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FREEDOM AT HOME: STATE CONSTITUTIONS AND MEDICAID FUNDING FOR ABORTIONS

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Until the twentieth century, state constitutions were the primary guardians of individual rights. In fact, state bills of rights existed prior to the federal constitution.[1] But when the Supreme Court "federalized" civil liberties jurisprudence by applying the Bill of Rights to the states, most state courts began to defer to the judgments of the United States Supreme Court on individual liberty.[2] All state constitutions, however, have bills of rights provisions protecting individuals from government actions. Until recently, these guarantees were either ignored or interpreted co-extensively with the bill of rights provision in the federal constitution.

As former Justice William Brennan counselled, however, "[t]he legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed."[3] And, in the wake of eroding federal protection for fundamental rights, a new state constitutional jurisprudence has begun to emerge. The federal constitution provides a floor of minimum level protection for its citizens. Now, state courts are reading their constitutions more expansively even where the state and federal constitutions have similar or identical language.[4]

This Article addresses the multiplicity of accounts of a woman's procreative choice. In particular, it examines the funding of abortions under Medicaid—the joint federal-state reimbursement medical assistance program established by Title XIX of the Social Security Act.[5] The Article first provides an overview of the Medicaid Program and the Hyde Amendment to the Medicaid Program to restrict medicaid funding for abortion. It then examines the federal right to privacy, and the constitutionality

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1. Richard Vuernick, *State Constitutions as a Source of Individual Liberties: Expanding Protection for Abortion Funding Under Medicaid*, 19 J. CONTEMP. L. 185, 186 (1993) (noting that "[i]n our federalist system, the federal constitution was designed to protect states from an omnipotent centralized government, while the state constitutions were enacted to protect individual citizens from intrusive state governments."). In addition, the Federal Bill of Rights was modeled after provisions in state constitutions. *Id.* (citing California v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975)).

2. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 636 (1987) (stating that "state constitutional rights litigation all but disappeared").

3. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

4. *See e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

5. 42 U.S.C. §§ 1396-1396u (1988 & Supp. III 1991).

of abortion funding schemes based on an interpretation of the Federal Constitution. Next, it analyzes the use of state constitutional challenges to abortion funding statutes. Three states have followed United States Supreme Court precedent and upheld restrictions on Medicaid funding for abortion. Twelve others have found a greater degree of protection for individual liberty than that found in the United States Constitution.

Finally, this Article provides a brief review of the pending constitutional challenge to Medicaid funding of abortion in New Mexico. It then confirms that the area of reproductive rights is one example of the large and vital role of state constitutions in protecting and securing individual liberties.

I. TITLE XIX OF THE SOCIAL SECURITY ACT AND THE HYDE AMENDMENT

A. *Title XIX of the Social Security Act*

Congress first authorized the expenditure of Federal funds to enable States to provide medical assistance to certain classes of needy persons in 1965. Title XIX of the Social Security Act, or Medicaid, is one of several joint federal-state programs of assistance to needy Americans.[6] State participation in Medicaid is optional and States have broad parameters within which to determine the scope and extent of the assistance offered.[7] However, once a state decides to participate, it must comply with certain minimum requirements.[8]

Two classes of persons may receive Medicaid assistance under Title XIX of the Social Security Act—the "categorically needy" and the "medically needy."[9] Federal legislation does not specify the services which states must offer within the mandated categories of care and services; however, it does require participating states to set up reasonable standards governing the extent of such services.[10] Crucial to this analysis is the fact that Medicaid-participant states may, but need not, subsidize abortions beyond those for which federal reimbursement is available.[11]

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6. *See* 42 U.S.C. § 1396 (1988).

7. Harris v. McRae, 448 U.S. 297, 302 (1980).

8. *Id.*

9. The "categorically needy" include families with dependent children eligible for public assistance under the Aid to Families with Dependent Children program, 42 U.S.C. §§ 601-617 (1988), and the aged, blind, and disabled eligible for benefits under the Supplemental Security Income program, 42 U.S.C. §§ 1381-1383c (1988 & Supp. III 1991). 42 U.S.C. § 1396a(a)(10)(A) (1988). A State must furnish five types of services to qualified individuals. They include (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and X-ray services, (4) skilled nursing services, early periodic screening and diagnosis, and family planning services, and (5) physicians' services. 42 U.S.C. § 1396d(a)(1)-(5).

The "medically needy" include those who are under eighteen and pregnant, as well as pregnant women who may not meet income requirements to qualify as "categorically needy," and other needy people. 42 U.S.C. § 1396a(a)(10)(C)(ii) (1988 & Supp. II 1990).

10. *See* Beal v. Doe, 432 U.S. 438, 441 (1977) (citing 42 U.S.C. § 1396a(a)(17) and holding, however, that as a matter of statutory construction, Title XIX does not require states to fund the cost of non-therapeutic abortions when the states were funding medically necessary abortions for financially needy persons as part of their medical programs).

11. *McRae*, 448 U.S. at 309 (stating that "[i]f Congress chooses to withdraw federal funding for a particular service, a State is not obliged to continue to pay for that service as a condition of continued federal financial support of other services.").

B. *The Hyde Amendment*

In 1976, Congress enacted the first federal restrictions on Medicaid funding for abortions.[12] Named after its original congressional sponsor, Representative Henry Hyde of Illinois, the "Hyde Amendment" is a rider to the Labor-HEW Appropriations Act. The 1976 Amendment limited federal reimbursement of abortions to cases in which "the life of the mother would be endangered if the fetus were carried to term."[13] Similar restrictions passed Congress in 1977, 1978, and 1979.[14]

In 1979, Congress dropped the "severe and long-lasting health damage" exception.[15] The resulting legislation further restricted the circumstances under which coverage would be available. Today, reimbursement for abortion is limited to cases in which continued pregnancy is life-threatening, to cases of ectopic pregnancy, and to certain cases involving rape or incest.[16] The legislation continues to provide that states participating in Medicaid may choose not to fund abortions in their sole discretion.[17]

II. THE RIGHT TO PRIVACY AND ABORTION FUNDING CHALLENGES UNDER THE FEDERAL CONSTITUTION

A. *The Federal Right to Privacy*

In *Griswold v. Connecticut*,[18] the United States Supreme Court first recognized a right to privacy in procreative choice as a protected federal constitutional right. Under the Fourteenth Amendment, several fundamental constitutional guarantees create a zone of privacy encompassing "notions of privacy surrounding the marriage relationship."[19] The Court held that a married couple's right to use contraceptives is implicit in the couple's right to privacy. Seven years later, in *Eisenstadt v. Baird*,[20] the Court extended the right to privacy to include the right of unmarried couples to use contraceptives. The *Eisenstadt* decision separated the right of reproductive freedom from the right of marriage.[21]

The right of privacy, or perhaps more accurately the right of heterosexuals to use birth control, was finally extended to the abortion context in 1973. In the landmark decision of *Roe v. Wade*,[22] the United States

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12. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).
13. *Id.*
14. The 1977 version was slightly broader than the 1976 version. It included two additional categories of coverage, cases of "severe and long-lasting physical health damage" and "rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service." Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977). There were no changes in the 1978 version. *See* Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978); Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979).
15. Pub. L. No. 96-123, § 109, 93 Stat. at 926.
16. Pub. L. No. 96-536, § 109, 94 Stat. 3170 (1980).
17. *Id.*
18. 381 U.S. 479 (1965).
19. *Id.* at 485-86 (finding that several of the Bill of Rights guarantees protect the privacy interest and create a "penumbra" or "zone" of privacy).
20. 405 U.S. 438 (1972).
21. *Id.*
22. 410 U.S. 113 (1973).

Supreme Court held that the liberty interest protected by the Due Process Clause of the Fourteenth Amendment includes the freedom of a woman to decide whether to end her pregnancy. The Court concluded, however, that a pregnant woman does not have an absolute constitutional right of choice. According to the then all-male Court, legitimate state interests limit a woman's fundamental right of procreational choice. These interests are weighed differently as the woman progresses though the three trimesters of pregnancy.

The Court found that the state has two legitimate interests: the preservation of the health of the pregnant woman and the protection of potential human life.[23] The Court concluded that because a woman's right to decide whether to terminate a pregnancy is fundamental, the state must advance a compelling interest to regulate the pregnancy.[24] The Court posited that the asserted state interests became sufficiently compelling to justify regulation in the second and third trimesters.[25] Thus, *Roe* did not give a woman an unqualified right to an abortion. Rather, the Court decided only that she is unqualifiedly protected from governmental interference with her freedom to decide whether to terminate the pregnancy in the first trimester of pregnancy.

Since *Roe*, there has been an erosion of federal protection in the abortion context. The most important post-*Roe* decision, *Planned Parenthood v. Casey*,[26] explicitly declined to overrule *Roe*.[27] Nevertheless, the Court granted states more latitude in restricting access to abortions.[28] The *Casey* Court not only rejected the strict scrutiny standard of review for evaluating the constitutionality of abortion regulations, but also cast aside the trimester framework and adopted the less restrictive "undue burden" standard.[29] In its retreat, the Court rebalanced the relative interests of the state and pregnant women and reinforced the state's interest in protecting maternal health and potential fetal life "from the outset" of the pregnancy.[30] Under this new standard, the right to choose an abortion no longer enjoys the strong protection afforded other fundamental rights under the Federal Constitution.

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23. *Id.* at 162.

24. *Id.* at 162-63. The Court reasoned that the mortality rate for women having abortions during the first trimester is lower than the rate for pregnancies resulting in birth. Thus, the state has no compelling interest in protecting the mother's health and cannot ban abortions during the first trimester. *Id.* at 163. That decision is left to the pregnant woman and her physician.

25. *Id.* at 163-64. The Court ruled that during the second trimester, the state may protect only its interest in the mother's health and not the fetus' life. Thus, a complete ban on abortions during this period is not permitted. The Court then noted that at the onset of the third trimester, the fetus typically becomes "viable." Because the state has a compelling interest in protecting the fetus at that juncture, it may proscribe abortions during the third trimester except when necessary to preserve the life or the health of the mother.

26. 506 U.S. 833 (1992).

27. *Id.* at 846-47 (holding that the substantive liberty guarantee in the Fourteenth Amendment barred states from absolutely banning abortions).

28. *See id.* at 877-78.

29. *Id.* at 878.

30. Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1155 (1993).

B. *Federal Abortion Funding Cases*

In a line of cases in 1977, the United States Supreme Court reviewed the constitutionality of Medicaid abortion funding schemes and held that a state may fund childbirth related expenses without funding medically necessary abortions.[31] Three years later, the Court determined that the Hyde Amendment was constitutional.[32] The Court was plainly concerned that creating an affirmative funding obligation would require Congress to subsidize all medically necessary abortions of pregnant women even if Congress had not enacted the Medicaid program to subsidize other medically necessary services.[33]

In *Maher v. Roe*,[34] the plaintiff challenged the constitutionality of Connecticut's decision to refuse funding for non-therapeutic abortions[35] under the state's Medicaid scheme on both equal protection and due process grounds. On the equal protection question, the Court distinguished between a state's interference with a woman's right to choose and the state's decision to fund childbirth but not abortions. The Court decided that indigent women are not a suspect class for equal protection purposes.[36] Under a rational basis standard, the state does not have to pay for non-therapeutic abortions even if it funds childbirth-related expenses.

On the due process question, the Court held that the statute did not impinge on the fundamental right of choice guaranteed by the Constitution. In reaching its conclusion, the majority interpreted *Roe* to mean that a woman merely had a fundamental right to be free of "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[37] The Connecticut statute placed no direct obstacle in the pregnant woman's path. It simply failed to ease her pre-existing condition of poverty.

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31. *See* Beal v. Doe, 432 U.S. 438, 445-46 (1977); Maher v. Roe, 432 U.S. 464, 469-80 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977).

32. *See* Harris v. McRae, 448 U.S. 297, 317 (1980).

33. *See Maher*, 432 U.S. at 469; *Harris*, 448 U.S. at 318.

34. 432 U.S. 464 (1977).

35. Therapeutic abortions are those that are medically necessary to protect the life or health of the pregnant woman, while elective, or non-therapeutic abortions are generally considered everything else, such as birth control or "mere convenience."

In *Beal*, Justice Brennan argued that there is no meaningful distinction between "elective" and "medically necessary" abortions. "Elective" abortions must be considered a form of health care since "[p]regnancy is unquestionably a condition requiring medical services." *Beal*, 432 U.S. at 449.

36. *Maher*, 432 U.S. at 470 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973)). *San Antonio* involved a statutory system for financing public education which authorized an ad valorem tax by each school district on property within the district to supplement funds received by the State. Because of the variation in the amount of taxable properties within each district, there were substantial interdistrict disparities in per-pupil expenditures. The Court held that while important, education is not a right afforded either explicit or implicit protection by the Federal Constitution. The Court in *San Antonio* noted that it never invoked strict scrutiny for reviewing classifications based on wealth unless such classifications deprived a person of a fundamental right.

37. *Maher*, 432 U.S. at 474 (observing that "the Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires.").

Again, there was no reason for strict scrutiny. The Court found that the state's regulation was a policy decision that was "rationally related" to a "constitutionally permissible purpose"[38]—a preference for childbirth over abortion. The Connecticut Medicaid restriction did not interfere with a protected activity, but rather encouraged an alternative activity which the legislature had previously approved.[39]

Justice Brennan dissented in *Maher*. He noted that by funding childbirth-related expenses but not abortion, the State has brought "financial pressures on indigent women that force them to bear children they would not otherwise have."[40] He criticized the majority for failing to recognize burdens on the fundamental right to privacy and pointed to other abortion statutes that the Court found unconstitutional because they infringed on the woman's right to procreative choice.[41]

In *Harris v. McRae*,[42] a bitterly divided Court upheld the constitutionality of the then-current version of the "Hyde Amendment." Under Hyde, a state participating in the Medicaid program need not fund medically necessary abortions when no federal reimbursement was allowed.[43] The Court again relied on the decision in *Maher*. It argued that lack of federal funding placed no burden on a woman's right to decide whether to have an abortion.[44] The Court reasoned that merely because a woman has a right it does not give her an entitlement to have that right reimbursed at state expense.[45] Thus, the majority concluded there was no "affirmative funding obligation" in the Due Process Clause and that the Hyde Amendment did not restrict the exercise of any constitutionally protected fundamental right.[46] Rather than view the Hyde Amendment as a governmental restriction, the Court stated:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those

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38. *Id.* at 478 (citations omitted).
39. *Id.* at 474, 478-79.
40. *Id.* at 484.
41. *Id.* at 487 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (holding that Missouri's requirement of spousal consent for an abortion was unconstitutional)).
42. 448 U.S. 297 (1980).
43. *Id.* at 326.
44. *Id.* at 316.
45. *Id.*
46. *Harris*, 448 U.S. at 318. The Court also decided that the Hyde Amendment did not violate the Equal Protection Clause or the Establishment Clause. *Id.* at 319. The Court countered the equal protection argument by relying on the reasoning of *Maher*. *See id.* at 322. The Court noted that because indigent women are not a suspect class, under a rational basis analysis, the Hyde Amendment's goal of encouraging childbirth was rationally related to the legitimate governmental objective of protecting potential life. *Id.* at 323-25 n.26.

In addition, the Court dismissed the appellees' contention that the Amendment violated the Establishment Clause because it incorporated into law the doctrines of the Roman Catholic Church concerning the sinfulness of abortion and the time when life commences. Instead, the Court found that just because the law "happen[ed] to coincide or harmonize with the tenets of some or all religions," it did not contravene the Establishment Clause of the U.S. Constitution. *Id.* at 319-20 (citation omitted) (noting that because "the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.").

> not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.[47]

Both *Maher* and *Harris* sidestepped prior decisions showing that the government's decision to fund one program and not another may be unconstitutional if its purpose is to discourage the exercise of a constitutionally protected right.[48] A pregnant woman has a choice between two alternatives. When the government decides to subsidize only childbirth, it penalizes one of the constitutionally protected choices in much the same fashion that the Arizona residence requirement penalized the indigent patient's right to travel in *Memorial Hospital v. Maricopa County*.[49] In this context, the Supreme Court has "permitted states to discriminate between childbirth and abortion when allocating monies or providing services" to indigent women.[50]

III. STATE CONSTITUTIONAL INTERPRETATION IN ABORTION FUNDING CASES

The United States Supreme Court has consistently held that subsistence or welfare payments are not fundamental rights. Such holdings prevent any chance of successfully challenging Medicaid abortion funding restrictions under the Federal Constitution. Therefore, the future of reproductive freedom of poor women in this country depends largely on the willingness of state courts to interpret the bills of rights in state constitutions as conferring more rights than the Due Process Clause of the United States Constitution. Some state courts have refused to do so. Most, however, have been willing to diverge from federal precedent to find a greater degree of protection using existing state constitutional doctrine.

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47. *Harris*, 448 U.S. at 316. Justice Brennan again dissented, arguing that the State has no right to use its power to burden a woman's fundamental right to choose an abortion. *Id.* at 330. Focusing on the coercive nature of denying funds to indigent women, he stated: "[I]t is obvious that the Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly." *Id.* at 331.

48. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (holding that an Arizona statute requiring one year's residence in the county prior to being admitted to a hospital to receive non-emergency care was unconstitutional as a violation of the Equal Protection Clause absent a compelling interest); Healy v. James, 408 U.S. 169 (1972) (holding that the burden for denying a college group's application for recognition as a student organization fell on the administration and that the local group's affiliation with a national organization, the administration's disagreement with the group's philosophy, and its unsubstantiated fear of disruption were insufficient to warrant a denial of official recognition unless the administration could prove the student group failed to comply with campus regulations); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a state may not grant unemployment compensation to most workers, but deny it to a worker who is discharged because her religion prevents her from working on Saturday).

49. 415 U.S. 250 (1974).

50. Kolbert & Gans, *supra* note 30, at 1156.

A. *"Flying in the Face of Our Own Existence"*

To date, only Pennsylvania, Michigan and Kentucky, have upheld abortion funding limitations under the equal protection clauses of their state constitutions.[51] The clear trend in state constitutional law is to conduct an independent analysis of each state's constitutional guarantees. Nevertheless, the above three states did not recognize the important role of state constitutions in safeguarding a woman's reproductive choice and, as a result, have left poor women subject to continuing government manipulation.

In *Fischer v. Department of Public Welfare*,[52] the Pennsylvania Supreme Court considered the guarantees found in article I, section 1,[53] and article III, § 32, of the Pennsylvania Constitution.[54] Although the court acknowledged that it was free to interpret state constitutional provisions more expansively than federal courts, it nevertheless adopted the United States Supreme Court's framework of analysis for equal protection claims brought under the Pennsylvania Constitution.[55]

Pennsylvania's Constitution affords protection for abortion rights. However, the court defined the Plaintiff's claim as "the purported right to have the state subsidize the individual exercise of a constitutionally protected right, when it chooses to subsidize alternative constitutional rights."[56] The Commonwealth's constitution did not explicitly state the right to such an entitlement. Thus, the court held that the right was not fundamental, and strict scrutiny was not appropriate.[57] The court accepted the majority's reasoning in *McRae* and found that the goal of favoring childbirth over abortion satisfied even an intermediate level of scrutiny.[58]

In addition, the restriction violated neither the non-discrimination clause of the Pennsylvania Constitution nor the Pennsylvania Equal Rights

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51. *See, e.g.*, Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985); Doe v. Department of Social Serv., 487 N.W.2d 166 (Mich. 1992); Doe v. Masten Childers, No. 94CI02183 (Ky. Cir. Ct. Aug. 7, 1995).

52. 502 A.2d 114 (Pa. 1985).

53. This section provides: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." PA. CONST. art. I, § 1.

54. This section provides: "The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law . . . . Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law . . . ." PA. CONST. art. III, § 32.

55. *See Fischer*, 502 A.2d at 121 (reasoning that "[a]lthough the view of the United States Supreme Court concerning proper guidelines for its interpretation of the Federal Constitution is not binding upon us in interpreting the Pennsylvania Constitution, we agree that we should be guided by the same principles in interpreting our Constitution." *Id.* (quoting Kroger v. O'Hara Township, 392 A.2d 266, 274 (Pa. 1978))).

56. *Id.*

57. *Id.*

58. *Id.* at 122 (citing *Beal v. Doe*, 432 U.S. 438, 445 (1977); *Harris v. McRae*, 448 U.S. 297, 324 (1980); *Roe v. Wade*, 410 U.S. 113, 162 (1973) (noting that to hold that the preservation of potential life is not important "is to fly in the face of our own existence," and that the funding restriction was closely related—in fact "necessary"—to reach the Pennsylvania Legislature's goal of preserving life)).

Amendment.[59] The court determined that the non-discrimination clause only applies when the State penalizes a person for the exercise of a constitutionally protected freedom. The discriminatory funding scheme had not "penalized [plaintiffs] for exercising their right to choose, but has merely decided not to fund that choice in favor of an alternative social policy."[60] The court failed to give any independent significance to the clause preventing the State from denying "to any person the enjoyment of any civil right."[61]

The Michigan Supreme Court in *Doe v. Department of Social Services*,[62] and the Kentucky court in *Doe v. Masten Childers*,[63] both found that selectively withholding funds for abortion while funding all other pregnancy related care did not impinge on the constitutional right to decide whether to terminate a pregnancy. The Michigan court found that neither textual differences nor drafter's intent showed that the Michigan equal protection clause provided broader protection than the parallel federal clause.[64] The Kentucky court merely found that its equal protection clause is coterminous with the federal provision.[65] Both courts held that the restriction passed a rational basis test.

Thus, Pennsylvania, Michigan, and Kentucky followed United States Supreme Court precedent and simply adopted federal equal protection analysis as their own. The inevitable result, however, was "'absolute deferential conformity' with Supreme Court interpretations."[66]

B. State Constitutional Discourse: An Expansive Interpretation to Protect Individual Autonomy

Since 1981, the courts of New Mexico, Montana, West Virginia, Idaho, Illinois, New Jersey, California, Massachusetts, Oregon, Minnesota, Connecticut, and Vermont have invoked their state constitutions to strike

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59. The Pennsylvania non-discrimination clause provides:
"Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." PA. CONST. art. I, § 26.

The Pennsylvania Equal Rights Amendment provides: "Equality of rights under the law shall not be denied or abridged in the Commonwealth . . . because of the sex of the individual." PA. CONST. art. I, § 28.

60. *Fischer*, 502 A.2d at 124.

61. PA. CONST. art I, § 26.

62. 487 N.W.2d 166 (Mich. 1992).

63. No. 94CI02183, slip op. at 2 (Ky. Cir. Ct. Aug. 7, 1995).

64. *Doe v. Department of Social Serv.*, 487 N.W.2d at 175 (noting that "the pattern suggests a deliberate effort to duplicate the protection secured by the federal clause. Furthermore, a careful examination of the record of the debates of the Constitutional Convention confirms this view."). The court explicitly avoided the issue of whether the state constitution affords protection for abortion rights and rejected the court of appeals' expansive reading of Michigan's equal protection guarantee. *See generally id.*

65. *Masten Childers*, No. 94CI02183, slip op. at 20.

66. Utter & Pittler, *supra* note 2, at 645. This "dual approach" has been harshly criticized as a "non-approach" because it substitutes the judgment of the federal court for the independent legal analysis of the state court concerning a state provision. *Id.* at 646.

down statutes restricting abortion funding.[67] Each court has analyzed its own state constitution and relied on interpretations by sister states to develop a principled state constitutional jurisprudence. Some of these state constitutions contained federal analogs; others had provisions, such as the state Equal Rights Amendment, with no federal counterpart. None, however, simply accepted its state constitution as a mere reiteration of the federal charter.

The challenged state Medicaid statutes provided funding for all childbirth-related procedures except "medically necessary" abortions.[68] In each of the cases, the court used a two-step analysis. First, a woman's right to choose an abortion received broader protection under various provisions in the respective state constitution. As a result, the decision to carry a pregnancy to term and the decision to terminate a pregnancy have equal constitutional dignity.

Second, the courts held that the state cannot discriminate between the two choices. States routinely choose to confer public benefits upon their citizens. Once a state makes that choice, however, the state constitution mandates that it must do so in a non-discriminatory manner. This is particularly true when important individual interests are at stake.

1. Step One: Recognizing a Woman's Constitutional Interest in her Reproductive Choices

Several state courts first invalidated limitations on government funding for abortion as an infringement of the fundamental right of procreative

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67. *See, e.g.*, New Mexico Right to Choose/NARAL v. Danfelser, No. SF 95-867(C), slip op. at 3 (N.M. Dist. Ct. July 3, 1995), *appeal pending*, No. 23239 (N.M. Sup. Ct. Oct. 23, 1995); Women's Health Ctr. v. Panepinto, 446 S.E.2d 658 (W. Va. 1993); Roe v. Harris, No. 96977 (Idaho Dist. Ct. Feb. 1, 1994); Doe v. Wright, No. 91-CH-1958 (Ill. Cir. Ct. Dec. 2, 1994), *leave to file late appeal denied*, No. 78512 (Ill. Feb. 28, 1995); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779 (Cal. 1981); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387 (Mass. 1981); Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on statutory grounds*, 687 P.2d 785 (Or. 1984) (en banc); Women of Minn. v. Steffen, No. MC 93-3995 (Minn. Dist. Ct., June 16, 1994) (*appeal pending*); Doe v. Maher, 515 A.3d 134 (Conn. Super. Ct. 1986); Doe v. Celani, No. S81-84CnC (Vt. Super. Ct. May 26, 1986).

68. The definition of "medically necessary" has varied somewhat among the states. Oregon, for example, found that there was no definition of the phrase "medically indicated" and were thus, "not certain what it means in the context of abortions, as compared to other elective surgical procedures." *Planned Parenthood Ass'n*, 663 P.2d at 1251 (providing its own "working definition" and considering an abortion to be medically necessary "when that surgical procedure is required, in a physician's opinion, because specified medical problems may be caused or aggravated by the pregnancy endangering the health of the woman." *Id.* at 1252). *See also Women's Health Ctr.*, 446 S.E.2d at 661 n.4 (stating that procedure is determined to be medically necessary when it is "medically advisable by the attending physician in light of physical, emotional, psychological, familial, or age factors (or a combination thereof) relevant to the well-being of the patient." (citation omitted)); *Byrne*, 450 A.2d at 930 (stating that a physician may consider (1) physical, emotional, and psychological factors; (2) family reasons; (3) age (citing N.J. ADMIN CODE § 10:53-1 to -14(b)); *Moe*, 417 N.E.2d at 393 ("the consulting physician believes that [the] abortion is medically indicated, but cannot certify that the procedure is necessary to prevent death"); *Maher*, 515 A.2d at 137 (finding that a physician must certify that "the abortion is medically necessary for the patient's health").

choice guaranteed by their state constitutions.[69] These states have recognized the importance of a pregnant woman's right to choose in a variety of ways. The right of choice, rooted in the state constitution's "privacy" clause, has been found either in the "due process" clause, "inalienable rights" clause, or "open courts" provisions. One court has found an implicit right to privacy rooted in the state's common law.[70]

Two states courts looked to their due process clauses to find a fundamental right to reproductive choice. First, the Superior Court of Connecticut in *Doe v. Maher*[71] relied on Article I, section 10 of the state constitution in reaching its decision.[72] It looked first to federal precedent, however, and determined "[t]he inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[73] Using principles derived from *Roe* and its progeny, the court concluded that the right to privacy is "implicit in Connecticut's ordered liberty."[74] In addition, the right to privacy was fundamental in the state constitution's language, history, and previous interpretation.[75] Specifically, the framers of the state constitution of 1818 recognized fundamental or "natural rights" as "deeply rooted in the core of liberty."[76]

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69. *See, e.g., Danfelser*, No. SF 95-867(C); *Moe*, 417 N.E.2d at 399 (finding that the Massachusetts provision prohibiting use of state funds for medically necessary abortions violated the state constitution, which protects the choice to beget or bear children); *Committee to Defend Reprod. Rights*, 625 P.2d at 804 (noting that the California Constitution contains an explicit right to privacy); *Byrne*, 450 A.2d at 934 (determining that state right to privacy includes woman's right to control her own body and to choose whether to terminate the pregnancy or bear child); *Planned Parenthood Ass'n*, 663 P.2d at 785 (stating that the state constitution protects a women's right to terminate pregnancy); *Maher*, 515 A.2d at 150 (stating that the state constitution protects the right to privacy, including procreative choice); *Celani*, No. S81-84CnC (finding that denial of funding for medically necessary abortion violates state constitutional common benefit and safety clauses).

70. Women of Minn. v. Steffen, No. 93-3995, slip op. at 14 (Minn. Dist. Ct. June 16, 1994) (*on appeal*). The court cited *Roe* for the proposition that the right to privacy encompasses abortion, but then relied heavily on prior state court decisions to further support the fundamental nature of the right. *Id.*, at 13 (citation omitted). The court found that although judicial recognition of the right of privacy in Minnesota was relatively recent, the preservation of bodily integrity has been firmly rooted in its law for centuries. *Id.* at 14. Thus, "[r]eproductive freedom is an integral aspect of the right of personal integrity guarded by Minnesota common law." *Id.*

71. 515 A.2d 134 (Conn. Super. Ct. 1986).

72. Connecticut's due process clause provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." CONN. CONST. art. I, § 10.

73. *Maher*, 515 A.2d at 149 (quoting Powell v. Alabama, 287 U.S. 45, 67 (1932)). The court's use of federal law, however, was "on a case-by-case basis," and the federal principles were used "in the formulation of state constitutional law." *Id.* at 147 (citation omitted).

74. *Id.* at 150 (describing the right to privacy in expansive terms and noting that privacy "encompasses the doctor-patient relationship regarding the woman's health, including the physician's right to advise the woman on the abortion decision based upon her well-being").

75. *Id.* at 148-49. The court reasoned that the framers of the 1818 constitution intended that "the right of privacy is . . . implicitly guaranteed under our state charter of liberty." *Id.* at 148. The court noted that the Connecticut Constitution not only constrained governmental power, but also conferred positive rights upon the people, some of which were enumerated, others which were implied. *Id.* Among these implied rights were fundamental or "'natural rights,' which the people took for granted as being deeply rooted in the core of liberty." *Id.*

76. *Id.* at 148. The court quoted Justice Zephaniah Swift, who was instrumental in the drafting

Second, the Massachusetts Supreme Court in *Moe v. Secretary of Administration & Finance*[77] applied its due process provision to invalidate a Medicaid funding scheme that subsidized only abortions to save the mother's life.[78] The restriction impermissibly burdened an implicit right to privacy stemming from article X of the Massachusetts Declaration of Rights.[79] The court relied heavily on federal law to define the nature of the right to privacy.[80] It then looked to prior case law interpreting the state constitution. The court explained that the right to privacy protecting family, sexuality and reproductive freedom is "but one aspect of a far broader [grant]" of personal autonomy.[81] Thus, under the Massachusetts constitution, a woman "has a strong interest in being free from non-consensual invasion of [her] bodily integrity."[82]

Many state constitutions contain expansive guarantees of safety, liberty,and happiness that have no parallel in the Federal Constitution. So-called inalienable rights or inherent rights are those which are "beyond the scope of governmental power to control or the free human being to surrender."[83] The Vermont Constitution's inalienable rights provision, like that in the New Mexico, New Jersey, and Idaho constitutions, is textually different from the United States Constitution.[84] Instead of focusing on the right to privacy, however, the Vermont Superior Court in *Doe v. Celani*[85] highlighted the "right to safety" provision in the inalienable rights clause and found that a citizen cannot safeguard that right if her health is threatened.[86] "Health is central to [one's] personal safety and

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and adoption of the constitution of 1818. In defending natural rights, he said "[n]atural rights consist in the enjoyment and exercise of a power to do as we think proper, without any other restraint than what results from the law of nature, or what may be denominated the moral law . . . ." *Id.* (quoting 1 SWIFT, DIGEST 15 (1822); Christopher Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition*, 15 CONN. L. REV. 87, 94-97 (1982)).

77. 417 N.E.2d 387 (Mass. 1981).

78. The plaintiffs also alleged an equal protection and Equal Rights Amendment violation. However, because the court agreed that the challenged restriction impermissibly burdened a right protected by the state constitutional guarantee of due process, it did not reach the alternative grounds of invalidity. *Id.* at 397.

79. The Massachusetts due process clause provides: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection . . . ." MASS. CONST. art. X.

80. *Moe*, 417 N.E.2d at 398 (stating that "[a]lthough we are not unaware of the criticism leveled at *Roe* . . . , we have accepted the formulation of rights that it announced as an integral part of our jurisprudence.").

81. *Id.* This autonomy demands that "the sanctity of individual free choice" and the freedom of "bodily integrity" be fundamental. *Id.* at 399 (quoting Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977)).

82. *Id.* (quoting *In re* Spring, 405 N.E.2d 115 (1980)).

83. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-3 (2d ed. 1988).

84. The Vermont Constitution provides "[t]hat all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety . . . ." VT. CONST. art. I, ch. 1.

85. No. S81-84CnC (Vt. Super. Ct. 1986).

86. *Id.* at 9 (noting that the "case does not present an issue involving the freedom of choice to obtain an abortion so much as it concerns an unequal protection by the State of indigent inhabitants' unconstitutionally [sic] protected right to personal health, safety and happiness.").

happiness."[87] Therefore, "one's safety is integrally at risk" if one's health is being threatened.[88] The constitutionally guaranteed inalienable right to pursue and obtain happiness and safety includes the availability of medically necessary services.

Similarly, the New Jersey Supreme Court in *Right to Choose v. Byrne*[89] noted that the language of the New Jersey Constitution is more expansive than that of the Federal Constitution.[90] After examining its own case law, the court established that an individual's right to privacy extended to a variety of areas, including a woman's personal right to control her body and life.[91] Moreover, by asserting the right to life, liberty and the pursuit of safety and happiness, the framers made the right of privacy implicit in the 1844 Constitution.[92]

The United States Supreme Court in *Maher* and *Harris* derogated a woman's interest by allowing the state to impose its own values when benefits are allocated.[93] Twelve state courts, however, have recognized the independent role of their state constitutions. They have found that the interests of a pregnant woman simply cannot be weighed. These courts regard their constitutions as an important supplement to the federal right to privacy. In addition, the state constitutional provisions act as an independent guarantor of protection of women's rights.

2. Step Two: The Equal Importance of Constitutionally Protected Choices

Some courts have held that the state cannot discriminate when dispensing funds for medically necessary procedures under the state equal protection clause,[94] or privileges and immunities clause.[95] However, the driving force

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87. *Id.*

88. *Id.*

89. 450 A.2d 925 (N.J. 1982).

90. The New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." N.J. CONST. art. I, § 1.

91. *Byrne*, 450 A.2d at 933 (citing *In re* Grady, 426 A.2d 467 (N.J. 1981); *In re* Quinlan, 355 A.2d 647 (N.J.), *cert. denied sub nom.*, Garger v. New Jersey, 429 U.S. 922 (1976)) (observing that the state right to privacy had been invoked to protect adult consensual sexual conduct, the right to sterilization, and the right to terminate life support. The common thread running through these cases was the idea that sometimes "an individual's right to control her own body and life overrides the state's general interest in preserving life." *Id.*).

92. 450 A.2d at 933 (citing Heckel, *The Bill of Rights*, *in* II CONSTITUTIONAL CONVENTION OF 1947, 1336, 1339 (1951)).

93. *See supra* notes 33-41, 42-47 and accompanying text.

94. *See* Women of Minn. v. Steffen, No. 93-3995 (Minn. Dist. Ct. June 16, 1994) (on appeal) (noting that the state supreme court has "repeatedly interpreted Minnesota's equal protection guarantee to afford greater protection of individual liberties than that afforded by the federal constitution." *Id.* at 17. The creation of the two classifications—women obtaining funding if they carried to term and women choosing an abortion—were arbitrary and unreasonable. Moreover, the court noted that the provision posed an "obstacle" because it conditioned payment "upon the indigent woman's waiver of her constitutional right." *Id.* at 15, 17-23.).

95. *See* Planned Parenthood Ass'n v. Department of Human Resources, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984). Unlike most states, the Oregon

behind most of the Medicaid funding cases has been the adoption of the principle of neutrality. The neutrality doctrine is independent of the equal protection guarantee.[96] Nevertheless, the application of the neutrality doctrine is really one of equality jurisprudence and fundamental fairness.

In the abortion funding context, the neutrality principle recognizes that the state is under no obligation to support financially a woman's exercise of her fundamental right to reproductive choice. Once it chooses to do so, however, the state must not discriminate in its assistance. Otherwise, a poor woman who cannot afford appropriate medical care must forego her constitutional right of reproductive choice when the state subsidizes one option but not the other.[97]

Justice Brennan's dissenting opinions in both *Maher* and *Harris* acknowledged the dilemma that indigent women face when the government influences their constitutionally protected right of reproductive choice.[98] Similarly, virtually every state court that has found a constitutional basis for requiring nondiscrimination in government funding of reproductive health services has recognized the coercive effect of selective subsidies.[99] As one court noted,

> [F]rom a realistic perspective, we cannot characterize the statutory scheme as merely providing a public benefit which the individual recipient is free to accept or refuse without any impairment of her

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Constitution does not contain an equal protection clause, a due process clause or a privacy clause. The Oregon Constitution provides: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

The Oregon Court of Appeals analyzed the Oregon Privileges and Immunities Clause in equal protection terms. The court rejected the defendants' contention that the classification was based on wealth and found that the distinction between poor and rich was created only by the financial eligibility criteria for the medical assistance program. The court concluded: "It may well be that if the medical assistance program is a comprehensive one providing all medically necessary services for men but not for women if those services involve an abortion, the program denies equal privileges to women because they are women." *Planned Parenthood Ass'n*, 663 P.2d at 1260.

96. Under federal law, the Fourteenth Amendment guarantee of equal protection mandates that people who are situated similarly will be treated similarly. The principle of neutrality, on the other hand, is rooted in First Amendment doctrine and forbids the state to use its power to influence matters of religious theory, doctrine, and practice. *See* Epperson v. Arkansas, 393 U.S. 97 (1968) (striking down an Arkansas law prohibiting the teaching of evolution and noting that government may not be hostile to any religion or to the advocacy of no religion at all, and it may not aid, foster, or promote one religion or religious theory against another or even against the "the militant opposite." The First Amendment, the Court said, mandates government neutrality between religion and religion, and between religion and non-religion.).

97. Thus, the government is not free "to achieve with carrots what [it] is forbidden to achieve with sticks." TRIBE, *supra* note 83, at 933 n.77.

98. *See Maher*, 432 U.S. at 487-89; *Harris*, 448 U.S. at 331.

99. *See, e.g., Moe*, 417 N.E.2d at 396 ("For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective as 'interdiction' . . . as would ever be necessary.") (quoting Singleton v. Wulff, 428 U.S. 106, 118-19 n.7 (1976)); *Committee to Defend Reprod. Rights*, 625 P.2d at 793 (recognizing coerciveness of funding ban); *Byrne*, 450 A.2d at 935 ("nor is it neutral to provide one woman with the means to protect *her life* at the expense of a fetus, and to force another woman to sacrifice *her health* to protect a potential life." (emphasis added)); *Maher*, 515 A.2d at 152 ("[T]he regulation impinges upon those constitutional rights to the same practical extent as if the state were to affirmatively rule that poor women were prohibited from obtaining an abortion."); Women's Health Ctr. v. Panepinto, 446 S.E.2d 658, 664 (W. Va. 1993) (finding that "[t]here is a federally-created right of privacy that we are required to enforce in a non-discriminatory manner . . . .").

> constitutional rights. On the contrary, the state is utilizing its resources to ensure that women who are too poor to obtain medical care on their own will exercise their right of procreative choice only in the manner approved by the state.[100]

State courts in California, Massachusetts, and Connecticut further analogized between the discriminatory funding of childbirth but not abortion, and the selective allocation of other government benefits to promote the exercise of constitutional rights in a state-approved manner.[101] In each case, the court had earlier held that the State cannot subsidize one activity and penalize another.

For example, the California Supreme Court in *Committee to Defend Reproductive Rights v. Myers*[102] discussed two cases. The first invalidated a state program allowing private organizations to use public schools for public meetings but excluding "subversive elements" from the use of the property.[103] The second reinstated a nurse's aide at a state-owned hospital who was dismissed as a result of political activity.[104] The California Supreme Court found that neutrality in supporting the exercise of constitutional rights in the area of reproductive choice, is no less important than when free speech or the right to vote is at stake.[105] Neither of the cases cited about the selective allocation of government benefits involved the use of state funds. Nevertheless, the court reasoned that as the state could not bar facilities from groups whose speech and association the state sought to suppress, neither could it impose a disfavored opinion about abortion by denying health care subsidies to a woman who sought to end her pregnancy.[106]

The neutrality principle potentially offers an important source of constitutional protection. In the first instance, the federal two-tiered equal protection analysis does not bind state courts. Moreover, state courts do not feel compelled to justify a divergence. Instead, by adopting the equal protection framework and weaving it together with principles of neutrality, courts have found a constitutional basis for requiring non-discrimination in government funding of reproductive services.

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100. Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 793 (Cal. 1991).

101. *See, e.g., Committee to Defend Reprod. Rights*, 625 P.2d at 785, 787-88; *Moe*, 417 N.E.2d at 401; *Maher*, 515 A.2d at 151 (citing Healy v. James, 408 U.S. 169 (1972) (holding that a state college cannot constitutionally withhold official recognition from a student group and bar it from otherwise open facility on grounds that the administration dislikes its views)). Just as the State may, for example, use public funds to inform voters about a tax scheme, it may not advocate a position on the tax. Similarly, a State cannot subsidize one alternative and not another.

102. 625 P.2d 779 (Cal. 1981).

103. *Id.* at 785, 787-88 (citing Danskin v. San Diego Unified Sch. Dist., 171 P.2d 885 (Cal. 1946)) (reasoning that just as the state could not bar those who wanted to use public property for speech and association the state sought to suppress, it could not deny health care subsidies to those who sought to use funds for an abortion).

104. *Id.* at 786-88 (citing Bagley v. Washington Township Hosp. Dist., 421 P.2d 409 (Cal. 1966)) (characterizing the issue as one where the state sought to exclude potential recipients from governmental benefit programs solely on the basis of their exercise of constitutional rights).

105. *See* Kolbert & Gans, *supra* note 29, at 1165.

106. *Committee to Defend Reprod. Rights*, 625 P.2d at 785, 787-89.

C. *Rights Protections Not Contained in the Federal Constitution: Gender Equality Jurisprudence*

Some courts have invoked their state equal rights amendments (ERAs) to find that restrictive abortion laws violate gender-based equality guarantees under the state constitution. Because state ERAs have no federal counterpart, they are an important and largely untapped source of protection for women.

Before the enactment of the Federal Equal Pay Act in 1963 and Title VII of the 1964 Civil Rights Act prohibiting sex discrimination in employment, differences in the legal treatment of the sexes survived a variety of constitutional attacks. The underlying social and legal attitudes of courts routinely reinforced stereotypes of women and their role in society. Laws were upheld providing special protection to women in recognition of the differences in the physical capacities of the sexes and of the general weaker bargaining position of women in the labor market.[107]

Since the 1970s, however, the Court has elevated the legal status of women by giving more than minimal review to gender based classifications. Thus, a statute preferring men over women as administrators of estates is unconstitutional;[108] and a statute allowing a serviceman to claim his wife as dependent (whether or not she was dependent on him), but prohibiting the servicewoman from claiming her husband as a dependent unless he depended on her for more than one-half of his support, is constitutionally infirm.[109]

The *Roe* Court repeatedly maintained that the decision to choose an abortion belongs to the pregnant woman. Thus, the right to choose and the right to retain control over one's body ostensibly diminished the gap

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107. *See, e.g., In re* Mahaffay's Estate, 254 P. 875 (Mont. 1927) (holding that a statute requiring a husband to consent to a wife's will depriving him of more than two-thirds of her estate did not violate the equal protection guarantee though the husband could make such a disposition without the wife's consent); Carrithers v. City of Shelbyville, 104 S.W. 744 (Ky. Ct. App. 1907) (a law providing that only resident voters could protest the annexation of their property by a municipality was consistent with the equal protection guarantee though women could not protest such annexation because they were not privileged to vote at the time); Hall v. State, 187 So. 392 (Fla. 1939) (states could constitutionally prevent women from selling intoxicating beverages or from serving as jurors); Commonwealth v. Welosky, 177 N.E. 656 (Mass. 1931), *cert. denied*, 284 U.S. 684 (1932). The United States Supreme Court even held that a woman could constitutionally be denied a license to practice law on the mere grounds of her sex. Bradwell v. State, 83 U.S. 130 (1872).

These attitudes are best illustrated by the concurring opinion of Justice Bradley. In his view,

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

Id. at 141-42.

108. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971).

109. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973). *See also* Craig v. Boren, 429 U.S. 190 (1976) (holding that a statute which forbade the sale of 3.2% beer to males under the age of 21 and to females under the age of 18 violated the equal protection clause).

between the legal status of women and men. Justice O'Connor in *Planned Parenthood v. Casey*[110] noted that for the past twenty years, women have relied on *Roe's* constitutional protections:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[111]

As shown by *Harris v. McRae*,[112] however, sexual equality was not an issue for the Court.

Voters defeated the Federal Equal Rights Amendment in 1982.[113] However, more than a third of the states have explicit ERAs that ban sex discrimination.[114] Because there is no federal counterpart, these states have been free to develop an independent constitutional jurisprudence and paradigms of gender-discrimination doctrines. States are not uniform in their construction of ERAs.[115] Nevertheless, the equality guarantees of the amendments provide an important rationale for protecting a woman's reproductive choice. Some courts have suggested that laws restricting funding for abortion do not discriminate between men and women because

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110. 505 U.S. 833 (1992).

111. *Id.* at 856.

112. 448 U.S. 297 (1980) (finding the right to choose as an issue of abstract personal privacy rather than a question of sexual equality).

113. The proposed Equal Rights Amendment was passed by Congress on March 22, 1972, and submitted to the legislatures of the states for ratification as the Twenty-Seventh Amendment to the Constitution. It declared that: "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." H.R.J. Res. 208, 92d Cong., 2d Sess. (1972).

114. *See, e.g.*, ALASKA CONST. art. I, § 3 (amended 1972); COLO. CONST. art. II, § 29 (amended 1972); CONN. CONST. art. I, § 20 (amended 1974); HAW. CONST. art. I, § 3 (amended 1972); ILL. CONST. art. I, § 18; LA. CONST. art. I, § 3 (amended 1974); ME. CONST. DECLARATION OF RIGHTS, art. 46 (amended 1972); MASS. CONST. pt. I, art. 1 (amended 1976); MONT. CONST. art. II, § 4 (amended 1972); N.H. CONST. part I, art. 2 (amended 1974); N.M. CONST. art. II, § 18 (amended 1973); PA. CONST. art. I, § 28 (amended 1971); TEX. CONST. art. I, § 3a (amended 1972); VA. CONST. art. I, § 11 (amended 1971); WASH. CONST. art. 31, § 1 (amended 1972).

115. Construction has ranged from a strict interpretation to a meaningless interpretation. Adopting the "literal" interpretation, some courts have interpreted their ERAs as prohibiting the government from making any distinctions based on sex. *See, e.g.*, Rand v. Rand, 374 A.2d 900, 904-05 (Md. 1977) ("[T]he 'broad, sweeping, mandatory language' of the [state ERA] is cogent evidence that the people of Maryland are fully committed to equal rights for men and women."); National Elec. Contractors Ass'n v. Pierce County, 667 P.2d 1092, 1102 (Wash. 1983) ("The ERA absolutely prohibits discrimination on the basis of sex . . . . and absolutely prohibits the sacrifice of equality for *any* state interest, no matter how compelling . . . ."). Some courts use a strict scrutiny standard, thus invalidating all sex-based classifications that are not reasonably related to a compelling state interest. *See, e.g.*, Doe v. Maher, 515 A.2d 134, 161 (Conn. Super. Ct. 1986); People v. Ellis, 311 N.E.2d 98, 101 (Ill. 1974); Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 393 N.E.2d 284, 291 (Mass. 1979); *In re* McLean, 725 S.W.2d 696, 698 (Tex. 1987); Phelps v. Bing, 316 N.E.2d 775 (Ill. 1974). Finally, others construe the ERA as permitting any classification based on sex so long as the classification is reasonably related to a legitimate state interest. *See, e.g.*, Archer v. Mayes, 194 S.E.2d 707 (Va. 1973).

only women get abortions.[116] Others take an opposing view. They point out that men can protect their health and exercise their procreative choices free of governmental interference. The impact of abortion restrictions falls on a class composed only of women *because* only women get abortions. Thus, restrictive legislation coerces only women to continue their pregnancies to term and singles them out for adverse treatment.[117]

The Connecticut court, holding to the latter view, invalidated funding restrictions under its equal rights amendments. In 1986, the court in *Doe v. Maher*[118] found that the funding of childbirth, but not abortion, discriminated on the basis of sex:

> [U]nder the medicaid program, all the medical expenses necessary to restore the male to health are paid and likewise for the female *except* for therapeutic abortions that are not life-threatening. [In addition,] all the male's medical expenses associated with their reproductive health, for family planning and for conditions unique to his sex are paid and the same is provided for women *except* for the medically necessary abortion that does not endanger her life.[119]

The court noted that such exceptions are neither an accident of biology nor the incidental effect of a policy of promoting childbirth.[120] Rather, they are part of a long history in which "women's biology and [their] ability to bear children have been used as a basis for discrimination against them . . . ."[121] The court found that the funding ban distributes benefits in a manner that reflects unfair stereotypes about women's proper roles, penalizing women who fail to conform to the traditional belief that one of their primary purposes is to bear and raise children.[122] The Connecticut court's use of its state ERA to invalidate restrictive abortion funding regulations expands the privacy/liberty view that a woman has a right to control her own body. In turn, that view gives her similar control over the definition of her role in society.

When the state leaves a woman with no alternative but to continue an unwanted pregnancy, it perpetuates sex-oriented discrimination. The

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116. *See* Fisher v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985).

In other words, such laws do not distinguish "between men and women, but between pregnant persons seeking an abortion, all of whom were women, and non-pregnant persons, men and women, who would have no need for an abortion." Robert A. Sedler, *The Constitution and Personal Autonomy: The Lawyering Perspective*, 11 COOLEY L. REV. 773, 795 (1994).

117. Kolbert & Gans, *supra* note 29, at 1167 (noting that the impact of abortion restrictions falls only on a class composed of women, while men can protect their health and exercise their procreative choices free of governmental interference).

118. 515 A.2d 134, 159 (Conn. Super. Ct. 1986).

119. *Id.* The court stated, "[p]regnancy is a condition unique to women, and the ability to become pregnant is a primary characteristic of the female sex. Thus, any classification which relies on pregnancy as the determinative criterion is a distinction based on sex." *Id.* (quoting Massachusetts Elec. Co. v. Massachusetts Comm'n Against Discrimination, 375 N.E.2d 1192 (1978)).

120. *Id.* at 159-60.

121. *Maher*, 515 A.2d at 159. The court also noted that "[i]t is absolutely clear that the framers intended that pregnancy discrimination would come with the purview of the sex discrimination prohibited by Connecticut's ERA . . ." *Id.* at 160; *see generally* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

122. *Id.*

language found throughout the *Casey* opinion affirms the connection between the right of reproductive choice and equality. Anything less would be "[t]o give society—especially a male-dominated society—the power to sentence women to childbearing against their will [and] is to delegate to some a sweeping and unaccountable authority over the lives of others."[123]

IV. NEW MEXICO ACCEPTS THE CHALLENGE

New Mexico is in the vanguard of states to find that a woman has not only a right to choose, but a right to effectuate that choice. New Mexico provides public assistance, including medical assistance, to needy men and women throughout the state.[124] Since December 1, 1994, New Mexico has extended assistance to indigent women in need of medically necessary abortions.[125] The Department of Health and Human Services (HSD), however, promulgated a regulation, to have taken effect on May 1, 1995, that would limit medical assistance for abortions to mirror the Federal Medicaid program.[126] Thus, abortions would only be available when the pregnancy endangers a woman's life, the pregnancy resulted from rape or incest, or the pregnancy is ectopic.

In *New Mexico Right to Choose/NARAL v. Danfelser*,[127] the plaintiffs challenged the proposed regulation as violative of the state constitutional guarantees of due process, inherent rights, equal protection, and equal rights. On July 3, 1995, the New Mexico district court granted the plaintiffs' motion for a permanent injunction, invalidating the proposed regulation. At the time of this Article's publication, *Danfelser* was pending in the New Mexico Supreme Court. Nevertheless, the district court's opinion in *Danfelser* provides a reasoned basis for recognizing the independent guarantees of the New Mexico Constitution.

In a case of first impression, Judge Steve Herrera noted at the outset that the Federal Constitution does not limit the New Mexico Constitution.[128] Indeed, New Mexico has a long history of providing its citizens broader protections than the federal charter.[129]

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123. TRIBE, *supra* note 82, at § 15-10 (noting that any such allocation of power is a detriment of women as a class given the number of ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society).

124. *See* N.M. STAT. ANN. § 27-2-9 (Supp. 1994). Persons eligible for Medicaid receive comprehensive coverage of medically necessary services, including physician, hospital, laboratory, hospice, reproductive health, and midwife services. N.M. STAT. ANN. § 27-2-12.

125. MEDICAL ASSISTANCE DIVISION PROVIDER MANUAL reg. 766.3 (N.M 1994).

126. Human Serv. Reg., N.M., Final Reg. Governing Pregnancy Termination Procedures (Apr. 19, 1995).

127. No. SF 95-867(C) (N.M. Dist. Ct. July 3, 1995), *appeal pending*, No. 23239 (N.M. Sup. Ct. Oct. 23, 1995).

128. *Id.* at 3 (citing State v. Gutierrez, 116 N.M. 431, 435, 863 P.2d 1052, 1056 (1993)). *See also* City of Farmington v. Fawcett, 114 N.M. 537, 544-45, 843 P.2d 839, 846-47 (Ct. App.), *cert. denied*, 114 N.M. 532, 843 P.2d 375 (1992) (stating that "federal decisions do not control the nature and scope of the rights guaranteed by the New Mexico Constitution."); Blea v. City of Espanola, 117 N.M. 217, 221, 870 P.2d 755, 759 (Ct. App.), *cert. denied*, 117 N.M. 328, 871 P.2d

Utilizing a framework similar to that of sister states, the district court first looked to the New Mexico due process clause,[130] the inherent rights clause,[131] and *Roe* and *Casey* to determine the fundamental nature of the right at stake.[132] The court looked to the state constitution and rejected federal precedent. Significantly, the court found that the supreme court in *Lovelace Medical Center v. Mendez*,[133] had already explicitly stated that New Mexicans have a "legally protected interest in limiting the size of their famil[ies]."[134] Moreover, "[t]he choice not to procreate, as part of one's right to privacy, has become (subject to certain limitations) a Constitutional guarantee."[135]

Once the fundamental right to privacy was established, the court applied the neutrality doctrine. The principle of neutrality is not a new concept in New Mexico. In 1990, the New Mexico Supreme Court made clear that "[s]o long as the state chooses to provide particular rights . . . it may not limit the exercise of such rights selectively."[136] In addition, the state attorney general has repeatedly stated that when subsidizing the rights to free speech, to vote, and to a free press, the State must be

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984 (1994) (finding that the New Mexico Supreme Court has "continued its expansion of rights in favor of the citizen").

129. *See Danfelser*, No. SF 95-867(C), slip op. at 3 (citing State v. Attaway, 117 N.M. 141, 870 P.2d 103 (1994); State v. Gutierrez, 116 N.M. 431, 435, 863 P.2d 1052, 1956 (1993); State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989)). *See also* Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994), *rev'g*, 113 N.M. 421, 827 P.2d 136 (Ct. App. 1991).

Almost ten years ago, the New Mexico Supreme Court stated:

> [As] the ultimate arbiters of the law of New Mexico[, we] are not bound to give the same meaning to the New Mexico Constitution as the United States Supreme Court places upon the United States Constitution, even in construing provisions having wording that is identical, or substantially so, 'unless such interpretations purport to restrict the liberties guaranteed the entire citizenry under the federal charter.'

State *ex rel.* Serna v. Hodges, 89 N.M. 351, 356, 552 P.2d 787, 792 (1976) (quoting People v. Brisendine, 531 P.2d 1099, 1112 (Cal. 1975), *overruled on other grounds*, State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976).

130. The New Mexico due process clause provides: "No person shall be deprived of life, liberty or property without due process of law . . ." N.M. CONST. art. II, § 18.

131. The New Mexico inherent rights clause provides:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

N.M. CONST. art. II, § 4. *See* California First Bank v. State, 111 N.M. 64, 76, 801 P.2d 646, 658 (1990) (finding the inherent rights clause more expansive and affirmative than the Federal Constitution); State v. Sutton, 112 N.M. 449, 455, 816 P.2d 518, 524 (Ct. App.), *cert. denied*, 112 N.M. 308, 815 P.2d 161 (1991) (stating that inherent rights clause "contain[s] very general language protecting a variety of rights.").

132. *Danfelser*, No. SF 95-867(C), slip op. at 11-12.

133. 111 N.M. 336, 805 P.2d 603 (1991).

134. *Danfelser*, No. SF 95-867(C), slip op. at 12 (citing *Lovelace*, 111 N.M. at 346, 805 P.2d at 613 (1991)).

135. *Id.*

136. Trujillo v. City of Albuquerque, 110 N.M. 621, 627, 798 P.2d 571, 577 (1990) (holding that once the state chose to assist the exercise of the fundamental right of access to the courts by waiving sovereign immunity and affording litigants the right to sue a government tortfeasor, the state could not treat a municipal tort victim differently from other tort victims "unless the limitation [was] justified by a counterbalanced state interest of sufficient weight.").

"evenhanded," "equal," and "non-discriminatory."[137] In the abortion funding context, Judge Herrera noted "[t]his withholding of State funds imposes a discriminatory burden on the poorest of the poor and only affects women."[138] The neutrality doctrine is fundamental to the concept of individual rights in New Mexico.

New Mexico overwhelmingly ratified its Equal Rights Amendment in 1973.[139] The state ERA explicitly guarantees the equality of women and men.[140] New Mexico courts have had the opportunity to analyze the ERA in varying contexts almost since its ratification.[141] Guided by those decisions, the district court found that the funding regulation "necessarily discriminate[d] on the basis of gender."[142] Judge Herrera found it "illogical to suggest that the people of the State of New Mexico, the same people who recently affirmed the rights of all of its citizens to 'Equality of Rights Under Law,' would deny basic health choices to poor women."[143]

New Mexico has long drawn distinctions between the state constitution and the Federal Constitution when construing a state provision that is different from the federal counterpart, either textually or historically. The district court in *Danfelser* affirmed that New Mexico continues to preserve her autonomy. For New Mexicans, the Federal Constitution is *not* the last line of defense. The abortion funding issue has yet to be resolved by the New Mexico Supreme Court. If the supreme court holds to its tradition of independently analyzing the state constitution, however, poor New Mexico women will continue to be afforded the same guarantees as all other citizens of the state.

V. CONCLUSION

The challenges to restrictions on Medicaid funding for abortions have provided a useful illustration for developing a principled basis for in-

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137. *See* 1992 N.M. Op. Att'y Gen. No. 3, at 5 (May 5, 1992) (legislature may make space at the state capitol available for media's use provided the procedure for allocating the space is "evenhanded"); 1985 N.M. Op. Att'y Gen. No. 6, at 2 (Mar. 29, 1985) (local school boards or districts "may expend public funds to inform voters . . . [but] may not, however, use public funds to advocate a position on the tax . . . ."); 1964 N.M. ATT'Y GEN. REP. 606, 607 (state fair commission may lease fair grounds to private groups so long as the leasing is done "on a non-discriminatory or equal basis").

138. *Danfelser*, No. SF 95-867(C), slip op. at 12.

139. New Mexico's Equal Rights Amendment provides: "Equality of rights under law shall not be denied on account of the sex of any person." N.M. CONST. art. II, § 18.

140. *See* English v. Sanchez, 110 N.M. 343, 346, 796 P.2d 236, 239 (1990) (stating that the ERA mandates "equality of the rights" between sexes); State v. Sandoval, 98 N.M. 417, 419, 796 P.2d 485, 487 (Ct. App. 1982) (noting that the Amendment requires the State of New Mexico to "treat all persons alike, regardless of sex.").

141. *See* Swink v. Fingado, 115 N.M. 275, 279-80, 850 P.2d 978, 982-83 (1993) (ensuring equal treatment of women and men in domestic relations law); State v. Gonzales, 111 N.M. 590, 598-99, 808 P.2d 40, 48-49 (Ct. App.), *cert. denied*, 111 N.M. 416, 806 P.2d 65 (1991) (jury selection); State v. Sandoval, 98 N.M. 417, 418-19, 649 P.2d 485, 486-87 (Ct. App. 1982) (criminal prosecutions); Schaab v. Schaab, 87 N.M. 220, 223, 531 P.2d 954, 957 (1974) (state alimony statute must treat husband and wife with exact equality). *See also* 1975 N.M. ATT'Y GEN. REP. 193 (implicitly rejecting stereotypes of women as unfit for military service).

142. *Danfelser*, No. SF 95-867(C), slip op. at 14.

143. *Id.* at 13.

terpreting state constitutions. There has been diminishing federal protection for reproductive rights, and for women's access to abortions, for a number years. In the wake of these constitutional limitations, judicially activist courts have used state constitutions as a successful alternative. In addition to implicit guarantees to the right to privacy, the development of neutrality principles and use of state ERAs have provided a remedy against governmental discrimination in reproductive decision-making. While no two cases are alike, the abortion funding cases provide a powerful model for analysis of state constitutional guarantees.