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Harris v. McRae: Whatever Happened to the Roe v. Wade Abortion Right?

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Harris v. McRae: Whatever Happened to the *Roe v. Wade* Abortion Right?

The controversial Roe v. Wade decision purportedly removed the abortion controversy from the political arena and set constitutional standards by which questions on the issue could be resolved. The enactment of the Hyde Amendment, a bill which generally forbids the use of Medicaid funds for abortions, was a recent political response to the abortion controversy. However, in the recent case of Harris v. McRae, the Supreme Court upheld the constitutionality of the Hyde Amendment and thus injected the abortion controversy back into the political arena. The author exhaustively examines the abortion controversy from the time of the Roe decision up to the enactment of the Hyde Amendment, the various arguments and corresponding levels of review by which the Supreme Court upheld the Hyde Amendment and the drastic consequences that Harris v. McRae will pose for indigent women and the Supreme Court's "two-tiered" approach for Equal Protection Clause analysis. The author concludes that this case represents not only a retreat from the Roe decision, but also the sanction of a law that effectively violates the Due Process and Equal Protection Clauses of the fifth amendment.

I. INTRODUCTION

On June 30, 1980, the United States Supreme Court handed down a decision that extinguished for indigent women the practical importance of the fundamental right to an abortion that was recognized in *Roe v. Wade*.[1] In *Harris v. McRae*,[2] the Court held, in a five to four[3] decision, that the denial of Medicaid benefits for therapeutic[4] abortions was both statutorily and constitutionally valid. The Court relied heavily on its analysis in the nontherapeutic abortion funding case, *Maher v. Roe*,[5] for its decision. Therefore, the relationship between *McRae* and *Maher*, plus the political background behind the Hyde Amendment,[6] must be ana-

1. 410 U.S. 113 (1973).

2. 100 S. Ct. 2671 (1980).

3. Justice Stewart delivered the opinion of the Court joined by Chief Justice Burger and Associate Justices White, Powell and Rehnquist. Justices Brennan, Marshall, Blackmun and Stevens dissented and wrote separate dissenting opinions.

4. *See* note 47 *infra*.

5. 432 U.S. 464 (1977) (a state's refusal to fund nontherapeutic abortions under the Medicaid Program is not unconstitutional).

6. The Hyde Amendment, Pub. L. No. 94-439, § 208, 90 Stat. 1434 (1976), severely limited federal reimbursement for abortion costs under the Medicaid Program. *See* notes 15-48 *infra*, and accompanying text for discussion of the Hyde Amendment.

lyzed to understand how the Court came to this conclusion.

II. BACKGROUND

A. *Medicaid*[7]

The Medicaid Program was created in 1965 by the addition of Title XIX to the Social Security Act.[8] It is a cooperative plan where the federal government provides funds to the states to enable them to provide free medical services to persons unable to meet the costs of necessary medical treatment. Participation in the program by the state is entirely optional, but once the state chooses to participate, it must comply with the requirements of Title XIX. The state has broad discretion in determining the extent and duration of the services which it is required[9] or permitted[10] to provide. Title XIX, however, requires that states (1) establish reasonable standards for determining the extent of coverage;[11] (2) fund similar services in equal amounts; (3) provide

7. For a full explanation of Medicaid and The Social Security System, *see generally* COMMERCE CLEARING HOUSE, INC., 1974 SOCIAL SECURITY AND MEDICARE EXPLAINED—INCLUDING MEDICAID (1974).

8. 42 U.S.C. § 1396-1396k (1976 & Supp. II 1978).

9. States are required to provide financial assistance to the "categorically needy." This includes families with dependent children eligible for public assistance under Aid to Families with Dependent Children Program, 42 U.S.C. §§ 601-10 (1976), and the aged, blind and disabled eligible for assistance under Supplemental Security Income Program, 42 U.S.C. §§ 1381-84 (1976). *See* Social Security Act of 1965, 42 U.S.C. § 1396a(a)(10)(A) (1976 & Supp. II 1978). There are five general categories that must be provided for: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and X-ray services, (4) skilled nursing facilities, periodic early childhood diagnosis and screening, and family planning services, which does not specifically mention abortions, and (5) physician services. *Id.* §§ 1396a(a)(13)(B), 1396d(a)(1)-(5).

10. States are permitted to provide services for the "medically needy." This includes those who are not eligible under the previous category, but whose incomes are not sufficient to meet the costs of medically necessary treatment. *Id.* § 1396(a)(10)(C). It is not required to provide this service to participate in the Medicaid Program and the state may provide different areas of coverage. *See Id.* § 13962(a)(13)(C).

11. *Id.* § 1396a(a)(17). "Reasonable standards" are to be determined according to the following criteria:

> (a) The Plan must specify the amount and duration of each service that it provides.
> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
> (c) (1) The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 [categorically needy] and 440.220 [medically necessary] to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
> (2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

42 C.F.R. § 440.230 (1979).

qualified recipients with equal duration and scope of services;[12] and (4) act consistently with the stated objective of Title XIX[13] which is to provide medical assistance for those whose "income and resources are insufficient to meet the costs of necessary medical services."[14]

B. Hyde Amendment

Before the landmark decision of *Roe v. Wade*,[15] Congress avoided the abortion issue, thereby avoiding federal interference with what it considered to be a state matter.[16] The *Roe* decision, however, touched off a wave of controversy that had a powerful impact on the abortion and abortion funding cases that followed.[17]

The first reaction by Congress, responding to the pro-life lobby groups,[18] was to prohibit the use of United States foreign aid funds to pay for or encourage abortions.[19] Congress also amended a federal health program bill that permitted individuals and institutions receiving federal funds to exercise a "right of

12. 42 U.S.C. § 1396a(10)(b) (1976) (the comparability requirement).

13. *Id.* § 1396a(a)(17)(A).

14. *Id.* § 1396 (the preamble to Title XIX).

15. 410 U.S. 113 (1973).

16. Vinovskis, *The Politics of Abortion in the House of Representatives in 1976*, 77 MICH. L. REV. 1790, 1791 (1979) [hereinafter cited as Vinovskis].

17. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379 (1979) (a state may not require that physicians protect the life of the fetus whenever they have reason to believe the fetus might survive the abortion); Bellotti v. Baird, 443 U.S. 622 (1979) (a state may not require that an unmarried minor obtain her parents' consent or judicial approval before an abortion is allowed to be performed); Poelker v. Doe, 432 U.S. 519 (1977) (a city may provide publicly financed hospital services for childbirth, but deny the same for abortions in its public hospitals); Maher v. Roe, 432 U.S. 464 (1977) (a state's refusal to fund nontherapeutic abortions under the Medicaid Program is not unconstitutional); Beal v. Doe, 432 U.S. 438 (1977) (a state's refusal to fund nontheraputic abortions under their Medicaid Program does not violate the Social Security Act); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (states may not require a husband's consent or parents' consent for a minor as a prerequisite for having an abortion, may not ban the use of a particular method of abortion, and may not require doctors to take as much care to save the life of a fetus from abortion as if the fetus were a prematurely born child; however, a state may require a written consent from the woman).

18. Among the pro-life lobby groups were the National Right to Life Committee, NEWSWEEK, January 28, 1980, at 81; Catholic League for Religious and Civil Rights, TIME, January 28, 1980, at 30; and March for Life, U.S. NEWS AND WORLD REPORT, July 14, 1980, at 42.

19. Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 2(3), 87 Stat. 714 (1973). "None of the funds made available to carry out this part shall be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions." *Id.*

conscience."[20] This amendment excused these individuals and institutions from being required to perform abortions if it was against their religious or moral beliefs to do so. The amendment also prohibited discrimination in employment of persons who performed or refused to perform abortions because of their beliefs.[21] Pro-life congressional members[22] tried to pass a constitutional amendment to prohibit abortions altogether, but the opposing pro-choice faction[23] defeated the measure. Later in 1976, another constitutional amendment was introduced which would guarantee

20. Health Programs Extension Act, Pub. L. No. 93-45, § 401(b)(c), 87 Stat. 91 (1973).

> (b) The receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act by any individual or entity does not authorize any court or any public official or other public authority to require—
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> (1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or
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> (2) such entity to—
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> (A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions, or
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> (B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedure or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.
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> (c) No entity which receives a grant, contract, loan or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act after the date of enactment of this Act may—
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> (1) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or
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> (2) discriminate in the extension of staff or other privileges to any physician or other health care personnel,
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> because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

Id.

21. O'Hara, *Congress and the Hyde Amendment, How the House Moved to Stop Abortions*, CONG. Q., April 19, 1980, at 1037-38 (citing 1973 *Almanac* 489, 816) [hereinafter cited as *Abortion Funding*].

22. Senator Jesse A. Helms, the Senate's leading right to life proponent, and Representative Henry Hyde, originator of the amendment, are leading pro-life congressmen. Former Congressman Robert E. Bauman was also a leading pro-life supporter prior to his election defeat in 1980.

23. Representatives Patricia Schroeder, Bella S. Abzug and Joel M. Pritchard are examples. Pro-choice lobby groups include Right to Choose, National Abortion Rights Action League and National Organization for Women. U.S. NEWS AND WORLD REPORT, July 14, 1980, at 42.

the unborn child a right to life.[24] The proposed amendment read: "With respect to the right of life guaranteed in this Constitution, every human being, subject to the jurisdiction of the United States, or of any State, shall be deemed, from the moment of fertilization, to be a person and entitled to the right of life."[25] This appeared to be another attempt to overturn the *Roe* decision where the Supreme Court specifically determined, after an in-depth analysis of the historical and constitutional background, "that the word 'person' as used in the fourteenth amendment, does not include the unborn"[26] and that the state's interest in the protection of potential life is not cognizable until the third trimester.[27] Though the resolution was defeated forty-seven to forty in the Senate, the close vote inspired the abortion opponents to continue the strong attack.

The pro-life congressmen decided to take an alternative route by stopping the use of federal funds to pay for abortions through Medicaid.[28] They realized that the vast majority of federally funded abortions were for the Medicaid poor.[29] From 1974, the battle between the pro-life and the pro-choice factions continued in both houses with a variety of funding restrictions being passed in one house, only to be rejected in the other. Finally, in the election year of 1976,[30] in an amendment to the Labor-Health, Education, and Welfare appropriations bill in the House,[31] it was proposed that: "None of the funds appropriated under this Act shall be used to pay for abortions or to promote or encourage abortions."[32] Those congressmen against the bill[33] believed that it

24. Senate Judiciary Committee Resolution, S.J. Res. 178, 94th Cong., 2d Sess., 122 CONG. REC. 11,556 (1976) (introduced by Senator Jesse A. Helms (R.-North Carolina)).

25. Vinovskis, *supra* note 16, at 1790, 1792.

26. 410 U.S. at 158.

27. *Id.* at 164-65.

28. The stated purpose of the Hyde Amendment, *supra* note 6, was to prevent the use of the taxpayer's funds to promote or encourage abortions because many taxpayers are against abortion and should not be forced to pay for something they find morally objectionable. H.R. 14232, 94th Cong., 2d Sess., 122 CONG. REC. H8633-34 (1976) (remarks of Rep. Hyde).

29. *Abortion Funding*, *supra* note 21, at 1038.

30. Many members of Congress felt that the majority in their districts were in favor of abortion, but were aware that the strong opposing minority was very active and could cause them to lose the upcoming election. Vinovskis, *supra* note 16, at 1798 (citing 122 CONG. REC. 26,782 (1976)).

31. Pub. L. No. 94-439 § 209, 90 Stat. 1434 (1976).

32. Vinovskis, *supra* note 16, at 1793 (citing 122 CONG. REC. 20,410 (1976)).

33. *See* note 23 *supra*.

was discriminatory, unfair, and unconstitutional in that it only affected poor women on welfare who were least able to handle the problem of an unwanted or health-threatening pregnancy.[34] The Hyde Amendment met this criticism even from the anti-abortion faction where some members felt that it was "blatantly discriminatory."[35] While they realized that the amendment was not the best way, supporters viewed it as the only way to effectively stop abortions since a constitutional amendment was not feasible.[36] They saw the Supreme Court decision in *Roe* as "mistaken and immoral"[37] in that the unborn child is alive and has a right to life. The opponents of the Hyde Amendment, on the other hand, tried to point out that the right to choose an abortion had already been decided by the Supreme Court[38] and that Congress should not force their personal opinions upon the women of the country.

> We are not voting on abortion, we are not voting religious or conscientious views, the Members are simply going to be voting to deny access to what are acceptable methods of birth control and what are acceptable methods of family planning, which we have enacted into law in this Congress. . . . We are all entitled to our differences on abortion. We will continue to have them, and I trust we respect the differences that we have. . . . I think we should be concerned with preserving the essence of our democratic society which allows all viewpoints to flourish and compete for support.[39]

It was also pointed out that the Hyde Amendment was contrary to the very purpose of the Labor-Health, Education, and Welfare appropriations bill which was to provide services for all Americans regardless of their economic status.[40]

The anti-abortion lobby noted that "therapeutic and medical

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34. H.R. 14232, 94th Cong., 2d Sess., 122 CONG. REC. H8631 (1976) (remarks of Rep. Pritchard). "It is discriminatory and it is unconstitutional clearly. . . . All of the Federal courts have so held. This will not stop abortion, this will just stop safe abortions." *Id.* at H8632.

35. Vinovskis, *supra* note 16, at 1794 (remarks of Rep. Daniel J. Flood (D-Penn.), Chairman of the Labor-HEW Appropriations Subcommittee and a supporter of a constitutional amendment to prohibit abortions).

36. *Id.*

37. *Id.* at 1795 (citing 122 CONG. REC. 20,411 (1976) (remarks of Rep. Robert E. Bauman (R.-Maryland))).

38. Representative Don Edward of California believed the legislature was conditioning the receipt of a statutory benefit upon the relinquishment of the constitutional right recognized in *Roe*.

> No matter your private view or mine or even the view of this House collectively on the issue of abortion, the subject provision would create an invidious classification which would conflict with the Supreme Court's decision in *Roe* and *Doe* and almost every other lower court ruling interpreting those cases and would be violative of the equal protection standards of the fifth amendment.

122 CONG REC. H8633 (1976).

39. *Id.* at H8632 (remarks of Rep. Abzug (N.Y.)).

40. *Id.* at H8634 (remarks of Rep. Schroeder (Colo.)).

services . . . could be paid for by state, local, or private funds,"[41] thereby attempting to lessen the "blatant discrimination" criticism. The Hyde Amendment was finally passed by both houses after the Senate agreed to the compromise language providing funds for abortions where the mother's life is endangered. The final provision stated: "None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."[42] The bill became law on September 30, 1976,[43] but did not become effective until August 4, 1977, because of legal challenges;[44] however, the battle in Congress continued.[45] The following year's appropriation bill provided that abortion funds could be used only if the life of the mother would be endangered, severe and long-lasting physical health damage to the mother would result as determined by two doctors, and in cases of incest and rape.[46] This was much broader than the final version of the Hyde Amendment that is applicable for the fiscal year in 1980. This current provision provides:

None of the funds provided by this joint resolution shall be used to per-

41. Vinovskis, *supra* note 16, at 1797 (citing 122 CONG. REC. 26,782 (1976) (remarks of Rep. Flood)). Before federal funds were denied by the Hyde Amendment, 47 states and the District of Columbia provided Medicaid reimbursement for abortions. 122 CONG REC. H8635. However, after the decisions in *Beal*, *Maher*, and *McRae*, where it was held that the states have no statutory or constitutional duty to provide these funds, it is doubtful that the states will provide Medicaid funds when they are given no reimbursement from the federal government. As the district court predicted, "It is idle to suggest that the withdrawal of federal support and the lead the federal government has sought to take will not result in renewed efforts by the states to deny the needed medical assistance in these cases." McRae v. Mathews, 421 F. Supp. 533, 542 (E.D.N.Y. 1976).

42. *Id.* at 1798 (citing 122 CONG. REC. at 30,895 (1976)).

43. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

44. *See* notes 49-55 *infra* and accompanying text.

Before the Hyde Amendment, Medicaid abortions totaled approximately 250-300,000 a year at a cost of $45 million and accounted for roughly one third of all abortions performed. After the enactment of the Hyde Amendment, Medicaid abortions fell to a few thousand a year. Therefore, the restriction of funds clearly had a tremendous effect on the number of abortions performed through the Medicaid Program.

Abortion Funding, *supra* note 21, at 1038-39.

45. The anti-abortion forces pushed through two other funding restrictions: one restricted the Department of Defense to paying only for those abortions allowed in the Hyde Amendment, thereby reaching military personnel and their dependents, and the other prohibited the Peace Corps from paying for those abortions of its volunteers. *Abortion Funding*, *supra* note 21, at 1039.

46. Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978).

> form 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.[47]

As there is no evidence that this conflict is as yet resolved, Congress' next move is open to question.[48]

III. The Abortion Funding Decision

Harris v. McRae was the next logical step in the progression[49] of abortion funding decisions handed down by the Supreme Court. The suit was filed on the day the Hyde Amendment was originally enacted and sought to enjoin the enforcement of the funding restrictions in the Amendment on the grounds that it violated the Due Process Clause of the fifth amendment and the Establishment Clause and Free Exercise Clause of the first amendment and the Equal Protection guarantee of the fifth amendment. The District Court for the Eastern District of New York 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 24 weeks after the commencement of pregnancy, to terminate their pregnancies by abortion; . . . and on behalf of the class of duly licensed and Medicaid-certified providers of abortional services to Medicaid-eligible pregnant women.[50]

The court entered a preliminary injunction prohibiting the enforcement of the Hyde Amendment and requiring the Secretary of Health, Education, and Welfare to continue to provide federal reimbursement for all abortions to qualified Medicaid recipients.[51] The Secretary appealed this order to the Supreme Court because

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47. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979). *See also* Pub. L. No. 96-86, § 118, 93 Stat. 662 (1980). Thus, the current version excludes funds for therapeutic abortions where severe and long lasting physicial health damage to the mother would result from the pregnancy as long as the mother's life itself is not threatened by it. Where the mother's life is threatened, the abortion is not included within the therapeutic category.

48. In *Harris v. McRae*, the Court conducted its analysis using the 1976 version of the Hyde Amendment since it was most restrictive. If the most restrictive version could be sustained as constitutional, so could the broader versions.

49. *See* note 17 *supra*.

50. McRae v. Mathews, 421 F. Supp. 533, 543 (E.D.N.Y. 1976).

51. After the district court found that the plaintiffs had standing, it concluded that they would probably succeed on the merits since Klein v. Nassau County Medical Center, 409 F. Supp. 731 (E.D.N.Y. 1976), and Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975), decided that a state may not constitutionally deny Medicaid funds for elective abortions. Both were on appeal to the Supreme Court and the outcome would directly affect this case. McRae v. Mathews, 421 F. Supp. at 535-41. Also, the discontinuance of federal funds would impose irreparable harm on indigent women since facilities would no longer be available to them and, thus, their health would be put in jeopardy. *Id.* at 542-43.

of the implicit unconstitutionality of the restriction.[52] The Supreme Court, in light of *Beal v. Doe*[53] and *Maher v. Roe*,[54] vacated the injunction and remanded the case for further consideration in light of those decisions.[55]

A. Background

In *Beal v. Doe*,[56] the sole issue was whether a state participating in the Medicaid Program was required by Title XIX of the Social Security Act to provide funds for all legal abortions. This case involved Pennsylvania's Medical Assistance Program that limited its Medicaid funding of abortions to those certified by physicians as medically necessary.[57] The Supreme Court held, as a matter of statutory construction, that there was no obligation by the state to provide funding for nontherapeutic abortions as a

52. 28 U.S.C. § 1252 (1977).

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

Id.

53. 432 U.S. 438 (1977).

54. 432 U.S. 464 (1977).

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

56. 432 U.S. 438 (1977).

57. Neither counsel for the plaintiff nor the defendant referred to a specific regulation. However, the district court accepted as the applicable requirements the criteria set forth in an Opinion Letter of the Attorney General, dated August 6, 1973, to which the parties agreed. Doe v. Wohlgemuth, 376 F. Supp. 173, 175 n.1 (W.D. Pa. 1974), *modified sub nom.* 523 F.2d 611 (1977), *rev'd*, Beal v. Doe, 432 U.S. 438 (1977). Abortions may be performed if they meet the following criteria:

1. There is documented medical evidence that continuance of the pregnancy may threaten the health or life of the mother;
2. There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or
3. There is documented medical evidence that a continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient;
4. Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and
5. The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.

376 F. Supp. at 175.

condition of Medicaid participation.[58] The Hyde Amendment, however, was not involved in this case. If the state went ahead and provided funds for nontherapeutic abortions, it would continue to have been reimbursed by the federal government. The case was limited to the state's scope of discretion in determining the extent of its coverage under the Medicaid Program when federal funds are available.[59]

Maher v. Roe[60] involved the constitutionality of a Connecticut regulation[61] that refused Medicaid funding of nontherapeutic abortions but provided funding for childbirth and therapeutic or medically necessary abortions.[62] Plaintiffs, two women unable to obtain a physician's certificate of medical necessity and, therefore, not qualified for Medicaid funds for their desired abortions, challenged the regulation as a violation of their constitutional rights protected by the Due Process and Equal Protection guarantees of the fourteenth amendment.[63] Again, the Hyde Amendment was not involved; only the constitutionality of the state regulation was at issue. Federal funds were available for nontherapeutic abortions if the state included them within its coverage. The state was reimbursed for the medically necessary abortions that it provided. The Supreme Court held that Connecticut's regulation did not impinge upon the fundamental right of privacy as recognized in *Roe v. Wade*,[64] did not involve discrimination

58. 432 U.S. at 447. The Court determined that the requirement of Title XIX that the state plan must include "reasonable standards" for determining eligibility for and extent of the medical assistance provided afforded the states broad discretion and only required that such standards be "reasonable" and "consistent" with the objectives of the Social Security Act. *Id.* at 444. *See* note 14 *supra*. The Court held that, even accepting respondent's argument that the denial of funding for nontherapeutic abortions is unreasonable on both economic and health grounds, the state's valid interest in encouraging normal childbirth is reasonable and nothing in the legislative history of Title XIX suggests otherwise. *Id.*

59. *See* notes 8 and 9 *supra* and accompanying text.

60. 432 U.S. 464 (1977).

61. 3 CONNECTICUT WELFARE DEPARTMENT, PUBLIC ASSISTANCE PROGRAM MANUAL, ch. III, § 275 (1972) [hereinafter cited as CONNECTICUT WELFARE MANUAL].

62. The regulation states in § 275:

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

Id., *reprinted in* Maher v. Roe, 432 U.S. at 466 n.2.

63. 432 U.S. at 467.

64. *Id.* at 472-76. *See* notes 83, 85 and 99 *infra* and accompanying text.

against a suspect class,[65] and did not violate the Equal Protection guarantee of the fourteenth amendment.[66]

Then in *McRae v. Mathews*,[67] the Women's Division of the Board of Global Ministries of the United Methodist Church intervened as plaintiffs, and the complaint contended that a state participating in the Medicaid program remained obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement was no longer available due to the Hyde Amendment. The district court rejected this argument based on the Social Security Act, concluding that the Hyde Amendment relieved the state of any obligation to fund medically necessary abortions for which federal reimbursement was not available, but held that the Hyde Amendment was unconstitutional as a violation of both the Equal Protection guarantee of the fifth amendment and the Free Exercise Clause of the first amendment.[68]

In the analysis of the Supreme Court decision that follows, the *McRae* Court considered and rejected each of the following issues: the statutory issue of whether Title XIX imposed a funding

65. *Id.* at 471. *See* notes 132-34, and 137 *infra* and accompanying text.

66. *Id.* at 475-80. *See* notes 130-71 *infra* and accompanying text. For an in-depth analysis of the pre-*McRae* abortion funding cases, *see generally* Appleton, *The Abortion Funding Cases and Population Control: An Imaginary Lawsuit*, 77 MICH. L. REV. 1688-1723 (1979); Horan and Marzen, *The Moral Interest of the State in Abortion Funding: A Comment on Beal, Maher and Poelker*, 22 ST. LOUIS L.J. 566-595 (1979); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191-245 (1978) [hereinafter cited as Perry]; Unger, *Medicaid Assistance for Elective Abortions: The Statutory and Constitutional Issues*, 50 ST. JOHN'S L. REV. 762-770 (1976); Note, *Denial of Public Funds for Nontherapeutic Abortions: Beal v. Doe, Maher v. Roe and Poekler v. Doe*, 10 CONN. L. REV. 487-510 (1978); Note, *The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions Only for the Rich?*, 6 FOR. URB. L.J. 687-710 (1978); Note, *Social Security and Public Welfare—Federal Assistance and State. Cooperation, Statutes, and Regulations in General—Statute Disallowing Payment of Medicaid Funds for Therapeutic Abortions Held Invalid*, 56 N.D. L. REV. 289-99 (1980).

67. 421 F. Supp. 533 (E.D.N.Y. 1976).

68. 100 S. Ct. at 2682. The district court held that when an abortion is "medically necessary to safeguard the pregnant woman's health . . . the disentitlement to [M]edicaid assistance impinges directly on the woman's right to decide . . . to terminate her pregnancy in order to preserve her health." *Id.* The court also decided that the Hyde Amendment violated the Equal Protection guarantee by discriminating against women seeking therapeutic abortions while funding all other medically necessary services for women without a legitimate government interest being served. *Id.* The court then held that the Free Exercise guarantee was violated because a woman's religious beliefs might be the reason that the abortion was sought and the denial thereby infringes on those beliefs. *Id.*

obligation on the states, and the constitutional issues of whether the Hyde Amendment violated a woman's right to privacy within the liberty guarantee of the fifth amendment, the Establishment and Free Exercise Clauses of the first amendment, and the Equal Protection guarantee of the fifth amendment.

B. The McRae Court's Interpretation of the Hyde Amendment

The Supreme Court in *Harris v. McRae*[69] agreed with the district court's holding in *McRae v. Mathews* that a state participating in the Medicaid Program was not obligated by Title XIX to fund those medically necessary abortions for which federal reimbursement was available under the Hyde Amendment.[70] The Court, however, reached this conclusion for different reasons. The difference was that the district court reasoned that the enactment of the Hyde Amendment relieved a participating state of the obligation to include those medically necessary abortions in its Medicaid Program which it would otherwise have included without the Amendment.[71] In contrast, the Supreme Court held that the state was under no obligation to fund any medical treatment for which federal funds were unavailable.[72] Thus, the Court stated that even though Title XIX sets forth the requirement that a participating state establish "reasonable standards" for determining the extent of coverage; provide funds for similar services in equal amounts, duration, and scope to qualified recipients; and set standards that are consistent with the objectives of Title XIX,[73] it is not obligated to provide any funding for which federal reimbursement is not available.

The Court came to this conclusion by interpreting Title XIX as a system of "cooperative federalism."[74] Under this system, the federal government provides a specified percentage of the total expenditures of the state to enable them to furnish greater medical care to needy persons. The Court was unable to find anything in the legislative history to suggest that Congress intended a state

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69. This is a different issue than that decided in *Beal* because in this case federal funds are not available for reimbursement to the states by the Hyde Amendment restriction. Therefore, although in *Beal*, the Court noted that "serious statutory questions might be presented if a state Medicaid plan excluded *necessary* medical treatment from its coverage," 432 U.S. at 444-45 (emphasis added), this was presented in relation to federal assistance being available. It did not involve the duty of a state where federal funds were not available.

70. 100 S. Ct. 2671, *aff'g in part and rev'g in part*, McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976).

71. *See* notes 9-14 *supra* and accompanying text.

72. 100 S. Ct. at 2684.

73. *See* notes 10-14 *supra* and accompanying text.

74. 100 S. Ct. at 2683 (citing King v. Smith, 392 U.S. 309, 316 (1968)).

to assume the full cost of any service in the state's Medicaid Program. The purpose of Title XIX is "assistance"[75] and not "a device for the Federal Government to compel a State to provide services that Congress itself is unwilling to fund."[76] The Court stated that if Congress intends to change this scheme and require a state to assume the full cost of any treatment, Congress should, as it has in the past, express this intent in unambiguous terms.[77]

C. Analysis of the McRae Interpretation

This interpretation of Title XIX is reasonable because the state is particpating in the Medicaid Program voluntarily. The state is supposed to benefit by the greater medical services it will be able to provide its residents due to the federal funding supplements. However, to require a state to pay the total cost for an optional medical service would cut into its limited finances available for health care for the poor and thereby decrease the total amount of all Medicaid services the state is able to supply.[78] This could also be found to infringe upon the state's autonomy by dictating what services a state will provide its people for their general welfare.[79]

D. The Right To Privacy Issue in McRae

According to the Court, if a law "impinges upon a fundamental right explicitly or implicity secured by the Constitution [it] is

75. *Id.* at 2684 (citing S. Rep. No. 404, 89th Cong., 1st Sess., 83-85 (1965); H.R. Rep. No. 213, 89th Cong., 1st Sess., 72-74 (1965), *reprinted in* [1965] U.S. CODE CONG. AND AD. NEWS 1943).

76. 100 S. Ct. at 2684.

77. *Id.* at 2684 n.13.

78. *See* 100 S. Ct. 2701, 2715 & 2715 n.8 (Stevens, J., dissenting). The exclusion from Title XIX of inpatient hospital care of patients between 21 and 65 years old in institutions for tuberculosis or mental disease can be cost justified by conserving the assets of the pool to improve the services available to the entire class of Medicaid recipients. *Id.* This same rationale can be applied to optional services that the state elects to provide in its Medicaid Program.

79. *See* National League of Cities v. Usury, 426 U.S. 833 (1976). In an amendment to the Fair Labor Standards Act of 1938, states and their political subdivisions were included in the regulation of such employment conditions as minimum wage and hour and overtime compensation. The Court held that these provisions impermissibly interfered with the integral governmental functions of the states by displacing the state's policies regarding the manner in which they will structure delivery of those governmental services which their citizens require. This case was, however, decided on the basis of the Commerce Clause of the Constitution and the Court explicitly declined to rule on the application of its holding on the spending power of the Constitution. *Id.* at 852 n.17.

presumptively unconstitutional."[80] Purportedly using this as a basis for its analysis, the Court nevertheless held that the Hyde Amendment does not impinge upon the liberty protected by the Due Process Clause of the fifth amendment, as recognized in *Roe v. Wade*,[81] *i.e.*, the freedom of a woman to decide whether to terminate her pregnancy.

Previously in *Maher*,[82] the Court defined the exact nature and scope of the fundamental right recognized in *Roe* as protecting "the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy."[83] The *Maher* Court believed that since the Connecticut regulation did not place any obstacles in the indigent woman's path to obtaining an abortion that were not already present due to her indigency, it therefore did not interfere with the woman's decision. Since the state merely made a value judgment favoring childbirth over abortion[84] by allocating funds for childbirth only, the Court would not substitute its values for that of the state's legislature. The Court found a

> basic difference between *direct state interference* with a protected activity and *state encouragement* of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.[85]

Since the regulation imposed no governmental restrictions on access to an abortion, *Maher* held there was no violation of the fundamental right.[86]

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80. 100 S. Ct. at 2685 (quoting Mobile v. Bolden, 100 S. Ct. 1490, 1504 (1980) (plurality opinion)).

81. 410 U.S. 113 (1973). *See* notes 91-95 *infra* and accompanying text.

82. 432 U.S. 464 (1977). *See* notes 60-66 *supra* and accompanying text.

83. *Id.* at 473-74 (emphasis added). *See, e.g.*, note 17 *supra*.

84. *See* note 101 *infra* and accompanying text for criticism of this rationale.

85. 432 U.S. at 475-76 (emphasis added). *See* notes 99-101 *infra* and accompanying text for criticism of this conclusion.

86. The *Maher* Court cited Buckley v. Valeo, 424 U.S. 1 (1976), and American Party of Texas v. White, 415 U.S. 767 (1974), as an example of this difference. In *Buckley*, the Federal Election Campaign Act of 1971 was challenged on Equal Protection grounds since it allocated different amounts of public funds to general election campaigns by establishing certain classes—major parties, minor parties, and new parties. *White* involved Texas's election procedure where only the names of the two major parties were printed on the absentee ballots.

The regulation in *Buckley* was upheld and distinguished from *White* because in *White*, the state used the direct state interference, as opposed to the state encouragement of an alternative activity, distinction. *White* involved direct state interference because the law placed "direct burdens not only on the candidate's ability to run for office, but also on the voter's ability to voice preference regarding representative government and contemporary issues." 432 U.S. at 475 n.9 (citing Buckley v. Valeo, 424 U.S. 1 (1976)). However, *Buckley* was held to be merely state encouragement and not interference because the act "does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice." *Id.* The denial of public funding for new parties resulted from their

Using the *Maher* definition of the *Roe* right to an abortion and its reasoning, the *McRae* Court came to the same conclusion concerning the Hyde Amendment. However, as appellees pointed out, the basic difference between *Maher* and *McRae* is that the latter withheld funding of all *medically necessary* abortions, except where the life of the mother was endangered, as well as the *non*therapeutic abortion funds denied in *Maher*. Therefore, the interest of a woman in protecting her health—an admittedly important and central theme in *Roe*[87]—makes *McRae* a different constitutional issue than that of *Maher*. The *McRae* Court, however, found this difference to be irrelevant to the funding issue. The Court held that although the government may not prevent the exercise of fundamental rights, it has no affirmative funding obligation to remove the economic barriers that prevent the less fortunate from exercising their constitutional rights.[88] Extending this reasoning, the Court said that to hold the government to this affirmative duty would be to require it to provide funding for abortions even if there was no Medicaid Program. The Court believed that the Hyde Amendment would not alter the indigent woman's range of choices had Congress not provided any medical funding at all. As the argument goes, if indigency would prevent a woman from obtaining an abortion had Congress offered no funds, the funding for childbirth does not affect her access to an abortion; indigency is still her only barrier.[89]

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inability to raise private funds since the Act merely substituted with public funds what the party would have raised in private funds. This inability was thought to be caused by a general lack of public support for the party; therefore, the denial of funds was justified. 424 U.S. at 94, 94 n.128 and 95 n.129. Therefore, there was no governmental obstacle in the election process as there was in *White*.

The *Maher* Court also used the previous abortion decisions, *see* note 17 *supra*, as examples of direct interference compared with state encouragement. 432 U.S. at 477 n.10. The *Maher* Court stated that "all of those decisions placed state-created obstacles in the pregnant woman's path to an abortion." *Id.*

87. Even after viability, a state may not prohibit abortions "necessary to preserve the life or *health* of the mother." 410 U.S. at 164 (emphasis added).

88. The Court cites Griswold v. Connecticut, 381 U.S. 479 (1965), and Pierce v. Society of Sisters, 268 U.S. 510 (1925), to create an analogy where, though the government may not prohibit the use of contraceptives or prevent children from attending private schools, it cannot be required to provide funding to realize these ends. 100 S. Ct. at 2688.

89. *See* notes 101-02 *infra* and accompanying text for criticism of this rationale.

E. Analysis of the McRae Privacy Issue

This author agrees with the dissenting opinions[90] that the majority's line of reasoning is a product of its initial misdefinition in *Maher* of the fundamental right recognized in *Roe*.[91] The *McRae* Court defined the right to abortion as protection from unduly burdensome interference with a woman's freedom to decide whether to terminate her pregnancy. This definition ignores the vital importance of *Roe's* trimester distinction. The *Roe* Court concluded "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[92] The Court divided this right into three stages:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal *health*.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, for the preservation of the life or *health* of the mother.[93]

The *Roe* Court recognized that the state has two important and legitimate interests in the abortion decision: (1) to preserve and protect the health of a pregnant woman; and (2) to protect the potentiality of human life; and that these interests are separate and distinct, becoming more compelling as the pregnancy progresses.[94] Because of this, the purpose of distinguishing between the trimesters was to assign the relative weights of the respective interests involved.[95]

The *Maher* Court's definition of the liberty interest blurs these distinctions because it concentrates only on the third trimester. The result is that a state may now interfere with the woman's abortion decision at any stage so long as it is not "unduly burdensome." The denial of funding enables the state to assert its protection of potential life interest into the first trimester abortion decision, a conclusion *Roe* clearly held unconstitutional. "The [*Roe*] decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, *so long as*

90. Harris v. McRae, 100 S. Ct. 2701 (Brennan, Marshall, Blackmun, and Stevens, J.J., separate dissenting opinions).

91. 100 S. Ct. at 2702 (Brennan, Marshall, Blackmun, J.J., dissenting).

92. 410 U.S. at 154.

93. *Id.* at 164-65 (emphasis added).

94. *Id.* at 162-63.

95. *Id.* at 163.

those restrictions are *tailored* to the *recognized*[96] state interests . . . . Up to [the second trimester], the abortion decision *in all its aspects* is inherently, and primarily, a medical decision. . . ."[97] Therefore, as the dissent noted, the issue is not whether the government has an affirmative funding obligation to assure the exercise of a woman's right to an abortion, but whether it is constitutionally permissible for it to "wield its enormous power and influence" in such a way as to impinge upon the pregnant woman's freedom to choose whether to have an abortion.[98] It is clear from *Roe* that this is not constitutionally permissible during the first and second trimester.

The *McRae* Court, however, found that the Hyde Amendment did not impinge upon this fundamental right by declaring a distinction between "direct state interference" and "state encouragement" of an alternative activity.[99] This distinction is questionable because the government's encouragement of childbirth necessarily discourages abortion. A woman, who is unable to pay for alternative medical treatment of her pregnancy,[100] childbirth or abortion, is coerced into choosing childbirth since funds are available for that alternative, but denied for the abortion choice. Therefore, the funding of childbirth does in fact interfere directly with the indigent woman's decision concerning her pregnancy by discouraging abortion due to the denial of funds. Thus, there is no real distinction to be made between "interference" and "encouragement."[101]

The problem with the Court's analysis is that it avoided the issue by considering the abortion funding obligation in isolation from its funding of childbirth. Appellees did not assert that the government had an obligation to assure the exercise of every fundamental right. If Congress had no Medicaid Program, then the issue would not have arisen. It is the injection of the government's explicit decision to fund childbirth but not abortion that

96. Congress and the Court held that the state has a legitimate interest in encouraging childbirth as a justification for the funding of childbirth but not abortion. 100 S. Ct. at 2692. However, *Roe* did not mention this as a state interest.

97. 410 U.S. at 165-66.

98. 100 S. Ct. at 2702 (Brennan, J., dissenting).

99. 100 S. Ct. at 2687. *See* note 85 *supra*.

100. Justice Brennan noted that the medical condition of pregnancy has two possible medical treatment alternatives: abortion or childbirth. 100 S. Ct. at 2703 (citing Beal v. Doe, 432 U.S. at 449).

101. "It matters not that in this instance the government has used the carrot rather than the stick." *Id.* at 2704 (Brennan, J., dissenting).

creates the coercion which amounts to a denial of the right to choose to have an abortion. If there were no funds available for either treatment, the indigent woman's range of choices would depend upon her capability of raising the necessary finances. Indeed, on purely monetary grounds, abortion is less expensive than childbirth, both in the sense of short range medical costs and long ranges costs of raising the child; thus, abortion would be monetarily easier for the indigent woman to obtain. By the government's funding of childbirth, the indigent's choice is made for her since her childbirth is free while abortion still depends upon her ability to raise the necessary finances. Thus, the government is not merely making childbirth a "more attractive alternative." For the woman who cannot raise the necessary finances for an abortion, childbirth is the only alternative.

Not only did the Hyde Amendment interfere with the exercise of the woman's fundamental right as recognized in *Roe*, the political environment surrounding the Amendment indicated that its purpose was to interfere with that right.[102] Where the purpose of the legislation is to deter the exercising of a fundamental right, that purpose is constitutionally impermissible.[103] After considering the reaction in Congress to the *Roe* decision, it is evident that this is an "attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly."[104] The intent of Congress is indicated by its actions: to impinge upon the constitutionally protected right of the woman to decide to have an abortion free from governmental interference as recognized in *Roe* during the first trimester.[105] It

102. *See* notes 15-48 *supra* and accompanying text for discussion of the Hyde Amendment.

103. Shapiro v. Thompson, 394 U.S. 618 (1969), where the purpose of deterring welfare recipients of other states from entering the jurisdiction of the legislating state by the denial of welfare benefits until they fulfilled the residency requirements was held to be constitutionally impermissible. Since, in effect, it deterred interstate travel, it impinged upon the fundamental constitutional right to travel.

104. 100 S. Ct. at 2703 (Brennan, J., dissenting).

105. The exclusion of funds for a specific service from the general benefits offered has traditionally been justified on fiscal grounds. By refusing funds for some service that is not cost justified, the government can extend greater benefits through the other services that are cost justified. *See* note 78 *supra* and accompanying text. However, Congress is not able to use this rationale to justify excluding abortion funds to indigents for medical treatment because this is the objective of Title XIX. *See* note 14 *supra* and accompanying text. The cost of an abortion is only a small fraction compared to the costs of childbirth. In 1976, the cost of abortion was approximately $150 as compared to more than $1350 for childbirth. Harris v. McRae, 100 S. Ct. at 2715 n.9.

> [I]n an official Health, Education, and Welfare impact statement on the Hyde Amendment, [it is reported] that while medicaid reimbursement for abortion amounts to $50 million annually, the implementation of this amendment, forcing poor women to carry unwanted pregnancies to term,

accomplished this by conditioning welfare funds for pregnancy on the relinquishment of that constitutional right. As the *McRae* dissent recognized, the Supreme Court decided long ago that,

> [i]t is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect, is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.[106]

The majority rejected the view that the Hyde Amendment "penalizes" the exercise of a woman's choice to terminate her pregnancy. Their reasoning was that since *Maher* decided there was only a semantic difference between a "penalty" and an "unduly burdensome interference,"[107] the same analysis applied, thereby finding no penalty. In its analysis, the *McRae* Court distinguished between the withholding of benefits for only certain kinds of protected activity and the withholding of all benefits from an otherwise eligible recipient due to the exercise of a fundamental right. Using *Sherbert v. Verner*,[108] where a woman was denied all unem-

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will cost the Government from $450 to $565 million for medical care and public assistance for the first year after birth.

122 CONG. REC. H8635 (1976) (remarks of Rep. Schroeder). Therefore, by this reasoning the Hyde Amendment violates the objective of Title XIX and the Labor-Health, Education, and Welfare appropriations bill. *See* notes 14 and 40 *supra* and accompanying text. The Amendment also "harms the entire [Medicaid-benefited] class as well as its specific victims." 100 S. Ct. at 2715 (Stevens, J., dissenting).

> [T]he decision to tolerate harm to indigent persons who need an abortion in order to avoid 'serious and long lasting health damage' is one that is financed by draining money out of the pool that is used to fund all other necessary medical procedures. . . . [T]his discrimination harms not only its direct victims but also the remainder of the class of needy persons that the pool was designed to benefit.

Id. at 2715 (Stevens, J., dissenting).

106. 100 S. Ct. at 2705-06 (Brennan, J., dissenting) (quoting Frost and Frost Trucking Co. v. Railroad Comm'n of Cal., 271 U.S. 583, 593-94 (1926)).

107. The *Maher* Court reasoned that since penalties were typically criminal sanctions imposed after the performance of some proscribed conduct, there was a sufficient analogy to a denial of welfare to one who did not fulfill the residency requirements. The Court found that a "penalty" existed for the exercise of a constitutional right to travel. In this case, there was "such unduly burdensome interference" with the welfare recipients right to travel so as to equate it with a penalty for the exercise of that right. 432 U.S. at 474-75 n.8 (construing Shapiro v. Thompson, 394 U.S. 618 (1969)).

The *McRae* Court reasoned that the denial of Medicaid funds for abortion would only be a penalty if *all* Medicaid benefits were then withheld from the otherwise eligible recipient solely because she had exercised her constitutional right to decide to have an abortion. 100 S. Ct. at 2688 n.19. *See* note 110-14 *infra* and accompanying text.

108. 374 U.S. 398 (1963).

ployment compensation because she refused to work on Saturday due to a religious tenet, the Court held that since the Hyde Amendment was not as broad a disqualification as was the statute in *Sherbert*, it was not a penalty. "A refusal to fund a protected activity, *without more*, cannot be equated with the imposition of a 'penalty' on that activity."[109] Previously, the Supreme Court had found a "penalty" in *Shapiro v. Thompson*;[110] *Memorial Hospital v. Maricopa County*;[111] and *Sherbert v. Verner*[112] where all benefits had been denied. Evidently, the "more" that the Court is looking for must be the denial of *all* welfare benefits due to the exercise of a constitutional right. Nonetheless, whether all Medicaid benefits are withheld or only those that are vital to the otherwise eligible recipient for her needed medical treatment, there is the same type of "penalty" imposed for the exercise of a constitutional right. The *Maher* Court compared the denial of welfare to non-residents to a criminal sanction;[113] this comparison is equally applicable to the denial of Medicaid funds for abortions. The distinction between the denial of all benefits and only those needed by the pregnant indigent is really no distinction at all. The bottom line is that the pregnant indigent woman is denied funds to preserve her health for the sole reason that she exercised her constitutional right to have an abortion. This is *more* than simply a refusal to fund a protected activity. It is clearly "conditioning" benefits on the relinquishment of a constitutional right and is in reality "penalizing the exercise of this right." What relevance does the extent of the disqualification have to the finding of whether a penalty exists? To the pregnant indigent woman, especially one who needs an abortion to protect her health, the denial of Medicaid benefits is absolute since the funds she requires are denied because she wishes to exercise her constitutional right.[114]

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109. 100 S. Ct. at 2688 n.19 (emphasis added).

110. 394 U.S. 618 (1969) (residency requirements that denied all welfare funds to otherwise eligible recipients were held to be unconstitutional because they penalized the exercise of the constitutional right to travel).

111. 415 U.S. 250 (1974) (residency requirements held unconstitutional because they penalized the exercise of the constitutional right to travel).

112. 374 U.S. 398 (1963) (*all* unemployed compensation benefits were denied because of the exercise of the fundamental right protected by the Religion Clauses of the first amendment).

113. *See* note 107 *supra*.

114. The *Maher* Court tried to distinguish *Sherbert*, not on the *extent* of its denial of benefits as in *McRae*, but on the basis that it originated in the first amendment's Freedom of Religion and Establishment Clauses; therefore, *Maher* was decided in a different context. 432 U.S. at 475 n.8. This, however, does not reconcile the fact that the denial of unemployment compensation benefits was unconstitutional, not only because the ineligibility derived solely from the practice of her religion, but also because of the *pressure* put upon her to relinquish her constitu-

McRae is also indistinguishable from *Shapiro* and *Maricopa County* because the residency requirement did not prohibit travel by itself, rather, the effect of the regulation served to inhibit this right.[115] Likewise in *McRae*, the Amendment does not prohibit abortion outright, but the effect of it serves to prevent the exercise of that right to decide.[116] By paying for childbirth but denying funds for abortion, Congress is preventing the choice of the only alternative to childbirth: abortion.

From the foregoing analysis, the *McRae* Court's decision that the Hyde Amendment does not impinge on a constitutional right to privacy is irreconcilable with that right as defined in *Roe* and with the previous public funding cases of *Shapiro*, *Maricopa*, and *Sherbert*. The Amendment does impinge on that constitutional right and should be found to be unconstitutional since there is no legitimate compelling state interest to justify it.[117]

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tional right. 100 S. Ct. at 2704-05 (Brennan, J., dissenting) (citing Sherbert v. Verner, 374 U.S. at 404-06).

Conditioning the receipt of welfare benefits on the relinquishment of constitutional rights has never been expressly sanctioned. *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971), where a beneficiary under the Aid to Families with Dependent Children Program was denied benefits due to her refusal to permit a caseworker to conduct a routine visit at her house. The welfare recipient claimed it violated the fourth amendment's protection against unreasonable searches. The Court held that the visit could not be classified as a search within the meaning of the fourth amendment. *Id.* at 317. Even if it was considered a search, it was not unreasonable, which is the standard by which warrantless searches must be reviewed according to the fourth amendment. *Id.* at 318. Therefore, though the recipient's benefits were terminated, it was not due to her exercise of a constitutional right.

115. 394 U.S. at 631.

116. The *McRae* Court followed the *Maher* Court's reasoning that since *Shapiro* and *Maricopa* did not hold that a state would penalize the right to travel by refusing to pay the bus fares of indigent travelers, the Hyde Amendment, likewise, does not penalize the right to an abortion by refusing to pay the medical costs.

Arguably, the right to travel is far less important than the decision of how to deal with a health threatening pregnancy. Additionally, the alternatives for dealing with a pregnancy are mutually exclusive, whereas there are many alternative ways to exercise the right to travel. A proper analogy to the right to travel cases would be where Congress is not paying the bus fare for indigents, and it is not funding any other means for transportation in order for the indigent to exercise the right to travel. If a particular means of transportation were constitutionally guaranteed, for example by bus, and Congress funded all types of transportation but that particular one, would this analogy be relevant to *McRae*. Abortion and childbirth are the alternative means by which the woman exercises her right to decide whether to have an abortion. By paying for childbirth, Congress is penalizing the choice of the only alternative: abortion. 432 U.S. at 474 n.8.

117. The lack of a compelling state interest is discussed under the equal protection analysis. *See* notes 130-72 *infra* and accompanying text.

F. The Freedom of Religion Issue in McRae

The Hyde Amendment was also attacked on the grounds that it violated the Establishment Clause of the first amendment because it incorporated into law the beliefs of the Roman Catholic Church concerning the immorality of abortion[118] and the determination that life begins at conception.[119] The Court concluded that the parallel of the Hyde Amendment rationale to the doctrines of the Catholic Religion does not, without more, violate the Establishment Clause.[120] Since the Amendment reflected traditional

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118. Part of this argument is derived from the fact that Catholic organizations have been very active lobby groups in Congress. *See* note 18 *supra*. As Judge Dooling, who decided McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976), recognized,

> Roman Catholic clergy and laity are not alone in the pro-life movement, but the evidence requires the conclusion that it is they who have vitalized the movement, given it organization and direction, and used ecclesiastical channels of communication in its support—this organized effort of institutional religion influenced a decisive number of votes [for the Hyde Amendment].

MS., April 1980, at 23. Catholic organizations have also brought suits challenging the constitutionality of some laws as a violation of the Establishment Clause. One such action, National Conference of Catholic Bishops v. Bell, 490 F. Supp. 734 (D.D.C. 1980), challenged the constitutionality of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), and the Equal Employment Opportunity Commission's Guidelines on Sex Discrimination, 44 Fed. Reg. 23804-09 (1979) (to be codified in 29 C.F.R. § 1604.10), which interpreted the Act. The Act required employers to pay for some employee abortions and to provide such leave for employees to have abortions. They challenged the Act as having a chilling effect on their first amendment rights and those of other employers with a conscientious objection to abortion. The suit was dismissed, however, on the grounds that the case was not ready for adjudication and that there was no case or controversy; therefore, the court lacked subject matter jurisdiction. NEW YORK TIMES, March 16, 1980, at 21, col. 6.

119. The challenge to this determination of when life begins is derived from the asserted state interest in the protection of prenatal life. Before the state can protect prenatal life, there has to be life there to protect. At common law, the nonviable fetus was considered part of the mother; therefore, its destruction was not homicide. Life was recognized after "quickening," the first movement of the fetus in the womb. At this point, the fetus was infused with a soul and recognizably human. Roe v. Wade, 410 U.S. at 716.

The states are not in agreement as to whether prenatal life is entitled to legal protection. *See* Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (1974); Davis v. Simpson, 313 So. 2d 746 (Fla. Dist. Ct. App. 1975); Hardin v. Sanders, 538 S.W.2d 336 (Mo. 1976) (wrongful death action may not be maintained because a viable fetus which is injured and dies before birth is not a person within the meaning of the wrongful death statute); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958). *Cf.* Chrisafogeorgis v. Brandenberg, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949) (a fetus is a "person" within the meaning of the wrongful death statute when it becomes viable); Kelly v. Gregory, 282 A.D. 542, 125 N.Y.S.2d 696 (1953) (recognizing a fetus as an existing separate life form from the moment of conception). *See generally*, 1 DOOLEY, MODERN TORT LAW, §§ 14.01-14.05 (1977).

120. 100 S. Ct. at 2689.

secular values,[121] the fact that it also reflected the values of certain religions was irrelevant. Though the government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another,"[122] "a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion."[123] The Court noted that criminal laws are based on values held by many religions, but are clearly not a violation of the Establishment Clause because they are based on secular values as well.[124]

G. Analysis of the Religion Issue in McRae

This rationale is basically sound since traditional secular values place a high value on life as evidenced by our criminal laws for

121. The Court does not define what the traditional secular values are. The dictionary defines "secular" as: "of or relating to the worldly or temporal as distinguished from the spiritual or eternal: not sacred . . . rationally organized around impersonal and utilitarian values and patterns and receptive to new traits—contrasted with sacred." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2053 (1971). The case which best discloses the meaning is Zablocki v. Redhail, 434 U.S. 374 (1978), concerning the state's regulation of the marriage relationship, where it was stated: "The State, representing the *collective expressions of moral aspirations*, has an undeniable interest in ensuring that its rules of domestic relations *reflect the widely held values of its people*." *Id.* at 399 (emphasis added). In other words, traditional secular values are those that reflect the morals of a civilized society as a whole—not dependent upon any religious belief, and are concerned with the functioning of man's civilization as opposed to the life hereafter. *See also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 78 (1977) (plaintiff's request for Saturday off for religious reasons was denied as he was not at a high enough level on the seniority system to bid for the most desirable days off. The Court held the seniority system represented a significant accommodation to both the secular and religious needs of all TWA employees); Mullaney v. Wilbur, 421 U.S. 684 (1975) (detailed a historical analysis of the early fight between ecclesiastic and secular jurisdiction over murder trials); Johnson v. Robinson, 415 U.S. 361 (1974) (where conscientious objectors of military service accepted alternative civil service to satisfy their military obligation, but were denied educational benefits awarded military service veterans. Benefits were provided for the purpose of advancing "secular governmental interests of enhancing military service and aiding the readjustment of military personnel to civilian life. Conscientious objectors were not included as beneficiaries, not because of any legislative design to interfere with their exercise of religion, but because to do so would not rationally promote the Act's purpose." *Id.* at 385.).

122. 100 S. Ct. at 2689 (quoting Everson v. Board of Ed. of the Township of Ewing, 330 U.S. 1, 15 (1946)).

123. *Id.* (quoting Commission for Public Ed. and Religious Liberty v. Regan, 100 S. Ct. 840, 846 (1980)).

124. 100 S. Ct. at 2689.

murder. Therefore, a denial of funds for abortion could reflect the value that society places on life and have nothing to do with the corresponding and coincidental religious values. Nonetheless, considering the fact that the strong opposition to abortion came from the Catholic organizations, which are attributed as being the catalyst that began the controversy,[125] there is a good indication that religion is at least involved in the enactment of this Amendment. In *McRae v. Mathews*,[126] Judge Dooling came very close to ruling that the Hyde Amendment violated the constitutional separtion of church and state since he recognized these peculiarly inseparable aspects of abortion. "A woman's freedom to terminate her pregnancy for health reasons [is] 'nearly allied to her right to be' a matter 'of *moral* judgment and ultimately religious in origin.' "[127] Still, since the Amendment can be justified on secular grounds, it cannot be found to be a violation of the Establishment Clause.

Another religion issue was that the Hyde Amendment impinged upon the Free Exercise Clause of the first amendment because a woman's decision to obtain an abortion may be based on the certain recognized religious beliefs she holds, as for example, those held by some Protestant and Jewish religions.[128] The Court did not rule on this issue because the appellees lacked standing to raise the Free Exercise challenge.[129] Accordingly, this issue was unfortunately left undecided by the *McRae* decision.

H. The Equal Protection Issue in McRae

Since federal reimbursement is available for all medically necessary treatment under the Medicaid Program, the Hyde Amend-

125. *See* note 118 *supra*.

126. 421 F. Supp. 533 (1976).

127. TIME, January 28, 1980, at 30 (quoting Judge Dooling).

128. 100 S. Ct. at 2689. Some of the religious teachings of different faiths received in evidence in *McRae v. Mathews* included the following: (1) *Judaism*—A woman has the religious duty to preserve her health and to choose life; (2) *Baptist*—"Liberty of conscience" itself is the most precious single principle for the Baptist understanding of religious faith. This means the exercise of one's moral awareness; (3) *Protestant* denomination—People, "in giving birth to children, must act responsibly and seriously . . . . The question is whether the human being is bringing life into the world under conditions which make it possible for that life to participate in God's intention." MS., April, 1980, at 22-24. However, these religions do not necessarily advocate abortion to comply with these teachings.

129. Standing was lacking because of the following reasons: (1) the indigent pregnant appellees failed to allege that their abortions were sought on the basis of a religious belief, (2) the Women's Division failed to allege that they are pregnant or eligible to receive Medicaid, though they did possess the religious beliefs, and (3) the Women's Division, as an organization, could not assert a claim that required participation of the individual members in order to understand and resolve their individual claims. 100 S. Ct. at 2689-90.

ment is challenged as violating the Equal Protection guarantee of the fifth amendment because it singles out medically necessary abortions for special treatment under the law.

The Court used the presently conventional two-tier analysis for its decision of this issue.

> The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity. It is well-settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless 'the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.' This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, 'suspect.'[130]

Thus, if a statutory classification is either based on certain "suspect" criteria or affects a fundamental right, it will be subject to strict scrutiny and require a compelling governmental interest to justify such a classification. If no suspect criteria can be found, the regulation will be subject to minimal scrutiny and require only that the classification bear a rational relationship to a legitimate government purpose.[131]

Having found that the Hyde Amendment did not impinge on any fundamental right, the Court considered whether the statutory classification of medically necessary abortions was predicated on any constitutionally suspect criteria. The Court found this case "indistinguishable from *Maher*"[132] in the suspect classification analysis and relied totally on the *Maher* decision to find that the legislation was not based on suspect criteria.

In *Maher*, the Connecticut legislation was challenged on the grounds that by subsidizing medical expenses incident to pregnancy and childbirth in general, the exclusion of nontherapeutic abortions was a discriminatory classification. The *Maher* Court concluded that financial need alone has never been recognized as a suspect classification.[133] The fact that the impact of the regulation falls only on indigent pregnant women does not make it discriminatory. In addition, the Court simply stated that "an

130. 100 S. Ct. at 2691 (citing McGowan v. Maryland, 366 U.S. 420, 425 (1961)).

131. Shapiro v. Thompson, 394 U.S. 618 (1969). *See generally* G. GUNTHER, CONSTITUTIONAL LAW 670-76 (10th ed. 1980) [hereinafter cited as GUNTHER].

132. 100 S. Ct. at 2691.

133. 432 U.S. at 471 (citing San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) and Dandridge v. Williams, 397 U.S. 471 (1970)).

indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases."[134]

The *McRae* Court found the distinction between the refusal to fund nontherapeutic abortions and the refusal to fund medically necessary abortions irrelevant in the "suspect" classification analysis.[135] Justice Marshall, in dissenting, pointed out that there is a crucial difference between *Maher* and *McRae* in this respect.[136] Justice Marshall noted that in *Maher*, Medicaid funds were based on medical necessity and the Court concluded that elective abortions did *not* fall into the medically necessary category; women seeking elective abortions were not similarly situated with other Medicaid recipients seeking medically necessary treatment.[137] However, as Justice Marshall noted in *McRae*, the Hyde Amendment denied funds for medically necessary abortions and therefore, women seeking therapeutic abortions were deemed similarly situated with other recipients of medically necessary treatment. The dissent believed that the exclusion of therapeutic abortions posed a different question than *Maher* and the Court's total reliance on that case was consequently misplaced.[138]

The Court's failure to find a suspect classification is a mere reflection on the Burger Court's reluctance to expand the relatively new scope of equal protection that the Warren Court had developed[139] and points to the fact that equal protection analysis is currently in a stage of transition.[140] This is most clearly shown by the difference between the Warren Court's handling of *Shapiro v. Thompson*[141] and the Burger Court's analysis in *Dandridge v. Williams*.[142] In *Shapiro*, where a durational residency requirement

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134. *Id.* (citing no cases for support of this conclusion).

135. 100 S. Ct. at 2691. The Court reasoned that though, like *Maher*, the Hyde Amendment's impact is mainly on the indigent, poverty alone is not a suspect classification. *Id.* (citing James v. Valtierra, 402 U.S. 137 (1971)).

136. 100 S. Ct. at 2711.

137. *Id.* at 2710.

138. *Id.*

139. The Warren Court developed the current two-tier approach which applied strict scrutiny to large new areas where only deferential scrutiny was applied before. The Warren Court was willing to expand the list of fundamental interests for which strict scrutiny was applicable.

> [I]t was the 'fundamental interest' ingredient of the new equal protection that proved particularly dynamic, open-ended, and amorphous: 'It was the element that bore the closest resemblance to freewheeling substantive due process, for it circumscribed legislative choices in the name of newly articulated values that lacked clear support in the constitutional text and history.

GUNTHER, *supra* note 131, at 671-72.

140. *Id.* at 670-76.

141. 394 U.S. 618 (1969).

142. 397 U.S. 471 (1970). The Burger Court upheld the Maryland Aid to Families

for the obtaining of welfare benefits was struck down, the Warren Court emphasized the importance of the benefits denied. The Court viewed these benefits as "aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."[143] The Warren Court based its decision on the conclusion that the regulation "penalized" the right to travel. The finding of a "penalty," however, depended on whether there was an effect on a "necessity of life." Where there was no effect on a "necessity of life," a penalty was not found; thus, strict scrutiny was not invoked.[144] The Warren Court opened up the possibility that all legislation impinging on "necessities" might be subject to strict scrutiny.[145]

Using the *Shapiro* standard, *McRae* would have probably been reviewed using the stricter scrutiny standard because denial of Medicaid benefits for medically necessary abortions involves a necessity of life with respect to the mother since her health is at stake. As Justice Marshall noted in his *Dandridge* dissent, "whether or not there is a constitutional 'right' to subsistence . . ., [deprivation] of benefits necessary for subsistence [have often] receive[d] closer constitutional scrutiny, under both the Due Process and Equal Protection Clauses, than will deprivations of less essential forms of governmental entitlements."[146] Justice Marshall found medical care as much a basic necessity of life to an indigent as welfare assistance.[147]

In *Dandridge*, however, the Burger Court made it clear that strict scrutiny would not be applied to welfare legislation generally even where "necessities" were involved, and that the government had no affirmative duty to assure equity of condition.[148] Thus, it refused to find that wealth or economic status was a sus-

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with Dependent Children Program that imposed a maximum grant limit of $250 per month per family, regardless of family size or need.

143. 394 U.S. at 627.

144. GUNTHER, *supra* note 131, at 958 (citing Justice Marshall's majority opinion in Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)); and 967 (citing Dandridge v. Williams, 397 U.S. at 508 (Marshall, J., dissenting)).

145. GUNTHER, *supra* note 131, at 671-72.

146. 397 U.S. at 523 n.18 (Marshall, J., dissenting); *see also* Memorial Hospital v. Maricopa County, 415 U.S. at 259.

147. *Id.*

148. GUNTHER, *supra* note 131, at 672 n.5. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), where the Burger Court refused to find education a "fundamental interest" and refused to find wealth a "suspect classification" in a case that challenged Texas's system of financing public education that relied mainly on local property taxes.

pect classification and refused to give such "necessities of life" heightened judicial scrutiny.

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. The problems of government are practical ones and may justify, if they do not require, rough accommodation. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. . . .
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> . . . The administration of public welfare assistance, . . . involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. It is a standard that has consistently been applied to state legislation restricting the availability of employment opportunities. And it is a standard that is true to the principal that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic, social policy.
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> . . . [T]he intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.[149]

Therefore, since *McRae* involves social welfare funding, this Court was already predisposed to afford it only the minimal level of judicial scrutiny. This is seen in the Court's deference of the matter to Congress as nothing more than a congressional policy decision, leaving to their judgment whether, after balancing the competing interests, this freedom of choice deserves federal subsidization.[150] In *Dandridge*, fundamental rights were not at issue and deference to Congress was appropriate. *Dandridge* seems to be saying that cases involving social welfare funding cannot automatically be deferred to congressional judgment. Where fundamental interests are involved, the higher level of scrutiny must be applied for their protection against governmental interference through the use of its spending power. This fundamental interest is especially evident in *McRae* where Congress' action and possible motive for enacting the Hyde Amendment resulted in the denial of the exercise of a fundamental right. Congress' use of its spending power interferes with the fundamental right to decide to have an abortion. The decision not to fund did not depend on "allocating limited public welfare funds among the myriad of potential recipients" because the denial cost the Medicaid Program more money than an abortion funding decision would have

149. Dandridge v. Williams, 397 U.S. at 485-87 (citations and footnotes omitted).
150. 100 S. Ct. at 2689, 2693.

cost.[151] As Justice Brennan noted in his dissent,

> When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless. Though it may not be this Court's mission to decide whether the *balance* of competing interests reflected in the Hyde Amendment is wise social policy, it most assuredly is our responsibility to vindicate the pregnant woman's constitutional right to decide whether to bear children free from governmental intrusion.[152]

Thus, just because social welfare funding is involved, the Court cannot automatically defer the case to congressional judgment.

Though *San Antonio Independent School District v. Rodriguez*[153] reconfirmed the Burger Court's stance concerning welfare benefits, the test for determining a suspect class put forth in that case further exemplifies the unreasonableness of the *McRae* Court's analysis. According to *Rodriguez*, a class is not suspect if it has none of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subject to such a history of purposeful unequal treatment, or relegated to such a position of *political powerlessness* as to command extraordinary protection from the majoritarian political process."[154] This would seem to run directly counter to the finding of no suspect classification since the burden of the Amendment falls upon a class that fits into this criteria. As the dissent notes,

> the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality. The instant legislation thus calls for more exacting judicial review than in most other cases.[155]

The *McRae* Court, however, finding neither an infringement of a constitutional right nor a suspect classification,[156] denied appellees the strict judicial scrutiny that would have invalidated the regulation.[157] Instead, the Court asked whether the Hyde Amend-

151. *See* note 105 *supra*.
152. 100 S. Ct. at 2703 (citations omitted).
153. 411 U.S. 1 (1973).
154. *Id.* at 28 (emphasis added).
155. 100 S. Ct. at 2703 (Brennan, J., dissenting).
156. See notes 90-117, 135-55 *supra* and accompanying text for criticism of this conclusion.
157. Justice Marshall, in giving a complete criticism of the two-tier equal protection analysis, notes that if a statute is subject to strict scrutiny, the statute is nearly always struck down. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting). *See* notes 186-88 *infra* and accompanying text.

ment is rationally related to a legitimate governmental objective. The Court found that this minimal rational basis test was satisfied by the government's interest in protecting the potential life of the fetus. Again relying entirely on *Maher*, the *McRae* Court concluded that by funding childbirth and not abortion, the government is merely offering incentives to the indigent woman to make childbirth a more attractive alternative, an alternative which is directly related to the objective of protecting potential life. The Court justified the fact that medically necessary abortions are singled out from the funding of medically necessary procedures by stating that abortion is inherently different from other medical procedures because it alone involves the purposeful termination of potential life.[158] The *McRae* Court found support for this justification in *Roe* by noting that *Roe* recognized the government's interest in protecting potential life.[159] Finally, the Court decided that the lower court impermissibly performed a legislative function by weighing the competing interests of the woman's health and the state's protection of potential life.[160]

The *Maher* Court's mischaracterization of the fundamental right recognized in *Roe* continues to be the major problem with the Court's analysis.[161] In *Roe*, the Court recognized three reasons for the creation and justification of the original criminal abortion laws in the 19th century: (1) a Victorian social concern to discourage illicit sexual conduct; (2) to protect the woman's own health and safety due to the fact that at that stage of medical knowledge, the procedure was extremely hazardous; and (3) the state's interest in protecting prenatal life.[162] The *Roe* Court recognized that the procedure is no longer hazardous (actually safer than childbirth now), but that the state retains an interest in the woman's health and safety when an abortion is desired at a later stage of pregnancy. Recognizing these interests of the state and also finding the right of privacy to apply to the abortion decision, the *Roe* Court balanced these interests and developed its trimester distinction.[163] Thus, it was decided in *Roe* when the state's interests could be balanced by a court in an abortion decision. The state's interest in protecting maternal health becomes relevant only after the first trimester and any regulation must be relevant

158. The *Roe* Court never recognized that abortion was different from other medical procedures.
159. 100 S. Ct. at 2692.
160. *Id.* at 2691-93.
161. *See* notes 83, 91-101 *supra* and accompanyng text.
162. 410 U.S. at 147-50.
163. *See* notes 92-95 *supra* and accompanying text.

to protecting maternal health.[164] The state's interest in protecting potential life becomes relevant only after viability and even then the regulation cannot inhibit the health of the mother.[165] Therefore, the issue of whether the Hyde Amendment rationally relates to a legitimate state interest was already decided by *Roe* since the state's interest in protecting potential life is not a legitimate interest until viability. Even after viability, the state's regulations must be related to the protection of maternal health.[166] The Hyde Amendment is not rationally related to the protection of maternal health as is evident by the inevitable results of this denial of funds for therapeutic abortions where the mother's life is not in danger. The pregnant indigent woman has two alternatives: (1) to bear the child and accept the physical and mental injuries that will result,[167] or (2) to resort to self-induced or illegal abortions in an effort to prevent these physicial and mental injuries.[168]

The Government's interest in protecting fetal life is not a legitimate one

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164. With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in light of present medical knowledge is at approximately the end of the first trimester . . . . [A]fter this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.

Roe v. Wade, 410 U.S. at 163.

165. With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64.

166. The ultimate question *Maher* presents, then, is whether, after *Roe v. Wade*, discouraging abortion is a constitutionally permissable pursuit of government. If *Roe v. Wade* stands for the proposition that a state's interest in prohibiting a woman from having a previability abortion is constitutionally subordinate to a woman's interest in having one, how in *Maher* did the state's interest in discouraging abortion become paramount to a woman's interest in terminating her pregnancy?

Perry, *supra* note 66, at 1197. *See also* 100 S. Ct. at 2707-11, 2712-15 (Marshall, Stevens, J.J., dissenting).

167. Justice Marshall recognizes four areas of physical and mental injury that will possibly result: (1) other illnesses, such as cancer, heart disease, etc., increase the risks associated with pregnancy; (2) mental injuries created by unwanted pregnancies, such as suicides and child abuse; (3) pregnancies caused by rape or incest will not be aborted due to the strict reporting requirements; and (4) pregnancy, where it is known that the fetus will not be able to survive, will nonetheless have to be born. 100 S. Ct. at 2707, 2710 (Marshall, J., dissenting).

168. *Id.* An additional way of obtaining an abortion is by raising funds by fore-

> when it is in conflict with the 'preservation of the life or health of the mother,' and when the Government's effort to make serious health damage to the mother 'a more attractive alternative than abortion,' [it] does not rationally promote *normal* childbirth.[169]

Therefore, the state's interest in protecting potential life is not a legitimate one to justify the exclusion of therapeutic abortions from the Medicaid Program.

The district court did not invade the legislative function as the Court charged by weighing the competing interests, rather it recognized the correct characterization of the *Roe* decision and applied it accordingly.[170] Furthermore, the Hyde Amendment is not rationally related to the purpose of the Medicaid Program: to provide medical assistance for those whose income and resources are insufficient to meet the costs of necessary medical services.[171] The Hyde Amendment not only denies medical treatment to those who are in desperate need, but also spends millions of dollars more than would otherwise be required by forcing these women to bear the child.[172] Thus, it reduces not only the total amount of benefits available, but also further jeopardizes the states resources in terms of future costs. Therefore, the Hyde Amendment cannot even be justified by the rational relationship test.

IV. IMPACT OF THE *MCRAE* DECISION

A. Future Abortion Laws

As noted above, the *McRae* decision diminished the importance of the fundamental right to choose to have an abortion as recognized in *Roe*; indigent women are denied a real choice.[173] Also, since *Maher* redefined the *Roe* definition of that fundamental right[174] and that definition was confirmed in *McRae*, all future abortion laws will be subjected to the test of whether they impose a restriction that creates an "unduly burdensome interference

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going basic necessities, such as food or shelter, or resorting to theft. *Id.* at 2710-11 n.7.

169. *Id.* at 2710 (emphasis added and citations omitted). As Justice Stevens notes, this case is distinguishable from *Maher* in yet another aspect. *Maher* justified the refusal to fund nontherapeutic abortions in part by stating that this would merely result in normal childbirth. Arguably, however, the refusal to fund medically necessary abortions cannot result in normal childbirth when there will be inevitable harm to the mother or death or defect of the fetus. *Id.* at 2715 n.7.

170. *See* Roe v. Wade, 410 U.S. at 465.

171. *See* note 14 *supra* (in order to increase the medical treatment available to the poor).

172. *See* note 105 *supra*.

173. *See* notes 100-02 *supra* and accompanying text. *See also* notes 163-68 *supra* and accompanying text.

174. *See* note 83 *supra* and accompanying text.

with her freedom to decide whether to terminate her pregnancy."[175] If this definition is used, the *Roe* trimester distinctions will have been eliminated for indigent women since this would allow the government to place restrictions on public funding of the woman's choice to have an abortion as long as the restrictions are not considered by the Court to be "unduly burdensome."[176]

In determining whether a restriction impinges on the fundamental right to privacy recognized in *Roe*, the Court must try to distinguish between "*direct state interference* with a protected activity and *state encouragement* of an alternative activity consonant with legislative policy."[177] However, as the *McRae* case itself illustrates, this analysis is not easily applied as a restriction can arguably be both a direct state interference and state encouragement of an alternative activity.[178] In distinguishing the two, the *Maher* Court stated that "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader."[179] Nonetheless, the Court did recognize that Congress can impose its will to eliminate abortion through the Hyde Amendment's restriction of funds. This coercion is direct government interference with a fundamental right, as discussed above.[180] Since the government was also encouraging childbirth, the Court looked only at this to find no impingement of the fundamental right.

Similar issues were decided in *Bellotti v. Baird*,[181] where parental consent and notice or judicial approval was required before a minor could obtain an abortion. The Court held this to be a direct state interference in that it imposed an absolute veto over the minor's decision to have an abortion.[182] However, the consent requirement was merely to encourage an unmarried pregnant minor to seek the advice of her parents in making this important decision.[183] Since an absolute obstacle is not required to find di-

175. Maher v. Roe, 432 U.S. at 474.
176. *See* notes 91-98 *supra* and accompanying text.
177. 432 U.S. at 475 (emphasis added).
178. *See* notes 99-117 *supra* and accompanying text.
179. 432 U.S. at 476.
180. *See* notes 99-117 *supra* and accompanying text.
181. 443 U.S. 622 (1979).
182. *Id.* at 643.
183. *Id.* at 639.

rect state interference,[184] this test, as *McRae* and *Belloti* illustrate, will lead to unpredictable and inconsistent results. The result will be that different levels of scrutiny, strict or minimal, will accordingly be applied depending on a finding of interference of a fundamental right or encouragement of an alternative activity. Also, in the area of public funding, the Court seems to be predisposed to defer to legislative judgment,[185] and thus will tend to find an encouragement and not an interference in these cases.

B. The Future of the Two-Tier Approach to Equal Protection Analysis

As Justice Marshall states in his dissent, "[t]his case is perhaps the most dramatic illustration to date of the deficiencies in the Court's obsolete 'two-tiered' approach to the Equal Protection Clause."[186] The fact is that Justice Marshall has long been critical of this approach, developed by the Warren Court and the Burger Court in general, and is also becoming discontented with the rigid two-tiered classifications of strict scrutiny for fundamental interests and suspect classifications and mere rationality for all others.[187] Because of this, commentators have suggested that equal protection analysis will undergo significant changes as it is applied to future cases.[188]

What has been proposed to replace the rigid two-tiered test is a

184. 432 U.S. at 473 (citing Doe v. Bolten, 410 U.S. 179 (1973)).

185. *See* note 149-50 *supra* and accompany text.

186. 100 S. Ct. at 2708 (Marshall, J., dissenting).

187. GUNTHER, *supra* note 131, at 672-73.

188. The basic criticism of the two-tier analysis, made by Justice Stevens, is that interests and classes, by their nature, are not alike and cannot be rigidly categorized as fundamental or suspect. GUNTHER, *supra* note 131, at 678. In reality, there is a variable degree of suspectness and fundamentality, and the degree of scrutiny should accordingly be variable. It has been noted that the Court is actually not adhering to the strict two-tier analysis, but rather applying this "variable scrutiny" approach. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 320 (Marshall, J., dissenting); GUNTHER, *supra* note 131, at 678; Reagan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1624-25 (1979) [hereinafter cited as Reagan]; Craig v. Boren, 429 U.S. 190, 211-14 (1976) (Stevens, J., concurring).

> [T]he Court seems to perceive a range of classifications of varying degrees of suspectness. Race is thoroughly suspect, along with national origin or ethnicity. Sex and illegitimacy are somewhat suspect, but not as suspect as race. Alienage is probably still somewhat suspect, though the question is confused by the federalism aspects. Similarly, there is a range of rights—some more fundamental, some less. The right to vote is fundamental, but not quite so fundamental is the right to vote by absentee ballot. The right of a criminal defendant to certain assistance in his defense is fundamental. The right to education is apparently fundamental up to a point, but not fundamental or certainly less fundamental thereafter. Marriage and divorce seem both to be "somewhat" fundamental.

Reagan, *supra*, at 1625-26 (citing McDonald v. Board of Election Commr's, 394 U.S. 802 (1969), and O'Brien v. Skinner, 414 U.S. 524 (1974) (voting)); San Antonio Independent School Dist., 411 U.S. at 36-37 (education); Zablocki v. Redhail, 434 U.S.

balancing test. Stated in Justice Marshall's terms, the factors that should be weighed are "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive and the state interests asserted in support of the classification."[189] Thus, the "costs," which vary with the degree of suspectness or fundamentality derived from constitutional values, are balanced against the weight of the state's interest and the degree to which the legislation promotes that interest.

The criticism to such an approach is that it would create a "superlegislature" in the courts, thus intruding on the function of the legislature by ignoring its judgment and substituting that of the court.[190] However, as long as the Court applies the standard of a "reasonable American legislature,"[191] this criticism is unfounded. For under this standard, it is "not what the ideally reasonable legislature *would* do, but rather what a humanly reasonable legislature, [concerned for our national traditions] *could* do."[192] Legislative purpose also becomes important, and

374 (1978) and Califano v. Jobst, 434 U.S. 47 (1977) (marriage); Boddie v. Connecticut, 401 U.S. 371 (1971) and Sosna v. Iowa, 413 U.S. 393 (1975) (divorce).

As Justice Marshall points out, however, there is danger and inefficiency to the Court's verbal adherence but effective repudiation of the two-tier approach because (1) there are no consistent standards governing a particular case to give the parties involved notice of or to give guidance to judges which results in ad hoc decisions, and (2) the results are unpredictable since the courts are not adhering to stated standards and pose the threat that relevant factors will be misapplied or ignored. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 321 (Marshall, J., dissenting).

When the Warren Court established the two-tier analysis, it was very liberal in expanding the range of fundamental rights and suspect classes recognized. GUNTHER, *supra* note 131, at 961 n.1. However, as noted above, the Burger Court has refused to continue this expansion, especially in social and economic areas and has afforded greater deference to legislative judgment. *Id.* at 975. Justice Marshall explains this as a natural consequence of the limitations of the two-tier analysis.

> If a statute invades a 'fundamental' right or discriminates against a 'suspect' class, it is subject to strict scrutiny. If a statute is subject to strict scrutiny, the statute always, or nearly always, is struck down. Quite obviously, the only critical decision is whether strict scrutiny should be invoked at all. It should be no surprise, then, that the Court is hesitant to expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered category.

427 U.S. at 319. Likewise, whenever the mere rationality test is applied, the legislation is always upheld. *Id.*

189. 427 U.S. at 318. *See also* Reagan, *supra* note 188, at 1626.

190. *See, e.g.*, Shapiro v. Thompson, 394 U.S. at 661 (Harlan, J., dissenting).

191. Reagan, *supra* note 188, at 1627-28.

192. *Id.* at 1628 (emphasised in original). "A law is constitutional, under this

the Court should take disparate impact as evidence of bad intent of the legislature as well as indifference to extreme disparate impact.[193]

Using this test in the *McRae* case would surely have produced a different and more just result, as Justice Marshall's dissent demonstrates.[194] The government benefits were of vital importance to the pregnant indigent women, the financially and politically oppressed. The asserted state interests are neither legitimate, nor rationally related to the legislation's purpose. Thus, the "dramatic illustration" in this case of the unjust application of the rigid two-tier approach may promote the acceptance of the proposed approach.

C. The Lack of Consensus Within the Supreme Court

Recently, the Burger Court has been plagued with indecision and lack of consensus in most of the major issues that came before the Court. In the term ending July 2, 1980, in the 130 cases that the Court handed down with written opinions, thirty-four were either five to four decisions or majority decisions with disagreement on the reasoning behind it.[195] This can be contrasted to the 1968-69 Term of the Warren Court where there were only nine such decisions.[196] This is further exemplified by the fact that in the last four major decisions in the Burger Court, there were twenty-two concurring and dissenting opinions.[197]

One author explains this rash of plurality opinions by recognizing that the Court is in a transitional stage.[198] "The current splintering is part of a transition process moving away from the activist days of the Warren Court, which emphasized the importance of individual rights. [The Court is] rethinking former posi-

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test, if a reasonable American legislature *could* pass it or fail to repeal it. The relationship . . . between the Court and the legislature is somewhat like the relationship between a trial judge and trial jury." *Id.* (emphasis in original).

193. *Id.* The application of the "reasonable American legislature test" could also be applied in this analysis.

> It may be that an ideal legislature would never pass a law that had a disparate impact on a class protected against purposeful discrimination without weighing the special costs such a disparate impact would impose by aggravating historic disadvantages. But unless the disparate impact is extreme, it is enough for the humanly reasonable legislature to avoid, or to weigh carefully, the explicit use of suspect classifications and to refrain from using apparently neutral classifications with the *purpose* of discriminating.

Id. at 1628-29 (emphasis in original).

194. 100 S. Ct. at 2708-09.

195. U.S. NEWS AND WORLD REPORT, July 21, 1980, at 60.

196. *Id.*

197. TIME, July 14, 1980, at 12.

198. *See* note 140 *supra* and accompanying text.

tions and ha[s] yet to reach a consensus."[199] It appears that the *McRae* decision is yet another illustration of this splintering, rethinking, and lack of consensus.

D. The Surrender of Constitutional Rights

The *McRae* case could unfortunately signal further circumvention by Congress of the rights implicitly found in the Constitution by the Court. As is clear from the political climate in which the Hyde Amendment was enacted, Congress passed the Amendment to reduce the effect of the Court's *Roe* decision which found a right to abortion in the right to privacy implicit in the Constitution. As Justice Brennan noted, "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."[200]

V. CONCLUSION

It is clear that the *McRae* Court simply relied on its prevailing "hands off" attitude toward social legislation by refusing to apply constitutional constraints and deferring the matter to congressional judgment. As a result, though the *Roe* Court succeeded in taking the abortion issue out of the political arena, the *McRae* decision allows it to be tossed right back—leaving a fundamental right to be manipulated for political ends and enabling the legislature to impose the evanescent majority's judgment of what is morally and socially desirable.

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199. Moskowitz, BUSINESS WEEK, July 14, 1980, at 42.
200. 100 S. Ct. at 2706 (Brennan, J., dissenting).