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# Refusal to Fund Constitutionally Protected Right Held Valid, Harris v. McRae, 100 S.Ct. 2671 (1980)

# CASE COMMENTS

## REFUSAL TO FUND CONSTITUTIONALLY PROTECTED RIGHT HELD VALID
## *Harris v. McRae*, 100 S.Ct. 2671 (1980)

In *Harris v. McRae*[1] the United States Supreme Court limited the ability of a woman to exercise her fundamental right to decide to terminate a pregnancy[2] by upholding the constitutionality[3] of a congressional act that severely restricts federal funding for abortions.

Since 1976, Congress has annually attached a rider to the appropriations bill[4] for the Department of Health, Education, and Welfare.[5] The rider, commonly known as the Hyde amendment,[6] prohibits the use of federal funds to reimburse the cost of abortions under the Medicaid program[7] except in certain specified circumstances. Plaintiffs, an indi-

1. 100 S. Ct. 2671 (1980).

2. *See* Roe v. Wade, 410 U.S. 113 (1973). For cases raising constitutional issues related to the right to abortion, see Bellotti v. Baird, 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977) (per curiam); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Singleton v. Wulff, 428 U.S. 106 (1976); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam); Doe v. Bolton, 410 U.S. 179 (1973). *See generally* notes 22-67 *infra* and accompanying text.

3. 100 S. Ct. 2671, 2693 (1980).

4. The version of the Hyde amendment for fiscal year 1980 provides:

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

Pub. L. No. 96-123, § 109, 93 Stat. 923 (1979).

This version of the amendment is broader than that passed in 1976 for fiscal year 1977. The exception for "rape or incest" was not included in that amendment. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976). The amendments for fiscal years 1978 and 1979 were broader, allowing payment for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978). The *Harris* Court used the term "Hyde amendment" to refer generally to all three versions of the amendment. 100 S. Ct. at 2681 n.4. This case comment will do the same.

5. The Department of Health, Education, and Welfare was recently renamed the Department of Health and Human Services. 42 U.S.C. § 1396 (Supp. III 1979). The *Harris* opinion retained the old title for clarity. 100 S. Ct. at 2680 n.2. This case comment will do the same.

6. 100 S. Ct. at 2680.

7. Congress instituted the Medicaid program in 1965 to provide financial assistance to states that fund medical services for needy persons. State participation in the program is optional; com-

gent woman who wished to terminate a pregnancy while in the first trimester and an association of hospitals that provide abortion services,[8] brought suit in district court to challenge the Hyde amendment's constitutionality. The district court issued a preliminary injunction against the implementation of the funding restrictions.[9]

On direct appeal, the Supreme Court[10] vacated the injunction and remanded the case to the district court[11] for reconsideration in light of the Court's decisions in *Maher v. Roe*[12] and *Beal v. Doe*.[13] On remand, the district court permitted additional plaintiffs to intervene[14] and file

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pliance with federal requirements is mandatory for all participants. The program lists five general categories of medical treatments that are to be funded under a state assistance plan. A state is not required to fund all medical treatment under all five categories. The standard for determining the proper extent of assistance is that the state plan must be reasonable and consistent with the objectives of the federal program. The purpose of the program is to enable states to provide medical assistance to those persons whose income is insufficient to meet the costs of necessary medical services. 100 S. Ct. at 2680. *See generally* Social Security Act, Title XIX, 42 U.S.C. § 1396 (1976 and Supp. II 1978).

8. The district court certified the case as "a class action . . . on behalf of the class of pregnant or potentially pregnant Medicaid-eligible women in the state of New York, who, in consultation with their physicians, decide within twenty-four weeks after the commencement of pregnancy, to terminate their pregnancies by abortion" and "as a class action . . . on behalf of the class of duly licensed and Medicaid-certified providers of abortional services to Medicaid-eligible pregnant women." McRae v. Matthews, 421 F. Supp. 533, 543 (E.D.N.Y. 1976).

9. Judge Dooling granted the preliminary injunction reasoning that the Hyde amendment was unconstitutional. "When the power of enactment is used to compel submission to a rule of private conduct not expressive of norms of conduct shared by the society as a whole without substantial division it fails as law and inures as oppression." McRae v. Matthews, 421 F. Supp. 533, 542 (E.D.N.Y. 1976).

10. The Supreme Court has immediate appellate jurisdiction from any civil action, suit, or proceeding, or proceeding to which the United States or its agents is a party, that holds an Act of Congress unconstitutional. 28 U.S.C. § 1252 (1976). *See* Brief for Petitioner at 2, Harris v. McRae, 100 S. Ct. 2671 (1980).

11. Califano v. McRae, 433 U.S. 916 (1977) (mem.).

12. 432 U.S. 464 (1977).

13. 432 U.S. 438 (1977). The Supreme Court decided *Maher* and *Beal* after the district court granted the preliminary injunction against the implementation of the Hyde amendment. *See* notes 56-67 *infra* and accompanying text.

14. The district court "permitted the intervention of several additional plaintiffs, including (1) four individual Medicaid recipients who wished to have abortions that allegedly were medically necessary but did not qualify for federal funds under the versions of the Hyde amendment applicable in fiscal years 1977 and 1978, (2) several physicians who perform abortions for Medicaid recipients, (3) the Women's Division of the Board of Global Ministries of the United Methodist Church (Women's Division), and (4) two individual officers of the Women's Division." 100 S. Ct. at 2681. The district court also recertified the case as a class action. This second certification "included all pregnant women regardless of the stage of their pregnancy" who wished to abort their pregnancy because of medical necessity. *Id.* at 2682 n.10.

an amended complaint.[15] In the complaint, plaintiffs alleged that the Medicaid statute requires a state to fund medically necessary abortions[16] and that the Hyde amendment is unconstitutional.[17] After disposing of the statutory issue,[18] the district court invalidated the Hyde amendment[19] and ordered the continued expenditure of federal funds for medically necessary abortions.[20] On appeal, the Supreme Court reversed and *held*: The Hyde amendment in its refusal to fund a constitutionally protected activity does not violate the fifth amendment.[21]

The fifth amendment of the United States Constitution[22] protects cit-

15. *Id.* at 2682. The district court opinion remains unreported.

16. The complaint alleged that the Hyde amendment did not change a state's funding obligations under the Medicaid act. Regardless of the federal matching funds available, each state was required to fund all medically necessary abortions because it participated in the Medicaid program. *Id.*

17. Plaintiffs argued that the Hyde amendment unconstitutionally violated the free exercise and establishment clauses of the first amendment and the due process clause of the fifth amendment. *Id. See* note 74 *infra*.

18. The district court described the Hyde amendment as a substantive amendment of Title XIX, the Medicaid act. Even though it was a rider to an appropriations bill, it effectively amended the substantive law. *See, e.g.,* Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979), *appeal dismissed*, 100 S. Ct. 3039 (1980). Women's Health Servs., Inc. v. Maher, 482 F. Supp. 725, 728 (D. Conn. 1980). *But see* Doe v. Busbee, 481 F. Supp. 46, 50 (N.D. Ga. 1979) (citing Doe v. Busbee, 471 F. Supp. 1326, 1334 (N.D. Ga. 1979)) (Hyde amendment did not substantively alter a state's funding obligation under Title XIX); Doe v. Mathews, 420 F. Supp. 865, 869 (D.N.J. 1976) (Hyde amendment did not affect or amend Title XIX). *See generally* TVA v. Hill, 437 U.S. 153, 190 (1978) (an appropriations act without clear and manifest intention to repeal does not repeal prior legislation by implication unless statutes "irreconcilable"); Director, Office of Workers' Comp. Programs v. National Mines Corp., 554 F.2d 1267, 1275 (4th Cir. 1977) (an appropriations act can be accorded significant weight in determining intent of earlier legislation and could be considered a substantive amendment).

19. The district court found that the Hyde amendment violated the equal protection component of the fifth amendment's due process clause because the decision to fund medically necessary services but only certain medically necessary abortions served no legitimate purpose. The court also held that the Hyde amendment violated the free exercise clause of the first amendment because a woman's decision to seek a medically necessary abortion may be produced by her religious beliefs. The court found no violation of the first amendment's establishment clause. 100 S. Ct. at 2682.

20. *Id.*

21. The Supreme Court also held that states are under no obligation to fund where the federal and state governments are cooperating in the administration of a program to accomplish a particular purpose such as the Medicaid program and the federal government withdraws funding. *Id.* at 2685. In addition, the Court held that the Hyde amendment does not contravene the establishment clause of the first amendment by coinciding with the religious tenets of the Roman Catholic Church and that none of the plaintiffs have standing to raise a free exercise challenge. *Id.* at 2684, 2689-90.

22. U.S. CONST. amend. V provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

izens from deprivation of any fundamental right[23] related to "life, liberty, or property" without due process of law. Implicit in this due process guarantee is the principle of equal protection under the law,[24] which is similar to the guarantee of equal protection found in the fourteenth amendment.[25] The guarantee of equal protection also protects people from governmental action that impinges on a fundamental right.[26] The Supreme Court has held various rights fundamental and protected.[27] By labelling a right fundamental the Court subjects any governmental impingement of that right to close scrutiny.[28]

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23. *See, e.g.,* Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring); Palko v. Connecticut, 302 U.S. 319 (1937) (Cardozo, J.). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 572-75 (1978). *See also* Roe v. Wade, 410 U.S. 113 (1973) (fundamental right protected by fourteenth amendment).

24. Vance v. Bradley, 440 U.S. 93, 94 n.1 (1979). *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 272, 800, 992 (1978); Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977).

25. Buckley v. Valeo, 424 U.S. 1, 93 (1976) (per curiam); Schlesinger v. Ballard, 419 U.S. 498, 505-06 (1975). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

U.S. CONST. amend. XIV, § 1, provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction of equal protection of the laws."

26. One form of equal protection analysis involves a judicial examination of the legislation to determine whether it impinges on a fundamental right or operates to the disadvantage of some suspect class. If the legislation impinges on fundamental rights, the legislative purpose must be compelling and the legislation must be related closely to that purpose. If the legislation does not impinge on fundamental rights, the legislation only need rationally relate to a legitimate legislative purpose. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). *Accord,* Maher v. Roe, 432 U.S. 464, 470 (1977); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). *But see* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (sliding scale of scrutiny); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172-73 (1972) (effort to formulate a single standard of review); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (law will be upheld if any reasonable set of facts support it). *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1970); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

27. *See* North Georgia Finishing, Inc. v. Di-Chem, 419 U.S. 601 (1975) (right to adversary hearing either prior to or immediately following a prejudgment garnishment); Roe v. Wade, 410 U.S. 113 (1973) (right to decide to terminate a pregnancy); Goldberg v. Kelley, 397 U.S. 254 (1969) (right of welfare recipient to evidentiary hearing prior to benefit termination); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives); Gideon v. Wainwright, 372 U.S. 335 (1963) (right of defendant in noncapital felony case to counsel); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

28. The Court has recognized that, "[w]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest.'" Roe v. Wade, 410 U.S. 113, 155 (1973).

One fundamental right is the right of privacy.[29] Authority for constitutional protection of the right of privacy emanates from the penumbral nature of specified constitutional rights that encompass basic notions of liberty and justice.[30] Actions protected under the privacy guarantee include childrearing,[31] procreation,[32] and private family action.[33]

In *Griswold v. Connecticut*[34] the Supreme Court, in striking down a state statute imposing criminal sanctions on the use of contraceptives,[35] extended the right of privacy to encompass the right of married persons to obtain contraceptives.[36] The Court considered the right to obtain contraceptives fundamental because of the societal importance of marital privacy.[37] The Connecticut statute impermissibly impinged on marital privacy because it forbade the use of contraceptives.[38]

In *Roe v. Wade*[39] the Supreme Court extended privacy protection to encompass a woman's right to decide to terminate a pregnancy.[40] The Court in *Roe* invalidated portions of a Texas criminal statute proscribing any abortion that was not necessary to save the mother's life.[41] The

29. *See* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *See generally* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?*, 64 MICH. L. REV. 197 (1965); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Note, *Indigent Women and Abortion: Limitation of the Right of Privacy in* Maher v. Roe, 13 TULSA L.J. 287 (1977).

30. Roe v. Wade, 410 U.S. 113, 152 (1973). *See also* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (citing Poe v. Ullman, 367 U.S. 497, 516-22 (1961) (Harlan, J., dissenting)); 381 U.S. at 493 (Goldberg, J., concurring) (citing Powell v. Alabama, 287 U.S. 45, 67 (1932)). Several constitutional amendments have provided support for the right of privacy in one context or another. *See* Roe v. Wade, 410 U.S. 113 (1973) (fourteenth amendment); Eisenstadt v. Baird, 405 U.S. 438 (1972) (same); Griswold v. Connecticut, 381 U.S. 479 (1965) (first, third, fourth, fifth, ninth, and fourteenth amendments); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (first and fourteenth amendments).

31. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

32. *See* Skinner v. Oklahoma, 316 U.S. 535, 536, 541-42 (1942).

33. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

34. 381 U.S. 479 (1965).

35. *Id.* at 480.

36. *Id.* at 485.

37. *Id.* at 486. *See also id.* at 491 (Goldberg, J., concurring).

38. 381 U.S. at 485.

39. 410 U.S. 113 (1973).

40. *Id.* at 154.

41. *Id.* at 117-19, 164-65.

right to decide to terminate a pregnancy is founded in the significant privacy interests[42] embodied in personal intimacy, including the possible distress resulting from an unwanted child.[43]

The *Roe* Court recognized two compelling governmental objectives that justify impingement on the fundamental right to decide to abort[44]—the protection of the life and health of the mother and the protection of the potentiality of life. The governmental interest in protecting the health of the mother becomes compelling at the end of the first trimester of pregnancy.[45] Thus, a state may regulate the abortion procedure after the end of the first trimester as long as the regulation reasonably relates to the preservation of maternal health.[46] Likewise, the governmental interest in protecting the potentiality of life becomes compelling when the fetus reaches viability.[47] The state may regulate abortions after viability[48] and even proscribe abortion except when it is necessary to preserve the mother's health.[49]

The Court has had several opportunities to clarify the scope of the right to terminate a pregnancy.[50] One decisive factor in several cases addressing the abortion issue is the medical aspect of the decision to abort.[51] The extent to which a statute presents an obstacle to the deci-

42. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972) (Court recognized right of unmarried persons to obtain and use contraceptives); Griswold v. Connecticut, 381 U.S. 479 (1965) (Court recognized right of married persons to obtain and use contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942) (Court protected prison inmate's right to procreate). *Contra,* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (suggesting lack of precedent and legal foundation for right recognized in *Roe*); Morgan, Roe v. Wade *and the Lesson of the Pre-*Roe *Case Law*, 77 MICH. L. REV. 1724 (1979) (same); Tribe, *The Supreme Court, 1972 Term, Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) (same).

43. 410 U.S. at 153 .

44. *Id.* at 163.

45. *Id.*

46. *Id.*

47. *Id.* The *Roe* Court declared viability important because at that point "the fetus then presumably has the capability of *meaningful* life outside the mother's womb." 410 U.S. at 163 (emphasis added). Prior to *Roe* the Court examined various notions of when life begins and concluded that the law made no value judgments on this issue. *Id.* at 160-62. The medical definition of viability is the capability of living, which "usually connotes a fetus that has reached 500 grams in weight and 20 gestational weeks." STEDMAN'S MEDICAL DICTIONARY 551 (3d unabr. law. ed. 1976).

48. The Court listed examples of permissible state regulation—requirements concerning the qualifications of persons who perform abortions, requirements concerning licensing, and requirements concerning the place where an abortion may take place. 410 U.S. at 163.

49. *Id.* at 163-64.

50. *See, e.g.,* cases cited in note 2 *supra*.

51. *See, e.g.,* Colautti v. Franklin, 439 U.S. 379 (1979) (determination of when viability oc-

sion to abort is another factor. An absolute obstacle is automatically an unconstitutional impingement.[52] The obstacle, however, need not be absolute to be impermissible.[53] The right to abort depends on the extent and nature of the state's interference with that right.[54] Finally, the Court has upheld statutes that require different recordkeeping procedures for abortions than for other medical services.[55]

In the public funding context, the Court continued to uphold statutory distinctions between abortions and other medical services.[56] In *Maher v. Roe*[57] the Supreme Court upheld a state regulation limiting state Medicaid benefits for first trimester abortions to medically neces-

curs left to physician); Singleton v. Wulff, 428 U.S. 106 (1976) (physician's right to perform abortions inextricably bound up with privacy rights of women who seek abortions); Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam) (right to abort encompasses right to clinical abortion performed by medically competent personnel).

52. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976). A state statute required the consent of a spouse before a woman could obtain an abortion. This requirement could operate as an absolute obstacle to a woman's choice to abort if her husband refused to consent. The state, however, cannot delegate to a spouse veto power that the state itself cannot exercise. Therefore, the Court held the statute unconstitutional. *Id.* at 67-72.

53. Bellotti v. Baird, 443 U.S. 622, 642-44 (1979) (statute requiring parental consent before a minor may obtain an abortion unconstitutional because alternative procedure for proving the minor's maturity not provided); Carey v. Population Servs. Int'l, 431 U.S. 678, 687-91 (1977) (statute prohibiting distribution of nonmedical contraceptives except through licensed pharmacists imposed significant burden on right of individual to choose to use contraceptives and thus unconstitutional because no compelling interest served); Doe v. Bolton, 410 U.S. 179, 195-98 (1973) (statute, interposing a hospital committee between the doctor and woman's abortion decision and the actual abortion, substantially limits a woman's right to receive medical care according to her physician's best judgment and, in absence of compelling interest, unconstitutional).

54. *See* Whalen v. Roe, 429 U.S. 589, 598-600 (1977) (*Roe* right can only be understood by considering both woman's interest and nature of state's interference with it); Bellotti v. Baird, 428 U.S. 132, 148-50 (1976) (constitutionality of any distinction between abortion and other medical services depends on degree and justification for state's interference). *See also* Maher v. Roe, 432 U.S. 464, 474 (1977) (state interference allowed when termed an encouragement for alternative choice).

55. *See* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 79-81 (1976) (statute imposing recordkeeping requirements for abortions constitutional because procedures reasonably related to preservation of maternal health).

56. *See* Poelker v. Doe, 432 U.S. 519 (1977) (Court upheld city owned public hospital's refusal to perform nontherapeutic abortion even though it does handle pregnancies); Beal v. Doe, 432 U.S. 438 (1977) (Court interpreted the federal Social Security Act to allow a state choice to withhold funds for nontherapeutic abortions when the state funded pregnancies and medically necessary abortions). These cases, together with Maher v. Roe, 432 U.S. 464 (1977), are commonly referred to as the Abortion Funding Cases. *See* Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (And some Reflections on the Uncertain Limits of Reproductive Privacy)*, 77 MICH. L. REV. 1688 (1979).

57. 432 U.S. 464 (1977).

sary abortions.[58] The same state Medicaid program generally subsidized the medical expenses incident to pregnancy and childbirth.[59] The Court characterized the state regulation as a policy choice that encourages alternatives to the constitutionally-protected abortion choice.[60] The state policy choice is permissible because the government has discretion to distribute funds.[61] The *Maher* Court held that the state decision not to fund elective first trimester abortions did not create an impermissible obstacle to a woman's decision to abort.[62] Prior to the development of a state policy to encourage childbirth through funding decisions,[63] a woman's indigency restricted her ability to choose.[64] The state Medicaid plan limiting benefits to medically necessary abortions thus did not impinge on the fundamental right to decide to abort.[65]

Following *Maher*, the lower federal courts disagreed on the proper scope of constitutional protection for the right to decide to terminate a pregnancy and the permissibility of severe restrictions on federal funds for abortions. In light of the Supreme Court's apparent approval of any legislative funding decision, some courts held that the Hyde amendment, as a federal funding choice, was permissible.[66] Other

58. *Id.* at 466, 480.

59. *Id.* at 468-69.

60. *Id.* at 474-76.

61. The Court's underlying premise appears to be that funding choices belong almost entirely in the legislative realm. "The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided." *Id.* at 479.

The legislature is the governmental forum for decision between divided opinions. *See* K. PREWITT & S. VERBA, PRINCIPLES OF AMERICAN GOVERNMENT 260 (1975). There is some disagreement, however, as to whether any governmental decision is appropriate. *See* Hardy, *Privacy and Public Funding:* Maher v. Roe *as the Interaction of* Roe v. Wade *and* Dandridge v. Williams, 18 ARIZ. L. REV. 903, 937 (1976), where the author argues, "In light of the comparative claims of opposing groups, and the availability of private recourse, it seems rational for the government to take a path of neutrality in the abortion funding decision."

62. 432 U.S. at 474. *But see id.* at 483, 488-89 (Brennan, J., dissenting).

63. *Id.* at 474-75.

64. *Id.*

65. *Id. But see id.* at 482 (Brennan, J., dissenting). The dissent argued that the state funding choice makes an indigent woman's access to medically competent physicians to obtain an abortion impossible. An indigent then will feel as though there is no choice but to carry the pregnancy to term, because the state will fund the pregnancy. The dissent found this practical consequence of the funding regulation determinative in finding an impingement on the fundamental right to decide to terminate a pregnancy. *See also* notes 91-96, 100-12 *infra* and accompanying text.

66. *E.g.,* Roe v. Norton, 522 F.2d 928 (2d Cir. 1975); Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975); Frieman v. Walsh, 481 F. Supp. 137 (W.D. Mo. 1979); Woe v. Califano, 460 F. Supp. 234

courts relied on the Supreme Court's emphasis on medical considerations and held the Hyde amendment unconstitutional because it denied federal funds for most medically necessary abortions.[67]

In *Harris v. McRae* the Supreme Court found *Maher v. Roe* decisive[68] in determining that a federal refusal to fund medically necessary abortions does not impinge on the fundamental right to decide to abort.[69] Justice Stewart, writing for the majority, rejected the argument that states must maintain Medicaid funding for medically necessary abortions even though the Hyde amendment precludes the use of federal funds for medically necessary abortions.[70] The Medicaid program pools federal and state funds in a common purposive effort.[71] The cooperative scheme contemplates the participation of both parties. The states therefore cannot be compelled to maintain funding when federal funds have been withdrawn[72] unless Congress evinces a contrary intent.[73]

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(S.D. Ohio 1978); D__ R__ v. Mitchell, 456 F. Supp. 609 (D. Utah 1978), *rev'd*, 617 F.2d 203 (10th Cir. 1980). *See also* Doe v. Mundy, 441 F. Supp. 447 (E.D. Wis. 1977) (county refusal of funding).

67. *E.g.,* Reproductive Health Servs. v. Freeman, 614 F.2d 585 (8th Cir. 1980); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Jaffe v. Sharp, 463 F. Supp. 222 (D. Mass. 1978), *cert. denied,* 441 U.S. 952 (1979); Right to Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587 (1979). *See also* Planned Parenthood v. Minnesota, 612 F.2d 359 (8th Cir. 1980) (state denial of funding); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1978) (same).

68. 100 S. Ct. at 2686-89.

69. *Id.* at 2689. *See* notes 56-65 *supra* and accompanying test.

70. The Court first examined this statutory issue because if it decided the issue in favor of appellees, *i.e.*, required the states to fund medically necessary abortions, there would have been no need to address the constitutional issues. *Id.* at 2680. *Accord,* Rescue Army v. Municipal Ct. of Los Angeles, 331 U.S. 549 (1947). This case delineates the policy justifications behind the Supreme Court's general ban on advisory opinions. The ban dictates that the Court not adjudicate a constitutional issue unless such decision is unavoidable. *See also* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1535-44 (9th ed. 1975). In *McRae* appellees argued that the Social Security Act required all states participating in the Medicaid program to fund medically necessary abortions despite congressional withdrawal of funds for that purpose. Appellees claimed that medical necessity was the statutory standard for determining what services to fund. Because the statute did not contain language outlining federal duties, the appellees concluded that a congressional withdrawal of funds did not change the state's obligation. *See* Brief for Appellees at 112, Harris v. McRae, 100 S. Ct. 2671 (1980).

71. 100 S. Ct. at 2683.

72. *Id.* at 2684.

73. The Court cited with approval the determination by other federal courts that Congress did not expect the states to maintain funding of the abortions for which the Hyde amendment withdrew federal funds. *Id.* at 2685. The legislative history is replete with statements by members of Congress expressing their belief that the states would and could withdraw Medicaid money

After addressing several other constitutional issues,[74] the majority held that the Hyde amendment does not impinge on the fundamental right to decide to terminate a pregnancy.[75] Due process does not prevent a legislature from using a funding allocation to encourage an alternate activity over a constitutionally-protected activity.[76] Although a woman's interests in her health and in her decision to abort are fundamental liberties,[77] the Constitution does not require the government to fund abortions because the government did not create the obstacle that effectively prohibits an indigent women from procuring an abortion.[78] That obstacle is indigency.[79] The due process clause does not guaran-

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from abortion funding after the Hyde amendment was passed. *E.g.,* 123 CONG. REC. H. 6085 (daily ed. June 17, 1977) (remarks of Rep. Bauman); *id.* at 6088 (remarks of Rep. Eckhardt); *id.* at 6092 (remarks of Rep. Holtzman); 123 CONG. REC. S. 18,583 (daily ed. Nov. 3, 1977) (remarks of Sen. Bayh); *id.* at 18,589 (remarks of Sen. Packwood).

74. Appellees argued several other constitutional issues that the Court rejected. Appellees claimed that the Hyde amendment violated the establishment clause of the first amendment because it incorporated into the law the doctrines of the Roman Catholic Church. 100 S. Ct. at 2689. Those doctrines declare abortion a sin and determine the point in time at which life commences. The Court used the three-prong test from Committee for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980), to find that the Hyde amendment did not contravene the establishment clause. 100 S. Ct. at 2689. The amendment has a secular purpose; its primary effect does not advance or inhibit religion; it does not foster an excessive governmental entanglement with religion. *Id.*

Appellees also argued that the Hyde amendment violated the guarantee of religious freedom in the first amendment's free exercise clause. They argued that a woman's decision to seek a medically necessary abortion may be a product of her religious beliefs. The Court did not reach the merits of this issue because it found that none of the appellees had standing to raise the challenge. *Id.* The class of indigent women did not have standing because none alleged or proved that she was compelled by religious beliefs to seek an abortion. *Id.* at 2690 (citing McGowan v. Maryland, 366 U.S. 420, 442 (1961)). The two Board officers did not have standing because they lacked a personal stake in the controversy; they failed to allege that they were or expected to be pregnant or eligible for Medicaid. *Id.* (citing Warth v. Seldin, 422 U.S. 490, 498-99 (1975)). The Women's Division did not have standing because of the requirements that must be met before an organization can assert the rights of its members. The Court found that a free exercise challenge necessitated a showing of how the statute coercively affects a person in the practice of religion. *Id.* (citing Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963)). Because an organizaton cannot assert the rights of its membership if the claim or requested relief requires the participation of individual members, the Women's Division could not meet the standing requirements. *Id.* (citing Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)).

The hospital association did not attack the Hyde amendment on the basis of the free exercise clause. *Id.* at 2690 n.22. *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1544-72 (9th ed. 1975).

75. 100 S. Ct. at 2689.

76. *Id.* at 2687 (citing Maher v. Roe, 432 U.S. 464 (1977)).

77. *Id.* at 2688 (citing Roe v. Wade, 410 U.S. 113 (1972)).

78. *Id.* (citing Maher v. Roe, 432 U.S. 464 (1977)).

79. *Id. See* notes 105-06 *infra*.

tee the availability of funds to effectuate a constitutionally-protected choice.[80]

The majority summarily disposed of the equal protection objections to the Hyde amendment.[81] The Hyde amendment does not impinge upon a fundamental right.[82] Although the impact of the Hyde amendment falls primarily on indigent persons,[83] the legislative purpose only need satisfy a rationality test because poverty alone is not a suspect class.[84] The protection of the potentiality of human life is a legitimate legislative purpose and the Hyde amendment rationally serves that legitimate purpose. Furthermore, abortion is rationally distinguishable from other medical services because no other medical procedure purposely terminates a potential life.[85] Thus, the majority stated that funding choices are most appropriately made by legislatures rather than by the judiciary.[86]

Justice White, in concurrence,[87] maintained that the Court's decision in *Maher v. Roe*[88] precluded[89] the dissent's balance[90] between a woman's fundamental right and the state's policy choice.

80. 100 S. Ct. at 2688-89 (citing Maher v. Roe, 432 U.S. 464, 469 (1977)). *See* notes 62-71 *supra* and accompanying text. Arguably, the Court based its decision on judicial deference to Congress' constitutionally-granted spending power. *See* 100 S. Ct. at 2689; U.S. CONST. art. I, § 8, cl. 1. That deference may be misplaced, however, in situations in which Congress uses the spending power to undermine a state's ability to protect its citizens, *e.g.*, by withdrawing funding so that a state is unable to fund its programs. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 314-16 (1978). *See also* National League of Cities v. Usery, 426 U.S. 833 (1976).

81. 100 S. Ct. at 2690-93.

82. *Id.* at 2691.

83. *See* notes 104-06 *infra* and accompanying text.

84. 100 S. Ct. at 2691 (citing James v. Valtierra, 402 U.S. 137 (1971)). *James* involved a California statute that required referendum approval for any low rent public housing project. The challengers to the statute claimed that the statute adversely affected poor persons. The Court said "a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." 402 U.S. at 142.

85. 100 S. Ct. at 2692.

86. *Id.* at 2693. When Congress makes a policy choice regarding funding, it acts under the constitutional authority granted by the spending power. U.S. CONST. art. I, § 8, cl. 1. Although congressional authority to spend is limited to spending for the general welfare, this authority is virtually without limit. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 247-50 (1978).

87. 100 S. Ct. at 2693 (White, J., concurring). Justice White's concurrence provided the necessary fifth vote for the majority opinion. The basis for his concurrence thus takes on added significance.

88. 432 U.S. 464 (1977). *See generally* notes 56-65 *supra* and accompanying text.

89. 100 S. Ct. at 2694.

90. *See* notes 91-99 *infra* and accompanying text.

In a dissenting opinion,[91] Justice Brennan emphasized the coercive effect of funding restrictions on an indigent woman's decision to abort.[92] Justice Brennan began with the premise that an indigent woman lacks the ability to pay for either a pregnancy or an abortion.[93] By funding pregnancies and not abortions, the government takes the decision of whether to abort or have a child out of the woman's hands. The governmental policy favoring childbirth thus can discourage the exercise of the fundamental right to choose to abort as effectively as would criminal sanctions against the exercise of that right.[94] This inhibition of a constitutionally-protected choice is unconstitutional[95] as a limitation on the use of governmental power to burden a woman's freedom of choice.[96]

Justice Stevens, in a separate dissenting opinion, focused on the po-

91. 100 S. Ct. at 2702 (Brennan, J., dissenting). Justice Brennan wrote this opinion in dissent to the Court's decisions in Harris v. McRae, 100 S. Ct. 2671 (1980) and Williams v. Zbaraz, 100 S. Ct. 2694 (1980). The *Williams* case involved a class action under 42 U.S.C. § 1983 (1976) to enjoin enforcement of a state statute that prohibited state Medicaid payments for all abortions except those necessary to save the life of the woman seeking the abortion. The Court found the opinion in *Harris* dispositive. 100 S. Ct. at 2701.

Justices Blackmun and Marshall joined Justice Brennan's dissent. Both Justices also wrote dissents of their own. *Id.* at 2711 (Blackmun, J., dissenting). *Id.* at 2706 (Marshall, J., dissenting).

Justice Marshall's dissent reiterated his dissatisfaction with the Court's rigid equal protection analysis. *Id.* at 2708 (Marshall, J., dissenting). He argued that the level of scrutiny for legislation exclusively affecting indigent women should be greater than that scrutiny afforded legislation concerning economic interests. Traditional strict scrutiny is unavailable to protect an indigent woman's interest because the Court refuses to define wealth as a suspect classification. Justice Marshall thus believes a new analysis is needed.

Justice Marshall's analysis would assess the classification in *Harris*, a distinction between medically necessary abortions and other medically necessary services, by weighing "the importance of the governmental benefits denied, the character of the class, and the asserted state interests." *Id.* at 2709 (Marshall, J., dissenting) (quoting his own dissent in Maher v. Roe, 432 U.S. 464, 458 (1977)). This analysis would hold the Hyde amendment unconstitutional. First, the governmental benefits at issue are of absolutely vital importance to the welfare of the recipients. Second, the burden of the amendment falls exclusively on a discrete and insular minority and the "devastating impact" of the amendment makes the class affected entitled to special consideration. Third, because the governmental interest in normal childbirth may not be effectuated if the abortion is a medical necessity and because the Hyde amendment's real purpose—to deprive poor women of the right to choose an abortion—is constitutionally impermissible, the governmental interests cannot outweigh the "brutal effect on indigent women." *Id.* at 2709 (Marshall, J., dissenting). *See also* note 26 *supra*.

92. 100 S. Ct. at 2703, 2704 (Brennan, J., dissenting).

93. *Id.* at 2704 (Brennan, J., dissenting).

94. *Id.*

95. *Id.* at 2705 (Brennan, J., dissenting).

96. *Id.* at 2702-04 (Brennan, J., dissenting). *See* note 76 *supra* and accompanying text. *But see* note 111 *infra* and accompanying text.

tentially life-endangering consequences of denying funding to indigent women for abortions. He interpreted the *Roe* doctrine[97] as a limitation on a state's protection of the potentiality of life when that interest conflicts with the health interests of a pregnant woman.[98] The Hyde amendment's disregard for the medical necessity of abortion thus proves its unconstitutionality.[99]

The *Harris* opinion failed to address the proper scope of constitutional protection for the right to decide to abort. The crux of the majority's opinion is its premise that a funding decision cannot impinge on the fundamental right to decide to abort.[100] The "no impingement" finding ingores the blatant consequences of presenting an indigent woman with a choice between a free pregnancy and a costly abortion. An indigent woman will choose the free alternative because she lacks the financial means to effectuate a decision to abort.[101]

Justice Brennan's argument that a governmental funding choice that encourages pregnancy can be an effective denial of the ability to decide to abort is correct.[102] The decision to abort is a fundamental constitutionally-protected right. Therefore, the effective denial of the exercise of the right is an "impingement" that subjects the statute to close scrutiny. The governmental interest in enacting the Hyde amendment was to protect the potentiality of life. Under *Roe v. Wade* that governmental interest becomes compelling only at viability.[103] Because the Hyde amendment denies federal funds for most abortions before viability, it

97. *See* notes 39-55 *supra* and accompanying text.

98. 100 S. Ct. at 2713 (Stevens, J., dissenting).

99. *Id.* at 2716 (Stevens, J., dissenting).

100. *See* notes 75-80 *supra* and accompanying text.

101. The source of the destructive effect on a woman's decision is a point of contention between the majority and the Brennan dissent. The majority recognized the possibility that a woman's decision to abort in fact may be impossible. *Id.* at 2687. The cause of such an effect is the woman's indigency, however, and not the legislation. Thus there is no impingement.

In contrast, Justice Brennan focused on the practical effect of lack of funding on a woman's decision. In his view, the Hyde amendment was designed to, and does in fact, inhibit a woman's freedom to choose abortion over childbirth. *Id.* at 2703 (Brennan, J., dissenting). *See* notes 91-96 *supra* and accompanying text.

Thus it appears that the disagreement between the majority and the dissent is greater than simply the source of the effect. The majority looked first to the governmental "action" and determined that there was "no action." Justice Brennan focused on the already recognized fundamental right to determine if it had been impinged.

102. *See* note 94 *supra* and accompanying text.

103. *See* notes 45-49 *supra* and accompanying text.

does not withstand close scrutiny and, therefore, is unconstitutional.[104]

The Court held that *Maher v. Roe* controlled whether a funding policy decision constituted an "impingement."[105] *Harris*, however, is factually distinguishable from *Maher*. In *Harris* the Hyde amendment disallowed funding for most abortions, regardless of the medical necessity.[106] In *Maher* the state statute only denied funding for elective first trimester abortions and had no effect on funding for medically necessary abortions.[107]

The Court failed to address adequately whether a funding policy may impinge on a fundamental interest magnified by medical necessity.[108] Given the Court's past concern with the medical aspects of the right to choose an abortion,[109] its disregard for medical necessity in *Harris* is confusing. The Court's failure to avow its past concern for a woman's health dissipates its seemingly definitive support for the legislative prerogative to make funding choices.

By disregarding a woman's health interest in an abortion decision, the Court implicitly limited the importance of the health interest in the decision to abort.[110] The majority also shifted the focus of "impingement on the fundamental right" analysis to the nature of the governmental action.[111] The present Court remains divided over the scope of constitutional protection provided by the Court for a woman's right to decide to terminate a pregnancy.[112] Until the Court provides a definitive answer to this issue, lower courts are free to allow as little or as much interference with that right as each deems proper.

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104. 100 S. Ct. at 2713 (Stevens, J., dissenting).

105. *Id.* at 2687-89. *See* note 68 *supra* and accompanying text. *See also* notes 56-65 *supra* and accompanying text.

106. 100 S. Ct. at 2680-81. *See* note 4 *supra*.

107. 432 U.S. at 466, 480. *See* note 58 *supra* and accompanying text.

108. The majority briefly acknowledged and dismissed the medical necessity issue at two points in the opinion. 100 S. Ct. at 2688, 2690-91. The opinion regards the relevance of the medical necessity distinction as limited to the issue of whether the classification is suspect. *But see id.* at 2707-09 (Marshall, J., dissenting); note 93 *supra*.

Justice Steven's dissent focused on the importance of the medical need in defining the fundamental right to be protected. 100 S. Ct. at 2713 (Stevens, J., dissenting). *See* notes 97-99 *supra* and accompanying text.

109. *See* notes 45-46, 51 *supra* and accompanying text.

110. *See* notes 45, 46, 51, 67-68, 97-99 *supra* and accompanying text.

111. *See* notes 38, 41, 44-49, 58-65, 76, 78, 80 *supra* and accompanying text.

112. *See* notes 30, 91, 108 *supra* and accompanying text.