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Abortion Funding Restrictions: State Constitutional Protections Exceed Federal Safeguards

ABORTION FUNDING RESTRICTIONS: STATE CONSTITUTIONAL PROTECTIONS EXCEED FEDERAL SAFEGUARDS

A concept of personal liberty antedating the United States Constitution inhibits state intrusion in some spheres of human activity otherwise unprotected against governmental intrusion.[1] Neither the United States Constitution nor the Bill of Rights explicitly protects an individual's right to privacy.[2] Nevertheless, constitutional decisions of the United States Supreme Court delineate a right to privacy that limits the exercise of governmental authority affecting decisions and activities the Court considers within the purview of the individual.[3] In *Roe v.*

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[1] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-3 (1978) [hereinafter cited as TRIBE]. The right to privacy, once defined as the right to be left alone by the government, may be "the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *But see* Katz v. United States, 389 U.S. 347, 353 (1967) (overruling Olmstead v. United States on other grounds). Professor Tribe identifies natural law, common law, and statutes as possible sources of the individual's right to be left alone. TRIBE, *supra*, § 15-3. Tribe notes, however, that none of the three sources adequately protects the contemporary notion of privacy. *Id.* The commentator suggests that the source of individual liberty is an inalienable right protected by the due process clauses of the fifth and fourteenth amendments of the United States Constitution. *Id.* (citing Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting)). *See generally* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1970) [hereinafter cited as Henkin]; Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973). The realm of family life is one area with which the state generally may not interfere. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 229-34 (1972) (parents' right to withdraw from school, for religious reasons, children who have acquired a basic education); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (parents' right to send child to private school); Myer v. Nebraska, 262 U.S. 390, 399-403 (1923) (parents' right to have children learn German in school).

[2] Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (right to privacy exists although not specifically articulated in Constitution). *See also* Doe v. Bolton, 410 U.S. 179, 209 n.2 (1973) (Douglas, J., concurring) (right to privacy not mentioned in Bill of Rights); Craven, Jr., *Personhood: The Right to Be Let Alone*, 1976 DUKE L. J. 699, 700-02 (advocating distinction between degree of constitutional protection afforded fundamental rights and that afforded more ordinary rights).

[3] *See generally* Henkin, *supra* note 1; Kauper, *Penumbras, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965) [hereinafter cited as Kauper]. In 1905, the Supreme Court recognized the existence of a sphere within which the individuals' will reigned supreme and the individual rightfully could dispute governmental authority to interfere with the exercise of his will. Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905). The *Jacobson* Court upheld the validity of a local regulation providing for free compulsory vaccinations of all adults, noting that the constitutional guarantee of liberty does not imply an absolute right to be wholly free from any public restraint. *Id.* at 25-26. Subsequent cases also recognized that the individual's right to privacy coexists and often conflicts with the state's police power. *See, e.g.*, Whalen v. Roe, 429 U.S. 589, 596-98 (1977) (upholding, as reasonable exercise of police power, statute requiring computerized records of persons receiving prescription drugs for which both legal and

Wade,[4] the Supreme Court declared that the right to privacy encompasses a woman's decision to terminate her pregnancy during the first trimester.[5] In the same decision the Court emphasized that the state re-

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illegal markets exist); Sosna v. Iowa, 419 U.S. 393, 406-09 (1975) (state interest in family relations sufficient to justify one year of residency as prerequisite to divorce); Stanley v. Georgia, 394 U.S. 557, 564-66 (1969) (categorization of materials as obscene insufficient to justify criminal penalties for private possession). *See also* Isaacs, *The Law of Fertility Regulation in the United States*, 19 J. FAM. L. 65, 65-68 (1980) [hereinafter cited as Isaacs]. The zone of privacy that the Constitution accords the individual encompasses both the right to avoid disclosure of personal matters and the right to make certain important decisions independently. Whalen v. Roe, 429 U.S. 589, 599-600 (1977); *see* Paul v. Davis, 424 U.S. 693, 714 (1976) (areas of decision include marriage, child rearing and education, procreation, contraception, and family relationships). *But see* Kelley v. Johnson, 425 U.S. 238, 245-49 (1976) (policeman has no fundamental right to privacy in deciding how to groom hair).

The Supreme Court explicitly recognized the fundamental right to privacy in making procreative decisions in *Griswold v. Connecticut*, invalidating a Connecticut statute forbidding the use of contraceptives by married couples. 381 U.S. 479, 485-86 (1965). The Court did not agree on any specific Bill of Rights provision as the basis of the asserted constitutional right to privacy. Justice Douglas, writing for the majority, found that the right emanates from the penumbras of the first, third, fourth, fifth, and ninth amendments, applicable to the states through the fourteenth amendment. *Id.* at 484-85. The first amendment protects free speech and association. U.S. CONST. amend. I. The third amendment protects against forced quartering of troops in citizens' homes, and the fourth amendment protects citizens against unreasonable search and seizure. U.S. CONST. amend. III, IV. The fifth amendment protects individuals against compulsory self-incrimination. U.S. CONST. amend. V. The ninth amendment reserves to the people rights not enumerated specifically in the Constitution. U.S. CONST. amend. IX. Concurring, Justice Goldberg found the right to privacy to be among the ninth amendment rights not explicity enumerated in the first eight amendments to the Constitution. 381 U.S. at 499. Justices Harlan and White, also concurring, derived the right to privacy from the protection the fourteenth amendment due process clause affords liberty. *Id.* at 500, 502-04. Justices Stewart and Black dissented, dissatisfied with the statute but unable to find any constitutional right of privacy that would support striking the statute. *Id.* at 507, 527. Justice Black strongly criticized the majority's apparent reliance on the doctrine of substantive due process, *see* note 18 *infra*, which the Court had discredited earlier. 381 U.S. at 520-24 (Black, J., dissenting). *See generally* Kauper, *supra* note 3.

The right to privacy in procreative decisions is an individual right rather than a right peculiar to marriage relationships, and the state may not limit the exercise of the right by married couples or single individuals. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (statute regulating distribution of contraceptives to unmarried persons invalidated). *See also* Carey v. Population Serv. Int'l, 431 U.S. 678, 687-91 (1977) (state may not ban commercial distribution of nonprescription contraceptives to minors or restrict sales to adults).

[4] 410 U.S. 113 (1973).

[5] *Id.* at 153. The Supreme Court in *Roe v. Wade* determined that the basis of the right to privacy is the fourteenth amendment concept of personal liberty and restrictions on state activity. *Id.*; *see* note 3 *supra* (concurring opinions of Justices Harlan and White in *Griswold*). The fourteenth amendment prohibits the states from depriving any person of life, liberty, or property without due process of the law. U.S. CONST. amend. XIV § 1. The *Roe* Court characterized as fundamental the woman's right to decide whether to terminate her pregnancy or give birth. 410 U.S. at 155. Justice Rehnquist, dissenting in *Roe*, noted that the right to an abortion is not so integral to the American tradition and conscience that the Court should characterize it as fundamental. *Id.* at 174. A fundamental right is one "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937). *But see* Benton v. Maryland, 395 U.S. 784 (1969) (overruling Palko v. Connecticut on other grounds). The exact contours of the right to privacy remain undetermined, *see* Adamson v.

tains an interest in protecting the health of the mother[6] and the potential life of the fetus.[7] *Roe* and the companion case of *Doe v. Bolton*[8] invalidated most state legislation regulating abortion.[9] Legislatures

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California, 332 U.S. 46, 53-55 (1947), although the Supreme Court has defined a fundamental right as one the Constitution implicitly or explicitly protects. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (defining fundamental right in equal protection context); note 19 *infra*.

As the *Roe* Court noted, only a compelling state interest may justify a regulation limiting the exercise of a fundamental right such as the right to privacy. 410 U.S. at 155-56. *See also* Kramer v. Union School Dist., 397 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Legislation limiting the exercise of a fundamental right must be narrow and specific, accomplishing only the legitimate state interest at stake. 410 U.S. at 155-56. The *Roe* Court's fourteenth amendment analysis, as Justice Stewart frankly conceded in his concurring opinion, is reminiscent of the disfavored doctrine of substantive due process. *Id.* at 167-68; *see* note 18 *infra* (substantive due process). *See generally* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807 (1973); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920 (1973); Heymann and Barzelay, *The Forest and the Trees:* Roe v. Wade *and its Critics*, 53 B.U.L. REV. 765 (1973); Perry, *Abortion, The Public Morals and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) [hereinafter cited as Perry]; Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 B.Y.U. L. REV. 811 [hereinafter cited as Wardle].

The *Roe* Court noted that the right to privacy in making the abortion decision is not absolute. 410 U.S. at 154. The degree of the state interest in limiting a woman's access to abortion, while always legitimate, becomes compelling enough to justify regulation only after the first trimester. *Id.* at 162-63; *see* note 3 *supra* (certain state interests may justify limiting exercise of personal liberty); text accompanying notes 6-7 *infra* (state interest during second trimester and after viability). *Compare* Roe v. Wade, 410 U.S. 113, 163 (1973) (woman and attending physician free to make abortion decision without state interference or regulation) *with* Planned Parenthood v. Danforth, 428 U.S. 52, 65-67, 79-81 (1976) (state may require physician to inform patient about dangers of and alternatives to abortion, obtain prior written consent from woman, and demand that doctors and health facilities report information about abortions performed) *and* Connecticut v. Menillo, 423 U.S. 9, 10-11 (1975) (state may prohibit nonphysicians from performing first trimester abortions).

[6] Roe v. Wade, 410 U.S. 113, 163 (1973) (state interest in protecting mother's health becomes compelling enough to support state regulation reasonably directed at maternal health after first trimester).

[7] *Id.* at 163-64 (state interest in potential human life becomes compelling after viability and will support proscription of abortions except when necessary to preserve mother's life or health). The *Roe* Court defined viability as the point at which the fetus is capable of meaningful life outside the womb, *id.* at 163, or has the potential to live outside the womb, albeit with artificial aid. *Id.* at 160. The Court has adhered to its decision that viability is the dividing line between the woman's right to abortion and the state's power to limit the right. *See* Colautti v. Franklin, 439 U.S. 379, 388-89 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 63-65 (1976). But, the Court's characterization of viability as a matter of medical judgment, skill, and technical ability, 428 U.S. at 64, frequently provides an inexact standard, particularly when state statutes do not provide uniform definitions of viability and may render a physician criminally liable for misjudgments. *See* Comment, *Survey of Abortion Law*, 1980 ARIZ. ST. L. J. 128-39 [hereinafter cited as *Survey*].

[8] 410 U.S. 179 (1973).

[9] *See* Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L.Q. 313, 314 & n.4 (1981) [hereinafter cited as Gold-

responded to the decisions with new statutory enactments, many of which restrained women attempting to exercise their right to elect an abortion rather than childbirth.[10]

Constitutional challenges to post-*Roe* statutes have embroiled courts in the controversy surrounding the scope of a woman's right to obtain an abortion and the state's concommitant authority to regulate certain aspects of the decision.[11] In evaluating the constitutionality of

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stein]; Survey, *supra* note 7, at 106-11. In 1973, only New York, Alaska, Hawaii, and Washington permitted abortion on demand, subject solely to procedural requirements. *See* ALASKA STAT. § 11.95.060 (1970); HAWAII REV. STAT. § 453-16 (Supp. 1971); N.Y. PENAL CODE § 125.05 (McKinney Supp. 1972-73); WASH. REV. CODE §§ 9.02.060-9.02.080 (Supp. 1972). The *Roe* Court struck down a Texas penal statute imposing criminal sanctions for procuring or attempting to procure an abortion except when necessary to save the mother's life. *See* Roe v. Wade, 410 U.S. at 117-18; TEX. STAT. ANN. §§ 1191-1196 (Vernon 1961), transferred to §§ 4512.6-.7 (Supp. 1973)). A majority of the states had similar statutes. Roe v. Wade, 410 U.S. at 118 n.2. In *Doe*, the Supreme Court invalidated a Georgia statute based on the Model Penal Code. *See* Doe v. Bolton, 410 U.S. at 182; GA. CODE ANN. § 26-1201-03 (1971), *reprinted in* 410 U.S. at 202-05; MODEL PENAL CODE § 230.3 (Proposed Draft 1962). The Court invalidated the Georgia statute's restriction of abortions to Georgia residents, and the statute's requirements that a doctor perform the abortion in an accredited hospital, with the approval of the hospital staff and only after two physicians confirmed the attending physician's decision. *See* Doe v. Bolton, 410 U.S. at 193-201.

[10] *See* NEV. REV. STAT. § 28-4 (1974) (declaration of purpose in post-*Roe* abortion law expressing dissatisfaction with *Roe* decision and intent to limit abortion as much as constitutionally permitted). The Rhode Island legislature unsuccessfully attempted to establish a conclusive presumption that human life begins at conception. *See* R.I. GEN. LAWS § 11-3-4 (1973) (declared unconstitutional, Doe v. Israel, 482 F.2d 156 (1st Cir. 1973), *cert. denied*, 416 U.S. 993 (1974)). *See generally* Bryant, *State's Legislation on Abortion after* Roe v. Wade: *Selected Constitutional Issues*, 2 AM. J. L. & MED. 101 (1976). The United States Congress enacted several versions of the "Hyde Amendment," riders to the appropriations bills of the Departments of Labor and Health, Education and Welfare, that limited federal reimbursement of state payments for abortions under the Social Security Act. *See* text accompanying note 14 *infra*.

[11] *See, e.g.*, H. L. v. Matheson, 450 U.S. 398, 407-10 (1981) (upholding statute requiring parental notice prior to abortion); Nyburg v. City of Virginia, 667 F.2d 754, 757-58 (8th Cir. 1982) (city ordinance not allowing doctors to use municipal hospital for abortions unless necessary to save life of mother held unconstitutional); Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 334-38 (5th Cir. 1981) (zoning decision barring abortion clinic in commercial zone constitutes direct burden on abortion decision not justified by significant state interest); Valley Family Planning v. North Dakota, 661 F.2d 99, 101-02 (8th Cir. 1981) (invalidating state statute denying public funds to family planning organizations providing abortion referral services); Scheinberg v. Smith, 659 F.2d 476, 485-87 (5th Cir. 1981) (state interest in promoting institution of marriage and husband's interest in procreative potential of marriage sufficient to justify burden that statutory spousal notice provision imposed); Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1205-08, 1211 (6th Cir. 1981) (holding unconstitutional provisions of municipal ordinance requiring parental consent to minor's abortion, informed consent obtained by physician, 24 hour delay between signing consent and obtaining abortion, and humane disposal of fetus), *cert. denied*, 102 S. Ct. 2268 (1982); Women's Medical Center of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1145-54 (D.R.I. 1982) (informed consent statute unduly burdens constitutional right to privacy); American Federation of Gov't Employees, 525 F. Supp. 250, 252-53 (D.D.C. 1981)

governmentally erected obstacles, the Supreme Court has distinguished direct state interference from indirect interference, and has invalidated only direct state interference.[12] The Court has upheld, as an indirect burden on the exercise of the fundamental right to obtain an abortion, the curtailment of government funding for the abortions of indigent women otherwise covered by the Medicaid program, Title XIX of the Social Security Act (Title XIX or Medicaid).[13] The United States

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(Office of Personnel Management enjoined from excluding therapeutic abortions from federal employees' health benefits plan).

[12] *See* Harris v. McRae, 448 U.S. 297, 314-18 (1980); Maher v. Roe, 432 U.S. 464, 474-75 (1977). The *McRae* and *Maher* Courts specifically distinguished direct state interference with a protected activity from state encouragement of an alternate activity. 448 U.S. at 315; 432 U.S. at 475. The Supreme Court asserted that indigency, not the state-imposed restrictions on medicaid funding, limits access to abortion. 448 U.S. at 315; 432 U.S. at 474; *see* text accompanying notes 34 & 54 *infra*. The dissents in *Maher* and *McRae* sharply contested the legitimacy of the Courts' distinction. *See* text accompanying notes 44 & 60 *infra*.

The *Maher* Court asserted that earlier decisions justified the distinction between direct and indirect burdens. 432 U.S. at 475-76 (citing Buckley v. Valeo, 424 U.S. 1 (1976) and American Party v. White, 415 U.S. 767 (1974)). In *Buckley* the Court upheld the selective public funding of presidential campaigns as an indirect burden, noting that minor party candidates' inability to campaign effectively derives from the inability to obtain private contributions rather than from the lack of public funding. 424 U.S. at 94-96. The *Buckley* court, however, subjected the funding provisions to a more stringent review than the rational relation test the *Maher* majority employed to evaluate the abortion funding restrictions. *See* Yarbrough, *The Abortion Funding Issue: A Study in Mixed Constitutional Clues*, 59 N.C. L. REV. 611, 617-18 (1981) [hereinafter cited as Yarbrough]. In *American Party*, the Court invalidated the more direct burden imposed by restrictions on candidates or party access to ballot. 415 U.S. at 794-95.

The Court had more difficulty distinguishing cases invalidating governmental refusals to disperse benefits to individuals exercising constitutional rights. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974) (invalidating one year residency requirement conditioning receipt of medical benefits); Shapiro v. Thompson, 394 U.S. 618, 627-38 (1969) (invalidating residency requirement conditioning receipt of welfare benefits); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (invalidating state refusal to disperse unemployment compensation to woman unwilling, for religious reasons, to accept employment requiring Saturday labor). *See also* Yarbrough, *supra*, at 615-20.

[13] *See* Harris v. McRae, 448 U.S. 297, 311, 326-27 (1980); Maher v. Roe, 432 U.S. 464, 478-79 (1977); text accompanying notes 31, 39 & 48-57 *infra*. *See also* 42 U.S.C. § 1396 (1976 & Supp. III 1979). Title XIX of the Social Security Act (Title XIX or Medicaid) provides partial federal reimbursement to participating states assisting medically needy people with medical costs. *Id.* States must fund medical services to the categorically needy, *id.* § 1396(a)(6)(A), but need not fund services to the medically needy, *id.* § 1396(a)(10)(C). States participating in the medicaid program must provide medical treatment in five categories, including family planning services. *Id.* § 1396d(a). Title XIX does not require states to fund all medical treatment in every category, but each state must establish reasonable standards commensurate with the statute's purpose for determining the extent of medical services the state will fund. *Id.* § 1396a(17).

State statutes restricting medicaid funding of abortions for indigent women are of varying severity. *See, e.g.*, Preterm, Inc. v. Dukakis, 591 F.2d 121, 122-23 (1st Cir. 1979) (Massachusetts statute precluded abortion funding unless abortion necessary to preserve

Congress has enacted a series of amendments to annual appropriations bills, popularly labelled the Hyde Amendments, that deny federal reimbursement to states that authorize Medicaid funding for certain categories of abortions.[14] The Supreme Court sustained the constitutionality of Hyde Amendment funding restrictions on both nontherapeutic and therapeutic abortions.[15] The Supreme Court further determined that neither Title XIX nor the United States Constitution mandates state funding of any abortion in the absence of federal reimbursement for the expenditure.[16] In upholding the legislative curtailment of Medicaid allocations for the abortions of indigent women,[17] the Supreme Court rejected substantive due process[18] and equal protec-

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mother's life or in cases of rape or incest properly reported), *cert. denied*, 441 U.S. 952 (1979), *appeal dismissed*, 448 U.S. 90 (1980); D.R. v. Mitchell, 456 F. Supp. 609, 610 (D. Utah 1978) (Utah statute precluded funding of abortions except when necessary to preserve woman's life), *rev'd*, 617 F.2d 203 (10th Cir. 1980); Doe v. Busbee, 471 F. Supp. 1326, 1329 (N.D. Ga. 1979) (Georgia regulation authorized funding when abortion necessary to preserve mother's life or protect against severe damage to mother's health, or in cases of rape or incest properly reported). *See generally* Isaacs, *supra* note 3; Comment, *The Hyde Amendment: An Analysis of its State Progeny*, 5 UNIV. DAYTON L. REV. 313 (1980). Congressionally imposed federal restrictions on medicaid funding have differed from year to year. *See* note 14 *infra* (discussion of Hyde Amendments).

[14] *See* Pub. L. No. 96-369, § 101(c), 94 Stat. 1352 (1981) (states may refuse to fund any Medicaid abortion services); Pub. L. No. 96-536, § 109, 94 Stat. 3170 (1980) (limits federal abortion funding to life endangering situations, certain pregnancies resulting from rape or incest, and ectopic pregnancies); Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979) (no funding for abortion except when life of mother endangered or when pregnancy is result of promptly reported rape or incest); Pub. L. No. 95-480, § 120, 92 Stat. 1586 (1978) (no funding of abortion except when life of mother endangered, when pregnancy is result of promptly reported rape or incest, or when two physicians determine pregnancy would result in severe long term health problems for mother); Pub. L. No. 94-205, § 101, 91 Stat. 1460 (1977) (same); Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976) (no funds for abortions except when life of mother endangered by carrying fetus to term). *See also* note 13 *supra* (Medicaid provisions of Social Security Act, 42 U.S.C. § 1396 (1976 & Supp. III (1979)).

[15] *See* Harris v. McRae, 448 U.S. 297, 326-27 (1980) (holding constitutional the 1979 Hyde Amendment, denying federal reimbursement to states for certain therapeutic abortions); text accompanying notes 48-61 *infra*.

An abortion is the premature expulsion of a developing child from the womb prior to viability whether the expulsion is spontaneous or induced. *See* 1 J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER A-16 (1981). A therapeutic abortion is one induced to save the life of the mother, or for other justifiable reasons. *See id.* at A-17. Justifiable reasons include serious malformation of the fetus, or a pregnancy resulting from rape or incest. *See id.* A nontherapeutic abortion is once induced at the request of the woman or her doctor.

[16] *See, e.g.*, Williams v. Zbaraz, 448 U.S. 358, 369 (1980) (upholding state statute limiting state assistance payments for abortions to those necessary to save woman's life); Harris v. McRae, 448 U.S. 297, 306-11 (1980) (Title XIX does not require states to fund medically necessary abortions absent federal reimbursement).

[17] *See* notes 13-14 *supra*.

[18] *See* note 20 *infra*. The *Roe* Court's grounding of the right to privacy in the fourteenth amendment's due process clause, *see* note 5 *supra* , evidences the renewed reliance on substantive due process that *Griswold*, *see* note 3 *supra*, foreshadowed. *See* Perry, *supra*

note 5, at 689-92; TRIBE, *supra* note 1, at 924 n.5. Professor Perry asserts that substantive due process connotes a public welfare limit on the legislative perogative to invade an individual's life, liberty or property. *See* Perry, *supra* note 5, at 700. Legislation that does not promote the general welfare thus constitutionally is beyond the reach of state authority. *Id.* at 726-27. The dividing line between statutes that promote the general welfare and those that do not is never clear, particularly in areas of public morals, when the legislature attempts to impose societal values on the individual. *Id.* One commentator posits that courts possess a constitutional and practical mandate to act as "juries" and evaluate legislative activities infringing on personal morality. *Id.* at 728-33. This mandate constitutes the basis of substantive due process. *Id. See also* Wardle, *supra* note 5, at 815-33 (discussion of the contours of the judicial deference owed legislative decisions impinging on personal and societal concepts of morality).

Judicial support for the idea that state exercise of police powers through economic regulation infringes on privacy rights developed gradually after the Civil War. *See* Perry, *supra* note 5, at 700. In 1873, the Court determined that regulation of the butcher's trade did not constitute deprivation of property without due process of law, thus implying a substantive element to the fourteenth amendment. Slaughterhouse Cases, 83 U.S. (16 Wall) 36, 80-81 (1873). Similarly, the Court invoked a judicial duty to protect implied or reserved individual rights to invalidate a state tax as an unlawful appropriation of private property. Loan Ass'n v. Topeka, 87 U.S. (20 Wall) 655, 662-65 (1874). The Court also upheld legislation prohibiting the manufacture and sale of intoxicating liquors, challenged as a deprivation of property without due process of law. Mugler v. Kansas, 123 U.S. 623, 660-64 (1887). In *Lochner v. New York*, the Supreme Court struck down a New York statute regulating bankers' hours as an invalid interference with the freedom of contract inherent in the fourteenth amendment's protection of property. 198 U.S. 45, 53 (1905). *Lochner* and its progeny represent a thirty-two year hey-day of substituting judicial for legislative judgment that the Court implicitly rejected during the 1930's. *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937) (upholding minimum wage legislation). The Court explicitly repudiated the doctrine of substantive due process in 1949. Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 536-37 (1949) (courts should not construe due process clause so broadly that Congress and state legislatures are unable to regulate conditions deemed offensive to public welfare). *See generally* TRIBE, *supra* note 1, §§ 8-6, 8-7; Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation*, 15 ARIZ. L. REV. 419 (1973); McClosky, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. Nevertheless, the Supreme Court did not abandon substantive due process, although the Court never invoked the doctrine by name. *See, e.g.*, Williams v. Lee Optical Co., 348 U.S. 483 (1955); note 3 *supra* (right to privacy cases).

Substantive due process provides an analytical framework for examining the legitimacy of state actions affecting personal liberty. The state police power is the state interest in regulating matters of health, safety, welfare, and morality for the common good. *See* Isaacs, *supra* note 3, at 66. Courts uphold police power regulations when the law is reasonable and advances a legitimate state purpose. *See* Mugler v. Kansas, 123 U.S. 623, 663 (1887). When the exercise of the police power impinges on a constitutionally protected or fundamental right such as the right to privacy, courts apply a more stringent test than mere rationality. *See* Kramer v. Union Free School Dist., 397 U.S. 621, 627 (1969). The state must show that the law is necessary and narrowly drafted to promote a compelling state interest. *See* Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964); Isaacs, *supra* note 3, at 67 n.5; note 3 *supra* (right to privacy is fundamental right); note 5 *supra* (compelling state interest standard in context of abortion regulation). Statutes generally pass constitutional muster when courts apply the rational relation test. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 478-80 (1977). Courts applying the compelling state interest standard, however, rarely sustain challenged statutes. *See, e.g.*, Carey v. Population Serv., Int'l, 431 U.S. 678, 690-91 (1977). *But see* Korematsu v. United States, 323 U.S. 214, 216-20 (1944) (upholding Japanese internment during World War II).

tion[19] challenges to the statutes.[20] At the same time, the Court acknowledged the probability that the funding restrictions would

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[19] *See* note 20 *infra*. Equal protection demands legislative rationality in the selection of the class singled out for special treatment. Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966). Courts test rationality by examining whether the statutory classification is "reasonable in light of its purpose." McLaughlin v. Florida, 379 U.S. 184, 191 (1964). Professor Tribe argued that deference to legislative purpose encourages courts to equate the rationality requirement with a strong presumption of constitutionality. *See* TRIBE, *supra* note 1, § 16-2. Courts, thus, are tolerant of underinclusive or overinclusive classifications unless the classifications clearly result from the arbitrary exercise of power. Parham v. Hughes, 441 U.S. 347, 351 (1979); Matthews v. DeCastro, 429 U.S. 181, 185 (1976). When the challenged legislative classification hinders the exercise of a fundamental right or burdens a suspect classification, however, courts subject the statute to strict scrutiny and will hold it unconstitutional absent a compelling justification. *See, e.g., In re* Griffiths, 413 U.S. 717, 721-22 (1973) (state failed to meet heavy burden justifying use of suspect classification when state denied resident aliens admission to bar); Shapiro v. Thompson, 394 U.S. 618, 627-38 (1969) (fundamental right to travel impinged by depriving indigents of welfare benefits because of less than 1 year's residency); Brown v. Board of Educ., 347 U.S. 483, 486-96 (1954) (legally compelled segregation of students held inherently unequal treatment that violates equal protection clause). Although strict in theory, the standard generally is fatal in actuality. *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Protection*, 86 HARV. L. REV. 1, 118 (1972) [hereinafter cited as Gunther].

When the classification does not impinge on a fundamental right or a suspect class, courts subject a statute only to the minimal scrutiny of the rational basis test. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976) (per curiam); Lindsey v. Normet, 405 U.S. 57, 73-74 (1972). *See generally* Gunther, *supra*; Tussman &tenBroek, *The Equal Protection of the Laws*, 27 CAL. L. REV. 341 (1949).

The Burger Court has developed an intermediate standard of review, applied when neither the compelling state interest nor the minimal rationality standard of scrutiny appears appropriate. *See* Craig v. Boren, 429 U.S. 190, 210-11 n.24 (1971) (Powell, J., concurring) (recognizing dissatisfaction with "two-tier" approach to equal protection analysis in application to gender-based classification); TRIBE, *supra* note 1, at § 16-30; Yarbrough, *supra* note 12, at 612. Legislation employing sensitive but not suspect classifications or impinging on important but not fundamental rights may trigger intermediate review. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 770-76 (1977) (invalidating statute depriving illegitimate children of inheritance when father died intestate because not least restrictive means of achieving state interest in promoting family relationship); Craig v. Boren, 429 U.S. 190, 197-202 (regulation authorizing sale of 3.2% beer to females at younger age than males insufficiently related to legitimate legislative attempt to protect public health and safety); Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976) (invalidating rule barring aliens from federal civil service employment because importance of right outweighs advanced justification of administrative convenience); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1974) (overly restrictive maternity leave policy heavily burdens protected freedoms); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (father's interest in retaining custody of children mandates more than minimal scrutiny).

[20] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 326-27 (1980) (upholding constitutionality of 1979 Hyde Amendment denying federal reimbursement to states for certain medically necessary abortions); Maher v. Roe, 432 U.S. 464, 469-80 (1977) (constitutional for state to fund childbirth expenses for indigent women while refusing to fund nontherapeutic abortions).

preclude most indigent women from exercising their right to obtain an abortion.[21]

Several recent state court decisions, however, have sustained challenges to funding restrictions based on state constitutional protections.[22] Massachusetts and Connecticut courts have held that the due process provisions of the Massachusetts and Connecticut constitutions require those states' Medicaid programs to fund therapeutic abortions, despite the lack of federal reimbursement.[23] The California Supreme Court has ruled that the state may not condition receipt of a governmental benefit on the abdication of the constitutional right to an abortion.[24] State courts, thus, have interpreted state constitutional protections of the right to privacy as more encompassing than federal courts have found similar federal constitutional provisions.[25]

The United States Supreme Court first addressed the validity of state statutory restrictions on medicaid funding of abortions in *Beal v. Doe*.[26] The *Beal* Court held, as a matter of statutory construction, that Title XIX does not require states participating in the Medicaid program to fund nontherapeutic abortions.[27] The Court reasoned that Title XIX

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[21] *See* Harris v. McRae, 448 U.S. 297, 314-15 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977).

[22] *See* text accompanying notes 63-65 *infra*.

[23] *See* text accompanying notes 66-81 *infra*.

[24] *See* text accompanying notes 82-94 *infra*.

[25] *See* People v. Brisendine, 13 Cal. 3d 528, 550-51, 531 P.2d 1099, 1113-14, 119 Cal. Rptr. 315, 329-30 (1979) (California constitution provides greater protection against unreasonable search and seizure than fourth amendment); Commonwealth v. Triplett, 462 Pa. 244, _____, 341 A.2d 62, 64 (1975) (defendant's statement, suppressed by suppression court, is inadmissable to impeach credibility of defendant testifying at trial, in opposition to Harris v. New York, 401 U.S. 222 (1971)); State v. Kaluna, 55 Hawaii 361, _____, 520 P.2d 51, 55-58 (1974) (Hawaii constitution affords greater protection against unreasonable search and seizure than fourth amendment). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 891-907 (1976); Wilkes, *More on the New Federalism in Criminal Procedure*, 62 KY. L. J. 873 (1975).

[26] 432 U.S. 438 (1977).

[27] *Id.* at 447; *see* note 13 *supra* (Title XIX). Plaintiffs in *Beal* challenged a Pennsylvania regulation limiting state funding of abortions to cases in which the physician certified the abortion to be medically necessary. 432 U.S. at 441; *see* 3 Pennsylvania Bulletin, 2207, 2209 (Sept. 29, 1973) *cited in* Brief for Petitioners at 4, Beal v. Doe, 432 U.S. 438 (1977). The Pennsylvania regulation identifies several categories of medically necessary abortions. 432 U.S. at 441 n.3. In Pennsylvania, an abortion is medically necessary when documentary evidence supports the physician's determination that the pregnancy constitutes a threat to the mother's health, that the pregnancy is the result of statutory or forcible rape or incest and may be a threat to the woman's mental or physical health, or that the infant may be born mentally deficient or deformed. *Id.* The regulation further requires that two competent physicians certify in writing that they concur in the attending physician's decision and that the doctor perform the abortion in an accredited hospital. *Id.*

The *Beal* plaintiffs alleged that Title XIX requires participating states to fund nontherapeutic abortions. *Id.* at 440. The *Beal* plaintiffs also alleged that the Pennsylvania

grants the states broad discretion to determine what unnecessary medical services to fund,[28] as long as the eligibility requirements and the extent of benefits comport with the statute's objectives.[29] A state's refusal to fund nontherapeutic abortions is consistent with Title XIX's primary objective, the furnishing of medical assistance to individuals with insufficient income to defray necessary medical expenses.[30]

The United States Constitution does not obligate states participating in the Medicaid program to fund nontherapeutic abortions, even when the state does fund the childbirth expenses indigent women incur.[31] In *Maher v. Roe*,[32] the Supreme Court rejected the plaintiffs' argument that state funding of childbirth but not abortion expenses constitutes discriminatory funding in violation of the equal protection clause of the fourteenth amendment.[33] The *Maher* Court determined that indigent women desiring abortions are not a suspect class[34] and that the

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regulation violated both the fourteenth amendment equal protection guarantee and the statutory mandate of Title XIX. *Id.* at 442. The federal district court found no statutory violation but upheld the equal protection challenge to the statute's constitutionality. Doe v. Wohlgemuth, 376 F. Supp. 173, 186, 191 (W.D.Pa. 1974), *modified*, 523 F.2d 611 (3d Cir. 1975). The Third Circuit reversed the district court, holding that the state statute conflicted with Title XIX, and thus was void, without examining the constitutional issue. Doe v. Beal, 523 F.2d 611, 621-22 (3d Cir. 1975) (en banc), *rev'd*, 432 U.S. 438 (1977). The Supreme Court therefore resolved only the question of statutory construction. 432 U.S. at 443-44.

[28] 432 U.S. at 444.

[29] *Id.*; *see* 42 U.S.C. § 1396(a)(17) (1976 & Supp. III 1979) (states need not fund all medical procedures, but must articulate reasonable standards consistent with Title XIX's purpose for distinctions made).

[30] 432 U.S. at 444-45; *see* 42 U.S.C. § 1396(a)(10)(c) (1976 & Supp. III 1979) (purpose of medicaid program is to provide necessary medical services to individuals with incomes insufficient to defray costs themselves). The *Beal* Court reasoned that since nontherapeutic abortions are not necessary medical services, states need not provide medicaid funding for them. 432 U.S. at 44-45. The Court further noted that the state's significant interest in encouraging normal childbirth throughout the pregnancy justifies a refusal to undercut this interest by funding elective abortions. *Id.* at 445-46.

Justice Brennan, dissenting, argued that therapeutic abortion, nontherapeutic abortion, and childbirth constitute alternate medically necessary treatment for pregnancy. *Id.* at 449-52. A state may elect not to fund treatment for pregnancy, but once a state decides to fund treatment, Title XIX does not authorize the state to fund some pregnancy treatments and not others. *See id.* at 449-51.

[31] Maher v. Roe, 432 U.S. 464, 466, 478-79 (1977). *See also* Poelker v. Doe, 432 U.S. 519, 521-22 (1977) (per curiam).

[32] 432 U.S. 464 (1977).

[33] *Id.* at 478-79; *see* note 19 *supra* (equal protection analysis). The *Maher* plaintiffs alleged that the Connecticut statute violated both the equal protection and the due process clauses of the fourteenth amendment. Maher v. Roe, 432 U.S. at 467. The Court upheld the statute against the equal protection challenge, *see* text accompanying notes 34-39 *infra*, but did not discuss the due process challenge.

[34] *Id.* at 470-71. Indigence alone does not identify a class as "suspect" for purposes of equal protection analysis. *Id.*; *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 22-23 (1973) (suggesting that for wealth to be suspect classification, statute must peculiarly disadvantage group fairly definable as indigent and absolutely deprive them of desired benefit). Neither is sex a suspect class, though the Supreme Court has subjected statutes imposing a disproportionate impact on women to a more meaningful level of

statute did not inhibit the exercise of the fundamental right to privacy in the abortion decision as delineated in *Roe v. Wade*.[35] Having eliminated the need for strict scrutiny,[36] the Supreme Court subjected the statute to the minimal scrutiny of the rational relation test,[37] requiring only that the statute be "rationally related" to a "constitutionally permissible" state purpose.[38] The Court concluded that the statute furthered the legitimate state interest in promoting childbirth rather than abortion and upheld the statute.[39]

Strong dissents in *Beal* and *Maher* rejected the majority's statutory and constitutional rationales for upholding state restrictions on medicaid funding of abortions.[40] Justice Brennan, dissenting in *Beal*, argued that pregnancy requires some medical treatment and that nontherapeutic abortion is one form of treatment available.[41] Brennan concluded that

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scrutiny than the rational relationship test imposed in *Maher*. *See* note 19 *supra* (intermediate scrutiny).

[35] 432 U.S. at 471-74. The *Maher* Court characterized the *Roe v. Wade* right to privacy in deciding whether to terminate an abortion as fundamental but not absolute. *Id.* at 473-74; *see* note 5 *supra* (discussion of *Roe*). The Court cited *Whalen v. Roe* in support of the proposition that a fundamental right to privacy does not preclude state regulations to effectuate legitimate state policy. 432 U.S. at 473; *see* 429 U.S. 589, 598-604 (1977). The *Whalen* Court upheld a New York statute authorizing computerized records of doctors' prescriptions of certain dangerous drugs. 429 U.S. at 603-04. The *Whalen* Court recognized that possible public disclosure of personal use of the prescription drug might deter some patients from medical treatment, just as the *Maher* Court recognized that denial of funding might deter some patients from obtaining an abortion. *Id.* at 602; *see* 432 U.S. at 479. The *Maher* Court did not address the important distinction between the nature of the state interest underlying each statute. Although the purported interest of the Connecticut legislature was to advance the state's interest in protecting potential human life, *id.* at 478-79, that interest does not become compelling until after viability. Roe v. Wade, 410 U.S. at 163-64. The *Maher* Court explicitly distinguished between state interference with a protected right and state encouragement of an alternative consonant with legislative policy. 432 U.S. at 475; *see* note 12 *supra* & note 97 *infra*. Presumably, legislative intent also extended to restricting the availability of abortions, albeit only to indigent women. *See* Beal v. Doe, 432 U.S. at 454-55 (Marshall, J., dissenting) (dissent applies also to *Maher v. Roe*).

[36] *See* Maher v. Roe, 432 U.S. at 470-75. The Court applies strict scrutiny or the compelling state interest standard to legislation challenged under the equal protection clause only if the legislation affects a suspect classification or the exercise of a fundamental right. *See* note 34 *supra* (statute does not involve suspect classification); note 35 *supra* (statute does not impinge on exercise of fundamental right).

[37] *See* note 19 *supra* (equal protection, rational relationship test).

[38] 432 U.S. at 478-79.

[39] *Id.* at 479. The *Maher* Court refused to retreat from the *Roe* holding that the right to privacy encompasses the right to abortion in the first trimester. *Id.*; *see* note 5 *supra*. Rather, the *Maher* Court asserted that the legislature is the proper place for resolving policy and value conflicts as "sensitive" as public funding of nontherapeutic abortions. *Id.* at 479; *see* text accompanying notes 107-08 *infra*.

[40] *See* text accompanying notes 41-47 *infra*. Justices Brennan, Blackmun, and Marshall dissented from the *Maher* and *Beal* decisions. 432 U.S. at 448, 454, 462 (Brennan, Blackmun, and Marshall, JJ., dissenting); 432 U.S. at 482 (Brennan, Blackmun, and Marshall, JJ., dissenting).

[41] Beal v. Doe, 432 U.S. at 449-52 (Brennan, J., dissenting); *see* note 29 *supra* (Brennan dissent).

since Title XIX does not authorize selective state funding of medical treatment,[42] state statutes distinguishing between abortion and childbirth as alternative methods of treatment conflict with Title XIX and thus should be invalid.[43] The dissenters also advanced several constitutional arguments for invalidating the state funding restrictions. The dissenters contended that funding restrictions exert financial pressure on the indigent woman's abortion decision and thus unduly burden the exercise of a fundamental right in violation of the fourteenth amendment's due process protection.[44] Additionally, the dissenters took issue with the majority's equal protection analysis.[45] Justice Marshall, in particular, advocated imposing a more flexible standard of judicial review that would consider the importance of the benefit denied, the character of the class affected, and the nature of the state interest asserted.[46] Under Marshall's suggested framework, funding restrictions on first trimester nontherapeutic abortions would be unconstitutional.[47]

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[42] 432 U.S. at 450-51 (Brennan, J., dissenting).

[43] *Id.*

[44] *See* Maher v. Roe, 432 U.S. at 484 (Brennan, J., dissenting). Justice Brennan asserted that Planned Parenthood v. Danforth, 428 U.S. 52 (1976), severely curtailed the scope of permissible state interference in a woman's decision to abort. 432 U.S. at 485. Additionally, Brennan asserted that the Court's decision in Singleton v. Wulff, 428 U.S. 106, 122 (1976), established that the effect of direct state interference with a protected activity is indistinguishable from that of state encouragement of an alternate activity. 432 U.S. at 485-86. Brennan thus argued that the Connecticut statute constituted an undue burden on the fundamental right to decide freely whether or not to abort a pregnancy, and should be impermissible absent a compelling state interest to justify the interference. *Id.* at 489-90; *see* note 18 *supra.*

[45] *See* Beal v. Doe, 432 U.S. at 454 (Marshall, J., dissenting) (applies to *Maher* also); Maher v. Roe, 432 U.S. at 482 (Brennan, J., dissenting). Justice Brennan asserted that the disparate impact of the Connecticut statute on indigent women violated the equal protection and the due process clauses of the fourteenth amendment. *See* Maher v. Roe, 432 U.S. at 482-83.

[46] 432 U.S. at 458-61 (Marshall, J., dissenting). Justice Marshall sharply criticized the *Maher* majority's two-tier equal protection analysis and what he termed the majority's misreading of the *Roe* right to privacy. *Id.* at 457-58; *see* text accompanying notes 32-39 *supra* (majority opinion). Marshall applied a version of intermediate scrutiny, *see* note 19 *supra* (equal protection analysis), characterizing the right at issue as the fundamental right to abortion during the first trimester. *See* 432 U.S. at 457; note 5 *supra* (*Roe* right to abortion). Marshall noted that although poverty is not a suspect classification, a statute's disparate impact on indigents is relevant to an examination of the statute's validity. 432 U.S. at 459-60; *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 22-23 (1973) (poverty may be suspect classification); note 33 *supra.* Finally, Marshall concluded that the state interest in protecting the potential human life of the fetus cannot justify the significant deprivation the funding restrictions represent. 432 U.S. at 461; *cf.* Doe v. Bolton, 410 U.S. 179, 198-200 (1973) (invalidating, as unconstitutional burden, Connecticut statute requiring two physicians' concurrence in third physician's abortion decision). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 322 (1976) (Marshall, J., dissenting); Yarbrough, *supra* note 12, at 621-26 (discussion of Marshall's intermediate scrutiny).

[47] 432 U.S. at 461 (Marshall, J., dissenting).

In *Harris v. McRae*,[48] the Supreme Court relied on the *Maher* decision to sustain the congressional decision to curtail federal reimbursement of state medicaid payments for most therapeutic abortions.[49] The *McRae* Court held that Title XIX imposes no statutory obligation on the states to fund even medically necessary abortions when federal reimbursement will be unavailable.[50] On constitutional grounds, the *McRae* Court reasoned that the funding restrictions of the Hyde Amendment were not governmental obstacles directly impinging on the exercise of a fundamental right.[51] Rather, the funding restrictions represented a legislative decision not to remove the existing obstacle, indigency.[52] The Hyde Amendment, therefore, did not constitute a violation of the fifth amendment due process protection delineated in *Roe v. Wade*.[53] The Court further found no violation of the equal protection component of the fifth amendment due process clause.[54] As in *Maher*, the Court applied the minimal scrutiny of the rational relation test, noting the absence of a fundamental right or suspect classification that would require invoking the more stringent scrutiny of the compelling state interest standard.[55] The *McRae* majority concluded, in accord with the *Maher* majority,[56] that the funding restrictions were rationally related to the legitimate legislative objective of protecting human life.[57]

The *McRae* dissenters[58] distinguished the denial of funding for

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[48] 418 U.S. 297 (1980). *See also* Williams v. Zbaraz, 448 U.S. 358 (1980). The *Zbaraz* Court noted that Harris v. McRae, 448 U.S. 297 (1980), resolved the issue raised in *Zbaraz*. 448 U.S. at 368-69.

[49] *See* text accompanying notes 50-57 *infra* & 32-39 *supra* (*Maher* decision).

[50] Harris v. McRae, 448 U.S. 297, 306-11 (1980).

[51] 448 U.S. at 316-18. The *McRae* Court relied on the *Maher* Court's discussion of the nature of the *Roe v. Wade* right to privacy in the abortion decision. *Id.* at 313-15; *see* note 35 *supra*.

[52] 448 U.S. at 317-18. The *McRae* Court distinguished between a state's legitimate refusal to fund a protected activity and a refusal to provide another benefit to an individual who exercised the right to engage in the protected activity. *Id.* at 317 n.19. *But see* note 35 *supra* & note 97 *infra* (no meaningful distinction between direct and indirect government burden).

[53] 448 U.S. at 318; *see* note 5 *supra*.

[54] 448 U.S. at 321-26. The *McRae* Court found no constitutional violation of the establishment clause of the first amendment. *Id.* at 319-20.

[55] *Id.* at 322-26. The *McRae* Court, having found no infringement of a constitutionally protected right during its due process analysis, *see* notes 52-53 *supra*, relied on *Maher* to refute the plaintiffs' assertion that the Hyde Amendment affected a suspect class. 448 U.S. at 323; *see* note 34 *supra* (*Maher* Court's discussion of indigence as suspect classification). The *McRae* Court discerned no difference between the refusal to fund nontherapeutic abortions and the refusal to fund some therapeutic abortions, at least for the purpose of determining the existence of a suspect classification. 448 U.S. at 323.

[56] *See* text accompanying notes 37-39 *supra*.

[57] 448 U.S. at 324-26.

[58] *See* text accompanying notes 59-61 *infra*. Justice Stevens joined Justices Brennan, Blackmun, and Marshall, who dissented in *Beal* and *Maher*, in dissent from the *McRae* decision. *See* 448 U.S. at 329, 337, 348, 349; note 40 *supra*.

therapeutic abortions from the restrictions of nontherapeutic abortions upheld in *Maher*.[59] Additionally, the dissenters asserted that the selective dispersal of governmental benefits, when receipt is contingent upon the abdication of a fundamental right, constitutes state interference in the exercise of protected liberties in violation of the fifth amendment's due process clause.[60] Applying equal protection analysis, the dissenters further argued that the Hyde Amendment should fail even the minimal scrutiny of the rational relation standard of review.[61]

The denial of federal reimbursement to repay state funds expended on abortions does not preclude states from electing to fund abortions.[62] Nonetheless, many states have enacted statutes similar to one of the Hyde Amendments, limiting state funding to therapeutic abortions or those necessary to save the life of the mother.[63] Several state courts examining the constitutionality of such statutes have adopted the due process or discriminatory funding analysis of the Supreme Court dissenters[64] and have invoked state constitutional provisions to invalidate the statutes.[65]

In *Moe v. Secretary of Administration & Finance*,[66] the Supreme Court of Massachusetts examined the constitutionality of statutory funding restrictions that limited state medicaid funding to cases in which an abortion was necessary to prevent the woman's death.[67] The

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[59] 448 U.S. at 345 (Marshall, J., dissenting); *id.* at 349-50 (Stevens, J., dissenting).

[60] 448 U.S. at 329-37 (Brennan, J., dissenting); *see* note 45 *supra* (discussion of Justice Brennan's dissent in *Maher* on due process grounds). In *McRae*, Justice Brennan carefully reviewed the illegitimacy of any government program interfering with the exercise of a fundamental right by selectively bestowing government favors. 448 U.S. at 334-37. Brennan concluded that state action to deprive an individual of a constitutional right under the guise of conferring a benefit in exchange for surrendering the right is as constitutionally reprehensible as a direct burden. *Id.*

[61] *See* 348 U.S. at 344-46 (Marshall, J., dissenting). *See also* 348 U.S. at 349-57 (Stevens, J., dissenting). Justice Marshall reiterated his recommendation in *Maher*, see note 47 *supra*, that the majority abandon the rigid two-tier equal protection analysis and adopt a more flexible standard of review. 448 U.S. at 343-44; *see* text accompanying notes 44-47 *supra*.

[62] *See* Maher v. Roe, 432 U.S. 464, 480 (1977).

[63] *See, e.g.*, 1980 Cal. Stats. ch. 510, § 2, item 287.5; MASS. GEN. LAWS ch. 29, § 20B (West Supp. 1980-81).

[64] *See* notes 34, 45, & 61 *supra*.

[65] *See, e.g.*, Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (Cal. 1981); Moe v. Secretary of Adm. and Fin., 1981 Mass. Adv. Sh. 464, 417 N.E.2d 387 (Mass. 1981); Doe v. Maher, [1981-1982] 8 FAM. L. RPTR. (BNA) 2006 (Conn. Super. Ct. 1981).

[66] 1981 Mass. Adv. Sh. 464, 417 N.E.2d 387 (Mass. 1981).

[67] 1981 Mass. Adv. Sh. at _____, 417 N.E. 2d at 390, 397-404. The Massachusetts Supreme Court sustained the *Moe* plaintiffs' due process challenge under the state constitution and thus did not reach the equal protection claims. *Id.* at _____, 417 N.E.2d at 397; *see* MASSACHUSETTS DECLARATION OF RIGHTS art. 10. The court also noted that the most recent Hyde Amendment expressly authorized state legislatures to fund abortions as the legislatures deemed appropriate, thus precluding supremacy clause problems with a state funding statute not congruent with federal funding restrictions. *Id.*; *see* Pub. L. No. 96-536, § 109, 94 Stat. 3170 (1980). The *Moe* court also stressed the distinction between medically

court upheld the plaintiffs' due process challenge to the restrictions, holding that the statute constituted an impermissible burden on the constitutionally protected right to abortion.[68] The Massachusetts Supreme Court reasoned that the zone of privacy encompassing a woman's right to determine whether to terminate her pregnancy by abortion, though not absolute, is an essential element in the state's constitutional guarantee of due process.[69] The fundamental nature of the right to privacy mandates that any state intervention in the exercise of the right be neutral.[70] Thus, once the state elects to fund a benefit, the state may not allocate funds on the basis of criteria that directly or indirectly discriminate against an individual's exercise of a fundamental right.[71] The Massachusetts court held that discriminatory funding of the expenses incurred in the medical treatment of pregnancy constituted a

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necessary and nontherapeutic abortions, since the Massachusetts Medicaid program funded only the latter. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 394 & n.12; *see* 106 CODE MASS. REGS. 450.204, *as amended*, 185 MASS. REG. 9 (1979).

[68] 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 397-404. The framework of the *Moe* court's due process analysis resembles that advanced by Justice Brennan, dissenting in the Supreme Court abortion funding cases. *See* notes 44 & 60 *supra* (Brennan dissent) & note 18 *supra* (substantive due process analysis generally). The Massachusetts court first examined the nature of the right to abortion and concluded that the right is an essential element of the fundamental right to privacy. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 398-99; *see* note 5 *supra* (right to privacy encompasses abortion decision). Second, the court questioned whether the statutory restrictions on medicaid funding of therapeutic abortions discriminatorily burdened the exercise of the right. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 399-402. Adopting the analysis of the dissenters in the Supreme Court abortion funding cases, the Massachusetts court acknowledged that while the state had no obligation to fund any medical expenses associated with childbirth, once the state elected to fund such expenses, it must do so in a neutral manner. *Id.* at _____, 417 N.E.2d at 400; *see* text accompanying notes 40-47 & 58-61 *supra*. The *Moe* court also declined to distinguish between direct and indirect burdens on the exercise of a fundamental right. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 401-02; *see* notes 52 & 60 *supra*; notes 97-98 *infra*. The Massachusetts court concluded that by conditioning medicaid dispersal of benefits for the treatment of pregnancy on the abandonment of the right to abortion, the state did not satisfy the constitutional obligation of neutrality. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 402. Finally, the Massachusetts court evaluated the justifications the state proffered in support of the legislation, recognizing the court's responsibility to balance the state's interests in regulating the abortion decision against the woman's interest in making the decision without state interference. *Id.* at _____, 417 N.E.2d at 402-04. The *Moe* court acknowledged that its test approximated, but did not equate with, the compelling state interest standard imposed in similar federal constitutional cases. *Id.* at _____, 417 N.E.2d at 402-03; *see* note 18 *supra*. The Massachusetts court employed a more flexible test, weighing the asserted state interests against those of the individual. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 403. The court noted that the state's legitimate interest in protecting the mother's health is absent when regulation prohibits medically necessary abortions. *Id.* at _____, 417 N.E.2d at 403. The court concluded that the state's interest in protecting the potential life of the fetus did not justify the severe intrusion into the woman's privacy in making a procreative decision. *Id.* at _____, 417 N.E.2d at 404.

[69] 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 397-99; *see* note 68 *supra*.

[70] 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 399-402; *see* note 68 *supra*.

[71] 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 401-02; *see* note 68 *supra*.

governmental intrusion into the constitutionally protected zone of privacy encompassing the abortion decision.[72] The court concluded that the state's primary interest, protecting potential human life, does not justify so severe an intrusion into a woman's privacy as compelling her to bear an unwanted child.[73] The Massachusetts constitution thus provides indigent women greater constitutional protection of the right to privacy than judicial interpretation of similar federal constitional provisions.[74]

The Connecticut Superior Court for New Haven similarly recognized that the Connecticut constitutional due process guarantee prohibits discriminatory funding of medical treatment for indigent women. In *Doe v. Maher*,[75] the Connecticut court held that a Medicaid program funding all necessary medical expenses for eligible recipients, including childbirth and pregnancy, could not refuse to fund therapeutic abortions.[76] The court initially determined that discriminatory funding of necessary medical treatment burdens an indigent woman's freedom of choice to such a degree that her only practical option is to elect childbirth.[77] The court then assessed the basis of state interference to determine whether the state interference arose from a compelling state interest.[78] The Connecticut court interpreted *Roe v. Wade*[79] as

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[72] 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 402; *see* note 68 *supra*.

[73] 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 402-04; *see* note 68 *supra*.

[74] 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 400; *see* text accompanying notes 50-51 *supra* (due process clause of fifth amendment). The *Moe* court noted that Massachusetts did not hesitate to interpret state constitutional guarantees more liberally than the Supreme Court interpreted federal guarantees. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 399 & n.15. *See, e.g.*, District Attorney for the Suffolk Dist. v. Watson, 411 N.E.2d 1274 (Mass. 1980) (invalidating death penalty as violation against prohibition on cruel and unusual punishment); Department of Pub. Welfare v. J.K.B., 1979 Mass. Adv. Sh. 2202, 393 N.E.2d 406 (Mass. 1979) (state due process protection of parents' right to court-appointed attorney in state-instituted custody proceedings).

The *Moe* dissent agreed with the *McRae* majority and concluded that a financial inducement to elect childbirth does not equal an obstacle to abortion. 1981 Mass. Adv. Sh. at _____, 417 N.E.2d at 406 (Hennessey, C. J., dissenting). The dissent stressed that disparate funding of birth over abortion constitutes one way for a state to achieve its legitimate interest in protecting potential life. *Id.* at _____, 417 N.E.2d at 407. The dissent concluded that the plaintiffs' equal protection claims failed because there was no suspect class and the statute easily passed the rational relation test. *Id.* at _____, 417 N.E.2d at 407. The dissent further concluded that the statute was within the legislative perogative, and that the judiciary should not overrule the legislature. *Id.* at _____, 417 N.E.2d at 408.

[75] [1981-1982] 8 FAM. L. REP. (BNA) 2006 (Conn. Super. Ct. 1981).

[76] *Id.*

[77] *Id.* at 2006-07. The Connecticut Superior Court recognized in *Doe* the right to privacy as part of Connecticut's concept of "ordered liberty" and held that the right encompasses procreative choice and the doctor patient relationship. *Id.* at 2007. The decision to abort a pregnancy, therefore, is within the sphere of protected privacy under the Connecticut constitution. *Id.*

[78] *Id.*

[79] 410 U.S. 113 (1973); *see* note 5 *supra*.

establishing that the state's interest in protecting potential human life never supercedes the woman's right to privacy in matters concerning her health.[80] The Connecticut Superior Court therefore concluded that the state's due process provisions protected the indigent woman's right to obtain necessary medical treatment, including an abortion, without the state prescribing the options available to her by funding one form of treatment and excluding another.[81]

In California, the state's constitutional protection of the right to privacy has been held to prohibit state imposition of medicaid funding restrictions on nontherapeutic as well as therapeutic abortions.[82] In *Committee to Defend Reproductive Rights v. Myers*,[83] the California Supreme Court invalidated state budget acts excluding funds for elective abortions as an unconstitutional intrusion into protected areas of private choice.[84] The *Myers* court characterized the constitutional issue as the protection of procreative choice from discriminatory governmental treatment.[85] The court refused to extend to the California constitution the *Maher* and *McRae* majorities' reasoning that the refusal to fund abortions is not a state-imposed obstacle to an indigent woman seeking to exercise her constitutional right to abortion.[86] The court acknowledged that the state has no constitutional obligation to fund medical care for the poor, but placed a heavy burden on the state to justify a discriminatory or restrictive government benefit program.[87]

The *Myers* court asserted that California cases mandate imposition of a three-prong test to assess the constitutionality of a government benefit program that selectively disburses funds.[88] Under California law, the state may justify a conditional benefit program only by showing that the imposed condition relates to the legislative purpose, that the utility of the conditions exceeds the harm arising from impairment of the constitutional right to privacy, and that no less offensive measures will

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[80] [1981-1982] 8 FAM. L. REP. (BNA) 2006 (Conn. Super. Ct. 1981).

[81] *Id.* The *Doe* court dismissed the state's argument that funding considerations mandated restrictions on state payments for abortions that the federal government would not reimburse. *Id.* The court found the argument neither constitutionally relevant nor compelling. *Id.*

[82] Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 256, 258, 625 P.2d 779, 781, 172 Cal. Rptr. 866, 868-69 (Cal. 1981).

[83] 29 Cal. 3d 256, 625 P.2d 779, 172 Cal. Rptr. 866 (Cal. 1981); *see* CALIF. CONST. art. I, § 1 (right to privacy included among inalienable rights); *id.* § 24 (California constitutional rights independent of United States Constitution guaranteed rights).

[84] 29 Cal. 3d at 258, 625 P.2d at 781, 172 Cal. Rptr. at 868-69; *see* 1980 Cal. Stat. ch. 510, § 2, item 287.5; 1979 Cal. Stat. ch. 259, § 2, item 261.5; 1978 Cal. Stat. ch. 359, § 2, item 248 (Budget Acts invalidated).

[85] 29 Cal. 3d at 256-57, 625 P.2d at 780-81, 172 Cal. Rptr. 867-68.

[86] *Id.* at 257, 625 P.2d at 868, 172 Cal. Rptr. at 868; *see* notes 34 & 54 *supra* (Supreme Court majorities distinguish between direct and indirect burdens on exercise of fundamental rights).

[87] 29 Cal. 3d at 263-71, 625 P.2d at 784-89, 172 Cal. Rptr. at 871-76.

[88] *Id.* at 265-66, 625 P.2d at 786, 172 Cal. Rptr. at 873.

achieve the state's objective.[89] The court found the funding restrictions unrelated to the purposes of the California Medicaid programs.[90] Applying the second prong of the test, the *Myers* court concluded that the utility of the funding restriction did not outweigh the severity of the resulting impairment of the fundamental constitutional right to procreative choice.[91] Finally, the *Myers* court asserted that the statutory scheme the state selected did not further the state interest in providing the needy with medical care in the manner least offensive to the woman's right of procreative choice.[92] The *Myers* court found that the state's selective benefit program limiting abortion funding interfered with California's constitutional right to privacy in making procreative choices and considered it irrelevant that the state was under no obligation to provide the benefit.[93] The court warned of the dangers in permitting the government to nullify constitutional rights by conditioning access to government benefits on the sacrifice of constitutional guarantees.[94]

The right to privacy articulated in *Roe v. Wade* protects women deciding whether to terminate a pregnancy or give birth from undue state intervention in the decision-making process.[95] California, Massachusetts and Connecticut courts recognize that state interference need not take the form of outright prohibition to deter the exercise of a fundamental liberty.[96] Governmental "carrots" in the form of benefits conferred may be as effective in influencing citizen behavior as "sticks" prodding individuals into particular patterns of behavior by imposing direct prohibitions or criminal sanctions.[97] The selective conferral of a

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[89] *Id.* at 265-66, 625 P.2d at 786, 172 Cal. Rptr. at 873. The *Myers* court applied the three-prong test articulated in Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 505-07, 421 P.2d 409, 414-15, 65 Cal. Rptr. 401, 406-07 (1966), for determining the validity of legislative enactments that exclude potential recipients from government benefit programs solely because they exercised constitutional rights. 29 Cal. 3d at 265-66, 625 P.2d at 786, 172 Cal. Rptr. at 873.

[90] 29 Cal. 3d at 271-73, 625 P.2d at 790-91, 172 Cal. Rptr. at 877-78; *see* CAL. WELF. & INST. CODE §§ 14000, 14132(a)(b) (West Supp. 1982) (California medicaid program funds medical and hospital procedures for recipients of public assistance and other medically indigent individuals).

[91] 29 Cal. 3d at 273-82, 625 P.2d at 791-97, 172 Cal. Rptr. at 878-84. The *Myers* court found that funding restrictions would severely impair or totally deny an indigent woman's right to choose abortion over childbirth. *Id.* at 273-76, 625 P.2d at 791-93, 172 Cal. Rptr. at 878-80. The *Myers* court concluded that protecting the potential life of the fetus "realistically" underlies the budget restrictions limiting medicaid payment for abortions. *Id.* at 278-79, 625 P.2d at 795, 172 Cal. Rptr. at 882.

[92] *Id.* at 282-83, 625 P.2d at 797-98, 172 Cal. Rptr. at 884-85.

[93] *Id.* at 263-64, 284-86, 625 P.2d at 784-86, 798-99, 172 Cal. Rptr. at 871-73, 885-86.

[94] *Id.* at 284-85, 625 P.2d at 798-99, 172 Cal. Rptr. at 885-86.

[95] *See* note 5 *supra* (discussing *Roe v. Wade*).

[96] *See* text accompanying notes 70-73, 78 & 88-92 *supra.*

[97] *See generally* Johnson & Bond, *Coercive and Noncoercive Abortion Deterrence Policies*, 2 LAW & POL'Y Q. 106 (1980). The commentators consider coercive policies as those that attempt to lower the benefits or raise the costs associated with the nonpreferred activity,

government benefit contingent upon the relinquishment of a constitutional right constitutes government interference in the exercise of that constitutionally protected right.[98] Selective disbursement is government intervention, even when the government service in question is one the legislature elected to provide.[99] Once the state elects to fund private medical care for indigent women desiring treatment for pregnancy, the criteria for determining eligibility should not vary with the method of treatment the woman and her doctor select.[100]

The Supreme Court has asserted that women have an almost absolute right to decide with their doctors to abort rather than carry a pregnancy to term, at least during the first trimester.[101] Nevertheless, the Court has sanctioned state and federal legislative programs that admittedly affect, if not curtail, the woman's exercise of her right.[102] The *Maher* and *McRae* courts distinguished, as the state courts refused to

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abortion. *Id.* at 113-14. An example of a government attempt to lower the benefits associated with abortion is the imposition of a ban or severe restrictions on fetal research. *Id.* at 114. The commentators include limits on public funding of abortions as one example of coercive state action designed to deter abortions by raising the costs associated with abortion. *Id.* at 114 (also included in category were facility requirements, consultations with more than one doctor, residence requirements, and spousal or parental notice or consent requirements). Noncoercive policies are those attempting to increase the benefits or lower the costs of the preferred behavior, in other words, nonabortion. *Id.* at 117. State activity may attempt to lower the costs of unwanted pregnancy through family planning programs or encourage alternatives to abortion by lowering the costs of childbirth or increasing the benefits associated with rearing a child. *Id.* at 117-18 (examples include tax deductions for children, payments for increased family size such as the Aid to Families with Dependent Children program, state supported medical and day care facilities, adoption). Medicaid funding restrictions may exhibit both coercive (limits on public funding of abortions) and noncoercive (funding of family planning and childbirth expenses) elements. The commentators conclude that neither method particularly is effective in reducing abortion rates. *Id.* at 124-26. *See also* Bennett, *Abortion And Judicial Review: Of Burdens And Benefits, Hard Cases And Some Bad Law*, 75 NW. U. L. REV. 978, 1010-11 (1981) [hereinafter cited as Bennett].

[98] *See* Harris v. McRae, 448 U.S. 297, 334 (1980) (Brennan, J., dissenting); note 61 & text accompanying notes 71-74, 79, 89-93 *supra* (state courts). *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974) (invalidating one year residency requirement to receive medical benefits); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (invalidating residency requirement for eligibility under Aid to Families with Dependent Children program); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (invalidating denial of unemployment compensation benefits to woman whose religious beliefs precluded accepting job requiring Saturday employment); Speiser v. Randall, 357 U.S. 513, 528-29 (1958) (invalidating California scheme denying tax exemptions, available to veterans generally, to veterans advocating overthrow of government); *cf.* Buckley v. Valeo, 424 U.S. 1 (1976) (upholding selective public financing of campaigns of presidential candidates); American Party v. White, 415 U.S. 767 (1974) (invalid to restrict candidates' and political parties' access to ballot).

[99] *See* Bennett, *supra* note 97, at 1009-17.

[100] *Id.*; *see* note 29 *supra* (discussion of Title XIX's purpose).

[101] *See* note 5 *supra* (discussion of *Roe v. Wade*).

[102] *See* Harris v. McRae, 448 U.S. 297, 314 (1980) (citing Maher v. Roe, 432 U.S. 464, 474 (1977)); text accompanying notes 24-38 & 49-58 *supra*.

do, the government's selective benefits program from the criminal sanctions the *Roe v. Wade* decision prohibited.[103]

The Supreme Court has disallowed selective governmental dispersal programs in other contexts.[104] Both the dissenters in the abortion funding cases[105] and numerous commentators[106] have criticized the Court's unconvincing efforts to distinguish these cases from the abortion funding cases. Since a principled distinction seems lacking, presumably the Court has another basis for upholding selective benefit dispersals in abortion funding cases. Commentators have suggested that the continuing volatility of the abortion issue and institutional deference to the legislature as the proper forum for controversial decisions in matters affecting the public morals are among the factors that may have motivated the Court.[107] Yet, part of the judicial function is to act as a check on the majoritarian impulses of the legislature, especially when the legislature seeks to impose public values on private choices.[108] The Supreme Court already has struck down legislative efforts to restrict the range in which a woman may exercise her right to abortion by defining viability[109] or imposing parental or husband consent requirements.[110] Similarly, lower federal courts have invalidated city ordinances directed at zoning abortion clinics out of town[111] and overly burdensome informed consent regulations.[112] These direct burdens may be qualitatively different than the indirect burden of imposing on indigent women a positive obligation to pay for abortions.[113] But the result in all instances is state interference with the exercise of the right to privacy in deciding whether to abort or give birth.

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[103] *See* Harris v. McRae, 448 U.S. 297, 314 (1980) (citing Maher v. Roe, 432 U.S. 464, 474 (1977)). *But see* text accompanying notes 70, 79, 90 *supra*.

[104] *See* note 112 *infra* & note 98 *supra*.

[105] *See* text accompanying notes 39-48 & 59-62 *supra*.

[106] *See, e.g.*, Goldstein, *supra* note 9, at 327-34 (1981); Bennett, *supra* note 97, at 1010-17; Yarbrough, *supra* note 12, at 615-20.

[107] *See, e.g.*, Perry, *Why the Supreme Court was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1128 (1981); Wardle, *supra* note 5, at 827-30; note 39 *supra* (*Maher* Court identifies legislature as proper forum for resolving sensitive policy issues).

[108] *See* Bennett, *supra* note 97, at 980-88; Perry, *supra* note 5, at 706-19; note 39 *supra*.

[109] *See* Planned Parenthood v. Danforth, 428 U.S. 52, 63-65 (1976).

[110] *See* Bellotti v. Baird, 443 U.S. 622, 646-51 (1979); Planned Parenthood v. Danforth, 428 U.S. 52, 69-71, 74-75 (1976); *cf.* H.L. v. Matheson, 450 U.S. 398, 407-10 (1981) (upholding parental notice requirement for unemancipated and immature minors).

[111] *See* Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 335-37 (5th Cir. 1981).

[112] *See* Akron Center for Reproductive Health v. Akron, 651 F.2d 1198, 1202 (5th Cir. 1981) (invalidating regulation requiring physician to provide women detailed information prior to obtaining informed consent, but upholding written consent requirement). *See also* Valley Family Planning v. North Dakota, 661 F.2d 99, 102 (8th Cir. 1981) (supremacy clause mandates invalidating state statute banning funding of family planning services making abortion referrals); note 11 *supra*.

[113] *See* notes 12 & 97 *supra* (direct and indirect burdens).

The state courts discussed above interpreted state constitutional provisions as more protective of the right to privacy than the similar federal constitutional provisions.[114] Nevertheless, the Supreme Court's retreat, in the area of discriminatory funding of abortions and childbirth, from the substantive protection of the right to privacy in making procreative choices is unsettling, especially as applied to therapeutic abortions. Even if other state courts continue to invoke state constitutional privileges to protect the federal right to privacy from the indirect burdens imposed by selective public funding of state health plans, discrepencies undoubtedly will develop in the scope of the protection afforded. It seems incongruous that an indigent woman in California will receive medicaid funding for an abortion, whether therapeutic or elective, while a Massachusetts resident may obtain only a medically necessary abortion at public expense. Yet the distinction may be rational in light of varying levels of medical care state Medicaid programs provide. But state legislatures should not be able to inhibit a woman's right to elect an abortion rather than childbirth, for reasons of health, by the selective funding of a program. Nor should citizens have to rely on state court interpretations of state constitutional protections to restrain government interference with the right to privacy the federal constitution guarantees. The logic of the state court decisions considered above compels the conclusion that indirect state interference is nonetheless interference that should be subject to the compelling state interest standard rather than the rational relation standard the Supreme Court applied.

CATHERINE O'CONNOR

[114] *See* text accompanying notes 66-94 *supra.*