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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.

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 have children learn German in school).


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


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 explicitly 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 590-94 (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, 694-91 (1977) (state may not ban commercial distribution of nonprescription contraceptives to minors or restrict sales to adults).


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

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.


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 Am. Soc. L. J. 128-39 [hereinafter cited as Survey].

\(^8\) 410 U.S. 179 (1973).

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 concomitant authority to regulate certain aspects of the decision.¹¹ In evaluating the constitutionality of


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. 2288 (1982); Women's Medical Center of Providence, Inc. v. Roberts, 630 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. 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).

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.

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. § 1396a(a)(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, 551 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. The Supreme Court sustained the constitutionality of Hyde Amendment funding restrictions on both non-therapeutic and therapeutic abortions. 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. In upholding the legislative curtailment of Medicaid allocations for the abortions of indigent women, the Supreme Court rejected substantive due process and equal protection.

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).


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 malfunction 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.


See notes 13-14 supra.

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, 50-51 (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, Embraisure 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, 451 U.S. 675, 690-91 (1977). But see Korematsu v. United States, 323 U.S. 214, 216-20 (1944) (upholding Japanese internment during World War II).
challenges to the statutes. At the same time, the Court acknowledged the probability that the funding restrictions would


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preclude most indigent women from exercising their right to obtain an abortion.\footnote{See Harris v. McRae, 448 U.S. 297, 314-15 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977).}

Several recent state court decisions, however, have sustained challenges to funding restrictions based on state constitutional protections.\footnote{See text accompanying notes 63-65 infra.} 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.\footnote{See text accompanying notes 66-81 infra.} 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.\footnote{See text accompanying notes 82-94 infra.} 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.\footnote{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 inadmissible 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, 90Harv. 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).}

The United States Supreme Court first addressed the validity of state statutory restrictions on Medicaid funding of abortions in \textit{Beal v. Doe.}\footnote{Id. at 447; see note 13 supra (Title XIX).} The \textit{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.\footnote{Id. at 442 U.S. 438 (1977).} The Court reasoned that Title XIX
grants the states broad discretion to determine what unnecessary medical services to fund, as long as the eligibility requirements and the extent of benefits comport with the statute's objectives. 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.

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. In *Maher v. Roe*, 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. The *Maher* Court determined that indigent women desiring abortions are not a suspect class and that the regulation violated both the fourteenth amendment equal protection guarantee and the statutory mandate of Title XIX. 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.

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. *Id.* at 449-51. 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. 

Having eliminated the need for strict scrutiny, the Supreme Court subjected the statute to the minimal scrutiny of the rational relation test, requiring only that the statute be “rationally related” to a “constitutionally permissible” state purpose. The Court concluded that the statute furthered the legitimate state interest in promoting childbirth rather than abortion and upheld the statute.

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

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

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).

See Maher v. Roe, 432 U.S. at 470-75. The Court applies strict scrutiny or the compelling state interest standard to legislation challenging 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).

See note 19 supra (equal protection, rational relationship test).

432 U.S. at 478-79.

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 197-08 infra.

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).

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,\(^4\) state statutes distinguishing between abortion and childbirth as alternative methods of treatment conflict with Title XIX and thus should be invalid.\(^3\) 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.\(^4\) Additionally, the dissenters took issue with the majority's equal protection analysis.\(^5\) 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.\(^6\) Under Marshall's suggested framework, funding restrictions on first trimester nontherapeutic abortions would be unconstitutional.\(^7\)

\(^4\) 432 U.S. at 450-51 (Brennan, J., dissenting).
\(^3\) Id.
\(^4\) 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. See Maher v. Roe, 432 U.S. at 489-90; see note 18 supra.

\(^3\) 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.

\(^3\) 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).

\(^3\) 432 U.S. at 461 (Marshall, J., dissenting).
In *Harris v. McRae*, 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. 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. 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. Rather, the funding restrictions represented a legislative decision not to remove the existing obstacle, indigency. The Hyde Amendment, therefore, did not constitute a violation of the fifth amendment due process protection delineated in *Roe v. Wade*. The Court further found no violation of the equal protection component of the fifth amendment due process clause. 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. The *McRae* majority concluded, in accord with the *Maher* majority, that the funding restrictions were rationally related to the legitimate legislative objective of protecting human life. The *McRae* dissenters distinguished the denial of funding for

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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.

therapeutic abortions from the restrictions of nontherapeutic abortions upheld in *Maher*.

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. 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.

The denial of federal reimbursement to repay state funds expended on abortions does not preclude states from electing to fund abortions. 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. Several state courts examining the constitutionality of such statutes have adopted the due process or discriminatory funding analysis of the Supreme Court dissenters and have invoked state constitutional provisions to invalidate the statutes.

In *Moe v. Secretary of Administration & Finance*, 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. 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.


64 See notes 34, 45, & 61 supra.


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. 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. The fundamental nature of the right to privacy mandates that any state intervention in the exercise of the right be neutral. 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. The Massachusetts court held that discriminatory funding of the expenses incurred in the medical treatment of pregnancy constituted a 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).

18 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.


governmental intrusion into the constitutionally protected zone of privacy encompassing the abortion decision. 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. The Massachusetts constitution thus provides indigent women greater constitutional protection of the right to privacy than judicial interpretation of similar federal constitutional provisions.

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, 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. 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. The court then assessed the basis of state interference to determine whether the state interference arose from a compelling state interest.

The Moe dissent agreed with the McRae majority and concluded that a financial inducement to elect childbirth does not equal an obstacle to abortion. 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. 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. The dissent further concluded that the statute was within the legislative perogative, and that the judiciary should not overrule the legislature.


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Id.

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.
establishing that the state’s interest in protecting potential human life never supercedes the woman’s right to privacy in matters concerning her health. 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.

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. In Committee to Defend Reproductive Rights v. Myers, the California Supreme Court invalidated state budget acts excluding funds for elective abortions as an unconstitutional intrusion into protected areas of private choice. The Myers court characterized the constitutional issue as the protection of procreative choice from discriminatory governmental treatment. 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. 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.

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 disburse funds. 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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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.
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).
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. The court found the funding restrictions unrelated to the purposes of the California Medicaid programs. 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. 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. 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. 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.

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. 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. 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. The selective conferral of a

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93 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.

94 Id. at 282-83, 625 P.2d at 797-98, 172 Cal. Rptr. at 884-85.

95 Id. at 283-84, 284-86, 625 P.2d at 784-86, 798-99, 172 Cal. Rptr. at 871-73, 885-86.

96 Id. at 284-85, 625 P.2d at 798-99, 172 Cal. Rptr. at 885-86.

97 See note 5 supra (discussing Roe v. Wade).

98 See text accompanying notes 70-73, 78 & 88-92 supra.

99 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.\textsuperscript{98} Selective disbursement is government intervention, even when the government service in question is one the legislature elected to provide.\textsuperscript{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.\textsuperscript{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.\textsuperscript{101} Nevertheless, the Court has sanctioned state and federal legislative programs that admittedly affect, if not curtail, the woman's exercise of her right.\textsuperscript{102} The \textit{Maher} and \textit{McRae} courts distinguished, as the state courts refused to abortion. \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. \textit{Id.} at 124-26. See also Bennett, \textit{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].\textsuperscript{103}


\textsuperscript{99} See Bennett, \textit{supra} note 97, at 1009-17.

\textsuperscript{100} \textit{Id.; see} note 29 \textit{supra} (discussion of Title XIX's purpose).

\textsuperscript{101} \textit{See} note 5 \textit{supra} (discussion of \textit{Roe v. Wade}).


\textsuperscript{103} See Bennett, \textit{supra} note 97, at 1009-17.
do, the government's selective benefits program from the criminal sanctions the Roe v. Wade decision prohibited.\textsuperscript{103}

The Supreme Court has disallowed selective governmental dispersal programs in other contexts.\textsuperscript{104} Both the dissenters in the abortion funding cases\textsuperscript{105} and numerous commentators\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{109} or imposing parental or husband consent requirements.\textsuperscript{110} Similarly, lower federal courts have invalidated city ordinances directed at zoning abortion clinics out of town\textsuperscript{111} and overly burdensome informed consent regulations.\textsuperscript{112} These direct burdens may be qualitatively different than the indirect burden of imposing on indigent women a positive obligation to pay for abortions.\textsuperscript{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.


\textsuperscript{104} See note 112 infra & note 98 supra.

\textsuperscript{105} See text accompanying notes 39-48 & 59-62 supra.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{108} See Bennett, supra note 97, at 980-88; Perry, supra note 5, at 706-19; note 39 supra.


\textsuperscript{111} See Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328, 335-37 (5th Cir. 1981).

\textsuperscript{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.

\textsuperscript{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. 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, discrepancies 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.

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114 See text accompanying notes 66-94 supra.