute poses significant problems regarding its legitimacy. Traditionally, legislation by appropriation has been a disfavored means of effectuating changes in existing laws. Morton v. Mancari, 417 U.S. 535, 549 (1974), *quoting* Posadas v. National City Bank, 296 U.S. 497, 503 (1936). *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190 (1978), where the Supreme Court emphasized the dangers of applying appropriations acts substantively:

> We recognize that both substantive enactments and appropriations measures are "acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure.

By its own rules, Congress is to abstain from enacting an appropriation bill affecting the substance of other legislation. Senate Standing Rule XVI, § 4 (94th Cong. 1975) provides: "[N]o amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received." House Rule XXI, § 2 (94th Cong. 1976) provides:

> No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order, except such as being germane to the subject matter of the bill shall retrench expenditures by the reduction of the number and salary of the officers of the United States, by the reduction of the compensation of any person paid out of the Treasury of the United States, or by the reduction of amounts of money covered by the bill.

51. *See* Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977). *See also* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979); Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Klein v. Nassau County Medical Center, 409 F. Supp. 731 (E.D.N.Y. 1976) (per curiam), *vacated and remanded in light of* Beal v. Doe and Maher v. Roe, *men. sub nom.* Coe v. Hooker, 406 F. Supp. 1072 (D.N.H. 1976); Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975), *prob. juris. noted sub nom.* Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).

for Medicaid abortions, participating states might still be obligated to provide abortion services and shoulder the entire economic burden.[52] If, however, the Hyde Amendment substantively amended Title XIX by removing certain abortions from the scope of Medicaid coverage, a state would be relieved from funding those abortions unless it elected to do so.[53]

In *Beal* v. *Doe*,[54] the Supreme Court resolved the issue of state funding of elective abortions by narrowly construing the Medicaid statute.[55] Holding the funding of non-therapeutic abortions to be optional, the Court found no express or implied congressional intent requiring states to fund elective abortions.[56] In addition, the Court affirmed the notion that states are afforded wide discretion in selecting the types of medical assistance offerred.[57] A state's obligation to provide funds for medically necessary abortions under Title XIX, however, remained undetermined.

Because of the inherent tension between the Hyde Amendment, Medicaid, and the right to obtain an abortion, a definitive finding on the validity and construction of the Hyde Amendment was of paramount importance. In order for the Hyde Amendment to achieve its intended purpose of curtailing abortions by withholding federal funds,[58] it must not only be construed to alter Title XIX, but also to withstand various constitutionally-based attacks. These challenges were considered by the Supreme Court in *Harris* v. *McRae*.

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52. Beal v. Doe, 432 U.S. 438, 443-44 (1977).

53. *Id.* at 447.

54. 432 U.S. 438 (1977).

55. *Id.* at 444.

56. *Id.*

57. *Id.* at 447.

58. Congressman Hyde, the sponsor of the original Hyde Amendment, unequivocally manifested his intent to halt all abortions by any available means:

> Yesterday, remarks were made that it is unfortunate to burden an appropriation bill with complex issues, such as bussing, abortion and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the members may work their will, unfortunately, is an appropriation bill. I regret that. I certainly would like to prevent, if I could legally, any body [sic] having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW medicaid bill. A life is a life. The life of a little ghetto kid is just as important as the life of a rich person. And so we proceed in this bill.

123 CONG. REC. H6083 (daily ed. June 17, 1977).

THE DISTRICT COURT DECISION

The constitutionality of the Hyde Amendment was attacked on the day of its enactment in *McRae* v. *Mathews*.[59] The plaintiffs[60] sought to invalidate the amendment and to enjoin its enforcement. After a preliminary hearing, the district court granted a nationwide injunction which prohibited the Secretary of Health, Education, and Welfare from enforcing the Hyde Amendment and compelled the continued disbursement of federal funds to cover elective abortions obtained under Medicaid.[61]

Subsequent to the Supreme Court decisions of *Maher* v. *Roe*[62] and *Beal* v. *Doe*,[63] which decided the issue of the availability of public funding for elective abortions, several new plaintiffs[64] intervened in the suit. These new plaintiffs requested Medicaid funding for therapeutic abortions. Therefore, instead of examining the Hyde Amendment in the context of elective abortions, the district court was required to focus on its validity with respect to medically necessary or therapeutic abortions.[65]

In *McRae* v. *Califano*, the district court held that the Hyde Amendment violated the free exercise clause of the first amend-

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59. 421 F. Supp. 533 (E.D.N.Y. 1976).

60. The plaintiffs formed a group representing diverse socio-economic backgrounds: Cora McRae, a New York resident in the first trimester of pregnancy who desired to obtain an abortion through the Medicaid program; Dr. Irwin B. Teran, a licensed physician specializing in obstetrics and gynecology; Planned Parenthood of New York City, Inc.; and The New York City Health and Hospitals Corporation, a public benefit corporation and provider of health and medical services, including abortions. *Id.* at 535-36.

61. In granting the preliminary injunction, the district court was satisfied that the plaintiffs had established a reasonable probability of success on the merits. *Id.* at 541. In addition, the plaintiffs established their standing to sue and made a showing of irreparable harm. *Id.* at 538.

62. 432 U.S. 464 (1977). *See* notes 30-34 *supra* and accompanying text.

63. 432 U.S. 438 (1977). *See* text accompanying notes 54-57 *supra*.

64. Additional plaintiffs were: Jane Doe, Mary Doe, Susan Roe, and Ann Mae, all New York residents eligible for Medicaid benefits and precluded from obtaining medically necessary abortions because of the Hyde Amendment; Jane Hodgson, M.D., David B. Bingham, M.D., Hugh Savage, M.D., Edgar W. Jackson, M.D., and Lewis H. Koplik, M.D., physicians who perform abortions for Medicaid recipients; Women's Division of the Board of Global Ministries of the United Methodist Church; and Theressa Hoover and Ellen Kirby, two officers of the Women's Division.

65. Prior to addressing the constitutional issues, the district court rejected the plaintiffs' statutory argument that Title XIX requires a participating state to fund all medically necessary abortions regardless of the availability of federal funds. Instead, the court construed the Hyde Amendment to substantively amend Title XIX and relieve a state from carrying the full funding burden for medically necessary abortions. McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980).

ment[66] and the due process clause of the fifth amendment.[67] It then recertified the *McRae* case as a nationwide class action on behalf of all Medicaid-eligible pregnant women wishing to obtain medically necessary abortions, and all licensed providers of these types of abortions.[68] In addition, the court ordered the Secretary of Health, Education and Welfare to "cease to give effect" to the Hyde Amendment with respect to therapeutic abortions and to continue the authorization of federal matching funds in reimbursement for such abortions.[69]

THE SUPREME COURT OPINION

In *Harris* v. *McRae*,[70] the Supreme Court conducted a two-part analysis of the Hyde Amendment. The Court resolved the statutory state funding question under Title XIX, and considered the constitutional issues surrounding the right of abortion.

The Statutory Issue

The Court first examined the statutory issue[71] of whether, as a result of the Hyde Amendment, a state participating in the Medicaid program was obligated to bear the total cost of medically nec-

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66. The court ascertained that the decision to terminate pregnancy for medical reasons may be a product of a religiously formed conscience. *Id.* at 742. Specifically, a woman's decision to secure a therapeutic abortion may stem from certain Jewish and Protestant beliefs. For this reason, the court held that the Hyde Amendment contravened the free exercise guarantee of the first amendment. *Id.* Furthermore, Judge Dooling found the standards contained in the Hyde Amendment "alien" to current medical standards. *Id.* at 667. The medical relevance of poverty, considerations of fetal abnormality, familial problems, damage to mental health, and fetal viability were all excluded from consideration under the Hyde Amendment's narrow terms. *Id.* at 668-90.

67. The district court found the Hyde Amendment to be violative of the equal protection strand of the fifth amendment's due process clause. The court found no legitimate governmental interest furthered in the exclusion of funding for certain medically necessary abortions. *Id.* at 738. On the contrary, it found existing law to be supportive of effective family planning to avoid unwanted pregnancies and births. *Id.*

The court also declared that the Hyde Amendment operates to the detriment of a "suspect class" consisting of indigent teenage women seeking medically necessary abortions. Relying on the adverse effects teenage pregnancies impose on adolescent mothers, Judge Dooling created a new classification of individuals entitled to heightened constitutional protection. *Id.*

68. *Id.* at 742.

69. *Id.*

70. 100 S. Ct. 2671 (1980).

71. For jurisprudential reasons, the Supreme Court addressed the statutory issue prior to the constitutional questions because the Court "ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Id.* at 4944, *quoting* Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944).

essary abortions. The Court examined the language, purpose, and congressional intent underlying Title XIX. It concluded that "[t]itle XIX does not require a participating State to pay for those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment."[72]

Unlike the district court,[73] however, the Supreme Court did not construe the Hyde Amendment to substantively amend Title XIX.[74] It concentrated on the original congressional intent not to impose a unilateral funding obligation on a state participating in the Medicaid program. The Supreme Court ruled that the Hyde Amendment did not substantively affect the Medicaid statute because Title XIX embodies sufficient flexibility to expand or contract with the availability of federal funds.[75] Consequently, with the discontinuance of federal reimbursement for therapeutic abortions, a state is relieved from its parallel obligation to fund such abortions by the normal operation of Title XIX.[76]

Redefining the Scope of Title XIX

The practical effect of the Supreme Court's construction of Title XIX on the funding of medically necessary abortions is identical to that of the district court. Both the lower court and the Supreme Court held that Title XIX does not obligate a participating state to fund medically necessary abortions. Instead of merely carving out an exception to the general policy of providing medically necessary services to individuals eligible for Medicaid, however, the Supreme Court redefined the scope of Title XIX. The preamble of Title XIX articulates its objective of providing "necessary medical services" to indigent persons.[77] By definition, a therapeutic abortion is a medically necessary procedure.[78] According to the comparability standard of Title XIX,[79] individuals satisfying the two dis-

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72. 100 S. Ct. 2671, 2685 (1980).

73. *See* note 65 *supra*.

74. 100 S. Ct. 2671, 2684-85 (1980).

75. Although the Court cites no specific authority for this contention, support may be found at 42 U.S.C. § 1396d(b) (1970), *as amended*, (Supp.V 1975) (illustrating the inherent flexibility of federal reimbursement to states under Title XIX). *See also* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979).

76. The Court noted, however, that a state remains free to continue funding those medically necessary abortions for which federal funding is unavailable if it elects to do so. 48 U.S.L.W. at 4945 n.16.

77. 42 U.S.C. § 1396 (1970), *as amended*, (Supp.V 1975).

78. *See* note 37 *supra*.

79. The Medicaid statute requires that a participating state provide certain basic medi-

tinct, neutral criteria of financial need and medical need are entitled to equal access to Medicaid resources.[80] The Court's disposal of the statutory issue directly conflicts with this comparability standard because the Hyde Amendment effectively denies medically needy individuals[81] access to Medicaid funds.

That the Hyde Amendment was, in fact, enacted, illustrates congressional intent[82] to substantively amend Title XIX by removing previously subsidized abortions from the scope of the Medicaid program.[83] By not adopting this view, however, the Court managed to avoid the issue of the legitimacy of legislation by appropriation.[84]

The Due Process Challenge

The challengers of the Hyde Amendment raised a number of constitutional issues. They first asserted that the funding limitations of the Hyde Amendment violated the due process clause of the fifth amendment by impinging on the "fundamental" right of a woman to choose to terminate her pregnancy.[85] Relying substantially on its holding in *Maher* v. *Roe*,[86] the Court found no violation of the fundamental right to abortion recognized in *Roe* v. *Wade* and its progeny.[87] The Court did not view the provisions of the Hyde Amendment as an undue interference on a woman's freedom to undergo an abortion. Rather, it found that the Hyde Amendment, by withholding federal funds for certain medically necessary abortions, served to encourage the alternative activity of normal childbirth.[88] The Court concluded that the refusal to subsidize abortion places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy; it merely promotes a

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cal services to the "categorically needy." *See* note 39 *supra*. The "comparability standard" demands that once a state elects to extend a Medicaid service to the "medically needy," the service provided to both the categorically and medically needy must be equal. 42 U.S.C. § 1396a(a)(10)(B), (C) (1970), *as amended*, (Supp.V 1975).

80. *See* 100 S. Ct. at 2712 (Stevens, J., dissenting).

81. *See* note 39 *supra*.

82. *See* note 58 *supra*.

83. *See* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979).

84. *See* notes 47 and 50 *supra*.

85. 100 S. Ct. at 2685.

86. *See* notes 30-34 *supra* and accompanying text.

87. *See* notes 12-15 *supra* and accompanying text.

88. 100 S. Ct. at 2687. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (a state may subsidize public education without incurring a corresponding obligation to fund private and parochial educational); Meyer v. Nebraska, 262 U.S. 390 (1923).

legitimate governmental interest.[89]

Recognizing the significant factual distinction between *Maher* (elective abortions) and *McRae* (therapeutic abortions), the Court in *McRae* briefly addressed the implications of a woman's interest in protecting her health.[90] The Court acknowledged that this interest was an important aspect of the *Wade* decision. The Court reasoned, however, that a woman's due process liberty to have an abortion does not trigger a constitutional duty to publicly fund the exercise of that liberty. Therefore, the Court concluded, whether a woman's interest in protecting her health lies at the "core or periphery"[91] of the abortion right is immaterial because there is no corresponding constitutional entitlement to financial resources annexed to that right. The Court further explained that indigency, and not govermental limitations on access to abortions, impedes a woman from exercising her constitutionally protected right. The Court declared that to hold otherwise would impose an affirmative constitutional obligation on the federal government to fund all medically necessary abortions for indigent women, regardless of the existence of the Medicaid program.[92]

In addition to the initial due process issue, the Court summarily disposed of the contention that the Hyde Amendment penalized the exercise of a woman's right to have an abortion.[93] In footnote discussion, the Court again applied the *Maher* rationale to hold that a denial of public funding for constitutionally protected activity is not comparable to a "penalty" on that activity.[94] Because the Hyde Amendment did not provide for blanket disqualifications from the receipt of Medicaid benefits, but only prohibited the subsidization of certain conduct, the Court found no penalization of the fundamental right of abortion.[95]

The Dissent's View

In his dissent, Justice Brennan, joined by Justices Blackmun

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89. 100 S. Ct. at 2687-88.

90. *Id.*

91. *Id.* at 2688.

92. *Id.* at 2689.

93. The penalty analysis was first applied in Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidated a state law conditioning the receipt of welfare benefits on a lengthy residency requirement), and later extended in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (invalidated a county durational residency requirement as a precondition of medical benefits for indigents).

94. 100 S. Ct. at 2688 n.19.

95. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

and Marshall, viewed the Hyde Amendment as a conscious attempt by Congress to circumvent the constitutionally protected right of abortion.[96] The dissent further maintained that the Hyde Amendment operates to deprive an indigent woman of her freedom to secure an abortion by "injecting coercive financial incentives favoring childbirth into a decision that is constitutionally guaranteed to be free from governmental intrusion."[97] As a practical matter, for many women dependent upon Medicaid for all medical services, the funding of expenses associated with childbirth and denial of funding for a medically necessary abortion forecloses the exercise of a due process right. It is not only a pregnant woman's poverty that prevents the assertion of her right to undergo an abortion; it is her indigency coupled with the government's unequal funding of abortion and childbirth that obliterates her due process liberty.[98]

In a separate dissent, Justice Marshall noted that in choosing the disfavored option of terminating her pregnancy, an indigent woman is faced with two alternatives. She may either bear the financial burden of a private abortion or resort to a non-medical abortion.[99] Thus, a woman must suffer either an economic or health-related "penalty" in taking a constitutionally protected course of action.[100] Conversely, an indigent woman who carries her pregnancy to term is entitled to the full range of Medicaid benefits. According to the dissent, the majority, by upholding the Hyde Amendment, has allowed Congress to condition the grant of Medicaid benefits on the relinquishment of a cherished constitutional right.[101]

Disregard of the Maternal Health Interest

The Court's reliance on *Maher* in its treatment of the two-pronged due process challenge reflects an unwillingness to recognize the tremendous influence the Hyde Amendment will have on

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96. 100 S. Ct. at 2704 (Brennan, J., dissenting).
97. *Id.* at 2703-04.
98. *Id.*
99. 100 S. Ct. at 2706 (Marshall, J., dissenting).
100. *See* notes 93-95 *supra* and accompanying text.
101. 100 S. Ct. at 2705 (Brennan, J., dissenting). *See also* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Goldberg v. Kelly, 397 U.S. 254 (1970); Elfbrandt v. Russell, 384 U.S. 11 (1966); Speiser v. Randall, 357 U.S. 513 (1958); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926).

an indigent woman's choice to terminate a *complicated* pregnancy.[102] Although the Court admitted that *Maher* and *McRae* were factually distinguishable, it refused to recognize the significance of that distinction. A pregnant woman's health interest was not at issue in *Maher,* and the inclusion of this interest in *McRae* should have been a vital component of the constitutional analysis of the abortion right. *Wade* and *Bolton* defined the fundamental right of abortion in terms of medical necessity as a protected alternative to childbirth. Indeed, the Supreme Court had only a year earlier recognized that it is a state's concern for maternal health, not its interest in potential fetal life, that justifies regulation of the abortion procedure during the second trimester.[103] Thus, the *McRae* Court's disregard of the maternal health interest conflicts with the Court's protectice recognition of this interest in *Roe* v. *Wade* and its progeny.

A comparison of the Texas criminal statute struck down in *Wade* and the Hyde Amendment reveals two striking similarities: (1) the failure to distinguish between abortions performed early in pregnancy and those performed later, and (2) the harsh restrictions limiting available abortions to those necessary for the preservation of the mother's life. Both of these elements of the Hyde Amendment further illustrate its fatal inconsistency with the due process liberty established in *Wade.*

In failing to recognize the substantial dilution of the abortion right, the Court neglected to sufficiently analyze all ramifications of the Hyde Amendment. Should an indigent woman have a non-pregnancy related physical problem that could not be treated because of her pregnancy, she would effectively be denied Medicaid benefits for such treatment. An abortion would not be obtainable because of her indigency and the effect of the Hyde Amendment. Without the abortion, she could not receive proper medical care. This point was graphically illustrated by medical testimony given in the district court. An indigent terminal cancer patient unable to

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102. *See* Boddie v. Connecticut, 401 U.S. 371 (1971) (indigents cannot be denied a divorce by inability to pay filing fee). *Cf.* Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963); Draper v. Washington, 372 U.S. 487 (1963); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956) (states may not impose court and transcript fees to effectively deny an indigent access to his/her fundamental right to a criminal appeal). *But cf.* United States v. Kras, 409 U.S. 434 (1973) (indigents not entitled to a waiver of bankruptcy fees); Ortwein v. Schwab, 410 U.S. 656 (1973) (indigents not entitled to waiver of court costs for civil appeals).

103. Colautti v. Franklin, 439 U.S. 379 (1979).

use oral contraceptives sought an abortion when her alternative means of contraception failed.[104] Prior to the pregnancy, she had been receiving radiation therapy which, if continued, would have serious consequences for the fetus. Because the injunction of the Hyde Amendment was still in effect, the woman was able to obtain an abortion and continue her radiation treatment.[105] After *Harris* v. *McRae,* however, the only economically feasible course available to a similarly situated woman would be to forego vital medical treatment in addition to bearing an unwanted child. As a result, some indigent women will effectively be victimized by the "broad disqualifications" the majority failed to recognize.

The Establishment Clause Challenge

The next issue addressed by the Court concerned the constitutionality of the Hyde Amendment with respect to the establishment clause of the first amendment.[106] In order to withstand this constitutional attack, the Court noted that an enactment must have a "secular legislative purpose,"[107] and that it must neither advance nor inhibit religion,[108] nor "foster an excessive governmental entanglement with religion."[109] The Court found that the Hyde Amendment satisfied this criteria and, therefore, did not violate the establishment clause.[110]

In contrast, the district court found that the Hyde Amendment presented grave first amendment problems.[111] Following an extensive examination of the positions of various religious groups,[112] the lower court determined that the decision to undergo an abortion is

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104. McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y. 1980).

105. *Id.*

106. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion. . . ."

107. 100 S. Ct. at 2689, *quoting* Committee for Pub. Ed. & Rel. Lib. v. Levitt, 461 F. Supp. 1123 (S.D.N.Y. 1978). The secular purpose in the abortion context has generally been recognized as one of social policy. *See* Roe v. Wade, 410 U.S. 113 (1973).

108. 100 S. Ct. at 2689. *See* notes 115-16 *infra* and accompanying text.

109. *Id. See also* Lemon v. Kurtzman, 403 U.S. 602 (1971).

110. 100 S. Ct. at 2689. The Court noted that the mere fact that the Hyde Amendment coincides with the official position of the Roman Catholic Church is not enough to establish it as a legislative embodiment of those beliefs. *See* McGowan v. Maryland, 366 U.S. 420 (1961); Everson v. Board of Education, 330 U.S. 1 (1947).

111. *See* note 66 *supra.*

112. The district court examined the doctrines of the following religious organizations: Roman Catholic, Orthodox Jewish, Lutheran-Missouri Synod, Conservative and Reform Jewish, American Baptist, United Methodist Church, and American Protestant. McRae v. Califano, 491 F. Supp. 630, 690-714 (E.D.N.Y. 1980).

closely allied to a religiously formed conscience.[113] Therefore, a woman's conscientious decision to terminate her pregnancy for health reasons should be doubly protected when exercised in conformity with those religious beliefs and teachings protected by the first amendment.[114]

Abortion and Religious Beliefs: Avoiding the Issue

The Supreme Court's laconic treatment of the establishment clause argument reflects a purposeful avoidance of the single most sensitive and important legal question in the abortion area: "the moment at which the civil right to life vests and becomes a legally protectable interest."[115] Alluding to this issue, the Court categorized the belief that a fetus is a human being from the moment of conception as a "reflection of 'traditionalist' values."[116] In this regard, the Court recognized that this particular belief transcends religious boundaries. A general consensus on the point at which life begins may never be possible. If life at conception could be determined as a biological fact, the controversy would be scientifically resolved, and would cease to pose establishment clause problems.[117]

The Equal Protection Challenge

The Court faced the final constitutional argument that the Hyde Amendment violated the equal protection component of the fifth amendment's due process clause.[118] The Court characterized the equal protection guarantee as one requiring only a rational relationship between a legislative enactment and a legitimate governmental interest.[119] Emphasizing that a statutory scheme is presumptively valid unless it impinges upon a "fundamental" right[120]

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113. *Id.* at 742.

114. *Id. See* Wisconsin v. Yoder, 406 U.S. 205 (1972); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

115. Jonas and Gorby, *West German Abortion Decision: A Contrast to Roe* v. *Wade — with Commentaries*, 9 J. MARSHALL J. 551, 583 (1976).

116. 100 S. Ct. at 2689.

117. *See generally* Note, *Zbaraz* v. *Quern — Abortion and Medicaid: The Public Funding Dilemma*, 12 J. MARSHALL J. 609 (1979).

118. The Hyde Amendment was also attacked on the ground that it is void for vagueness. The Court found the provisions of the Hyde Amendment to be set out in terms readily comprehensible to an "ordinary person exercising ordinary common sense." 100 S. Ct. at 2685 n.17, *quoting* Broadrick v. Oklahoma, 413 U.S. 601 (1973). *See also* Colautti v. Franklin, 439 U.S. 379 (1979).

119. 100 S. Ct. at 2692.

120. Fundamental rights include the right to vote, Dunn v. Blumstein, 405 U.S. 330

or creates a "suspect" classification,[121] the Court employed the two-tiered constitutional analysis.[122] Under this analysis, legislative classifications impinging upon a "fundamental" right or based on suspect criteria not only lose their presumptive validity, but are subject to strict judicial scrutiny which can only be satisfied by the showing of a "compelling governmental interest."[123] All other legislative classifications are valid, however, if they demonstrate a rational relationship to a legitimate governmental objective.[124]

Because the Court had already determined that no fundamental rights had been violated,[125] it focused on whether or not the Hyde Amendment created a "suspect" classification. Employing the *Maher* rationale,[126] the Court ultimately uncovered no suspect criteria or impact which would render the Hyde Amendment unconstitutional.[127] Although the majority recognized that the impact of

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(1972); Carrington v. Rash, 380 U.S. 89 (1965); the right to privacy, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); the right to travel interstate, Shapiro v. Thompson, 394 U.S. 618 (1969); the right to avoid involuntary sterilization, Skinner v. Oklahoma, 316 U.S. 535 (1942); the right of parents to raise and educate their children, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

121. Suspect classifications include those based on race, Loving v. Virginia, 388 U.S. 1 (1967); national origin, Oyama v. California, 332 U.S. 633 (1948); alienage, Graham v. Richardson, 403 U.S. 365 (1971).

122. For a thorough discussion of the equal protection analysis *see* Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *See generally* Barrett, *Judicial Supervision of Legislative Classifications - A More Modest Role for Equal Protection*, B.Y.U.L. REV. 89 (1976); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L.L. REV. 117 (1978); Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).

123. *See* authorities cited in notes 117-18 *supra*.

124. Classifications in the area of economics or social welfare generally fall under this test. *See, e.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (financing of public schools); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (food stamp act exclusion); Ortwein v. Schwab, 410 U.S. 656 (1973) (filing fee to appeal from decision to terminate welfare benefits); United States v. Kras, 409 U.S. 434 (1973) (bankruptcy fees and access to courts); Jefferson v. Hackney, 406 U.S. 535 (1972) (welfare benefits); Dandridge v. Williams, 397 U.S. 471 (1970) (provisions of Aid to Families with Dependent Children program).

125. 100 S. Ct. at 2689. *See* text accompanying notes 85-89 *supra*.

126. 432 U.S. 464 (1977). Maher utilized the rational basis test in the context of nontherapeutic abortions. 432 U.S. 464 (1977).

127. The Supreme Court refuted the district court's finding of a "suspect" class composed of teenage women desiring medically necessary abortions. Because the Hyde Amendment is facially neutral as to age, a showing of purposeful discrimination and not a mere disproportionate impact is required. Washington v. Davis, 426 U.S. 229 (1976). *See also* Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979). Absent such a showing of

the Hyde Amendment falls almost entirely on the indigent, the Court held that in the absence of proof of purposeful discrimination, poverty, standing alone, is not a suspect classification.[128]

Having determined that the Hyde Amendment was not predicated on suspect criteria and that no fundamental right was impinged, the Court applied the lower level "rational basis" test.[129] The Court accepted the government's position that the Hyde Amendment serves the legitimate interest of protecting the potential life of the fetus by encouraging normal childbirth. In addition, the Court found the Hyde Amendment to be rationally related to the government's stated objective. Thus, the Hyde Amendment withstood the equal protection challenge and was found to be constitutionally sound.[130]

In his dissent, Justice Marshall strongly criticized the rigidity in application of the majority's two-tier, strict scrutiny/rational basis approach to equal protection.[131] He failed to see how any legitimate governmental interest is furthered by the Hyde Amendment when balanced against the impact of the amendment on indigent women.[132] Finally, Justice Marshall found it untenable that indigent women should be "treated with the same deference given to legislation distinguishing among business interests" by employing the rational relation standard.[133]

Failure to Apply Strict Scrutiny Analysis

Justice Marshall was justified in criticizing the majority's adherence to the traditional equal protection analysis. The Court, in recent years, has not always followed the "two-tier" approach, but has demanded more than a mere rationality standard in upholding governmental classifications.[134] Unfortunately, the majority did not

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intent, the Hyde Amendment does not violate the equal protection clause with respect to teenage women. 100 S. Ct. at 2691-92 n.26.

128. Harris v. McRae, 100 S.Ct. 2671 (1980); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1972); Dandridge v. Williams, 397 U.S. 471. (1970).

129. 100 S. Ct. at 2693.

130. *Id.*

131. 100 S. Ct. at 2707-08 (Marshall, J., dissenting). *See* Vance v. Bradley, 440 U.S. 93, 113-15 (1979) (Marshall, J., dissenting); Beal v. Doe, 432 U.S. 438, 457-58 (1977) (Marshall, J., dissenting); Massachusetts v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

132. 100 S. Ct. at 2710 (Marshall, J., dissenting).

133. *Id.* at 2708. *See also* Williamson v. Lee Optical, 348 U.S. 483 (1955).

134. *See* Foley v. Connelie, 435 U.S. 291 (1979) (alienage); Trimble v. Gordon, 430 U.S. 762 (1977) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (sex discrimination).

deem it advisable to require a more substantial justification from the government in upholding the Hyde Amendment. The Court stated that it is not its mission "to decide whether the balance of competing interests reflected in the Hyde Amendment is wise social policy."[135] It is, however, the function of the Court to determine if social policy, wise or unwise, contravenes any constitutionally protected rights. The implications of the Hyde Amendment on indigent women, in addition to its serious health ramifications, suggest that justice would be better served by a greater showing of rationality.

Had the Court elected to apply a strict scrutiny analysis requiring the government to demonstrate a compelling governmental interest, the Hyde Amendment could not have been upheld without expressly overruling *Roe* v. *Wade*. This result necessarily follows because the Court in *Wade* did not recognize the compelling interest in potential fetal life until the third trimester. Because it fails to distinguish the various stages of pregnancy, the Hyde Amendment should not survive a constitutional attack, even if the federal government succeeded in establishing its compelling interest in the potential life. It follows, then, that the lack of standards in the Hyde Amendment would render it unconstitutional under strict judicial scrutiny.

Impact of the Hyde Amendment

Harris v. *McRae* represents a further contraction of the right of abortion originally pronounced in *Roe* v. *Wade*. By first allowing elective abortions to be weeded from the scope of Medicaid coverage in *Beal, Maher* and *Poelker*,[136] the Court ostensibly pruned away a significant segment of the abortion right. In further assenting to the termination of Medicaid funds for medically necessary abortions, the Court has dealt a near fatal blow to the right of abortion as it exists for indigent women. The constitutional liberty to secure an abortion free from undue governmental interference now carries a price tag for poverty-stricken women and will be obtainable only by those who can afford to assert that right. As a consequence of the validation of the Hyde Amendment, there will undoubtedly be an upsurge of "back-alley" abortions and unwanted childbirths.[137]

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135. 100 S. Ct. at 2693.

136. *See* notes 30-36 and 54-57 *supra* and accompanying text.

137. 100 S. Ct. at 2706 (Marshall, J., dissenting). Prior to the imposition of the funding

The Hyde Amendment cannot be viewed as a means of reducing welfare costs. In Illinois, the average cost of an abortion is approximately $150, whereas the cost of a childbirth exceeds $1350.[138] The total increase in Medicaid and related costs associated with childbirth is estimated to be about $20,000,000 per fiscal year in Illinois alone.[139] Consequently, it is apparent that not only indigent pregnant women but the taxpayer as well will feel the impact of the Hyde Amendment.

It is ironic that the Supreme Court can rationalize the denial of public funds for therapeutic abortions in a program designed to finance medically necessary health services. In so doing, the Court not only exhibits a disregard for the plight of indigent women, but sets dangerous precedent as well. By conditioning the receipt of Medicaid benefits on the surrender of the constitutional right to obtain an abortion, the Supreme Court effectively obliterates that right. *Harris* v. *McRae* could very well be the harbinger of the eventual defeat of *any* fundamental, personal right enjoyed by the indigent; the exercise of which now appears dependent upon congressional discretion in the field of public funding.

Conclusion

The dangers inherent in upholding the Hyde Amendment are of immense proportion. If an appropriations bill can effectively curtail the assertion of a constitutional right, then the very foundation of that right is endangered. The appropriate vehicle for altering fundamental rights is the Constitution itself, and nothing short of a constitutional amendment should be allowed to single out and crush a constitutionally protected freedom. By continuing its policy of deferring to the legislature the resolution of sensitive and controversial socio-economic issues, the Supreme Court is gradually abandoning its post as guardian of constitutional rights.

Kris Palencia

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restrictions contained in the Hyde Amendment, 295,000 abortions were federally funded, although approximately 133,000 women eligible for Medicaid benefits were unable to obtain abortions. Trussell, Menken, Lindheim & Vaughan, *The Impact of Restricting Medicaid Financing for Abortion*, 12 Family Planning Perspectives 120, 129 (1980).

With the dissolution of the injunction forbidding the enforcement of the Hyde Amendment in 1977, the number of federally funded abortions fell to 2,000 and the unment need for Medicaid-funded abortions rose to about 234,000 for fiscal year 1978. *Id.*

138. 100 S. Ct. at 2715 n.9 (Stevens, J., dissenting).

139. *Id.*