

University of Michigan Journal of Law Reform

Volume 24

1991

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Recommended Citation

Carole A. Corns, *The Impact of Public Abortion Funding Decisions on Indigent Women: A Proposal to Reform State Statutory and Constitutional Abortion Funding Provisions*, 24 U. MICH. J. L. REFORM 371 (1991).

Available at: <https://repository.law.umich.edu/mjlr/vol24/iss2/3>

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THE IMPACT OF PUBLIC ABORTION FUNDING DECISIONS ON INDIGENT WOMEN: A PROPOSAL TO REFORM STATE STATUTORY AND CONSTITUTIONAL ABORTION FUNDING PROVISIONS

Carole A. Corns*

In the 1973 decision of *Roe v. Wade*,¹ the United States Supreme Court overturned a Texas statute that had criminalized all abortions except those necessary to save the life of a pregnant woman.² For the first time,³ the Court recognized the constitutional status of a woman's right to choose abortion over maternity, holding that her choice, if exercised prior to fetal viability, was guaranteed by a fundamental right to privacy.⁴ It was a pyrrhic victory for women's rights, however. By framing the right to procreative choice as a privacy right, the Court limited the extent of that right because privacy implies only freedom from government intervention, a negative right.⁵ In subsequent cases, the Supreme Court denied that the constitutional abortion right enumerated in *Roe* was absolute, holding that neither a state⁶ nor the

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

2. *Id.* at 164.

3. See Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 183 (1984) (noting that "[a]s recently as 1967, just six years before the foundation ruling in *Roe v. Wade*, no state in the nation permitted an abortion except to save the life of the mother" (footnotes omitted)).

4. *Roe*, 410 U.S. at 152-64. Specifically, the 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." *Id.* at 154.

The Court concluded that the State's interest in regulating the pregnancy becomes "compelling" at approximately the end of the first trimester, both because the health risk of continuing a pregnancy outweighs that of obtaining an abortion during the first trimester and because the state's interest in protecting "potential" human life arises at the point of fetal viability. *Id.* at 163-64.

5. For a critical analysis of the limitations of the constitutional right to privacy within the context of the right to abortion, see C. MACKINNON, *FEMINISM UNMODIFIED* 93-102 (1987). For a discussion of the distinction between equal protection based gender discrimination cases and due process based reproductive anatomy cases, see Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C.L. REV. 375, 375-80 (1985).

6. See *Maher v. Roe*, 432 U.S. 464, 469-80 (1977) (upholding a Pennsylvania law limiting the use of Medicaid funding for abortions to "medically necessary" abortions).

federal government⁷ had a positive responsibility to ensure that each woman seeking an abortion would be able, financially, to obtain one.

Specifically, the Court ruled that state governments, under their respective Medicaid plans, could withhold funding from indigent women seeking elective abortions, even though the states continued to provide for their childbirth-related expenses.⁸ Three years later, the Court ruled that the federal government could prohibit indigent women from using federal Medicaid funds for abortions.⁹ Rejecting equal protection challenges in both cases, the Court held that: 1) neither pregnancy nor poverty constituted a suspect classification, so the State was not required to show a compelling interest to justify its policy;¹⁰ and 2) the regulations at issue were rationally related to a legitimate governmental interest in encouraging childbirth.¹¹

State and federal restrictions on Medicaid funding for pregnant women, which reflect governmental preferences for childbirth over abortion,¹² operate to coerce some indigent women into maternity.¹³ An indigent woman who faces the options of using her welfare check to pay for an abortion or of obtaining government funding to carry her pregnancy to term has a choice between abortion and childbirth, but her freedom to make that choice is questionable.¹⁴ Except in the few

7. See *Harris v. McRae*, 448 U.S. 297, 316-18 (1980) (upholding an amendment to a federal appropriations bill that banned the use of federal Medicaid funds to pay for abortions, except where necessary to save the life of the pregnant woman).

8. *Maher*, 432 U.S. at 478-80.

9. *Harris*, 448 U.S. at 316-18.

10. *Harris*, 448 U.S. at 322-23; *Maher*, 432 U.S. at 470-71.

11. *Harris*, 448 U.S. at 324-26; *Maher v. Roe*, 432 U.S. 464, 478-80 (1977).

12. See *Harris v. McRae*, 448 U.S. 297, 325 (1980) (“[T]he Hyde Amendment, by encouraging childbirth except in the most urgent circumstances, is rationally related to the legitimate governmental objective of protecting potential life.”); IND. CODE § 16-10-3-4 (Supp. 1979) (“Childbirth is preferred, encouraged, and supported over abortion.”); N.D. CENT. CODE § 14-02.3-01 (1981) (“Between normal childbirth and abortion, it shall be the policy of the State of North Dakota that normal childbirth is to be given preference, encouragement, and support by law and by state action”); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1991) (“Since it is the public policy of the Commonwealth to favor childbirth over abortion, no Commonwealth funds . . . shall be expended by any State or local government agency for the performance of abortion [except under specific circumstances].”); cf. *Beal v. Doe*, 432 U.S. 438, 445 (1977) (“The State has a valid and important interest in encouraging childbirth.”); *Maher*, 432 U.S. at 477 (stating that “a State is not required to show a compelling interest for its policy choice to favor normal childbirth”).

13. See *Maher*, 432 U.S. at 483 (Brennan, J., dissenting).

14. See generally Henshaw & Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 FAM. PLAN. PERSP. 170 (1984) (discussing problems experienced by indigent women in obtaining funds for an abortion).

states that continue to fund abortions for Medicaid-eligible women,¹⁵ restrictive state and federal abortion funding decisions have limited the right to procreative choice to those women who can afford to pay for an abortion.¹⁶

This Note argues that state legislatures should relax funding restrictions on abortions for indigent women and proposes specific mechanisms to ensure the equal protection of indigent women in the abortion context. Part I briefly recounts the history of federal funding for abortions, from the liberal post-*Roe* funding scheme to the restrictive funding arrangements that have prevailed since the early 1980s. Part II surveys the existing literature and discusses patterns of state funding and the impact of funding restrictions on indigent women seeking abortions. This literature shows that the tightening of state funding policies subsequent to the federal Medicaid restrictions has inflicted physical and economic hardships on these women. Part III examines state funding trends by reviewing the states' legislative, judicial and popular responses to the abortion funding issue. Although a few state courts have overturned restrictive state laws and mandated the funding of abortions for indigent women¹⁷ and a few state legislatures have provided for such funding,¹⁸ the majority of states have imposed and maintained severe restrictions upon the funding of Medicaid abortions.¹⁹ Part IV argues that it is the states' responsibility to fund abortions sought by indigent women to prevent the negative economic impact and detriment to health and welfare that occurs when these women are prevented from terminating their pregnancies. This Part concludes by recommending a model state constitutional amendment and a statute that state legislatures could enact to ensure that welfare agencies exercise their responsibility to fund abortions for indigent women to protect the rights of indigent women to choose between childbirth and abortion.²⁰

15. See *infra* note 78.

16. *Maher v. Roe*, 432 U.S. 464, 483 (1977) (Brennan, J., dissenting) ("[T]his coercion [to bear children a woman would not otherwise choose to have] can only operate upon the poor, who are uniquely the victims of this form of financial pressure.").

17. See *infra* notes 79-80 and accompanying text.

18. See *infra* notes 78, 80 and accompanying text.

19. See *infra* notes 76-77 and accompanying text.

20. A discussion of the morality of abortion is beyond the scope of this Note. For an analysis of the moral and ethical arguments for and against abortion, see

I. A BRIEF HISTORY OF STATE AND FEDERAL FUNDING FOR ABORTIONS

In 1965 Congress established the Medicaid program, a federal-state cost-sharing program designed to fund medical care for indigent persons.²¹ Title XIX of the Social Security Act authorizes the use of federal funds to reimburse states for expenditures for a broad range of medical services.²² States participating in the Medicaid program are free to develop their own plans and consequently set their own limitations as long as they are consistent with the objectives of the Medicaid program.²³ If the state establishes a Medicaid plan that

ABORTION PARLEY (J. Burtchaell ed. 1980) and THE ETHICS OF ABORTION: PRO-LIFE! VS. PRO-CHOICE! (R. Baird and S. Rosenbaum eds. 1989).

Some taxpayers who believe that abortion is immoral or unethical object to the use of tax monies to finance abortion. Segers, *Political Discourse and Public Policy on Funding Abortion: An Analysis*, in ABORTION PARLEY, *supra*, at 275-76. On the other hand, a taxpayer might be morally opposed to abortion, and yet support Medicaid funding for abortion on equality grounds as long as abortion continues to be legal. See, e.g., Callahan, *The Court and a Conflict of Principles*, HASTINGS CENTER REP., Aug. 1977, at 7. A moral or religious objection to the use of tax monies to finance abortion does not, however, relieve the taxpayer of having to pay taxes. The Supreme Court has held that "religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *United States v. Lee*, 455 U.S. 252, 260 (1982) (upholding the imposition of social security taxes on the Old Order Amish despite religious objections to paying this type of tax).

21. Social Security Amendments of 1965, Pub. L. No. 89-97, tit. I, § 121(a), 79 Stat. 343 (1965) (codified as amended at 42 U.S.C. §§ 1396-1396s (1988)).

22. 42 U.S.C. § 1396 (1988) provides the following authorization for appropriations:

For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.

23. See *id.* § 1396a(a)(17) (requiring state plans to include "reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this subchapter"). See also Mechanic, *The Supreme Court and Abortion: 2. Sidestepping Social Realities*, HASTINGS CENTER REP., Dec. 1980, at 17, 17 (noting that "[f]ederal regulation did allow . . . for states to 'place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.'").

satisfies certain statutory requirements²⁴ and meets with federal approval,²⁵ the federal government agrees to pay a specified percentage of the total amount spent under the state plan.²⁶

Public funding of abortions under the Medicaid program began during the Nixon administration, when the Department of Health, Education and Welfare (HEW) began to reimburse states for expenditures made to provide abortions to indigent women.²⁷ The federal government's decision to provide Medicaid funding for abortions reflected the administration's recognition of abortion as a legitimate form of medical treatment.²⁸ In addition to decriminalizing abortion, the 1973 United States Supreme Court decision of *Roe v. Wade*²⁹ apparently legitimized the status of abortion as a medical procedure within the context of the Medicaid program.³⁰

Subsequently, the "pro-life" movement began to lobby state and federal legislators, arguing that tax monies should not be used to finance abortions.³¹ The states of Pennsylvania³² and Connecticut³³ adopted regulations proscribing the funding of elective abortions but permitting the funding of "medically necessary" abortions through their state Medicaid programs.³⁴ In addition, the Mayor of St. Louis, Missouri issued a policy directive prohibiting the use of municipal hospitals to

24. See 42 U.S.C. § 1396a(a) (1988).

25. See *id.* § 1396a(b).

26. See *id.* § 1396b(a).

27. Noonan, *The Supreme Court and Abortion: 1. Upholding Constitutional Principles*, HASTINGS CENTER REP., Dec. 1980, 14, 14.

28. *Id.*

29. 410 U.S. 113 (1973).

30. Noonan, *supra* note 27, at 14.

31. Ginsburg, *supra* note 5, at 381-82; see also Vinovskis, *The Politics of Abortion in the House of Representatives in 1976*, 77 MICH. L. REV. 1790, 1791 (1979).

32. The Pennsylvania regulation defined abortions as "medically necessary" if, among other conditions, documented medical evidence indicated that continuing the pregnancy might threaten the health of the pregnant woman, that the infant might be born with an incapacitating physical deformity or mental deficiency, or that, where the pregnancy resulted from statutory or forcible rape or incest, the continuance of the pregnancy might threaten the mental or physical health of the pregnant woman. *Beal v. Doe*, 432 U.S. 438, 441 n.3 (1977) (citing 3 Pa. Bull. 2207, 2209 (Sept. 29, 1973)).

33. The Connecticut regulation's definition of "medically necessary" was less specific than Pennsylvania's, but included "psychiatric necessity." See *Maher v. Roe*, 432 U.S. 464, 466 (1977) (citing 3 CONNECTICUT WELFARE DEPARTMENT PUBLIC ASSISTANCE PROGRAM MANUAL, ch. III, § 275 (1975)).

34. *Id.* (Connecticut regulation); *Beal*, 432 U.S. at 443-45 (Pennsylvania regulation).

provide abortions, except where necessary to save the life of the pregnant woman or to protect her from grave physical injury.³⁵

In 1976, Representative Henry J. Hyde (R-Ill.) proposed an amendment to the fiscal year 1977 appropriations bill for the Departments of Labor and HEW (the "Hyde Amendment") that would have prevented any funds under the act from being used "to pay for abortions or to promote or encourage abortions."³⁶ The House of Representatives passed the amendment by a vote of 209 to 165,³⁷ but the Senate defeated it by a vote of 53 to 35.³⁸ In response to the Senate defeat, Representative Silvio O. Conte (R-Mass.) proposed,³⁹ and the House approved,⁴⁰ a "compromise" amendment that proscribed federal funding for abortions except where the pregnancy endangered the life of the pregnant woman.⁴¹ Apparently appeased by this exception, the Senate approved the revised version of the Hyde Amendment.⁴² Three weeks after Congress adopted the appropriations bill, however, a federal district judge, in *McRae v. Mathews*,⁴³ enjoined the enforcement of the Hyde Amendment, and directed HEW to continue to provide federal Medicaid reimbursement to providers of elective abortions.⁴⁴ Judge John F. Dooling of the Eastern District of New York reasoned that withdrawing funds for elective abortions resulted in denial of medical assistance to indigent women solely because of their choice to exercise a constitutionally protected right.⁴⁵

The following year, in a triumvirate of decisions, the Supreme Court upheld the above-mentioned Pennsylvania and Connecticut regulations and the St. Louis policy directive. In

35. *Doe v. Poelker*, 497 F.2d 1063, 1065 n.1 (8th Cir. 1974) (documenting the policy), *rev'd per curiam*, 432 U.S. 519 (1977). See also Noonan, *supra* note 27, at 14.

36. 122 CONG. REC. 20,410 (1976).

37. *Id.* at 20,412-13.

38. *Id.* at 27,680.

39. See *id.* at 30,895-96.

40. *Id.* at 30,901-02.

41. *Id.* at 30,895.

42. *Id.* at 30,997. The modified version of the Hyde Amendment was eventually enacted as the Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977. Department of Labor Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976).

43. 421 F. Supp. 533 (E.D.N.Y. 1976), *vacated and remanded sub nom. Califano v. McRae*, 433 U.S. 916 (1977).

44. *Id.* at 543; see also Noonan, *supra* note 27, at 14.

45. 421 F. Supp. at 541-42.

the first case, *Beal v. Doe*,⁴⁶ the Court held that states participating in the Medicaid program had the discretion under the Social Security Act to refuse to fund abortions that were not medically necessary.⁴⁷ The Court next held, in *Maher v. Roe*,⁴⁸ that a state participating in the Medicaid program was not constitutionally compelled to fund elective (nontherapeutic) abortions, even if the state chose to fund childbirth.⁴⁹ The Court rejected the plaintiffs' due process and equal protection claims, stating that indigency is not a suspect classification⁵⁰ and that the Pennsylvania and Connecticut regulations bore a rational relationship to each state's "strong and legitimate interest in encouraging normal childbirth."⁵¹ Finally, in *Poelker v. Doe*,⁵² the Court held that states and cities need not provide public employees or facilities to perform nontherapeutic abortions.⁵³

The district court in *Mathews*, which broadly invalidated all funding restrictions imposed on abortions, had held that the constitutional right to abortion would be frustrated even by the withholding of federal funds for *elective* abortions.⁵⁴ Because the Supreme Court's decisions in *Beal* and *Maher* clearly repudiated this argument, and because the district court failed to distinguish between the funding of therapeutic and nontherapeutic abortions, the district court's order could no longer stand. The Supreme Court vacated the district court's order and remanded the case for further consideration in light of *Maher* and *Beal*.⁵⁵ In conformance with the language of the Hyde Amendment, HEW began to withhold Medicaid funding from all women seeking abortions unless the women's pregnancies were life-threatening.⁵⁶ Subsequent

46. 432 U.S. 438 (1977) (upholding as consistent with the Social Security Act a Pennsylvania regulation that limited the funding of abortions by the state Medicaid program to those abortions that the state considered "medically necessary").

47. *Id.* at 444-47.

48. 432 U.S. 464 (1977) (upholding the constitutionality of a Connecticut regulation that limited the funding of abortions by the state Medicaid program to those abortions which the state considered "medically necessary").

49. *Id.* at 478-80.

50. *Id.* at 470-71.

51. *Id.* at 478 (quoting *Beal v. Doe*, 432 U.S. 438, 446 (1977)).

52. 432 U.S. 519 (1977).

53. *Id.* at 521.

54. *McRae v. Mathews*, 421 F. Supp. 533, 540-42 (E.D.N.Y. 1976), *vacated and remanded sub nom. Califano v. McRae*, 433 U.S. 916 (1977).

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

56. See 42 C.F.R. §§ 441.201-441.208 (1978) (implementing the Hyde Amendment's prohibition against abortion funding).

versions of the Hyde Amendment for most of fiscal year 1978⁵⁷ and all of fiscal year 1979⁵⁸ were somewhat less restrictive, permitting the federal government to fund abortions when the life of the pregnant woman was endangered; where two doctors certified that continuation of the pregnancy would result in severe and long-lasting health damage; or when the pregnancy was the result of a reported rape or incest.⁵⁹ The 1980 version deleted the exception for severe and long lasting health damage.⁶⁰

On January 15, 1980, the federal district judge who decided *Mathews*⁶¹ enjoined once again the enforcement of the Hyde Amendment, this time on the grounds that the denial of federal Medicaid funds for medically necessary abortions constituted an "unduly burdensome interference with the pregnant woman's freedom to decide to terminate her pregnancy when appropriate concern for her health makes that course medically necessary."⁶² Thus, the district court eventually did distinguish between medically necessary and elective abortions in its attempt to sustain the challenge to the Hyde Amendment.

This second injunction against enforcement of the Hyde Amendment, however, was ultimately futile. On June 30, 1980, in *Harris v. McRae*,⁶³ the Supreme Court upheld the constitutionality of the Hyde Amendment,⁶⁴ rejecting the argument that the restriction on funding obstructed the exercise of a woman's interest in terminating her pregnancy and thus infringed on her personal liberty.⁶⁵ Relying on

57. Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977). The appropriations for HEW during October and November 1977, the first two months of fiscal year 1978, were provided by joint resolutions that continued in effect the 1977 version of the Hyde Amendment. Act of Nov. 9, 1977, Pub. L. No. 95-165, 91 Stat. 1323 (1977); Act of Oct. 13, 1977, Pub. L. No. 95-130, 91 Stat. 1153 (1977).

58. Departments of Labor and Health, Education, and Welfare Appropriations Act, 1979. Department of Labor Appropriation Act, 1979, Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586 (1978).

59. *Id.*; Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977).

60. Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979).

61. See *supra* notes 43-45 and accompanying text.

62. *McRae v. Califano*, 491 F. Supp 630, 737 (E.D.N.Y.), *rev'd sub nom. Harris v. McRae*, 448 U.S. 297 (1980).

63. 448 U.S. 297 (1980).

64. *Id.* at 322 (stating that "the Hyde Amendment violates no constitutionally protected substantive rights" nor is it "predicated on a constitutionally suspect classification").

65. *Id.* at 312-17.

*Maher*⁶⁶, the majority held that the government, rather than obstructing a woman's right to an abortion, merely "by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."⁶⁷ Finally, the Court held that Title XIX did not require states to pay for medically necessary abortions for which federal reimbursement was unavailable.⁶⁸ On the same day, in *Williams v. Zbaraz*,⁶⁹ the Supreme Court held that states imposing the same funding restrictions as the Hyde Amendment did not violate the equal protection clause of the fourteenth amendment.⁷⁰ Thus, states constitutionally could refuse to fund medically necessary abortions that were not funded by the federal government.

After the implementation and enforcement of the Hyde Amendment, states had to decide whether to pay for medically necessary abortions in non-life-threatening cases even though they would not be reimbursed by the federal government. Most states responded by sharply restricting the funding of abortions under their respective Medicaid programs.⁷¹ Aside from political pressure by "pro-life" groups, states were undoubtedly influenced by the cost of funding such abortions themselves. Although the cost of funding abortions for indigent women is less than that of funding expenses incident to birth and childcare,⁷² the difference in federal contribution toward these expenses is a crucial factor: the state would be obliged to pay the entire bill for the former expense, while the federal government would subsidize the latter expense heavily.⁷³

66. *Maher v. Roe*, 432 U.S. 464 (1977).

67. *Harris*, 448 U.S. at 315.

68. *Id.* at 311.

69. 448 U.S. 358 (1980).

70. *Id.* at 369.

71. ALAN GUTTMACHER INSTITUTE, ABORTIONS AND THE POOR: PRIVATE MORALITY, PUBLIC RESPONSIBILITY 6 (1979) [hereinafter ABORTIONS AND THE POOR]. The Alan Guttmacher Institute is a non-profit organization that studies family planning and reproductive issues and publishes the monthly magazine *Family Planning Perspectives*. For a current listing of state statutes and regulations see *infra* notes 76-78.

72. See Torres, Donovan, Dittes & Forrest, *Public Benefits and Costs of Government Funding for Abortion*, 18 FAM. PLAN. PERSP. 111, 117 (1986) (showing that the taxpayer burden from the Medicaid funding of expenses related to childbirth and childcare is over four times that of the Medicaid funding of abortions).

73. *Cf. Harris v. McRae*, 448 U.S. 297, 325 (1980) ("By subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of women who undergo abortions . . . Congress has established incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid." (footnote omitted)).

The final version of the Hyde Amendment, passed in 1981, contains the restrictive language of the original "compromise" Hyde Amendment.⁷⁴ Since fiscal year 1981, federal funding in the abortion context has been limited to situations in which the life of the pregnant woman is endangered.⁷⁵ State legislatures and Medicaid administrations have tended to follow the federal government's lead; the majority of states have embraced the restrictive life-threatening only language of the most recent version of the Hyde Amendment.⁷⁶ A few

74. Supplemental Appropriations and Rescission Act, 1981, Pub. L. No. 97-12, § 109, 95 Stat. 14, 96 (1981).

75. Gold & Guardado, *Public Funding of Family Planning, Sterilization and Abortion Services, 1987*, 20 FAM. PLAN. PERSP. 228, 233 (1988).

76. These states are: Alabama, see ALA. MEDICAID AGENCY ADMIN. CODE r. 560-x-6.09(1)(b) (Supp. 1990); Arizona, see ARIZ. REV. STAT. ANN. § 35-196.02 (1990); Arkansas, see ARK. CONST. amend. 68, § 1; Colorado, see COLO. CONST. art. V, § 50; Delaware, see DIVISION OF SOC. SERVS., DEL. DEP'T OF HEALTH & SOC. SERVS., DELAWARE MEDICAID PROVIDER MANUAL 33 (July 1990); Florida, see FLA. ADMIN. CODE ANN. r. 10C-7.038(5)(a)9 (1986); Georgia, see GEORGIA DEP'T OF MED. ASSISTANCE, POLICIES AND PROCEDURES FOR PHYSICIAN SERVICES PART II § 904.2 (Oct. 1, 1989); Illinois, see ILL. REV. STAT. ch. 23 para. 6-1 (1989); Indiana, see IND. CODE § 16-10-3-3 (Supp. 1979); Kansas, see KANSAS DEP'T OF SOC. AND REHABILITATION SERVS., PHYSICIAN PROVIDER MANUAL sec. 8400 (Sept. 1990); Kentucky, see KY. REV. STAT. ANN. § 205.560(1), (6) (Michie/Bobbs-Merrill 1991), KY. REV. STAT. ANN. § 311.715 (Michie/Bobbs-Merrill 1990); Louisiana, see LA. REV. STAT. ANN. § 40-1299.34.5 (West Supp. 1990); Maine, see BUREAU OF MED. SERVS., MAINE DEP'T OF HUMAN SERVS., MEDICAL ASSISTANCE MANUAL ch. II § 90.05-2A (1981); Massachusetts, see MASS. GEN. L. ch. 29, § 20B (1988); Michigan, see MICH. COMP. LAWS ANN. § 400.109a (West 1988); Mississippi, see MISSISSIPPI DIV. OF MEDICAID, MEDICAL SERVICES MANUAL ch. 6 C(3) (Aug. 1990); Missouri, see MO. REV. STAT. § 188.205 (1986); Montana, see MONT. ADMIN. R. 46.12.2002(e)(i) (1990); Nebraska, see MEDICAL SERVS. DIV., NEBRASKA DEP'T OF SOC. SERVS., PROGRAM MANUAL § 18-004.08 (Nov. 19, 1982); Nevada, see NEVADA STATE WELFARE DIV., MEDICAID PROVIDER BULLETIN, BULL. NO. 331, at 1 (June 1, 1988); New Hampshire, see N.H. CODE ADMIN. R. sec. He-W 504.06(c) (1990); New Jersey, see N.J. STAT. ANN. § 30:4D-6.1 (West 1981); New Mexico, see NEW MEXICO MED. ASSISTANCE DIV., MEDICAL ASSISTANCE PROGRAM MANUAL SUPPLEMENT, No. 89-31, para. IX.J (Sept. 1, 1989); North Dakota, see N.D. CENT. CODE § 14-02.3-01 (1981); Ohio, see OHIO REV. CODE ANN. § 5101.55(C) (Baldwin 1989); Oklahoma, see OKLA. STAT. tit. 56, § 206(C) (Supp. 1990); Rhode Island, see R.I. GEN. LAWS § 23-13-18(a), (c) (1989); South Carolina, see SOUTH CAROLINA STATE HEALTH & HUMAN SERVS. FIN. COMM'N, MEDICAID PROVIDER MANUAL: PHYSICIAN, CLINICAL, AND ANCILLARY SERVICES para. 211.8(C) (1988); South Dakota, see S.D. CODIFIED LAWS ANN. § 28-6-4.5 (1984); Tennessee, see TENNESSEE MEDICAID PHYSICIAN PROVIDER MANUAL § 307.2 (Apr. 1986); Texas, see TEXAS DEP'T OF HUMAN SERVS., MEDICAID PROVIDER PROCEDURES MANUAL 300 (Sept. 1990); Utah, see UTAH CODE ANN. § 26-18-10(6) (1989); Vermont, see VERMONT DEP'T OF SOC. WELFARE, WELFARE ASSISTANCE MANUAL, BULL. NO. 80-62, at M617 (1984); cf. District of Columbia Appropriations Act, 1991, Pub. L. No. 101-518, § 117, 104 Stat. 2224, 2235 (1990) (Congress imposes Hyde Amendment restrictions on the District of Columbia). See generally NARAL FOUND./NARAL, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION RIGHTS 1991 (1991).

have provided additional exceptions, such as terminations of pregnancies resulting from rape or incest or involving fetal abnormality.⁷⁷ Only eight states voluntarily use state funds to finance all medically necessary abortions sought by indigent women.⁷⁸ Courts in three additional states have relied on state constitutions to invalidate restrictions on the funding of abortions that are medically necessary but not life-threatening.⁷⁹

77. Four states fund abortions for indigent women only when the women's pregnancies result from rape or incest, or when the abortion is necessary to prevent the death of the mother. See MINN. STAT. ANN. § 256B.062516 (West Supp. 1991); PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1990); WIS. STAT. §§ 20.927, 59.07(136), 66.04(1)(m) (1987-88); WYO. STAT. § 35-6-117 (1988). Idaho provides the additional exception that the state will fund abortions that are necessary to preserve the pregnant woman's health. See IDAHO CODE § 56-209c (Supp. 1990). Iowa funds abortions that result from rape or incest, or are necessary to prevent the mother's death, and also funds abortions when the fetus is "physically deformed, mentally deficient, or afflicted with a congenital illness." See IOWA ADMIN. CODE r. 441-78.1(17) (1991). Maryland and Virginia are less restrictive than Iowa; these states fund most abortions that Iowa would fund, and also provide funding when the pregnancy is likely to have a serious and adverse effect on the woman's physical or mental health. See Maryland State Budget for Fiscal Year Ending June 30, 1991, 1990 Md. Laws 1460-61 (ch. 409 line item 32.17.01.03); VA. CODE ANN. § 32.1-92.1, .2 (1985) (authorizing funding for abortions when pregnancy results from rape or incest or when the physician believes the fetus has an "incapacitating physical deformity or mental deficiency"); VIRGINIA DEP'T OF MED. ASSISTANCE SERVS., PHYSICIAN MANUAL ch. IV, 21-23 (Jan. 1988) (stating that Virginia will fund abortions when the pregnancy threatens the pregnant woman's health).

78. These states are: Alaska, see ALASKA ADMIN. CODE tit. 7, § 43.140(b) (Oct. 1988); Connecticut, see MEDICAL CARE ADMIN., CONNECTICUT DEP'T OF INCOME MAINTENANCE, MEDICAL SERVICES POLICY, para. 173G.III.a (1984); Hawaii, see HAW. ADMIN. R. §§ 17-742.1-10(b), 17-744-48.1(b) (1989); New York, see N.Y. SOC. SERV. LAW § 365a(2) (McKinney 1983 & Supp. 1991) (defining "medical assistance" and the scope of care, services and supplies to be provided without restricting abortion funding); North Carolina, see N.C. ADMIN. CODE tit. 10, r. 42w.0002 (Oct. 1990); Oregon, see OR. ADMIN. R. 461-14-052 (July 1988); Washington, see DIVISION OF MED. ASSISTANCE, WASHINGTON DEP'T OF SOC. & HEALTH SERVS., SCHEDULE OF MAXIMUM ALLOWANCES AND PROGRAM DESCRIPTIONS, 96a (1990); West Virginia, see NARAL FOUNDATION, *supra* note 76, at 162 (citing West Virginia Medicaid Program Regulation MA-85-4 (1985)); see also Sullivan, *New York Judge Rejects State Prenatal Program that Excludes Abortion*, N.Y. Times, Apr. 16, 1991, at B3, col. 2.

In 1990, the West Virginia Legislature passed a budget bill for fiscal year 1990-91 which restricted public funding of abortions to cases in which continuation of the pregnancy could result in permanent, catastrophic physical injury to the pregnant woman, the pregnancy resulted from rape or incest, or continuation of the pregnancy would result in the birth of a child with permanent physical or mental defects. 1990 W. Va. Acts 229. West Virginia's Attorney General, however, issued an opinion letter stating that these limitations are "void and of no effect." Opinion Letter from W.Va. Attorney General Roger Tompkins to the Honorable Robert Chambers, Speaker of the W. Va. House of Delegates (June 26, 1990). See generally NARAL FOUNDATION, *supra* note 76, at 162-65.

79. See *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 646, 417 N.E.2d 387, 397 (1981); *Right to Choose v. Byrne*, 91 N.J. 287, 318, 450 A.2d 925, 941 (1982); *Doe v. Celani*, No. S81-84CnC, slip op. at 19 (Vt. Super. Ct., Chittenden County May 23, 1986).

California does not restrict the use of public funds for abortion and provides funding for abortions even when they are purely elective and of no therapeutic value.⁸⁰

In July 1989, the Supreme Court decided *Webster v. Reproductive Health Services*,⁸¹ which dramatically broadened the power of states to regulate abortions.⁸² Relying on *Maher*,⁸³ *Poelker*,⁸⁴ and *Harris*,⁸⁵ the Court upheld Missouri's ban on the use of public facilities for abortions and a prohibition against public employees performing abortions in the scope of their employment.⁸⁶ The Court held that the restrictions imposed upon the pregnant woman's access to abortion were "rationally related to the legitimate governmental goal of encouraging childbirth"⁸⁷ and placed "no governmental obstacle in the path of a woman who chooses to terminate her pregnancy."⁸⁸ The Court further observed that a woman's inability to obtain an abortion in a public hospital performed by a public employee was "considerably less burdensome . . . than indigency,"⁸⁹ and implied that the restrictions imposed by the Missouri law were not only consistent with, but more reasonable than, those previously upheld in *Maher* and *Harris*.⁹⁰

80. See Cal. Budget Act of 1990, 1990 Cal. Legis. Serv. 1702, 1946-51 (West) (ch. 467 line item 4260-101-001) (providing funding for California's Medical Assistance Program without restricting public funding of abortion services); Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 284-85, 625 P.2d 779, 798-99, 172 Cal. Rptr. 866, 885-86 (1981) (holding that state budget allocations which funded childbirth-related expenses but not abortion-related expenses were unconstitutional under the California Constitution). See also NARAL FOUNDATION, *supra* note 76, at 15.

81. 492 U.S. 490 (1989).

82. The court upheld a Missouri law which (1) required physicians, prior to performing abortions, to ascertain the viability of fetuses of more than 20 weeks gestational age; (2) prohibited abortions of viable fetuses; (3) prohibited the use of public facilities for performing any abortion not necessary to save the life of the pregnant woman; and (4) prohibited public employees acting within the scope of their employment from performing abortions except when necessary to save the life of the pregnant woman. *Id.* at 507-20. For press discussion of *Webster's* broadening of state power to regulate abortions, see, e.g., Greenhouse, *The Year the Court Turned to the Right*, N.Y. Times, July 7, 1989, at A1, col. 2; Brozan, *New York Likely to Be Battleground in the War After Webster*, N.Y. Times, July 5, 1989, at A16, col. 1; Greenhouse, *Battle Over; Now, a War*, N.Y. Times, July 5, 1989, at A1, col. 4.

83. *Maher v. Roe*, 432 U.S. 464 (1977).

84. *Poelker v. Doe*, 432 U.S. 519 (1977).

85. *Harris v. McRae*, 448 U.S. 297 (1980).

86. *Webster*, 492 U.S. at 507-11.

87. *Id.* at 508-09.

88. *Id.* at 509 (quoting *Harris v. McRae*, 448 U.S. 297, 315 (1980)).

89. *Id.*

90. *Id.* at 509-10.

On October 11, 1989, the House of Representatives concurred with a Senate amendment⁹¹ to its 1990 appropriations bill and voted to expand federal funding of abortions under Medicaid to cover those pregnancies resulting from rape or incest.⁹² President Bush summarily vetoed the bill.⁹³ The House attempted to override the veto but failed to obtain the necessary two-thirds vote.⁹⁴ As a result, appropriations measures for 1990, like those of the previous nine years, permitted federal funding of an abortion only when the pregnancy endangered the woman's life.⁹⁵ The appropriations act for 1991 contained similar restrictions.⁹⁶

In May 1991, the Supreme Court handed down its decision in *Rust v. Sullivan*,⁹⁷ which further extended the federal government's power to regulate abortion by limiting public expenditures. Specifically, the Court upheld regulations promulgated by the Secretary of Health and Human Services under Title X of the Public Health Service Act.⁹⁸ One of the challenged regulations prohibited abortion-related counseling or referrals by family planning projects receiving Title X funds.⁹⁹ The regulations, which remain effective, require a project funded by Title X to refer pregnant clients "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of the mother and the unborn child"¹⁰⁰ and expressly prohibit the project from referring pregnant clients to abortion providers even on

91. 135 CONG. REC. H6905 (daily ed. Oct. 11, 1989).

92. *Id.* at H6914.

93. *Id.* at H7356-57 (daily ed. Oct. 23, 1989).

94. *Id.* at H7482, H7495 (daily ed. Oct. 25, 1989).

95. See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 101-166, § 204, 103 Stat. 1159, 1177 (1989).

96. See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, Pub. L. No. 101-517, § 203, 104 Stat. 2190, 2208 (1990).

97. 111 S. Ct. 1759 (1991).

98. *Id.* at 1764 (citing 42 U.S.C. §§ 300-300a-6 (1988)). Title X of the Public Health Service Act authorizes the Secretary of Health and Human Services to grant federal funding to establishments providing family planning services. 42 U.S.C. § 300(a) (1988). The Act provides that "[n]one of the funds appropriated under [Title X] shall be used in programs where abortion is a method of family planning." *Id.* § 300a-6.

99. *Id.* at 1765 (citing 42 C.F.R. § 59.8(a)(1) (1989)).

100. *Id.* (quoting 42 C.F.R. § 59.8(a)(2) (1989)).

specific request.¹⁰¹ Relying on *Maher*,¹⁰² *Harris*,¹⁰³ and *Webster*,¹⁰⁴ the *Rust* Court rejected the petitioners' challenge that the regulations violate a woman's fifth amendment right to choose whether to terminate her pregnancy.¹⁰⁵ The Court reasoned that:

Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family-planning services at all. The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the government had not enacted Title X.¹⁰⁶

II. PATTERNS OF STATE FUNDING AND THE IMPACT ON INDIGENT WOMEN SEEKING ABORTIONS: A SURVEY OF EXISTING LITERATURE

During fiscal year 1977, before the Hyde Amendment became effective, about 294,600 of an estimated 427,300 abortions sought by Medicaid-eligible women were federally funded through Medicaid.¹⁰⁷ Thus, even before the restrictions on federal funding were implemented, approximately 132,700 women were unable to obtain Medicaid-funded abortions for reasons including inaccessibility or unavailability of abortion services¹⁰⁸ and state policies prohibiting or restricting abortion funding under Medicaid.¹⁰⁹

101. *Id.* (citing 42 C.F.R. § 59.8(b)(3), (5) (1990)).

102. *Maher v. Roe*, 432 U.S. 464 (1977).

103. *Harris v. McRae*, 448 U.S. 297 (1980).

104. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

105. 111 S. Ct. at 1777.

106. *Id.* The Court noted the petitioners' contention that "most Title X clients are effectively precluded by indigency and poverty from seeing a health care provider who will provide abortion-related services," but ruled that the indigency of Title X clients would not affect the outcome of the case. *Id.*

107. ABORTIONS AND THE POOR, *supra* note 71, at 13.

108. *Id.* Rural, teenage, and nonwhite women were disproportionately affected by inaccessibility or unavailability. *Id.* at 13.

109. *Id.* During 1977, in six states, Medicaid did not pay for any abortions for eligible women; in another thirteen states, it financed fewer than one-fourth of the abortions sought by Medicaid-eligible women. *Id.* at 14.

Not surprisingly, the Hyde Amendment resulted in a sharp drop in the number of abortions funded by the federal government under Medicaid. During fiscal years 1978 and 1979, the federal government funded approximately 6,000 abortions.¹¹⁰ Eighty-two percent of these pregnancies threatened the life of a pregnant woman; 16% threatened to cause long-lasting damage to her physical health; 2% were the result of rape or incest.¹¹¹

Because the Hyde Amendment does not foreclose the possibility of state-funded abortions under the Medicaid program,¹¹² the responses of individual states are fundamental to the interests of indigent pregnant women. A 1981 study published in the *Journal of the American Medical Association (JAMA)* estimated that 250,000, or 85%, of the 294,600 women who obtained federal funding for their abortions in 1977 would have qualified for state funding if they had had their abortions during fiscal year 1978.¹¹³ Only about 194,000 women, however, actually used state funds to finance abortions during fiscal year 1978.¹¹⁴ The study attributed this fact to the variable character of state funding policies resulting from differences in interpretation of policy, fluctuations in policy, and public confusion about availability of state funds.¹¹⁵

A number of states with sizable populations of Medicaid-eligible women, including Colorado, Illinois, Ohio, and Pennsylvania, have changed their funding policies between 1976 and 1987. Colorado, Illinois, and Ohio have brought their policies in line with the 1981 Hyde Amendment policy,¹¹⁶ and Pennsylvania adopted the Hyde language with exceptions for rape and incest.¹¹⁷ As Table I shows, as

110. Cates, *The Hyde Amendment in Action: How Did the Restriction of Federal Funds for Abortion Affect Low-Income Women?*, 246 J.A.M.A. 1109, 1110 (1981).

111. *Id.* at 1110.

112. *Id.* ("[T]he Hyde Amendment . . . was not binding in regard to how states chose to spend their own funds.").

113. *Id.*

114. *Id.* In estimating the number of abortions sought by indigent women during 1978, the study assumed no increase from the number of abortions they sought in 1977. Based on the 1977 information, the study estimated that 295,000 women would be "at risk" of an unwanted pregnancy during 1978. *Id.* at 1109.

115. *Id.* at 1111.

116. See Act of June 4, 1985 ch. 230, 1985 Colo. Sess. Laws 948 (became law without the Governor's signature) (codified at COLO. REV. STAT. §§ 26-4-105.5, 26-15-104.5 (1989)); Act adopted Nov. 17, 1977, Pub. Act No. 80-1091, 1977 Ill. Laws 3246-49 (Governor's veto overridden Nov. 17, 1977) (codified as amended at ILL. REV. STAT. ch. 23, paras. 5-5(17), 6-1, 7-1 (1989)); OHIO ADMIN. CODE § 5101:3-17-01(A) (1990) (effective Nov. 12, 1980).

117. Act approved Dec. 19, 1980, Pub. L. No. 239, § 1, 1980 Pa. Laws 1321, 1321-22 (codified at PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1991)).

TABLE I
ESTIMATED NUMBER OF PUBLICLY FUNDED ABORTIONS IN
FISCAL YEARS (FY) 1977 AND 1987

STATE	FY 1977	FY 1987
ALABAMA	1,000	7
ALASKA	300*	300
ARIZONA	†	0
ARKANSAS	600	2
CALIFORNIA	101,000**	77,000
COLORADO	2,800*	4
CONNECTICUT	1,700	2,950
DELAWARE	700**	3
DISTRICT OF COLUMBIA	5,600	4,421
FLORIDA	4,500	56
GEORGIA	6,600	5
HAWAII	1,500	NA
IDAHO	100	2
ILLINOIS	21,400	2
INDIANA	NA	0
IOWA	900	10
KANSAS	3,000	1
KENTUCKY	1,900	0
LOUISIANA	0	5
MAINE	400	NA
MARYLAND	6,000	2,642
MASSACHUSETTS	4,400	5,800
MICHIGAN	15,000	20,000
MINNESOTA	1,900	2
MISSISSIPPI	NA	0
MISSOURI	2,500**	0
MONTANA	500	1
NEBRASKA	500	0
NEVADA	400	0
NEW HAMPSHIRE	200	0
NEW JERSEY	11,000	10,422
NEW MEXICO	500	1
NEW YORK	50,000**	53,495
NORTH CAROLINA	1,500	4,205
NORTH DAKOTA	NA	0
OHIO	10,000*	NA
OKLAHOMA	700*	0
OREGON	2,400	1,376
PENNSYLVANIA	13,600	478
RHODE ISLAND	700	0
SOUTH CAROLINA	1,000	8
SOUTH DAKOTA	NA	0
TENNESSEE	1,200*	4
TEXAS	3,500	199
UTAH	200	0
VERMONT	300	266
VIRGINIA	4,000	62
WASHINGTON	4,300	5,093
WEST VIRGINIA	500	419
WISCONSIN	3,700	NA
WYOMING	100	0
TOTAL	294,600	189,241

NA

Not available

†

As of 1977, Arizona had not yet established a Medicaid program.

*

Fiscal Year 1976

**

Calendar Year 1976

a result of these changes, the number of publicly funded abortions in these states declined markedly between 1976 and 1987.¹¹⁸ As of 1991, Michigan and the District of Columbia, both of which provided abortion funding in 1987, no longer do so.¹¹⁹ These two jurisdictions accounted for 24,421 of the state-funded abortions performed in 1987.¹²⁰

The *JAMA* study estimated that among the pregnant, Medicaid-eligible women residing in states with restrictive funding policies, no more than 5% would resort to illegal or self-induced abortions.¹²¹ The study estimated that 20% of the Medicaid-eligible women in these states continued their unwanted pregnancies to term.¹²² Given the number of states that have restricted Medicaid funding for abortions in the last decade,¹²³ the actual number of women who are forced to consider these undesirable alternatives is likely to have grown since the 1981 study.

A 1984 study conducted by the Alan Guttmacher Institute investigated the financial and physical impact of the funding restrictions on indigent women.¹²⁴ The study revealed that 38% of the Medicaid-eligible women surveyed postponed their abortions because of difficulties in obtaining money for the

118. This table is distilled from tables appearing in ABORTIONS AND THE POOR, *supra* note 71, at 17, and Gold & Guardado, *supra* note 75, at 232. Updated statistics regarding state and federal funding for fertility control services, including abortion, contraception and sterilization are scheduled to appear in the September-October 1991 issue of *Family Planning Perspectives*, published by the Alan Guttmacher Institute, New York, N.Y.

119. See Act of June 23, 1987, Pub. L. No. 59, 1987 Mich. Pub. Acts 196, 1759 (effective Mar. 30, 1988) (codified at MICH. COMP. LAWS ANN. § 400.109a (West 1988)); District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, § 117, 102 Stat. 2269, 2269-9 (1988); see also Gold & Guardado, *supra* note 75, at 233 (stating that Appropriations Act caused an abrupt change in the District of Columbia's abortion funding policy). The Michigan Court of Appeals has invalidated the statute that bars funding for abortions, see *Doe v. Director of the Dep't of Social Servs.*, 187 Mich. App. 493, 468 N.W.2d 862, *appeal docketed*, Nos. 91092, 91093, 1991 Mich. LEXIS 1593, 1991 WL 158155 (Mich. July 23, 1991), but the Michigan Department of Social Services continues to refuse to pay for abortions pending appeal of the decision, see Pluta, *Abortion Funding Ban Question Goes to Supreme Court*, United Press Int'l, July 25, 1991 (LEXIS, Nexis Library); see also *infra* notes 180-86 and accompanying text.

120. See *supra* Table 1.

121. Cates, *supra* note 110, at 1111.

122. *Id.* Based on studies performed in Georgia, Ohio, and Texas showing that 18% to 35% of Medicaid-eligible pregnant women continued their unwanted pregnancies to term, Cates estimated that 9,000 of the estimated 45,000 such women living in restricted states had carried their unwanted pregnancies to term. *Id.*

123. See *supra* note 76 and accompanying text.

124. Henshaw & Wallisch, *supra* note 14.

abortion and its accompanying expenses.¹²⁵ The average delay among these women was two to three weeks.¹²⁶ Because the risk of complications from an abortion increases sharply after the eighth week of pregnancy, a delay of this length could have serious physical consequences for the pregnant woman.¹²⁷ The study also showed that almost half (44%) of the indigent women surveyed financed their abortions at least in part with money intended for basic living expenses (food, clothing, and shelter), incurring personal and family hardships as a result of their decisions.¹²⁸ The cost of an abortion at the clinic used in the study averaged 66% of the indigent women's monthly household income after rental payments.¹²⁹

But indigent women are not alone in suffering the economic consequences of the Hyde Amendment and its state successors. In 1986, the Alan Guttmacher Institute performed a state-by-state analysis of the burden imposed on taxpayers as a result of using taxpayer dollars to pay for abortions.¹³⁰ The study found that for every tax dollar spent to pay for abortions for indigent women, more than four dollars are saved in public expenses, such as Aid to Families with Dependent Children, that would have been incurred had the pregnancy been carried to term.¹³¹

III. TRENDS IN STATE FUNDING: LEGISLATIVE, JUDICIAL AND POPULAR RESPONSES BY STATES

After the Hyde Amendment restricted federal funding for abortions by authorizing federal funding only in life-endangering situations, many states instituted their own

125. *Id.* at 178.

126. *Id.*

127. *Id.*

128. *Id.* at 178-79.

129. *Id.* at 178. The average cost of a first-trimester abortion at the clinic used in the study was \$150, and the indigent women's average monthly household income after rental payment was \$226.

130. Torres, *supra* note 72 (surveying states to determine the average cost of an abortion as compared to the average cost of childbirth and childcare expenses).

131. *Id.* at 117. The study found the average benefit-cost ratio to be 4.3:4.6. Cited birth-related expenditures include: prenatal care; pediatric care for the first two years of the child's life; Aid to Families with Dependent Children, food stamps, and the Special Supplemental Food Program for Women, Infants and Children for the first two years of the child's life. *Id.* at 113-17.

restrictive abortion funding policies. Voter initiatives in Colorado and Michigan exemplify the drastic policy changes that swept the nation. Colorado had funded Medicaid abortions since 1969,¹³² but in 1984 voters passed an amendment to the state constitution to proscribe state funding of abortions except when a pregnancy threatened a woman's life.¹³³ In 1987, after a succession of Michigan governors had vetoed legislative attempts to restrict abortion funding,¹³⁴ Michigan voters brought an initiative petition which, upon taking effect, restricted state funding of Medicaid abortions to life-threatening situations.¹³⁵ In October 1988, Congress enacted legislation prohibiting the District of Columbia from using its own funds to finance abortions for Medicaid-eligible women.¹³⁶ In 1989 President Bush vetoed attempts by the House of Representatives to expand abortion funding by the District of Columbia to pregnancies resulting from rape or incest.¹³⁷

A few states, on the other hand, have steadfastly maintained policies that support abortion funding. Of the twelve states that continue to finance medically necessary abortions, seven are authorized to provide such funding by administrative rules,¹³⁸ and two are expressly authorized to do so by the state legislature.¹³⁹ Continuation of abortion funding in the remaining three states depends upon the stability of the court rulings which oblige them to provide such funding.¹⁴⁰

132. Torres, *supra* note 72, at 111.

133. See COLO. CONST. art. 5, § 50; see also Torres, *supra* note 72, at 111.

134. Church, *Five Political Hot Spots*, TIME, July 17, 1989, at 64; see also Stopczynski v. Governor, 92 Mich. App. 191, 195-97, 285 N.W.2d 62, 63-64 (1979) (documenting legislative attempts to restrict abortion funding and gubernatorial vetoes).

135. Act of June 23, 1987, Pub. L. No. 59, 1987 Mich. Pub. Acts 196, 1759 (effective Mar. 30, 1988) (codified at MICH. COMP. LAWS ANN. § 400.109a (West 1988)).

136. See District of Columbia Appropriations Act, 1989 Pub. L. No. 100-462, § 117, 102 Stat. 2269, 2269-9 (1988); see also Gold & Guardado, *supra* note 75, at 233.

137. 135 CONG. REC. H7738 (daily ed. Oct. 30, 1989). The 1990 District of Columbia Appropriations Act contained the restrictive language of the Hyde Amendment. District of Columbia Appropriations Act, 1990 Pub. L. No. 101-168, § 117, 103 Stat. 1267, 1278 (1989).

138. Alaska, Connecticut, Hawaii, North Carolina, Oregon, Washington, and West Virginia. See *supra* note 78.

139. California and New York. See *supra* notes 78, 80.

140. Court decisions in Massachusetts, New Jersey and Vermont struck down those states' restrictive abortion funding laws. See *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 659-60, 417 N.E.2d 387, 405 (1981); *Right to Choose v. Byrne*,

An example of a particularly stable court order is the order issued by the Supreme Court of California, anchored in the state constitution. In *Committee to Defend Reproductive Rights v. Myers*,¹⁴¹ the Supreme Court of California struck down the 1978, 1979, and 1980 state budget provisions which restricted Medi-Cal¹⁴² abortion funding to the termination of pregnancies which resulted from rape, incest, or unlawful intercourse with a minor; which endangered the life of the pregnant woman; which threatened severe and long-lasting health damage to the pregnant woman; or which would result in the birth of a severely defective infant.¹⁴³ Noting that the California Constitution is a "document of independent force,"¹⁴⁴ the court held that the right of privacy guaranteed by the California Constitution was broader than that guaranteed by the U.S. Constitution,¹⁴⁵ and that the funding scheme was an unconstitutional condition upon the exercise of that right.¹⁴⁶ Specifically, the court determined that the funding scheme was antithetical to the purposes of the

91 N.J. 287, 318, 450 A.2d 925, 941 (1982); *Doe v. Celani*, No. S81-84CnC, slip op. at 19 (Vt. Super. Ct., Chittenden County May 23, 1986).

Two other states' courts have invalidated restrictive abortion funding provisions, see *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 285, 625 P.2d 779, 798-99, 172 Cal. Rptr. 866, 886 (1981); *Doe v. Maher*, 40 Conn. Supp. 394, 449-50, 515 A.2d 134, 162 (Super. Ct. 1986), but those states now provide less restrictive abortion funding under legislative or administrative direction, see Cal. Budget Act of 1990, 1990 Cal. Legis. Serv. 1702, 1946-51 (West) (ch. 467 line item 4260-101-001) (providing funding for California's Medical Assistance Program without restricting public funding of abortion services); MEDICAL CARE ADMIN., CONNECTICUT DEP'T OF INCOME MAINTENANCE, MEDICAL SERVICES POLICY, para. 173 G.III.a (1984). In addition, the Michigan Court of Appeals has ruled that Michigan's restrictive funding statute violates the state's constitution. *Doe v. Director of the Dep't of Social Servs.*, 187 Mich. App. 493, 534-35, 468 N.W.2d 862, 880, *appeal docketed*, Nos. 91092, 91093, 1991 Mich. LEXIS 1593, 1991 WL 158155 (Mich. July 23, 1991).

141. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

142. Medi-Cal is California's health care benefits program. CAL. WELF. & INST. CODE § 14131 (West 1980). See generally CAL. WELF. & INST. CODE §§ 14000-14196 (West 1980 & Supp. 1991).

143. 29 Cal. 3d at 258-59, 625 P.2d at 782, 172 Cal. Rptr. at 869 (citing 1978 Cal. Stat. ch. 359, § 2, item 248, at 823-25; 1979 Cal. Stat. ch. 259, § 2, item 261.5, at 644-46; 1980 Cal. Stat. ch. 510 § 2, item 287.5 at 1146-48).

144. *Id.* at 261, 625 P.2d at 783, 172 Cal. Rptr. at 870 (quoting *People v. Brisendine*, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975)).

145. See *id.* at 284, 625 P.2d at 798, 172 Cal. Rptr. at 885. The court held that the right to procreative choice is "so private and so intimate that each woman in this state—rich or poor—is guaranteed the constitutional right to make that decision as an individual, uncoerced by governmental intrusion." *Id.*

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

Medi-Cal program,¹⁴⁷ that the benefits of the restrictions did not outweigh the impairment of constitutional rights,¹⁴⁸ and that less offensive means were available to further the state's objectives.¹⁴⁹ Finally, the court held that, although the state was not constitutionally required to finance abortion or childbirth, once it chose to furnish medical care to indigent women, it could not withdraw such care solely because a woman chose to have an abortion.¹⁵⁰ Thus, the scope of the privacy right in the California Constitution was broad enough to encompass a woman's decision to have an elective abortion.¹⁵¹

Medicaid funding for medically necessary, but not elective, abortions in Connecticut, Massachusetts, and New Jersey also rests on state constitutional grounds.¹⁵² Decisions by courts in these three states did not address the larger issue of indigent women seeking elective abortions, however. Thus, these decisions are considerably narrower in scope than that of the California Supreme Court.

In *Moe v. Secretary of Administration and Finance*,¹⁵³ the Supreme Judicial Court of Massachusetts invalidated a statute limiting Medicaid funding of abortion to life-threatening situations as an impermissible burden upon an indigent woman's right to privacy and a violation of due process.¹⁵⁴ Noting that the Massachusetts Declaration of Rights "afford[ed] a greater degree of protection to the right asserted here than does the Federal Constitution as interpreted by *Harris v. McRae*,"¹⁵⁵ the court expressed agreement with the language of Justice Brennan's dissenting opinion in *Harris* that restrictions on funding are coercive financial incentives which, by favoring childbirth over abortion, deprive indigent women of their constitutionally guaranteed freedom to choose abortion over motherhood.¹⁵⁶ The court concluded that once Massachusetts had chosen to fund the cost of necessary health

147. *Id.* at 271-73, 625 P.2d at 790-91, 172 Cal. Rptr. at 877-78.

148. *Id.* at 273-82, 625 P.2d at 791-97, 172 Cal. Rptr. at 878-84.

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

150. *Id.* at 284-85, 625 P.2d at 798, 172 Cal. Rptr. at 885.

151. *Id.* at 284, 625 P.2d at 798, 172 Cal. Rptr. at 885.

152. *See Doe v. Maher*, 40 Conn. Supp. 394, 395, 515 A.2d 134, 135 (Super. Ct. 1986); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 659, 417 N.E.2d 387, 404 (1981); *Right to Choose v. Byrne*, 91 N.J. 287, 293, 450 A.2d 925, 928 (1982).

153. 382 Mass. 629, 417 N.E.2d 387 (1981).

154. *Id.* at 654-55, 417 N.E.2d at 402.

155. *Id.* at 651, 417 N.E.2d at 400.

156. *Id.* at 655, 417 N.E.2d at 402 (citing *Harris v. McRae*, 448 U.S. 297, 333 (1980) (Brennan, J., dissenting)).

care for pregnant women, it had to do so with "genuine indifference" to their procreative choices.¹⁵⁷

The Superior Court of Connecticut used a similar constitutional analysis to invalidate a funding statute in *Doe v. Maher*.¹⁵⁸ The court held that a statute which limited state funding of Medicaid abortions to life-threatening situations was unconstitutional as an infringement on the right to privacy, which encompassed the right to seek an abortion and the right to preserve one's health.¹⁵⁹ The court questioned the logic of *Harris v. McRae* for upholding the blatant denial of Medicaid funds for a medically necessary operation,¹⁶⁰ and gave voice to its belief that the Hyde Amendment was a veiled attempt by the government to discourage women from exercising their reproductive rights.¹⁶¹ Furthermore, the court held that the statute violated Connecticut's equal protection clauses¹⁶² and equal rights amendment¹⁶³ because the statute denied funding for necessary medical expenses to indigent women while paying for all necessary medical expenses incurred by indigent men.¹⁶⁴

In *Right to Choose v. Byrne*,¹⁶⁵ the Supreme Court of New Jersey likewise invalidated a statute which denied funding for medically necessary abortions except where necessary to save the life of the pregnant woman, but on substantially different constitutional grounds. First, the court observed that the right of procreative choice is a fundamental right of all women.¹⁶⁶ Second, while not finding any state obligation to fund all abortions,¹⁶⁷ the court ruled that the state could not discriminate between indigent women who required a medically necessary abortion and those who required medical care incident to childbirth.¹⁶⁸ Finally, the court held that a woman's constitutional right to protect her health outweighed

157. *Id.* at 654, 417 N.E.2d at 402.

158. 40 Conn. Supp. 394, 515 A.2d 134 (Super. Ct. 1986).

159. *Id.* at 426-32, 515 A.2d at 150-53.

160. *Id.* at 441-42, 515 A.2d at 157-58.

161. *Id.* at 437-38, 515 A.2d at 156 (citing Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331 (1985)).

162. CONN. CONST. art. I, §§ 1, 20.

163. *Id.* § 20.

164. 40 Conn. Supp. at 440-49, 515 A.2d at 157-62.

165. 91 N.J. 287, 450 A.2d 925 (1982).

166. *Id.* at 305, 450 A.2d at 934.

167. *Id.* at 304, 450 A.2d at 934.

168. *Id.* at 305-06, 450 A.2d at 934.

the state's interest in protecting potential life,¹⁶⁹ and that the state therefore could not jeopardize the health of an indigent woman by excluding medically necessary abortions from Medicaid coverage.¹⁷⁰

In *Doe v. Celani*,¹⁷¹ the Vermont Superior Court of Chittenden County enjoined Vermont's Department of Social Welfare from denying Medicaid coverage to indigent women seeking medically necessary abortions.¹⁷² The court overturned a regulation promulgated by the Department that tied the state's abortion funding policy directly to the Hyde Amendment by providing for the funding of abortions "only under circumstances for which Federal Financial Participation is available."¹⁷³ The court observed that the Vermont Constitution provided broader protections of individual rights than did the U.S. Constitution,¹⁷⁴ the former specifically protecting the right to pursue one's safety¹⁷⁵ and prohibiting the discriminatory provision of governmental benefits.¹⁷⁶ The court held that by denying indigent pregnant women access to medically necessary health care, the state impinged upon their constitutionally guaranteed right to safety.¹⁷⁷ Furthermore, by singling out and refusing assistance to indigent women seeking medically necessary abortions, the regulation impermissibly discriminated in the provision of health care benefits.¹⁷⁸ Finally, the court concluded that the regulation, by favoring childbirth over abortion at the expense of the pregnant woman's health, was "antithetical to the medical assistance purpose of protecting health by equalizing and facilitating universal access to all medically necessary health care."¹⁷⁹

The most recent state court decision regarding Medicaid abortion funding was decided in February of 1991. In *Doe v. Director of the Department of Social Services*,¹⁸⁰ the

169. *Id.* at 306, 450 A.2d at 935.

170. *Id.* at 310, 450 A.2d at 937.

171. No. S81-84CnC (Vt. Super. Ct., Chittenden County May 23, 1986).

172. *Id.* slip op. at 19.

173. *Id.* at 2 (quoting Department of Social Welfare Regulation M617).

174. *Id.* at 5.

175. *Id.* at 6 (citing VT. CONST. ch. I, art. 1).

176. *Id.* (citing VT. CONST. ch. I, art. 7).

177. *Id.* at 11.

178. *Id.* at 11-12.

179. *Id.* at 16.

180. 187 Mich. App. 493, 468 N.W.2d 862, *appeal docketed*, Nos. 91092, 91093, 1991 Mich. LEXIS 1593, 1991 WL 158155 (Mich. July 23, 1991).

Michigan Court of Appeals overturned a voter-initiated statute that had been adopted in 1988.¹⁸¹ The court held that the privacy right implicit in the Michigan Constitution afforded women the fundamental right to an abortion.¹⁸² The court also held that the Michigan Constitution's equal protection clause was broader than the equal protection clause in the federal Constitution,¹⁸³ and that Michigan's equal protection clause prohibited the imposition of unconstitutional conditions on women's exercise of their fundamental right to an abortion.¹⁸⁴ The court then found that the statute impermissibly burdened indigent women seeking medically necessary abortions in the exercise of their constitutional right to procreative choice by rendering them the only group of indigent persons to be denied a medically necessary treatment.¹⁸⁵ The decision, however, has been appealed.¹⁸⁶

In April 1991, a New York court ruled that New York's Prenatal Care Assistance Program (PCAP),¹⁸⁷ a state medical assistance program funding obstetric and prenatal care for low-income women who were not eligible for Medicaid, violated the New York Constitution by failing to fund medically necessary abortions for women in this group.¹⁸⁸ Although PCAP expanded state funding for obstetric and prenatal care beyond that available under the state Medicaid program,¹⁸⁹ PCAP did not provide additional funding for abortions.¹⁹⁰ This exclusion of abortion funding violated the right to privacy implicit in the due process clause of the New York Constitution.¹⁹¹ The court found that the program, in providing

181. *Id.* at 534, 468 N.W.2d at 880 (invalidating MICH. COMP. LAWS ANN. § 400.109a (West 1988)).

182. *Id.* at 508-09, 468 N.W.2d at 869.

183. *Id.* at 511-18, 468 N.W.2d at 870-73 (citing MICH. CONST. art. I, § 2).

184. *Id.* at 510, 523-25, 468 N.W.2d at 869-70, 875-76.

185. *Id.* at 524-25, 468 N.W.2d at 876.

186. *See Doe v. Director of the Mich. Dep't of Social Servs.*, Nos. 91092, 91093, 1991 Mich. LEXIS 1593, 1991 WL 158155 (Mich. July 23, 1991). While the appeal is pending, the Michigan Department of Social Services has decided to continue its ban on funding abortions. *See Pluta, infra* note 119.

187. N.Y. PUB. HEALTH LAW §§ 2520-2529 (McKinney Supp. 1991).

188. *Hope v. Perales*, 971 N.Y.S.2d 971, 976-77 (Sup. Ct. 1991).

189. Services funded under PCAP are listed at N.Y. PUB. HEALTH LAW § 2522 (McKinney Supp. 1991) (abortion services are not funded). New York's Medicaid program funds medically necessary abortions. *See* N.Y. SOC. SERV. LAW § 365-a(5)(b) (1983); *Donovan v. Cuomo*, 126 A.D.2d 305, 306-07, 513 N.Y.S.2d 878, 879 (N.Y. App. Div. 1987). Provisions for New York's Medicaid program are codified at N.Y. SOC. SERV. LAW §§ 363-369 (McKinney 1983 & Supp. 1991).

190. *See* N.Y. PUB. HEALTH LAW § 2522 (McKinney Supp. 1991) (describing services available under PCAP).

191. *Hope*, 971 N.Y.S.2d at 976-77.

funding for childbirth but not for medically necessary abortions to women who were indigent and not eligible for Medicaid, "impermissibly pressures an . . . indigent woman toward childbirth" and "bases assistance on conduct, not need."¹⁹² The court held that the program violated a provision in the New York Constitution requiring the state to provide aid, care, and support to the needy.¹⁹³ The court also held that the program violated the equal protection clause of the New York Constitution.¹⁹⁴ Finally, the court required that, pending review by the Court of Appeals, the state must fund medically necessary abortions for women in this group.¹⁹⁵

IV. SUMMARY, ANALYSIS OF STATE CONSTITUTIONS, AND PROPOSALS FOR STATE LEGISLATIVE AND CONSTITUTIONAL REFORM

In establishing that neither the federal government nor the states had a constitutional obligation to provide Medicaid funding for either nontherapeutic abortions or medically necessary but not life-saving abortions,¹⁹⁶ the Supreme Court did not mention a fundamental corollary, namely, that states have the discretion to use their own budgets to finance Medicaid abortions. Indeed, several states have been funding Medicaid abortions ever since the Supreme Court handed down its decision in *Harris v. McRae*.¹⁹⁷ The two states with the greatest populations of Medicaid-eligible women, New York and California,¹⁹⁸ provide funding for all Medicaid-eligible women seeking medically necessary abortions. The legislatures and voting populations of several other populous states, however, have refused to follow the leads of New York and California.¹⁹⁹

192. *Id.* at 979.

193. *Id.* at 981 (citing N.Y. CONST. art. XVII, § 1).

194. *Id.* at 981-82.

195. *Id.* at 983.

196. *See supra* notes 46-70 and accompanying text.

197. *See* ABORTIONS AND THE POOR, *supra* note 71, at 22. *Cf. supra* note 76 (listing states which fund abortions only when necessary to save the pregnant woman's life).

198. *See* Torres, *supra* note 72, at 114.

199. These states include Illinois, Kentucky, Michigan, Ohio and Pennsylvania. *See supra* notes 76-77.

States which do not provide Medicaid funding can expect 18% to 35% of their Medicaid-eligible female residents seeking abortions to carry their pregnancies to term.²⁰⁰ Up to 5% more will resort to illegal or self-induced abortions at great physical risk to themselves.²⁰¹ The remaining women will manage to pay for an abortion at a private facility, but many will probably be obliged to use money needed for basic subsistence expenses.²⁰² Obtaining the money for an abortion is a significant burden for a welfare recipient because an abortion typically costs about two-thirds of her monthly welfare payment.²⁰³

In *Committee to Defend Reproductive Rights v. Myers*,²⁰⁴ the Supreme Court of California determined that such results run counter to the purposes of the Medi-Cal program, the aim of which is to provide basic health care to indigent persons.²⁰⁵ The test for provision of such care is that of medical necessity.²⁰⁶ If one accepts the logic of Justice Brennan's dissent in *Beal v. Doe*,²⁰⁷ pregnancy is a medical condition which requires one of two alternative and mutually exclusive medical solutions: abortion or prenatal care and child-birth.²⁰⁸ From the perspective of a pregnant woman who does not want to bear a child, abortion is always a medically necessary procedure.²⁰⁹ Under this analysis, the exclusion of abortion from Medicaid coverage denies indigent women a necessary medical service.²¹⁰ This view distinguishes the Supreme Court of California from other state courts that have analyzed the issue.

A central factor in the Supreme Court of California's decision to grant constitutional status to an indigent woman's right to a publicly funded abortion, in *Committee to Defend Reproductive Rights v. Myers*,²¹¹ was the California Constitution's specific enumeration of a fundamental right to privacy.

200. See *Cates*, *supra* note 110, at 1111.

201. *Id.*

202. See *Henshaw & Wallisch*, *supra* note 14, at 178-80.

203. *Id.*

204. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

205. *Id.* at 271-73, 625 P.2d at 790-91, 172 Cal. Rptr. at 877-78 (1981).

206. *Id.* at 271-72 & n.20, 625 P.2d at 790 & n.20, 172 Cal. Rptr. at 877 & n.20.

207. 432 U.S. 438 (1977).

208. *Id.* at 449 (Brennan, J., dissenting).

209. *Id.* at 452 (Brennan, J., dissenting).

210. *Id.*

211. 29 Cal. 3d 252, 285, 625 P.2d 779, 799, 172 Cal. Rptr. 866, 886 (1981).

Article I, section 1 states, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."²¹² The specific guarantee of the right of privacy in the Declaration of Rights²¹³ of the California Constitution enabled the Supreme Court of California to interpret this right as being broader than the right of privacy granted by the U.S. Constitution.²¹⁴ Under the "unconstitutional conditions" doctrine applied by the court, the imposition of a condition (the forfeiture of the constitutional right to privacy) upon the exercise of a public benefit (the receipt of Medi-Cal funding) was thus deemed unconstitutional.²¹⁵

In Connecticut, Massachusetts, Michigan, and New Jersey, the right to privacy is implicit in the state constitutions but is not specifically enumerated. By invalidating state statutes which limited Medicaid funding of abortion to women with life-threatening pregnancies, the courts in these states relied upon the implied right of privacy but did not interpret this right as requiring their respective states to provide Medicaid funding for elective or nontherapeutic abortions.²¹⁶ The most salient difference between the analysis used by the Connecticut, Massachusetts, and Michigan courts and the analysis used by the Supreme Court of California is that the Connecticut, Massachusetts, and Michigan courts relied upon other constitutional grounds, in addition to the implied right of privacy, to strengthen their opinions. Thus, in *Moe v. Secretary of Administration and Finance*,²¹⁷ the Supreme Judicial Court of Massachusetts interpreted the due process clause implied in article X of the Massachusetts Constitution,²¹⁸ including the implied constitutional right of privacy,

212. CAL. CONST. art. I, § 1 (emphasis added).

213. *Id.* §§ 1-30.

214. 29 Cal. 3d at 262-63, 625 P.2d at 784, 172 Cal. Rptr. at 871.

215. *Id.* at 270-83, 625 P.2d at 788-99, 172 Cal. Rptr. at 876-85.

216. See *Doe v. Maher*, 40 Conn. Supp. 394, 423-26, 449-51, 515 A.2d 134, 149-50, 162 (Super. Ct. 1986); *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 648-49, 660, 417 N.E.2d 387, 398-99, 405 (1981); *Doe v. Director of the Dep't of Social Servs.*, 187 Mich. App. 493, 507-10, 524, 468 N.W.2d 862, 868-69, 876, *appeal docketed*, Nos. 91092, 91093, 1991 Mich. LEXIS 1593, 1991 WL 158155 (Mich. July 23, 1991); *Right to Choose v. Byrne*, 91 N.J. 287, 303-04, 312, 450 A.2d 925, 933-34, 938 (1982).

217. 382 Mass. 629, 417 N.E.2d 387 (1981).

218. MASS. CONST. pt. 1, art. X.

to mandate the funding of all medically necessary abortions.²¹⁹ In *Doe v. Maher*,²²⁰ the Superior Court of Connecticut interpreted the due process clause articulated in Article 1, section 10 of the Connecticut Constitution, encompassing the right to protect one's health, in a similar manner.²²¹ Finally, in *Doe v. Director of the Department of Social Services*,²²² the Michigan Court of Appeals ruled that Michigan's equal protection clause prohibited the state from restricting funding of medically necessary abortions because such restrictions limited women's exercise of their constitutional right to terminate their pregnancies.²²³

The Supreme Court of New Jersey, in *Right to Choose v. Byrne*,²²⁴ also overturned a statute containing restrictive funding language, but it did so on more fragmented constitutional grounds. Applying article 1, paragraph 1 of the New Jersey Constitution,²²⁵ the court determined that the statute impinged upon a woman's right to privacy, which is implicitly guaranteed by this constitutional provision.²²⁶ In addition, by refusing to fund medically necessary abortions under its Medicaid program while funding childbirth-related expenses, the state denied equal protection to Medicaid-eligible women.²²⁷ Finally, although the court did not accord the woman's right to protect her health constitutional status,²²⁸ the court gave her right sufficiently high priority to find that it outweighed the state's interest in protecting potential life.²²⁹

In contrast, the Vermont Superior Court of Chittenden County, in *Doe v. Celani*,²³⁰ relied primarily upon the Vermont Constitution's explicit protection of the right to pursue

219. 382 Mass. at 645-50, 659-60, 417 N.E.2d at 398-99, 405-06.

220. 40 Conn. Supp. 394, 515 A.2d 134 (Super. Ct. 1986).

221. *Id.* at 426, 515 A.2d at 150.

222. 187 Mich. App. 493, 468 N.W.2d 862, *appeal docketed*, Nos. 91092, 91093, 1991 Mich. LEXIS 1593, 1991 WL 158155 (Mich. July 23, 1991).

223. *Id.* at 534, 468 N.W.2d at 880 (citing MICH. CONST. art. I, § 2).

224. 91 N.J. 287, 450 A.2d 925 (1982).

225. Article 1, paragraph 1 reads as follows: "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. 1, para. 1.

226. 91 N.J. at 303-06, 450 A.2d at 933-35.

227. *Id.* at 305-06, 450 A.2d at 934.

228. *Id.* at 304, 450 A.2d at 934.

229. *Id.* at 306, 450 A.2d at 935.

230. No. S81-84CnC (Vt. Super. Ct., Chittenden County May 23, 1986).

one's safety²³¹ when that court overturned a regulation denying funding of medically necessary abortions.²³² The court also relied on a provision in the Vermont Constitution that prohibits the discriminatory provision of governmental assistance.²³³ Thus, without relying on privacy, due process, or equal protection provisions, the Vermont court still overturned the funding restrictions on constitutional grounds.

Most other states' courts have not grappled with such issues, and state legislatures and administrations have drastically reduced the Medicaid funds available to a woman seeking a non-life-saving abortion. Few state legislatures or administrations have created exceptions to the Hyde Amendment policy, even for pregnancies which endanger a woman's physical or mental health, or which result from rape or incest. As a result, women who will suffer physical or mental harm if they carry their pregnancies to term are denied the opportunity to receive government aid for their medically necessary abortions. Regardless of how far one believes the right of privacy extends, this result is surely antithetical to any state Medicaid program which has a goal of providing basic medical services to indigent persons.

The principles of federalism dictate that state constitutions may provide broader rights guarantees than the federal Constitution does.²³⁴ Constitutional guarantees ensuring the right of procreative choice are currently provided to indigent pregnant women in seven states.²³⁵ The guarantee of Medicaid funding of elective abortion would ensure that indigent women enjoy the fundamental right to procreative choice enjoyed by their wealthier female counterparts. The guarantee of Medicaid funding of medically necessary abortions would fall short of this goal, but would at least ensure that

231. *Id.* slip op. at 6 (citing VT. CONST. ch. I, art. 1).

232. *Id.* at 19.

233. *Id.* at 6 (citing VT. CONST. ch. I, art. 7).

234. *See, e.g.,* State v. Kaluna, 55 Haw. 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502-03 (1977).

235. California, *see supra* notes 141-51 and accompanying text; Connecticut, *see supra* notes 158-64 and accompanying text; Massachusetts, *see supra* notes 153-57 and accompanying text; Michigan, *see supra* notes 180-85 and accompanying text; New Jersey, *see supra* notes 165-70 and accompanying text; New York, *see supra* notes 187-95 and accompanying text; Vermont, *see supra* notes 171-79 and accompanying text.

indigent women are as free to pursue their fundamental right to protect their health as their male counterparts are.

Because the right of privacy is not specifically delineated in most state constitutions, this right is not a reliable guarantor of the rights of indigent women to protect their health by obtaining a medically necessary abortion. To guarantee such rights, most state legislatures would have to implement one of two possible strategies. The first would be to pass a constitutional amendment. For example, a model constitutional amendment might read as follows:

Public funds shall be provided through the Medicaid program to pay for all abortions sought by indigent women.

The above amendment requires a sympathetic state legislature and would be difficult to pass. An alternative would be to model a constitutional amendment after the constitutions of California or New Jersey. Such an amendment might read as follows:

All persons are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining health, safety, happiness, and privacy.²³⁶

Because of the abstract language, such an amendment may be more politically palatable for legislators.

By expressly delineating the right to privacy, such an amendment would compel legislatures and courts to regard that right with such reverence that they would secure that right by mandating state funding for all abortions sought by indigent women. One drawback, however, is that this strategy relies upon an expansive privacy right interpretation that is rare among the states. A more realistic, but less far-reaching, solution would be to rely upon equal protection and the right to pursue one's health, as did New Jersey.²³⁷ With the help

236. This proposed constitutional amendment is a synthesis of CAL. CONST. art. I, § 1 and N.J. CONST. art. 1, para. 1, with the addition of an enumerated constitutional right to protect one's health.

237. See *Right to Choose v. Byrne*, 91 N.J. 287, 305-08, 450 A.2d 925, 934-36 (1982).

of this model amendment and its provisions for protecting the health and privacy of indigent women, state courts and legislatures would be able to determine that they must provide funding for medically necessary abortions sought by indigent women without being forced to resort to the penumbras of the state constitution.

Realistically, the success of such an amendment in establishing abortion rights for indigent women depends upon the interpretive powers of the state courts. An alternative strategy would be to adopt state legislation or administrative rules directly addressing the funding of abortions (therapeutic and nontherapeutic) for the indigent. A possible statute follows:

The state Department of Welfare [or analogue] is hereby authorized to provide medical assistance to all eligible indigent persons regardless of sex. "Medical assistance" shall mean the payment of part or all of the cost of care, services, and supplies which are necessary to prevent, diagnose, correct, or cure conditions in the person that cause acute suffering, endanger life, result in illness or infirmity, interfere with his or her capacity for normal activity, or threaten some significant handicap.²³⁸ "Medical assistance" shall include reimbursement for all expenses incident to childbirth or abortion incurred by indigent women, with genuine indifference to their reproductive choices.

The above statute provides both general and specific protection to indigent women seeking abortions. The language in the first sentence, reminiscent of the Connecticut Constitution's equal protection clause,²³⁹ proscribes state

238. This definition of "medical assistance" was obtained from a New York statute. See N.Y. SOC. SERV. LAW § 365-a(2) (McKinney 1983). Although the Appellate Division of New York's Supreme Court has interpreted this statute as excluding elective (not medically necessary) abortions, it held that the Department's reliance on a physician's certification of medical necessity as the sole basis for funding was not improper. See *Donovan v. Cuomo*, 126 A.D.2d 305, 308-09, 513 N.Y.S.2d 878, 880-81 (1987).

239. That clause reads: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." CONN. CONST. art. 1, § 20.

welfare agencies from denying any medically necessary treatment to indigent women. The second sentence provides a broad definition of "medical assistance" which would enable such agencies to provide this funding, consistent with the goals and objectives of the state Medicaid program. The third sentence specifically provides for the funding of all abortions sought by indigent women.

The right to procreative choice, which the United States Supreme Court in *Roe v. Wade*²⁴⁰ determined to be rooted in the concept of personal liberty and autonomy,²⁴¹ remains guaranteed by the right to privacy implicit in the federal constitution despite substantial limitations imposed by *Webster v. Reproductive Health Services*.²⁴² A woman who chooses abortion over childbirth is guaranteed the right to make that choice without unjustified intervention by the government,²⁴³ but is not guaranteed the right to governmental funding of the abortion.²⁴⁴ The United States Supreme Court has determined that the funding of childbirth at the expense of abortion does not violate the equal protection rights of indigent, pregnant women under the fourteenth²⁴⁵ or fifth²⁴⁶ amendments of the U.S. Constitution.

Certain state courts have employed various constitutional approaches to determine that an indigent woman has a constitutional right to funding for an abortion. By expanding the state constitutional guarantees of privacy or equal protection beyond those provided by the federal Constitution, a few

240. 410 U.S. 113 (1973).

241. See *id.* at 152, 155.

242. 492 U.S. 490 (1989). In *Webster*, the Supreme Court reaffirmed the state's interest, initially recognized in *Roe*, in protecting potential life. While *Roe* held that such an interest becomes compelling at the point of fetal viability, 410 U.S. at 164, *Webster* rejected the drawing of such a rigid line and implied that such compelling interests exist throughout a woman's pregnancy. 492 U.S. at 519-20. Even so, the Court left undisturbed *Roe's* prohibition against unconstitutionally infringing upon "the right to an abortion derived from the Due Process Clause" and reaffirmed *Roe's* holding that criminalizing all abortions was such an unconstitutional infringement on that right. *Id.* at 521.

243. The state may intervene, however, by requiring physicians to perform viability tests upon the fetus. See *Webster*, 492 U.S. at 519-20.

244. See *Harris v. McRae*, 448 U.S. 297, 316-18 (1980) (upholding an amendment to a federal appropriations bill that banned using federal Medicaid funds to pay for abortions except where necessary to save the life of the pregnant woman); *Maher v. Roe*, 432 U.S. 464, 469-80 (1977) (upholding a Pennsylvania law limiting Medicaid funding for abortions so that only "medically necessary" abortions would be funded).

245. *Maher*, 432 U.S. at 470-80.

246. *Harris*, 448 U.S. 321-26.

state courts have acted to ensure the provision of Medicaid funding for indigent women seeking abortions as well as for those desiring to carry their pregnancies to term. Women who have access to abortion funding have the opportunity to make a meaningful reproductive choice without suffering the physical and financial hardships borne by their counterparts in other states. Women in all states must be protected to ensure that their procreative decisions are products of free choice. The model statute and constitutional amendments proposed in this Note would help safeguard women's fundamental freedoms.

