

“Nearly Allied to Her Right to Be”¹- Medicaid Funding for Abortion: The Story of *Harris v. McRae*

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I remember Tijuana . . . I think the thing I will always remember most vividly was walking up three flights of darkened stairs and down that pitchy corridor and knocking at the door at the end of it, not knowing what lie behind it, not knowing whether I would ever walk back down those stairs again. More than the incredible filth of the place, and my fear on seeing it that I would surely become infected; more than the fact that the man was an alcoholic, that he was drinking throughout the procedure, a whiskey glass in one hand, a sharp instrument in the other; more than the indescribable pain, the most intense pain I have ever been subject to; more than the humiliation of being told, “You can take your pants down now, but you shoulda’—ha! ha! —kept ‘em on before;” more than the degradation of being asked to perform a deviate sex act after he had aborted me (he offered me 20 of my 1000 bucks back for a “quick blow job”); more than the [hemorrhaging] and the peritonitis and the hospitalization that followed; more even than the gut-twisting fear of being “found out” and locked away for perhaps 20 years; more than all of these things, those pitchy stairs and that dank, dark hallway and the door at the end of it stay with me and chills my blood still.²

When several states legalized abortion and, subsequently, the Supreme Court transformed abortion from a crime to a right in 1973 in *Roe v. Wade*, many assumed that health insurance, private and public, would provide funding for all women to assert that right. For a short time, coverage was unchallenged. This chapter tells the story of *Harris v. McRae*,³ the 1980 Supreme Court decision upholding the Hyde Amendment’s exclusion of coverage for medically necessary abortions from the otherwise comprehensive Medicaid program. Decided in the context of a growing, religiously-impelled mobilization against abortion and funding, this decision not only gutted the right to abortion for poor women, but it also undermined fundamental constitutional principles. Furthermore, the decision set the stage for restrictive approaches to constitutional protection of fundamental rights affecting the poor, reproductive rights, and previously assumed

¹ *McRae v. Califano*, 491 F.Supp.630, 742 (E.D.N.Y. 1980); Judge Dooling said:

A woman’s conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment.

² Brief for the National Abortion Rights Action League at al. as Amici Curiae in Support of Appellees at 9, *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (No. 84-495), 1985 WL 669630.

³ 448 U.S. 297 (1980).

rights more broadly. As we write almost thirty years later, the Hyde Amendment and the *McRae* decision remain unchallenged obstacles to comprehensive health care for women and to recognition of women's full citizenship. The above narrative reflects the horrific experience of many women who could pay for an abortion before *Roe v. Wade*.

The authors began litigating Medicaid cases as fairly new feminist lawyers involved in the political and legal struggles for women's rights, reproductive freedom, and economic justice, and served as co-counsel for plaintiffs in *McRae*. This chapter focuses on the course and complexities of the litigation. It begins with discussion of an early case that considered state restriction on Medicaid funding for abortion. After placing this issue in the context of the welfare rights movement and the effort to extend legal principles to poor people, the chapter turns to the political backlash against legal abortion that led to the adoption of the Hyde Amendment in 1976.

A 13-month trial in the U.S. District Court in Brooklyn explored the consequences to the lives and health of poor women of excluding insurance coverage for "medically necessary" abortions as a matter of discrimination against the exercise of fundamental rights. We also explored the role of religious belief and institutional mobilization in the debate about the Hyde Amendment, asserting that the amendment violated separation of church and state and the liberty of conscience. Though ultimately the U.S. Supreme Court's brutal 5-4 decision rejected all these claims, these disputes remain central to the abortion, health care and church/state debates in the twenty-first century. Finally, the chapter examines the impact of *McRae* on constitutional doctrine and on the lives and health of poor women, and concludes that it is time to stop excluding abortion from federally funded or regulated health programs.

Early Responses to Medicaid and the Legalization of Abortion: Klein v. Nassau County Medical Center

On April 9, 1970, New York repealed its law making abortion a crime and allowed women to choose abortion until the 24th week of pregnancy. The legislature had heard extensive testimony on the devastating health and life impact of criminal abortion, particularly on poor women. While doctors asserted that the criminal law interfered with their right to provide essential medical care, feminist activists broke into the hearings to assert women's right to control their bodies and to abortion on demand. The law passed dramatically by one vote on a second try when upstate Assemblyman George M. Michaels listened to the women in his family, changed his vote, and ended his legislative career.⁴

In July 1970, Sylvia, in a cab from JFK after a year in London, realized the magnitude of the change when, she heard a radio ad: "Pregnant? Don't want to be? Call the New York City Department of Health for a referral." She tore up her "Zagats" of illegal abortion providers—three pages of yellow legal pad filled with a decade of information about illegal abortion providers available to women with money and connections.

⁴ David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* 420 (1998).

In the summer of 1970, 3,000 women obtained abortions each week in New York.⁵ Between July 1, 1970 and April 8, 1971, New York Medicaid paid for 16,168 abortions solely provided by the NYC Health and Hospitals Corporation.⁶

Then, on April 8, 1971, the New York Commissioner of Social Services issued an Administrative Letter limiting Medicaid abortions to those that were “medically indicated.” It is not clear why pro-choice Governor Nelson Rockefeller allowed this policy change; some speculated that the vigorous effort of the Catholic Church to reverse the New York’s legalization of abortion played a role. In the spring of 1972, the Catholic fraternal organization, Knights of Columbus, drew more than 10,000 demonstrators to a Right to Life rally. In 1972, the New York legislature voted to repeal the 1970 reform law. Rockefeller vetoed the repeal. More than 60% of New Yorkers supported the 1970 reform law, “but the intensity and commitment of abortion opponents had more than offset that majority sentiment.”⁷

While the meaning of “medically indicated” was not clear, the Administrative Letter had the intended effect in many places. For example, after New York legalized abortion, doctors at Nassau County Medical Center (“NCMC”) routinely performed them for poor patients and received Medicaid payments for their services. However, after the 1971 Administrative Letter took effect, abortion services ceased. A local civil liberties lawyer, Jerome Seidel, filed suit in the federal court in the Eastern District of New York on behalf of women eligible for Medicaid who had been denied abortions.⁸ Seidel contacted the Center for Constitutional Rights (“CCR”), founded five years earlier, for help. Three of CCR’s lawyers—Nancy Stearns, Janice Goodman, and Rhonda Copelon—were already engaged in many cases asserting a woman’s right to abortion, presenting the experiences of women whose rights were directly at stake. Rhonda, with Nancy’s support, took the lead on the *Klein* case.

The federal complaint, filed against the Nassau County Medical Center and the State of New York before *Roe v. Wade*, alleged that the Administrative Letter violated both the federal Medicaid law and the Due Process and Equal Protection Clauses of the Federal Constitution. The State was unenthusiastically represented by the Attorney General’s Office. Lawyers Lawrence Washburn and Thomas Ford were permitted to intervene on behalf of unborn children. The opposing lawyers already knew one other from earlier abortion litigation.

On August 24, 1972, a unanimous three-judge court declared that New York’s Administrative Letter was unconstitutional. The state had defended its policy asserting that the doctor’s certification of medical indication would suffice, but the District Court accepted plaintiffs’ argument that this would not ensure poor women’s access to abortion. Judge John F. Dooling, Jr. authored the opinion that explained that “[p]regnancy is a condition which in today’s society is universally treated as requiring medical care The pregnant woman may not be

Comment [JBL1]: Maybe I missed who the authoring judge is, but the opinion says that *Klein* was a per curiam decision. How do we know that Dooling authored this opinion?

⁵ *Id.* at 456–57.

⁶ *City of New York v. Wyman*, 281 N.E.2d 180, 182 (N.Y. 1972) (Gibson, J., dissenting).

⁷ Garrow, *supra* note 4, at 546–47.

⁸ *Klein v. Nassau County Med. Ctr.*, 347 F. Supp. 496, 498 (E.D.N.Y. 1972).

denied necessary medical assistance because she has made an unwarrantedly disfavored choice.”⁹

In addition to asserting a liberty interest in controlling reproduction, plaintiffs offered two equal protection arguments: one based on discrimination against pregnant women who choose abortion over child birth and the second based on wealth. The *Klein* court agreed, ruling that indigent women should have the same choices available to those with means.¹⁰ The court explained that indigent women:

alone are subjected to State coercion to bear children which they do not wish to bear, and no other women similarly situated are so coerced. . . . No interest of the State is served by the arbitrary discrimination. Certainly the denial of medical assistance does not serve the State’s fiscal interest, since the consequence is that the indigent may then apply for prenatal, obstetrical and post-partum care.¹¹

Thus, in 1972, the court held that once New York had made abortion legal, imposing burdensome requirements on Medicaid payments for poor women seeking abortions violated both individual liberty of choice and equal protection requirements of even-handed treatment. The decision was appealed to the Supreme Court, but was not addressed by the Court until 1977.

The Welfare Rights Movement, Legal Services, and Medicaid Coverage for Abortion

Legal challenges to state denials of Medicaid coverage for abortion built upon prior work done by the welfare rights movement and neighborhood legal services lawyers. In 1964, as part of the War on Poverty, President Lyndon Johnson established the Office of Economic Opportunity to administer a neighborhood-based Community Action Program (“CAP”). Because of opposition from the American Bar Association, CAP did not initially include a legal services component. However, beginning in 1964, with funding from the Ford Foundation, three small neighborhood legal services programs began serving poor people. In 1965, the American Bar Association dropped its opposition to legal services programs. During 1966, three hundred federally-funded neighborhood legal services programs, created throughout the country, proved critical to enforcing subsistence and medical care programs for the poor.¹²

The most influential and visionary of the new legal services programs, Mobilization for Youth (“MFY”) led by Edward V. Sparer, embraced law reform work and test case litigation on behalf of the poor, following the model pioneered by the NAACP Legal Defense Fund under the leadership of Thurgood Marshall. Sparer supported the creation of self-governing client organizations.

⁹ *Id.* at 500.

¹⁰ 401 U.S. 371 (1971).

¹¹ 347 F. Supp at 500–01.

¹² This discussion is based on Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (1993).

The Warren Court quickly established important rights for legal services clients, including some of the principles that eventually formed the backbone of plaintiffs' arguments for Medicaid coverage of abortion. *King v. Smith*, relied upon in *Klein*, held that qualified poor people could go to federal court to enforce the mandatory requirements of the federal Social Security Act.¹³

In 1969, the Supreme Court found a state welfare requirement unconstitutional for the first time in *Shapiro v. Thompson*.¹⁴ The Court held that the constitution implicitly protected the right to travel from state to state and that state laws could not deny welfare benefits to new residents without very strong justification. The principle that statutory benefits could not be conditioned upon the sacrifice of constitutionally protected rights formed the heart of the plaintiffs' constitutional argument in the Medicaid abortion cases.

However, the Court quickly began to limit protections for welfare recipients. In the 1970 case *Dandridge v. Williams*,¹⁵ legal services lawyers asserted that a Maryland rule, placing a flat limit on the amount a family might receive in aid regardless of the size of the family, violated the fundamental right to choice about procreation and family composition, previously recognized in several cases. By characterizing the complaint as simply a challenge to state grant levels over which states had broad discretion, the Supreme Court rejected the plaintiffs' claim.

Thus, by 1973, when the Supreme Court decided *Roe v. Wade*, the welfare rights movement, backed by the legal services program, had established that the federal Social Security Act created entitlements enforceable in federal court and subject to constitutional protection. Those principles provided essential background for the debate over Medicaid payments for abortion. At the same time, by the 1970s, when the Medicaid funding issue moved to the foreground, the governing law was becoming complex and contradictory.

Maher and Beal: Medicaid and Medical Necessity

After *Roe*, state Medicaid programs, as well as private health insurance policies, covered abortions,¹⁶ but soon over a dozen states, including Pennsylvania and Connecticut, imposed restrictions denying Medicaid payment for abortion. These denials produced the cases *Beal v. Doe*¹⁷ and *Maher v. Roe*¹⁸ decided by the Supreme Court in 1977.

In 1973, Pennsylvania restricted reimbursement for abortion to claims supported by "documented medical evidence" of (1) threat to the health of the mother; (2) that an infant may be born with incapacitating physical deformity or mental deficiency; or (3) that the pregnancy resulted from legally-established forcible rape or incest. The State also required that two

¹³ See, e.g., Sasha Samberg-Champion, *How to Read Gonzaga: Laying the Seeds of a Coherent Section 1983 Jurisprudence*, 103 Colum. L. Rev. 1838 (2003).

¹⁴ 394 U.S. 618 (1969).

¹⁵ 397 U.S. 471 (1970).

¹⁶ Adam Sonfield, *Toward Universal Insurance coverage: A Primer for Sexual and Reproductive Health Advocates*, 11 Guttmacher Pol'y Rev. 11, 15 (2008).

¹⁷ 432 U.S. 438 (1977).

¹⁸ 432 U.S. 464 (1977).

additional physicians chosen for professional competency confirm these findings in writing and, in addition, that an accredited hospital must perform the abortion. Connecticut provided that an abortion could be funded only if, prior to the procedure, the attending physician submitted a certificate and received authorization from the state Medicaid director affirming that the abortion was “medically or psychiatrically necessary.”

*“A.B. sounded close to tears . . . as she told her story of seeking an abortion. As a resident of Pennsylvania, she receives \$316 per month in TANF (Temporary Assistance for Needy Families) cash assistance to support herself and her young child.” She was speaking on the helpline of the Women’s Medical Fund, an abortion access fund, part of the National Network of Abortion Funds, an association of grassroots groups that provides over \$2 million annually to help low income women have safe, legal abortions. “Her abortion will cost \$300,” and the price will increase as her pregnancy continues.*¹⁹

Legal services lawyers filed suits challenging these state restrictions as violating both the federal Medicaid statute and the U.S. Constitution. Plaintiffs argued that coverage of all legal abortion was mandatory under the federal Medicaid statute, noting that it required coverage for hospital, clinic, and physician services for eligible individuals; prohibited discrimination on the basis of “diagnosis or condition”; and, apart from irrelevant exceptions, relied completely on the attending physician’s pro forma affirmation of medical necessity.

States defended their restrictive abortion payment policies, emphasizing that the Medicaid Act limited payments to “medically necessary” services and gave states significant discretion to determine the meaning of “medically necessary.” The federal Department of Health, Education, and Welfare punted, taking the position that the federal government would contribute its share for all abortions that a state funded, but that federal law neither prohibited nor required states to pay for abortions that were not “medically necessary.”

Between 1973 and 1977, numerous federal courts agreed that the Medicaid Act required funding for all abortions, and, like *Klein*, premised their decisions on the fact that even the so-called “elective” abortion is inherently a “medically necessary” response to pregnancy. In a decision followed by many other federal courts, the federal court of appeals in *Beal*, struck down Pennsylvania’s policy, finding that it violated the letter and spirit of the federal act “to force pregnant women to use the least voluntary method of treatment, while not imposing a similar requirement on other persons who qualify for aid.”

In addition to the many federal court rulings that the federal Medicaid law prohibited discrimination against abortion, many lower federal courts found the Medicaid restrictions unconstitutional. Plaintiffs presented three related constitutional arguments. First they argued that the various burdensome requirements for proof of “medical necessity” and prior approval interfered with the liberty to choose abortion affirmed in *Roe v. Wade*. State rules requiring

¹⁹ Susan Schewel, *The Hyde Amendment’s Prohibition of Federal Funding for Abortion—30 Years is Enough!*, 31 *Women’s Health Activist* 1 (Sept. 1, 2006). For more information, see Women’s Medical Fund, at www.womensmedicalfund.org (last visited Nov. 30, 2009); National Network of Abortion Funds, at www.nnaf.org (the national umbrella for the local funds) (last visited Nov. 30, 2009).

second physician certification and limiting abortions to accredited hospitals were flatly inconsistent with the holding in *Bolton*²⁰.

Second, plaintiffs argued that the abortion restrictions violated equal protection because, even if the State had no affirmative obligation to provide medical care to the poor, it could not make services contingent upon forfeiture of a woman's constitutional right to choose abortion. The restrictive abortion reimbursement rules were also unequal as compared with reimbursement for all other routine medical services including childbirth.

Finally, plaintiffs argued that the restrictions were irrational under the most minimal constitutional scrutiny because they were damaging to women's health, given that abortion is much safer than childbirth. Plaintiffs debated how to handle the fact that denying abortion cost the State money. They asserted that public costs were not an acceptable basis for denying constitutional rights while reminding courts that denying abortion did not save public money.

All of these arguments persuaded the Second Circuit in *Maher* to strike Connecticut's law as unconstitutional. As a result of these and other decisions, state and federal Medicaid funded 250,000 to 300,000 abortions each year from 1973 to August 4, 1977.²¹

Both decisions were appealed to the Supreme Court and on June 20, 1977, the Supreme Court ruled 6-3 that the burdensome and unique Medicaid limits on abortion funding violated neither the federal Medicaid statute (*Beal*) nor the Constitution (*Maher*).²² Justice Powell wrote for the Court with Justices Blackmun, Brennan, and Marshall dissenting in both opinions. Preserving state power to manipulate the childbearing decisions of the poor, Justice Powell wrote in *Maher*:

Roe did not declare an unqualified "constitutional right to an abortion" Rather, the right protects the woman from *unduly burdensome interference* with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a

²⁰ *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*, struck down Georgia requirements that abortions be approved by a committee of medical experts and by two doctors, and that they be performed in an accredited hospital. Under *Roe*, the requirements were unconstitutional because they applied in the first trimester of pregnancy and did not promote women's health in the second trimester. Notably, *Bolton* also defines "health" in very broad albeit doctor-determined terms:

[The physician's] medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.

Id. at 192.

²¹ *McRae v. Califano*, 491 F. Supp. 630, 639 (E.D.N.Y. 1980) (Judge Dooling's opinion makes extensive findings of fact and will be used as a convenient source in this essay.).

²² *Supra* notes 16-17. A third case, *Poelker v. Doe*, 432 U.S. 519 (1977), decided, on the basis of *Beal*, that hospitals could likewise restrict abortions for indigent pregnant women.

State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

Connecticut's policy, Powell said, "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." Powell acknowledged that "[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation."²³

As advocates, in retrospect, we ask ourselves whether the litigation strategy erred in asserting a broad challenge to the restrictive policies. Lawyers litigated the cases entirely on motions with affidavits but without trial of factual issues. Perhaps we should have encouraged doctors to certify abortions as medically necessary and offered representation if claims were denied. Alternatively, perhaps we should have sued on behalf of individual women with particularly compelling medical circumstances. The large group of legal services and feminist lawyers involved in these cases preferred the broad policy-based challenge. They believed that, under the standards of *Roe* and *Bolton* and of the Medicaid Act, all abortions were medically necessary if the woman did not want to be pregnant. But, even if all such abortions should be understood as medically necessary, a state Medicaid certification still implied the need for doctor supervision of women's decisions. Finally, given the realities of pregnancy, individual challenges to restrictive decisions would be virtually impossible because the pregnant woman is unlikely to rush to a lawyer; nor can she delay the abortion pending a legal challenge.

At the time, Fred Jaffee of the Alan Guttmacher Institute eloquently argued for an approach that embraced rather than rejected the concept of medical necessity and considered virtually all abortions sought by women to be medically necessary. Such an approach, he contended, would remove doubt about their status as part of health care and deprive the anti-choice advocates of the red flag of "elective" or "convenience" abortion, without taking away the principle that patient choice is always the ethical bottom line in medical care. Some years later, influenced by the course of the international reproductive rights movement, which has been seeking abortion rights largely on the basis of the positive human right to health, Rosalind Petchesky, a leading feminist scholar questioned the movement's strategy from a different perspective. Although initially critical of "medical necessity" as compromising women's autonomy and reproductive freedom, she questioned whether the U.S. feminist and pro-choice movements' single-minded focus on choice had contributed to a false dichotomy between women's right to autonomy and right to health.²⁴

The Hyde Amendment: From Human Life Amendment to Medicaid

²³ *Maier v. Roe*, 432 U.S. 464, 473–74 (1977) (emphasis added).

²⁴ Rosalind P. Petchesky, *Abortion in the 1980s: Feminist Morality and Women's Health*, in *Women, Health, and Healing* (V. Oleson and E. Lewin eds., 1985). See also Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (rev. ed. 1990).

In fall 1976, while the state Medicaid cases awaited decision in the Supreme Court, a freshman Congressman from Illinois, Henry Hyde, led an effort to eliminate federal funding for all abortion. His focus on Medicaid reflected broad frustration over the anti-abortion movement's failure to obtain its ultimate goal—a constitutional Human Life Amendment (HLA)—recognizing and protecting the fetus as a human “person” from the moment of conception.²⁵ Denying poor women funding for abortions provided an easier target.

Circumventing the usual process to amend the Medicaid statute, Hyde offered an amendment in the form of a “rider” to the Department of Labor, Health, Education, and Welfare Appropriations Bill for 1977. Everyone understood that the amendment used the pressure of an appropriations bill to accomplish controversial substantive legislation, technically illegal under House rules, but also not subject to judicial challenge.²⁶

The first Hyde Amendment, which would have totally eliminated federal funding to perform or promote abortion, passed in the House, 207 to 167, but the Senate defeated it, 53 to 35.²⁷ Representative Silvio O. Conte (R-Mass.) proposed, and the House approved, a “compromise” amendment that proscribed federal funding for the performance of abortions “except where the life of the mother would be endangered if fetus were carried to term.” The latter clause—more restrictive than most pre-Roe statutes—would prevent funding where the doctor believed the pregnant woman would self abort or seek an illegal abortion. The House-Senate Conference accepted this language and the Senate adopted the compromise Hyde-Conte Amendment on September 30, 1976. “[T]he pro-life forces have held the appropriation bills hostage until the amendments were passed. . . . In a sense the amendments are enactments of the House of Representatives to which the Senate has acceded . . . rather than risk the appropriation bills.”²⁸

The district court opinion in *McRae*, supported by an extensive annex detailing the legislative debates,²⁹ summarized the purpose of the Amendment. “The debates made clear that the amendment was intended to prevent abortions, not shift their cost to others, and rested on the premise that the human fetus was a human life that should not be ended.”³⁰ The amendment was

²⁵ Immediately following *Roe v. Wade*, an HLA was introduced in the Senate to protect the fetus as a human “person” from the moment of conception and other proposed constitutional amendments sought to devolve the power to regulate abortion to the states. Between 1973 and 2008, more than 330 constitutional HLA proposals were introduced in Congress. The divergent versions of the HLA reflect a more general division between purists, unwilling to compromise the principle that abortion is murder, and incrementalists who seek to prevent as many abortions as possible. Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L.J. 1694, 1709, 1708 n43 (2008). Several extensive hearings were held on the amendments but no formal vote was taken until a 1983 vote in the Senate, on a states “rights” proposal that failed by a vote of 49-50.

²⁶ *McRae v. Califano*, 491 F. Supp. 630, 689 (E.D.N.Y. 1980).

²⁷ 122 Cong. Rec. 20,412-13, and 27,680 (1976).

²⁸ *McRae*, 491 F. Supp. at 727.

²⁹ *Id.* at 742–844.

³⁰ *Id.* at 641.

not defended as a means to encourage childbirth or population growth. “There is no national commitment to unwanted childbirth.”³¹ The amendment was not defended on grounds that Congress may not fund activities which individual tax payers find morally objectionable. Such a principle would be politically paralyzing in a nation of people with diverse moral views. Even several representatives who favored a constitutional amendment to overrule *Roe v. Wade* questioned Hyde’s approach; Representative Flood, for instance, called Hyde’s amendment “blatantly discriminatory” against poor women.³²

Supporters of the Hyde Amendment relied almost exclusively on religious concepts and rhetoric, and made frequent references to Herod’s “slaughter of the innocents” as well as to the “defenseless” and “innocent” fetus and its “immortal soul.”³³ At the House-Senate reconciliation conference, Mark Gallagher represented the United States Catholic Conference, the official organization of the U.S. Bishops. “Every time the Senate conferees make a compromise offer, Mr. Gallagher quietly walks to the conference table to tell a staff aide to the 11 House conferees whether the proposal is acceptable to the Bishops. His recommendations invariably are followed.”³⁴ The National Abortion Rights Action League (“NARAL”) also had representatives at every session of the Hyde debate,³⁵ though the bishops had more influence on the decision-makers.

Filing Harris v. McRae

On September 30, 1976, the day the Hyde Amendment was adopted, women’s advocates filed suit in the federal court in the Eastern District of New York challenging the constitutionality of the restriction.

A coalition of groups including the Center for Constitutional Rights (“CCR”), the Planned Parenthood Federation of America, the Reproductive Freedom Project of the American Civil Liberties Union (“ACLU-RFP”), and the Health and Hospitals Corporation of the City of New York, which filed a separate complaint, organized the litigation. Members of the original litigation team included CCR lawyers Rhonda Copelon and Nancy Stearns. Harriet Pilpel, a partner at the New York firm Greenbaum, Wolff & Ernst, and General Counsel to both Planned Parenthood and the ACLU, had represented women and doctors challenging restrictions on contraception and abortion since the 1940s. She was joined by two firm colleagues, Eve W. Paul, subsequently General Counsel to Planned Parenthood, and Fredric S. Nathan, former Corporation Counsel of the City of New York. The ACLU had supported reproductive choice, primarily through amicus briefs filed in the Supreme Court. When the ACLU Women’s Rights Project (“ACLU-WRP”) was founded in 1972, under the leadership of Ruth Bader Ginsberg, major funders prohibited work on abortion. However, in 1975 Harriet Pilpel and Sylvia Law

³¹ *Id.* at 691.

³² *Id.* at 744.

³³ *Id.* at 726.

³⁴ Martin Tolchin, *On Abortion, The Houses Still Remain Miles Apart*, N.Y. Times, Nov. 27, 1977, at ??.

³⁵ *McRae*, 491 F. Supp. at 723.

persuaded the ACLU to create a Reproductive Freedom Project (“RFP”) and Judith Mears, its first director, was part of the original team. In 1977, Janet Benshoof, who had history of work on welfare rights, became Director of the ACLU-RFP and part of the team with staff attorney Judith Levin joining later. Sylvia, a professor at NYU Law School joined the team based on her prior work on welfare rights and challenges to the state Medicaid abortion restrictions. While major decisions were made collaboratively, Rhonda and Janet led the team. The NYC Health and Hospitals Corporation, represented by Ellen Sawyer, provided most of the abortions in New York and Medicaid reimbursed half of them. Many others made important contributions. The group was eclectic in terms of politics, experience, age, resources, and lawyering style.

Why litigate in New York? In part, the lawyers were there. But, more importantly, New York was sympathetic to reproductive choice. Conventional wisdom regarded the Southern District in Manhattan as more sympathetic to civil rights plaintiffs than the Eastern District in Brooklyn. However, Rhonda convinced us to file in the Eastern District in Brooklyn on the theory that we could persuade Judge Dooling that the Hyde challenge was “related to” the earlier *Klein* case and we would have a powerfully sympathetic judge and avoid the risk of assignment by lottery. When she called Judge Dooling’s chambers to advise him that we would be filing a complaint, he answered the phone and told her we had to convince him that the case was “related.” The next day, he proceeded without even raising the issue.

John Francis Dooling, Jr. was born in Brooklyn in 1909, the son of a doctor. He graduated from St. Francis College in 1929 and attended St. John’s University Law School at night while working as a clerk at Sullivan & Cromwell during the day. Later, he transferred to Harvard Law School, where he was an editor of the law review. After law school, Dooling returned to Sullivan & Cromwell for twenty-seven years, specializing in litigation and was appointed to the federal bench by John F. Kennedy in 1961. Dooling and his wife Dorothea had five children, four girls and a boy, and all went to parochial schools. As a personal matter, he was deeply philosophical and a devout and learned Catholic.

Asked by the *New York Times* about the conflict between his opinion and the teachings of his Church, he said, “This [case] doesn’t have to do with what I think about abortion or what the church thinks about abortion. It has to do with the validity in civil law of restrictions on funding for abortion, in light of decisions of the Supreme Court.”³⁶ And when asked by his law clerk, during the course of the case, if there was anything that is *malum in se* (inherently wrong) but not *malum prohibitum* (a regulable wrong), he answered, without a moment’s hesitation: “abortion.” Judge Dooling wrote the *McRae* opinion and annex, the longest of his career, in long hand. It took thirteen months, during which, we later learned, he had had bouts of weakness. On January 15, 1981, on the anniversary of that decision, he died of a heart attack while walking to work, having refused the court’s offer of a car and driver.

The initial complaint—filed before the Supreme Court’s *Maher* decision—alleged that the restriction violated the liberty protected by *Roe* and *Bolton* and denied equal protection by providing radically different services to women depending upon their exercise of this right in relation to pregnancy. Eve Paul, a lawyer for Planned Parenthood, met Cora McRae, the named

³⁶ Leslie Bennetts, *Judge John Dooling Jr., 72, Dies; Made Ruling on Abortion Funds*, N.Y. Times, Jan. 13, 1981, at D19.

plaintiff, at a Planned Parenthood Clinic in Brooklyn where she sought an abortion. Paul advised McRae that she could sue as Jane Doe but she chose to use her own name. She was also advised that she would be provided the abortion as soon as the complaint was filed.

Americans United for Life Legal Defense Fund quickly sought to intervene and represent as defendants Rep. Henry Hyde, Senators James L. Buckley and Jesse A. Helms. In addition, a lawyer acting as self-appointed guardian ad-litem for all fetuses, sought to intervene. The fetal intervention should have been unacceptable after *Roe v. Wade*, which held that personhood and rights begin at birth. Plaintiffs opposed allowing all the intervenors as defendants, but Judge Dooling allowed intervention, as he had in *Klein*. A. Lawrence Washburn, Jr., a fierce anti-choice lawyer, took the lead, bringing the full force of the anti-choice movement—and the conflict in the Catholic Church between respect for conscience and dogmatism—into the courtroom.

On October 22, 1976, Judge Dooling issued an injunction with nationwide effect requiring the Secretary to inform all federal Medicaid administrators that federal payment was available “for all abortions provided to Medicaid-eligible women by certified Medicaid providers on the same basis as the Department pays reimbursement for pregnancy and childbirth-related services.”³⁷ While no plaintiff class was ever certified, an injunction against the federal defendant had most of the same practical effect. This injunction was appealed to the Supreme Court, but the Court took no action on it until its decisions in the state Medicaid cases. In deciding *Maher* and *Beal* on June 30, 1977, the Court vacated the injunction and sent the case back to the District Court for reconsideration.

On remand after *Maher* and *Beal*, Judge Dooling explained that, while he was bound by the Supreme Court decisions holding that neither the Social Security Act nor the constitution prevented states from limiting Medicaid payments to abortions that were “medically necessary,” he was willing to allow the plaintiffs to make a record demonstrating that the Hyde Amendment, prohibiting federal funding unless the life of the woman was in danger if the pregnancy were carried to term, was different. On August 4, 1977, he lifted his nationwide injunction requiring that Medicaid pay for abortion on the same basis as other medical services. Rhonda recalls that there was a palpable sense of the gravity of the moment and the courtroom seemed particularly cold on that hot August day.

*In November 1977, Jayne Row, a twenty-four year old black woman sought an abortion in South Carolina. Poor and eligible for Medicaid, she could not afford the fee and was denied a legal abortion. She found an illegal abortionist in February, 1978. She sought emergency help at a hospital. Doctors saved her life, by performing a hysterectomy that rendered her sterile.*³⁸

The trial took place intermittently from October 1977 until December 1978. Plaintiff had to distinguish, in practical and constitutional terms, abortions that a doctor would certify as “medically necessary”—the practice already upheld in *Maher*—from the narrow class permitted

³⁷ *McRae v. Mathews*, 421 F. Supp. 533, 543 (E.D.N.Y. 1976).

³⁸ *McRae*, 491 F.Supp. at 655 n. 17.

by the Hyde Amendment's language that limited payment unless the abortion was necessary to save the life of the mother if the pregnancy was carried to term. Plaintiffs presented extensive expert evidence probing the medical choices and risks confronting pregnant women and the doctors who care for them.

Plaintiffs also amended the complaint to add the Women's Division of the United Methodist Church as a plaintiff to include legal claims challenging the Hyde Amendment as a violation of the Establishment and Free Exercise clauses of the First Amendment. The Religion Clause arguments served two purposes. First, they provided an additional answer to *Maher's* holding that denying funding did not burden a constitutionally protected right. Excluding funding from the otherwise comprehensive Medicaid program obviously burdened the right recognized in *Roe*. But, in addition, under the Free Exercise Clause, it is unacceptable to use funding to favor one belief over another. Second, under the Establishment Clause, the State is not allowed to support religious belief with public money or to favor one belief over another. As a political matter, the Religion Clause arguments enabled plaintiffs to expose the heavy hand of religious belief and institutions in the battle over Medicaid and abortion generally. Pro-choice religious organizations, including the Religious Coalition for Abortion Rights, Catholics for a Free Choice, and many religious denominations that rejected the absolutist position banning abortion and understood its intimate connection to women's rights supported these claims.

Plaintiffs did not assert two claims. As feminists, the plaintiffs' lawyers appreciated that gender inequality lay at the heart of the abortion debate. Even though in 1976 absolutist Roman Catholic beliefs about the moral status of the fetus dominated the Congressional and political debate, popular opposition to abortion was also connected to a desire to preserve traditional gender roles in which women remained subordinate to men. Feminists understood that the social construction of pregnancy as naturally or divinely ordained was a key element in the preservation of patriarchy and that women's control of their bodies was a sine qua non of women's equality. But, despite the Supreme Court's recent recognition of women's constitutional claims for equality, plaintiffs did not assert that the Hyde Amendment was a form of gender discrimination. In one of the clearest examples of twisting reality into illusion, in 1974, the Supreme Court had held that discrimination against pregnant women in respect to disability benefits is not sex-based because men and women are not similarly situated with respect to pregnancy.³⁹ If this discrimination is not sex based, it was difficult to argue that discrimination against pregnant people seeking abortions was based on sex. Hence, the strategy focused on showing how decided cases supported the claims and avoided arguing that the Supreme Court had been wrong in the pregnancy discrimination cases.

A second claim that could be made today but was not ripe in 1977 was based on international human rights norms. The notion of human rights as applicable to everyday life rather than to conditions of dictatorship was in its infancy, and there was no international movement for women's human rights. Although even today, women's right to abortion is not yet fully established in international law, abortion to save life and to protect physical and mental health including in cases of rape and incest and fetal abnormality is increasingly recognized by

³⁹ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

international human rights law.⁴⁰ Moreover, in diametrical opposition to the position of the U.S. Supreme Court in the pregnancy cases, the international right to equality for women includes access to health services that only women need.⁴¹ And contrary to the negative rights approach of the U.S. Constitution, nations have not only an obligation to “respect” or not deny or interfere with the exercise of a fundamental civil right, but also a correlative duty to “ensure” or facilitate its exercise.⁴²

The Trial and Findings: Abortion and Women’s Health

Many physicians and other experts experienced with abortion testified about the medical management and risks of pregnancy. For most of the trial, the Hyde standard allowed federal reimbursement only if “the life of the mother would be endangered if the fetus were carried to term.” The 1978 Hyde Amendment, the result of a 5-month battle in Congress that held up the appropriation bill, included two other exceptions: when continued pregnancy would result in “severe and long lasting health damage . . . when so determined by two physicians” and “medical procedures . . . for victims of rape or incest . . . promptly reported to a law enforcement agency or a public health service,” which were eliminated the next year.⁴³ The medical testimony addressed all standards.

Prior to *Roe*, many states criminalized abortion except “for the purpose of saving the life of the mother,” i.e., only for “therapeutic” purposes.⁴⁴ Several doctors and a leading epidemiologist described the medical horrors of illegal abortion complications. Although “therapeutic” abortions were rare, they were far more likely to be offered to white women with

⁴⁰ Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 Hum. Rts. Q. 1 (2003).

⁴¹ Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12: Women and Health, ¶ 14 (20th sess. 1999) (“Other barriers to women’s access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>.

⁴² International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), art. 2(1) (Dec. 16, 1966), available at <http://www.un.org/documents/ga/res/21/ares21.htm> (follow “2200(XXI)” hyperlink). The European Court of Human Rights and numerous human rights treaty bodies have declared various restrictive abortion laws in violation of human rights. For further information on international status of abortion, see University of Toronto Faculty of Law at <http://www.law.utoronto.ca> (last visited May 27, 2009); Center for Reproductive Rights (CRR), at <http://www.reproductiverights.org> (last visited Dec. 1, 2009) (particularly, CRR’s compendium *Bringing Rights to Bear: Abortion and Human Rights* (2008) available under “Resources” hyperlink; then follow “Publications”; then follow “Briefing Papers” hyperlink). Among the notable national decisions, the Constitutional Court of Columbia ruled 5 to 3 in 2006, that international human rights norms and treaties ratified by Colombia prohibit criminalizing abortion when a woman’s life or health is in danger, the pregnancy is the result of rape or the fetus has malformation incompatible with life outside the womb. The court also recognized that, with decriminalization, public health programs must provide abortions to women unable to pay. For an English translation of the decision and commentary upon it, see Women’s Link Worldwide, at www.womenslinkworldwide.org (last visited, April 16, 2009).

⁴³ *Harris v. McRae*, 448 U.S. 297, at 302–03 (1980) (internal quotation marks omitted).

⁴⁴ *Roe v. Wade*, 410 U.S. 113, 118, 138–39 (1973).

private physicians compared with non-white poor women dependent upon public services.⁴⁵ Dr. Christopher Tietze, one the world's preeminent authorities on human fertility reported his study of the discriminatory effect of the 1968 rubella epidemic in New York City. While rubella, which causes fetal deformity, did not technically justify abortion under the life-only abortion law, private patients with rubella were certified for abortion, while poor women, served by the same doctors, were not.⁴⁶

Psychiatric reasons provided the most common indication of a need for abortion under the restrictive criminal law.⁴⁷ Prior to the legalization of abortion in New York in 1970, NYU Medical Center, which serves the insured patients with private physicians, had an established program to certify abortion as necessary for psychiatric reasons. By contrast, Bellevue Hospital, New York's premiere public hospital, staffed and governed by the same NYU doctors, had no similar process for poor women. In 1969, however, Judith Belsky, a young psychiatrist, was assigned to consider psychiatric indications among poor women.⁴⁸ A soft-spoken and profoundly moving witness, Dr. Belsky provided the Court with redacted copies of examples from the hundreds of lengthy letters she wrote describing in heart-breaking detail the situations facing the poor women served at Bellevue. She certified that abortion was necessary to save the life of every woman she examined. You could hear a pin drop in the courtroom during her testimony. The district court ultimately found, "[P]atients who could afford competent medical and psychiatric attention were significantly more likely to have applications for abortion approved than were patients whose limited means denied them timely access to adequate psychiatric and medical attention."⁴⁹

The physician witnesses offered detailed information illustrating a broad range of conditions that could make pregnancy potentially life-threatening for women, including high blood pressure, anemia, diabetes, obesity, thrombosis, cancer, psychiatric conditions, multiple sclerosis, renal disease, varicose veins, bladder infections, youth, age, and others.⁵⁰ At the same time, none of the doctors would advise a woman that she must have an abortion to save her life. If the woman wanted a child, and was willing and able to meet demanding conditions, the doctors would work with her. But, as the district court recognized, when pregnancy is complex and requires extraordinary medical response and patient cooperation; risks are greatly enhanced if the woman does not want to be pregnant.⁵¹

Doctors agreed and the district court found that it is almost never possible to predict early in a pregnancy whether a particular condition is "even relatively certain to create an unacceptably high risk of mortality at a later stage in the pregnancy."⁵² Even when doctors examined the records of women who had died during pregnancy, they reported that early in the

⁴⁵ *McRae v. Califano*, 491 F. Supp. 630, 638 (E.D.N.Y. 1980).

⁴⁶ *Id.* at 637-39.

⁴⁷ *Id.* at 663.

⁴⁸ *Id.* at 664.

⁴⁹ *Id.* at 663.

⁵⁰ *Id.* at 669-78.

⁵¹ *Id.* at 671-72.

⁵² *Id.* at 665.

pregnancy they could not have certified that the woman's life would be threatened.⁵³ The district court found the severe and long lasting health damage standards unworkable.⁵⁴

*The woman who entered the Planned Parenthood clinic in San Antonio, Texas . . . seeking an abortion was not promiscuous, single, or careless. She was the opposite of the "bad-girl" stereotype anti-abortionists favored. "She [was] a poor woman from a small town, happily married, the mother of two, and a woman who practiced birth control regularly but was pregnant nonetheless." She had cancer and her doctor would not begin treatment while she was pregnant. Because of the Hyde Amendment, "Medicaid would not pay for her abortion because the pregnancy was not considered a direct threat to her life, despite her cancer. In the end, the doctor who diagnosed her cancer paid for her abortion out of his own pocket."*⁵⁵

The doctors also testified and the district court found that "poverty is medically significant."⁵⁶ Poor people are more likely than people with money to suffer from physical disease and lack access to medical care. Both factors can complicate pregnancies. For example, Dr. Bingham, Director of a Planned Parenthood outpatient abortion clinic, testified that "poor women, because their health needs were greater, their level of nutrition lower, their levels of anemia worse and likely to worsen as pregnancy continued, were at significantly greater risk in their pregnancies than women generally." Maternal mortality is more than three times greater for black women than for others.⁵⁷ He noted that abortions "possibly identifiable as abortions of convenience were infrequent among [M]edicaid patients."⁵⁸

With respect to young women, Judge Dooling found that "pregnancy is a pathological condition physiologically undesirable for the female under fifteen years,"⁵⁹ and dangerous for the resulting child because of the increased rate of low birth weight (or premature birth) that is "not only related to higher mortality rates, but also to grave birth defects."⁶⁰ Nor can these risks be alleviated by prenatal care.⁶¹ Recounting the testimony on the relation between adolescent pregnancy, suicide, and other emotional disturbance as well as the social, educational and

⁵³ *Id.* at 666.

⁵⁴ *Id.* at 668.

⁵⁵ The example in this paragraph comes from Jan Jarboe Russell, Editorial, *Hyde Amendment Patently Unfair*, Seattle Post-Intelligencer, Aug. 2, 2002, at B7.

⁵⁶ *McRae*, 491 F. Supp. at 668.

⁵⁷ *Id.* at 665.

⁵⁸ *Id.* at 668.

⁵⁹ *Id.* at 683.

⁶⁰ *Id.* at 682.

⁶¹ *Id.* at 683.

economic deficits of early pregnancy, the court found that pregnancy “for the total adolescent group [is] socially and emotionally undesirable.”⁶²

The doctors underscored that stress exacerbates the risks of pregnancy especially for poor women. Stress can transform even common problems like borderline anemia, obesity, or vomiting into life-threatening conditions.⁶³ One welfare recipient and local New York City leader testified to her desperate attempts to self-abort before abortion was legal by using poison and throwing herself down a long flight of stairs. She also demonstrated the enormous stress of poverty. In a moment of unplanned truth, when Nancy Stearns asked her to tell the court about her life as a woman on welfare, she broke down as she said, “The mailbox.” Once recovered, she said: “You never know what you are going to get in the mailbox,” referring to the fear of termination notices.

The defendants offered only one medical witness, Dr. Bernard J. Pisani, former head of OB-GYN and then Emeritus at St. Vincent’s Hospital in New York City. Although opposed to abortion, he appeared an honest, humane, and ethical doctor, leading Rhonda to take some risks in cross-examination. Specifically, when asked whether it was impossible to predict early in pregnancy which woman would encounter life-endangering circumstances and whether poor women were at greater risk, he agreed. He also agreed with the pro-choice doctors as to the significance of a woman’s attitude to the safety of her pregnancy. Further, as to the percentage of poor women who would face such life-endangering conditions, he said, without hesitation, 15% by contrast to about 5% for middle class women.⁶⁴ As such, he confirmed the factual foundation of the case that the life-endangering standard was unworkable to protect poor women’s lives.

On the second Hyde Amendment’s rape and incest exceptions, the experts testified and the district court found that “the report requirement excludes a large part of rape victims from Medicaid coverage. The very young, those in fear of retaliation, those inhibited by a natural revulsion from recounting what happened, and those who fear unsympathetic and uncomprehending treatment by the authorities tend not to report rape to law enforcement agencies or to public health services.” The court noted that only sixty-one such abortions had been certified nationwide. It was estimated that pregnancy follows rape in approximately 7% of cases and that 250,000 rapes are committed in the U.S. per year. Judge Dooling also recited “the devastating consequences of rape, the most scarifying violation of self.”⁶⁵ Based on testimony and evidence, the court likewise found that “[i]ncest . . . of its very nature is reported only by exception.”⁶⁶

⁶² *Id.* at 683. *See generally id.* at 680–86.

⁶³ *Id.* at 671.

⁶⁴ *Id.* at 669.

⁶⁵ *Id.* at 687.

⁶⁶ *Id.* at 689.

Rejecting the idea that poor women could turn to charity, the court also found that poor women denied Medicaid coverage for abortion “have no significant alternative to Medicaid for legal abortions.”⁶⁷ The average cost of first trimester Medicaid-reimbursed abortions in the United States in 1976 was equal to the average monthly welfare payment and more than five times the \$48 monthly payment in Mississippi. Testimony from women eligible for Medicaid “established that even under New York’s comparatively generous public assistance provision, welfare recipients must live at a miserable and humiliating level of bare subsistence, and that they are without means to pay for abortion.”⁶⁸

The Trial and Findings: Abortion and Religion

Plaintiffs asserted that for many women of religious faith, the decision to have an abortion was guided, and in some cases compelled, by that faith. Concerned not to limit the free exercise right only to traditionally religious women, plaintiffs argued that the abortion decision was one of conscience for many women. Relying on *Sherbert v. Verner*,⁶⁹ which held that a Seventh Day Adventist could not be denied unemployment insurance because she was not available to work on Saturday, plaintiffs argued that funding for medical treatment for pregnant women could not favor one religious belief or conscientious choice over another.

With respect to the Establishment Clause claims, the plaintiffs relied significantly on the earlier contest over the teaching of creationism as opposed to evolution in the schools.⁷⁰ Plaintiffs provided evidence that the legislative history of the Hyde Amendment, and the particularly volatile, religiously-driven politics surrounding it, showed that the Amendment’s primary purpose was to enact a contested theological view on the inviolability of the fetus. Plaintiffs asserted that the primary effect of the Hyde Amendment was to advance one particular religious belief as against other contrary theological and non-religious beliefs and that all of the secular effects—on the life and health of women, the public fisc, and the integrity of the medical profession—were harshly negative. All of this created an impermissible entanglement of Church and State.

Judge Dooling allowed the plaintiffs and the intervenors wide latitude to present witnesses and extensive evidence on the Religion Clause claims. Reverend William B. Smith, the intervenors’ witness and an official theological spokesperson for the U.S. Bishops, testified that “abortion and infanticide are abominable crimes,” that “human life begins with fertilization,” and that if doubt exists whether the fruit of conception is a human being, “it would be objectively a grave sin to dare to risk murder through abortion.”⁷¹

Reverend John Philip Wagaman, past president of the American Society of Christian Ethics, explained the “mainstream” Protestant view of abortion and the obligation of responsible parenthood. “[N]early no aspect of life is more sacred, closer to being human in relation to God, than bringing new life into the world . . . [and] human beings must be sure that the conditions

⁶⁷ *Id.* at 659.

⁶⁸ *Id.* at 659–60.

⁶⁹ 374 U.S. 398, 404–06 (1963).

⁷⁰ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁷¹ *McRae*, 491 F. Supp. at 693.

into which the new life is being born will sustain that life in accordance with God's intention for the life to be fulfilled." With respect to the fetus, "there is not a fully human person until that stage in development where someone has begun to have experience of reality" as "the covenant subsists between God as the Creator of reality and those who have begun to experience the reality which God has created."⁷²

Rabbi David Feldman testified that for Conservative and Reform Judaism that "[w]hen a woman's life or health is threatened and abortion . . . becomes mandatory . . . [and] constitutes the performance of a religious duty on her part . . . oftentimes more important than the ritual observances." Reform Judaism allows consideration of a broad range of factors affecting a woman's well being, including mental anguish. The Rabbi may offer counsel, "but in every case the final decision is the woman's." In Jewish theology, the fetus is not a person until birth.⁷³ By contrast, the intervenor's witness, Rabbi Arron M. Schreiber, testified that American Orthodox Jewish scholars consider abortion prohibited except where the mother's life is clearly threatened. Since a person's body belongs to God, "neither the life or the fetus or the body of the mother is regarded as belonging to the mother, and the decision is not in her discretion."⁷⁴

Judge Dooling appeared to resonate most deeply with Dr. James E. Wood, Jr. Executive Director of the Baptist Joint Committee on Public Affairs who testified that because of the sacredness of bringing life into the world, "[t]he keynote in Baptist expression on the issue of abortion is liberty of conscience, and advocacy of a public policy that allows for the right of persons to make the abortion decision for themselves. The Baptist Church considers liberty of conscience itself the most precious single principle."⁷⁵ By contrast, the Southern Baptist Convention opposed abortion.

Plaintiffs sought to demonstrate that in 1977, when the Hyde Amendment was adopted, its primary purpose was to advance a religious, and predominantly Catholic, view of abortion.⁷⁶ The opposition of the Catholic Church to women's reproductive rights has a long history. But, after the Supreme Court's 1965 decision in *Griswold v. Connecticut*, affirming the constitutional right of married people to use contraception, the Church resolved that, even though artificial contraception is a mortal sin in the eyes of the Church, the Church should discourage contraception through education and example, rather than efforts to mobilize state criminal authority to restrict access to contraception.⁷⁷

⁷² *Id.* at 700–01.

⁷³ *Id.* at 696–97.

⁷⁴ *Id.* at 695.

⁷⁵ *Id.* at 697.

⁷⁶ Kristen Luker, *Abortion and the Politics of Motherhood* (1984?). In the last three decades opposition to abortion has broadened to include fundamentalist Protestants and most of the Republican Party.

⁷⁷ Charles E. Curran, *Toward an American Catholic Moral Theology* 29 (1987).

By contrast, following *Roe v. Wade*, its 1975 Pastoral Plan for Pro-Life Activities, approved by the National Conference of Catholic Bishops, included a well-funded public policy program, tightly coordinated at federal, Diocesan, and grass roots levels, and directed at legislative, judicial, and administrative actors to prevent as many abortions as possible.⁷⁸ The Pastoral Plan sought not only “to persuade all residents that a constitutional amendment is necessary,” but also “[t]o convince all elected officials and potential candidates that ‘the abortion issue’ will not go away and that their position on it will be subject to continuing public scrutiny.”⁷⁹

The Pastoral Plan worked. “[T]o a very considerable extent, Roman Catholic clergymen have encouraged their parishioners to participate actively in the political effort to have a right to life amendment passed and to support the Hyde [A]mendment.”⁸⁰ The decision found that under the Pastoral Plan, the Church was “demonstrably resolute, well-organized, and well-supported by voluntary workers, and it has required and obtained very substantial sums of money.”⁸¹

While this evidence demonstrated the predominance of the Catholic Church in the political anti-abortion campaign in various parts of the country, the debates on the Hyde Amendment, reflecting the ideation and pressure of a religiously motivated and organized constituency, were most telling. Judge Dooling concluded: “the pro-life effort, of which the organized Roman Catholic effort has been the most active component, has made use of the political process, and played a significant part in bringing about congressional legislation on the subject.”⁸²

There is little doubt that this case caused Judge Dooling anguish largely, we think, about the direction of the Church. One day he announced in court that he was receiving lots of mail, some of which was very thoughtful and some of which said that “hanging would be too good for me.”

The District Court Decision

Judge Dooling concluded his detailed opinion, issued on January 15, 1980, with a ringing defense of the idea that the constitution prohibits exclusion of abortion from Medicaid. He

⁷⁸ *McRae*, 491 F. Supp. at 703.

⁷⁹ *Id.* at 705 (internal quotations omitted).

⁸⁰ *Id.* at 705.

⁸¹ *Id.* at 706–07.

⁸² *Id.* at 727–28. At an earlier point, the court opined that:

[The] combination of religious belief and principle on the part of some with a fear of political reprisal on the part of others, and that the narrow votes in both houses are open to the inference that in one or the other way the religious factor was *decisive* of the issue for enough legislators to affect the outcome of the voting.

Id. at 724–25 (emphasis added).

issued an injunction requiring notice and federal reimbursement of medically necessary abortions:

A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation.

Judgment must be for the plaintiffs.⁸³

Judge Dooling ruled that women's health was the central concern of both Medicaid and *Roe*. By contrast *Beal* and *Maher* were "cases in which there was no health care need for an abortion."

To overrule the medical judgment, central as medical judgment is to the entire [M]edicaid system, and withdraw medical care at that point because the medically recommended course prefers the health of the pregnant woman over the fetal life is 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.⁸⁴

Further, "[t]he 'Hyde [A]mendments' cannot be sustained under the less demanding test of rationality . . . because the state's interest in fetal life, though growing as gestation advanced toward childbirth, could not be advanced at the cost of increased maternal morbidity and mortality among indigent pregnant women."⁸⁵

Judge Dooling accepted the free exercise claim, emphasizing that the abortion decision is one of conscience for all women under the Fifth Amendment and that the First Amendment provided additional protection to those with "religiously formed conscience."

Judge Dooling's disposition of the establishment claims reflected internal struggle. On the one hand, his detailed findings concerning the religious basis of the belief that the fetus is a human being as well as the predominance of institutional religious support for the Hyde Amendment strongly supported the argument that that the primary purpose and effect of the Hyde Amendment was to impose by law a religious view of the moral status of the fetus. He

⁸³ *Id.* at 742.

⁸⁴ *Id.* at 737.

⁸⁵ *Id.* at 738–39.

nonetheless rejected plaintiffs' Establishment Clause challenge. The Hyde Amendment, he wrote, reflects "a view that was reflected in most state statutes a generation ago." The purpose of the Hyde Amendment is "prevention of abortions, not an identifiably religious purpose, or one that became religious because, after 1973, the most vigorous spokesmen for it put their case in religious terms, and grounded them in religious reasons." Disapproval of abortion "reflects a general and long held social view."⁸⁶

Plaintiffs had not anticipated this result nor sought to illuminate the "traditionalist" reasons against abortion, and it is clear that Judge Dooling's use of the term, as well as the Supreme Court's after him, was vague as well as historically dubious. Prior to the 1980s, few American historians had explored the basis for the criminalization of abortion, which occurred only in the mid to late nineteenth century.⁸⁷ Some of the historical reasons for condemning abortion were anachronistic, for example the desire of the newly organized allopathic medical profession to cement their dominance by criminalizing non-allopathic practitioners, including homeopaths, chiropractors, midwives and abortionists. Other reasons for condemning abortion were no longer socially acceptable, for example a eugenic desire to stop white Protestant women from obtaining abortions out of fear that immigrants would out-breed WASPs. And some advocates of restriction took up the cause of the fetus though this theme was minor. When deconstructed, the core "traditionalist" reason justifying abortion restrictions was the belief that motherhood was women's central role, compelled by Divine Ordinance and the nature of things. Judge Dooling's opinion, however, bristles with opposition to the idea that women should be subordinated by the State to unwanted pregnancy. Perhaps plaintiffs should have taken the establishment argument further and attempted to demonstrate more precisely the discriminatory view of women that underlay the Church's absolutist position on conception. This strategy was risky for a number of reasons, including the slipperiness of motivational analysis. Laboring under the disconnect created by the Supreme Court in *Aiello* between gender discrimination and pregnancy made it more difficult to argue that this "tradition" was not its own justification.

In retrospect, was it wise to press the religious claims, even though they were rejected? Establishment Clause claims are often divisive and difficult to win. Judge Dooling found that in the 1970s, the Catholic Church played the central leadership role in promoting laws designed to prevent as many abortions as possible and that the arguments to restrict funding in Congress and in the larger constituency were rooted in religious doctrine and ideation.

The Establishment Clause arguments were plausible and, win or lose, we thought it important to make visible the profoundly religious character of the Hyde restriction and the dangers of the largely unchallenged power of the Church to impose its will on women, politicians, and the polity at large. It was also important to make clear that this battle was not simply between faith and non-faith. Strongly pro-choice religions exist with distinct views on the moral status of the fetus and of women as decision makers. Ultimately respect for the conscience of women, believers or not, is at the core of the abortion debate.

⁸⁶ *Id.* at 741.

⁸⁷ Brief of 250 American Historians as Amici Curiae in Support of Planned Parenthood of Southeastern Pennsylvania, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (No. 91-744, 91-902), 1992 WL 12006403.

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In 1979, after the *McRae* trial ended, the fundamentalist Protestants aligned themselves with the Catholic Church on the abortion issue and the Republican Party made opposition to abortion part of its successful bid for power beginning in the late 1980's. Subsequently, despite the even more powerful role today of religion in reproductive politics and more broadly, an Establishment challenge to restrictions on reproductive rights would be even more complex.

The Supreme Court Decision

Although plaintiffs won below, we sought, with advice from the Supreme Court clerk's office, expedited review. Winning parties protected by an injunction do not ordinarily seek review. But, since the Court had already agreed to hear an Illinois case holding the Hyde Amendment unconstitutional,⁸⁸ we believed that the Supreme Court would be more likely to declare the Hyde Amendment unconstitutional if it had before it the extensive factual record developed in *McRae*. Furthermore, the First Amendment arguments might appeal to several Justices and influence the decision as a whole. On Feb. 19, 1980, the Court granted expedited review at the same time as it denied the federal government's request for a stay of the injunction by a vote of 6 to 3, including Stevens, Stewart and White, all part of the *Maier* majority.⁸⁹

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Briefs were due on March 18, 1980, with oral argument set for April 10. Expedited appeal meant a flurry of intense work. It was no small task to reduce a decision of over 600 double-spaced pages and a trial transcript of 5,000 pages produced over thirteen months of trial testimony and accompanied by 400 voluminous documents to a concise and persuasive brief as well as an Appendix that requires negotiation with the defense lawyers. Coordinating the various organizations filing briefs amici curiae as friends of the court and helping to make each brief as effective as possible was also a major undertaking. Eventually, briefs in support of the plaintiffs were filed by a large coalition of Protestant and Jewish religious groups (as well as individual briefs by the Presbyterians and the Churches of Christ), a large coalition of civil rights, labor and legal organizations, a coalition of women's organizations, three state attorneys general, and a group of law professors. The defendants were supported by The United States Catholic Conference, several members of Congress, the Legal Defense Fund for Unborn Children, and the Coalition for Human Justice.

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Comment [JBL4]: Can you rephrase this sentence? The two gerunds make in the first clause make the sentence awkward. In fact, is this three clauses or two? Please note the verb agreement issue.

Comment [SMW5]: I agree with both John's comments if you can tweak this text.

Comment [JBL6]: Make both of these sentences into active voice so as to better identify the players.

The decision that Rhonda should do the oral argument was not controversial. She had taken the lead throughout the case and had previously argued and won a case in the Supreme Court involving the firing of African-American teacher aides on account of having out-of-wedlock children. We considered the possibility of recruiting an established Supreme Court advocate or constitutional scholar. But facts mattered and it would have been difficult for a new

⁸⁸ *Zbaraz v. Quern*, 469 F. Supp. 1212, 1220 (N.D. Ill. 1979), *rev'd sub nom. Williams v. Zbaraz*, 448 U.S. 358 (1980). When the Hyde Amendment was adopted, Illinois announced that it would only fund abortions for women eligible for Medicaid for whom federal matching funds were available. Legal services lawyers in Chicago sued Illinois, arguing that the federal Medicaid act and the constitution required the state to pay for all medically necessary abortions up to the point of viability. Ultimately, the district court ordered the state to pay on constitutional grounds, finding that the effect of denying Medicaid payment would "be to increase substantially maternal morbidity and mortality among indigent pregnant women." 469 F.Supp. at 1220.

⁸⁹ *Harris v. McRae*, 444 U.S. 1069 (1980).

person to command the laboriously developed wealth of medical and religious facts, particularly on such a short schedule. Beyond that, many of us felt that feminists who understood the issue legally, politically, and personally should, where possible, argue and be in control of such cases and would do a better job than someone more experienced (then mostly men) imported for the purpose. Sylvia initially favored co-counsel Harriet Pilpel, an extraordinarily effective and insightful advocate for reproductive choice. However, Harriet had not been involved in the nitty-gritty of the trial. Sylvia did not believe herself to be an effective oralist, and no one disagreed. Janet Benshoof, who went on to argue important reproductive freedom cases in the Supreme Court, would also have done a great job, but at the time she was relatively new to reproductive freedom practice and had not been able, by virtue of her own pregnancy, to participate consistently in the case.

On April 21, 1980, the Supreme Court heard argument. Warren Burger was Chief Justice. Sandra Day O'Connor had not yet joined the Court. Plaintiffs needed to persuade two Justices from the *Maher* majority to find that the Hyde restrictions were constitutionally different. Justices Stevens, Stewart, or possibly White, all of whom had refused the government's motion to vacate Judge Dooling's nationwide injunction, were possible votes.

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Wade H. McCree, Jr., Solicitor General of the United States, defended the Hyde Amendment while Representative Hyde looked on from the front row. McCree understood that the core question was whether the Equal Protection Clause prohibited Congress from excluding medically necessary abortions from a program that would otherwise cover them. His argument was straightforward. He argued that the question was purely legal and Dooling's extensive findings of fact were irrelevant. Because it was only a question of funding, not criminal or other prohibition, *Roe* did not control, and thus the classification should be upheld if any rational basis supported it. McCree identified that rational basis as "encouraging childbirth."

Most of the Justices' questions were friendly efforts to bolster the points McCree had made, but several colloquies were more difficult. McCree easily conceded that denying Medicaid payment for abortion ultimately cost the government money and that some women needing abortion would not get them. When asked by Justice White whether Congress could deny Medicaid funding for abortion when the pregnant woman would die, McCree hesitated before agreeing that funding could be denied.⁹⁰ Justice Stevens then pressed him on why the government's brief and the oral argument avoided the term "normal childbirth" used to describe the legitimate governmental interest in *Maher*. McCree conceded that some pregnancies, such as those involving fetal deformity or complications, would not be "normal," and he acknowledged that the interest in promoting childbirth was a more general interest in "preserving potential human life."

By comparison to the generally soft treatment of McCree, Justices Stewart and Rehnquist quickly interrupted Rhonda on an obvious and minor question, asking whether the constitutional issue was the same if the restriction were in an appropriations rider or a statute. Firmly, she asserted that *Maher*, where plaintiffs sought expansion of Medicaid coverage for "elective" abortion, was different from *McRae*, where plaintiffs sought to have abortion treated like every other covered medically necessary service. Having decided to focus not on the constitutional

⁹⁰ Harris v. McRae, 448 U.S. 297, 354 n.6 (1980) (Stevens, J., dissenting).

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rights at stake (since that didn't matter in *Maher* and would be argued by the Illinois plaintiffs), she emphasized that the abortion exclusion was irrational under the constitutional scheme established by *Roe* and the principle that the government should not coerce people into avoidable harm. Justice Rehnquist, quickly interrupted with a series of questions playing on the word rational. "I take it you mean literally those who voted to adopt the Hyde Amendment belong in the looney bin." Rhonda emphasized that she was talking about constitutional and not subjective irrationality. Rehnquist persisted: "The Congress "just went off the wall?"

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Questions that did not go to the heart of the dispute consumed most of Rhonda's thirty minutes, "Do you think that the evidence taken by a single federal judge . . . was intended to be allowed to invalidate a judgment of the elected representatives of the people under the equal protection clause?" Any law student knows that a core function of constitutional judicial review gives judges the power to override unconstitutional legislative conduct. Justice Stewart extensively pressed the point that even if the exclusion were irrational, Congress should be given the chance to decide whether it would rather expand the coverage to include abortion or abolish the entire Medicaid program. Rhonda pointed to an earlier case where standards had been set for judicially expanding benefits, and Justice Brennan intervened to clarify that the case addressed reducing not expanding funding. One Justice asked whether the fetus was a person under the Constitution, a matter clearly settled by *Roe*. Rehnquist asked whether Medicaid could exclude coverage for drug addiction, and another justice asked whether the right to possess pornography in the privacy of one's home implied a right to buy it.

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All this questioning left little time for discussion of Judge Dooling's medical findings or the First Amendment arguments that were so central to the plaintiffs' case. Some of the questions were predictable: How might one distinguish the Hyde Amendment from the prohibition on murder, since the latter also stemmed from a religious prohibition? Rhonda emphasized that the decision required a fact-based assessment of the theocratic nature of the belief and the degree of religious support for it at the time. Despite religious origins, the prohibition against murder is unanimously accepted and thus clearly secular today. To the query as to whether "religiously motivated people wouldn't be free effectively to lobby Congress to enact [such] legislation," she distinguished the right to lobby from the Court's obligation to nullify a religious enactment. Justice Rehnquist reverted to personalizing the legislature rather than examining the legislation: "[D]on't you have to say that the Congressmen were biased, religiously biased?" "And if Judge Dooling had ruled the other way, he would have been biased?" Justice Burger concluded the session with the question whether the exception for ritual use of wine contained in the federal Prohibition law was unconstitutional, providing Rhonda an opportunity to distinguish legitimate accommodation from imposition of religion through selective funding.

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Comment [SMW7]: I don't think using the shorthand works here – it looks like typos – I would delete from here to the end of the paragraph – let's talk if you disagree. would delete note 91 too – no real source given

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The argument, more a sparring game than a probing inquiry, suggested that of the *Maher* majority, all but Justice Stevens and possibly Justice White, had made up their minds to uphold the Hyde Amendment. Justice Blackmun's notes on the argument and on the comments of the Judges during their conference on the case appear to bear that out. In response to Justice Steven's questioning he noted that Stevens would join the majority. In conference, three of the majority Justices saw no meaningful distinction from *Maher*.

⁹² *Harris*, 448 U.S. at 315.

The decision, written by Justice Stewart for Burger, Rehnquist, Powell, and White, begins by framing the constitutional issues so as to leave out the plaintiffs' core claim and the one that distinguished *Maher*: that excluding abortion from the otherwise comprehensive Medicaid program violated equal protection. The Court answered the quite different question: "The principle recognized in *Wade* and later cases—protecting a woman's freedom of choice—did not translate into a constitutional obligation" to subsidize abortions,⁹² and then reiterated its decision in *Maher*. Ignoring the medically necessary nature of the excluded abortions, the majority ruled: "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."⁹³ "It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools."⁹⁴

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Near the end of the opinion, the Court addresses the question actually posed: whether a rational basis existed for excluding medically necessary abortions from the otherwise comprehensive Medicaid program. Ignoring one of *Roe*'s pillars, it held: "[T]he Hyde Amendment bears a rational relationship to its legitimate [state] interest in protecting the potential life of the fetus . . . Abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of potential life."⁹⁵

It was not a surprise that the majority also reversed Judge Dooling's innovative effort to establish pregnant adolescents as a suspect class. Relying on its then recent decision excluding discriminatory impact from constitutional protection,⁹⁶ it held that the Hyde Amendment "only" affects, but did not intend to harm them. The Court then avoided decision on the free exercise claim on the ground that plaintiffs lacked an individual pregnant woman plaintiff despite more liberal standing requirements in First Amendment cases. As to the Establishment Clause claim, the Court echoed Judge Dooling: although "the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church," it is as equally a "reflection of 'traditionalist' values toward abortion."⁹⁷

Four Justices—Stevens, Brennan, Marshall, and Blackmun—dissented. Each made different points. Justice Stevens distinguished *Maher*,⁹⁸ stating that in *McRae* where the program covered the needed service, *Roe v. Wade* controlled because a woman's constitutional right to protect her health trumped any interest in protecting unborn life and the harm inflicted

⁹³ *Id.* at 316.

⁹⁴ *Id.* at 318 (citations omitted).

⁹⁵ *Id.* at 324–25.

⁹⁶ *Washington v. Davis*, 426 U.S. 229 (1976).

⁹⁷ *Harris*, 448 U.S. at 319–20.

⁹⁸ *Id.* at 350 (Stevens, J. dissenting).

“is tantamount to severe punishment.”⁹⁹ While fiscal considerations “may compel certain difficult choices . . . ironically, the exclusion of medically necessary abortions harms the entire class as well as its specific victims . . . [because] the cost of an abortion is only a small fraction of the costs associated with childbirth.”¹⁰⁰ And he concluded, “[i]n my judgment, these Amendments constitute an unjustifiable, and indeed blatant, violation of the sovereign’s duty to govern impartially.”¹⁰¹

Justice Brennan, joined by Justices Blackmun and Marshall, acknowledged that *Roe* did not stand for the proposition that “the State is under an affirmative obligation to ensure access to abortions for all who may desire them.” Rather, as in *Maher*, “the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman’s freedom to choose whether to have an abortion.”¹⁰² For Brennan, “the coercive impact of the congressional decision to fund one outcome of pregnancy—childbirth—while not funding the other-abortion . . . is entirely irrational either as a means of allocating health-care resources or otherwise serving legitimate social welfare goals. And that irrationality in turn exposes the Amendment for what it really is—a deliberate effort to discourage the exercise of a constitutionally protected right.”¹⁰³ This hostility to abortion was not imposed “with equal measure upon everyone in our Nation, rich and poor alike. . . . [I]t is not simply the woman’s indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government’s unequal subsidization of abortion and childbirth. . . [b]y [which] the Government literally makes an offer that the indigent woman cannot afford to refuse.”¹⁰⁴

Justice Marshall’s passionate, characteristically reality-based, separate dissent details the potential impact on poor women denied reimbursement in 98% of cases, emphasizing the danger of “well-financed and carefully orchestrated lobbying campaigns” that produced the Medicaid restriction.¹⁰⁵ “The Court’s opinion studiously avoids recognizing the undeniable fact that for women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether.”¹⁰⁶ Moreover, under the Hyde Amendment, “one can scarcely speak of ‘normal childbirth,’” and thus the Hyde Amendment must fail even the minimal rational-basis standard of review.¹⁰⁷ Justice Marshall also reiterates his critique of the Court’s “two-tiered” equal protection jurisprudence, which ignores cases like this one where “the

⁹⁹ *Id.* at 351–54.

¹⁰⁰ *Id.* at 355.

¹⁰¹ *Id.* at 356–57.

¹⁰² 448 U.S. at 330 (Brennan, J., dissenting).

¹⁰³ *Id.* at 330 n.4.

¹⁰⁴ *Id.* at 332–34.

¹⁰⁵ *Id.* at 337 (Marshall, J. dissenting).

¹⁰⁶ *Id.* at 338.

¹⁰⁷ *Id.* at 341, 344.

burden . . . falls exclusively on financially destitute women,” and stresses that the “‘devastating impact on the lives of minority racial groups must be relevant’ for purposes of equal protection analysis.”¹⁰⁸

Justice Blackmun’s angry one paragraph dissent incorporated excerpts from his dissents in *Beal* and *Maher*: “There is ‘condescension’ in the Court’s holding that ‘she may go elsewhere for her abortion’; this is ‘disingenuous and alarming’; the Government ‘punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound’; the ‘financial argument, of course is specious’”

“A 25-year-old welfare mother with four children under 7 years old woke up in her Queens home . . . and wondered if Medicaid would pay the \$200 fee for the abortion she was to have several hours later. She was already aware that less than 24 hours earlier the United States Supreme Court had ruled that congress need not allocate funds for abortions for poor women, even . . . when the procedure is judged medically necessary.”

“‘I was scared this morning,’” she said. She was able to have the abortion because the decision did not take effect until returned to the district court.

“[A]sked what she would have done if Medicaid funding had not been available to cover the \$200 fee for the procedure,” she said, “‘I would have had to raise the money myself. . . . ‘My family doesn’t have it, so I probably would have used my welfare check and then eaten from house to house. I couldn’t have managed. I love the four children I have, but sometimes I don’t have enough milk and diapers for them. So I couldn’t clothe another baby. I could barely try to feed it, and I wouldn’t want to see another child suffer.’”¹⁰⁹

The Impact of McRae on Constitutional Doctrine

Maher and *McRae* allow the state to restrict access to abortion unless its rules are “unduly burdensome” on the theory that funding is not a state-created burden but rather a private matter--the fault of the poor woman. That pronouncement is a far cry from *Roe*’s affirmation that restrictions on women’s right to abortion must be strictly scrutinized and permissible only in accord with the trimester framework. While some advocates thought that the undue burden test would remain confined to special cases, the evolution of this standard, which permits restriction that can’t meet the strict scrutiny test, illustrates the way that restrictive language in one context can bleed into a general rule in a conservative court.

The “undue burden” language first appeared in June 1976, in a decision holding that states could require parental consent in the case of minors seeking abortion, so long as the State provided an expeditious judicial process to waive consent if the girl was mature or if it would not be in her best interest to notify the parents.¹¹⁰ Many reproductive rights lawyers hoped the

¹⁰⁸ *Id.* at 343–44.

¹⁰⁹ The information about this woman comes from **Error! Main Document Only.**Nadine Brozan, *High Court’s Abortion Ruling Stirs New Worries and Confusion*, N.Y. Times, July 4, 1980, § 1 (Style Desk), at 10.

¹¹⁰ *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

undue burden standard would apply only to the increasingly politicized issue of abortion funding. But, subsequently, in 1983, Justice O'Connor, in dissent, urged that undue burden be used to evaluate even "state-created" restrictions on access to abortion.¹¹¹ In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court, with Justice O'Connor in the majority, extended the "undue burden" standard to all abortion restrictions even in the first semester,¹¹² resulting in approval of regulations sharply restricting access to abortion. It is a cruel irony that *Casey* also contains the most ringing language about women's right to conscience in the abortion context,¹¹³ echoing the language used by Judge Dooling in *Klein* and *McRae*.

Comment [JBL8]: Any particular reason for both italics and quotations marks? State-created does not seem to appear in the opinion. Ditto - SMW

The impact of *McRae* on the rights of women who are dependent on government programs did not stop with Medicaid funding. In *Rust v. Sullivan*, the Court extended *McRae* to the First Amendment context,¹¹⁴ upholding the Reagan Administration's regulations prohibiting doctors in Title X-funded family planning clinics from counseling or referring a woman seeking abortion to safe, available services, including pointing her to the Yellow Pages. Instead, contrary to medical ethics, the regulations required the doctor to provide information about childbirth services even when the woman asserts that she needs help in ending her pregnancy. Despite longstanding precedents that government benefits could not be conditioned on an individual's sacrifice of free speech rights, *Rust*, relying on *McRae*, upheld the restrictions.¹¹⁵

Harris v. McRae was a critical point in reproductive rights as well as writing the poor out of the entitlements the constitution is supposed to guarantee. It is rich as a matter of constitutional theory and doctrine, and it presents a profound challenge to the notion of equal justice. Though Medicaid funding was far from a settled constitutional issue in the 1970s, no leading constitutional text presents it as a major case. Most texts mention it briefly in a discussion of substantive due process and abortion and note uncritically the distinction between constitutional rights and government funding for constitutional rights.¹¹⁶

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¹¹¹ *Akron v. Akron Ctr. For Reprod. Health*, 462 U.S. 416, 464 (1983).

¹¹² 505 U.S. 833 (1992) (see chapter ___ infra, discussing *Casey*).

¹¹³ *Id.* at 872–73.

¹¹⁴ 500 U.S. 173 (1991).

¹¹⁵ *Id.* at 196.

¹¹⁶ See, e.g., Chester James Antieau & William J. Rich, *Modern Constitutional Law* § 24.00, at 207, § 44.23, at 471 (2d ed. 1997) (including *Harris v. McRae* in a discussion about the limitations of congressional spending power as well as a discussion about the freedom from establishment of religion); Erwin Chemerinsky, *Constitutional Law* 893–95 (2d ed. 2005); Jesse H. Choper et al., *Constitutional Law: Cases – Comments – Questions* 414–18 (10th ed. 2006); Daniel A. Farber et al., *Constitutional Law: Themes for the Constitution's Third Century* 552 (3d ed. 2003); Geoffrey R. Stone et al., *Constitutional Law* 709–10, 872–75 (5th ed. 2005) (discussing *Harris v. McRae* within the framework of equality based on wealth classifications, as well as within the framework of the unconstitutional conditions doctrine); Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* (16th ed. 2007). But see Louis Fisher, *American Constitutional Law* (3d ed. [year]) (providing a five-page excerpt of the decision and citing state cases striking down abortion funding exclusions).

In a 2009 interview, Supreme Court Justice Ruth Bader Ginsburg noted the importance and incongruity of *Harris v. McRae*. Asked, “If you were a lawyer again, what would you want to accomplish as a future feminist legal agenda?” Justice Ginsburg referred to *Harris v. McRae*: “Reproductive choice has to be straightened out. There will never be a woman of means without choice anymore. . . . The basic thing is that the government has no business making that choice for a woman.”¹¹⁷

The Impact of McRae on Poor Women and Access to Abortion

The anti-abortion movement sees the Hyde Amendment and the Supreme Court’s decision in *McRae* as one of its greatest successes. Douglas Johnson of the National Right to Life Committee says the Hyde amendment has been one of the most effective anti-abortion laws ever enacted. “At the very minimum, there are over 1 million Americans walking around today alive because of the Hyde amendment.”¹¹⁸

*“The first woman known to have died because of the Hyde Amendment was Rosie Jimenez. In 1977, she was a 27-year-old from Harlingen, Texas, going to college on a scholarship and hoping to become a teacher to provide for her 4-year-old daughter, when she became pregnant. Unable to afford a safe, legal abortion, she sought an illegal one and died as a result.”*¹¹⁹

Abortion remains the most common surgical procedure in the United States. Nearly half of pregnancies among American women are unintended, and four in ten of these are terminated by abortion. Twenty-two percent of all pregnancies (excluding miscarriages) end in abortion. In 2005, 1.21 million abortions were performed, down from 1.31 million in 2000.¹²⁰

Abortion rates are much higher in the United States than in any other developed country.¹²¹ Why do so many U.S. women have unintended pregnancies? In recent years U.S. policy has denied young people access to fact-based sexual education. The medical profession and drug industry offer a narrower range of contraception than is available in other developed countries. The government restricts access to medically approved contraception. Many insurance plans exclude coverage for contraception and many more women remain uninsured.

¹¹⁷ Emily Bazelon, *The Place of Women on the Court*, N.Y. Times, July 12, 2009, § MM (Magazine), at 22.

¹¹⁸ [website], at <http://www.wbur.org/2009/05/15/obama-abortion-battles>.

¹¹⁹ **Error! Main Document Only.** Russell, *supra* note 55; see also Ellen Frankfort with Frances Kissling, *Rosie: The Investigation of a Wrongful Death* (1979).

¹²⁰ Guttmacher Institute, *Facts on Induced Abortion in the United States*, In Brief, July 2008, available at http://www.guttmacher.org/pubs/fb_induced_abortion.html

¹²¹ Megan L. Kavanaugh & Eleanor Bimla Schwarz, *Counseling About and Use of Emergency Contraception in the United States*, Persp. on Sexual and Reprod. Health, June 1, 2008, available at <http://www.articlearchives.com/medicine-health/sexual-reproductive-health-contraception/962684-1.html>; Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 Fam. Plan. Persp. 24 (1998), available at <http://www.guttmacher.org/pubs/journals/3002498.pdf>.

The anti-abortion movement opposes fact-based sex education, contraception, and funding for contraception. Why do so many women, confronted with an unintended pregnancy, seek abortion? Most women seeking abortions say that they do so because of their understanding of the responsibilities of parenthood and family life and their inability to meet those demands under present circumstances.¹²²

The anti-abortion movement has been successful in denying women access to abortion. In 2005, eighty-seven percent of all U.S. counties lacked an abortion provider. Thirty-five percent of women live in those counties. Between 2000 and 2005, the number of U.S. abortion providers declined by 2 percent. Denying funding discourages abortion. Between 20 percent and 27 percent of the women denied Medicaid coverage for abortion carry the pregnancy to term. The facts presented in *McRae* made plain that when a woman is forced to carry a pregnancy to term against her own best judgment, she may suffer as may the future child and her other children. Some women, denied access to legal abortion, obtain illegal abortions and a small number die. Most however, raise the money to have a legal abortion, often by foregoing essential food and shelter for themselves and their children. When Medicaid is denied, poor women wait on average two to three weeks longer than other women to have an abortion because of difficulties in obtaining the necessary funds. When abortion is delayed, health risks to the woman increase. A second trimester abortion costs about twice as much as a first trimester procedure.¹²³

In seventeen states, pro-choice advocates, often relying on material developed by plaintiffs in *McRae*, persuaded states to include abortion in Medicaid. (Four do so by legislative choice, and the rest do so under court orders holding that the exclusion of abortion from Medicaid violates state constitutions, most often state constitutional prohibitions against gender discrimination.). About 13% of all abortions in the United States are paid for with public funds, virtually all provided by state governments.

After *Roe v Wade* in 1973, most private insurance policies paid for abortion. Abortion is a surgical procedure, and surgery is typically covered by even the most restrictive insurance policies. Most private insurers and employee benefit plans continue to pay for abortion, though five states prohibit private insurance from covering abortion, except when a woman's life is in danger.¹²⁴ Private insurers and employee benefit plans appreciate that they save money and promote health by paying for abortions for women who want them. In other countries abortion services are covered by insurance to the extent that abortions are allowed by the law.¹²⁵

¹²² Guttmacher Institute, *supra* note 120.

¹²³ Heather Boonstra & Adam Sonfield, *Rights Without Access: Revisiting Public Funding of Abortion for Poor Women*, Guttmacher Rep. on Pub. Pol'y., Apr. 2000, at 8, 10, available at <http://www.guttmacher.org/pubs/tgr/03/2/gr030208.pdf>.

¹²⁴ Guttmacher Institute, *Restricting Insurance Coverage of Abortion*, State Policies in Brief (Dec. 2009), available at http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf.

¹²⁵ The Alan Guttmacher Institute, *Sharing Responsibility: Women, Society and Abortion Worldwide* 12–16, (1999), available at <http://www.Guttmacher.org/pubs/sharing.pdf>.

The anti-abortion movement used their victory in *McRae* to seek broader limits on funding for abortion. Every year from 1977 until 1997, Congress renewed the Hyde Amendment. In the early years, the annual debates were intense. Congress wrote the amendment into permanent law as part of the Budget Reconciliation Act of 1997.¹²⁶ Congress has extended the ban on federal funding for abortion to other groups including military personnel and their dependents, federal employees and their dependents, teenagers participating in the State Children's Health Insurance Program, low-income residents of the District of Columbia, members of the Peace Corps, disabled recipients of Medicare, federal prison inmates, and Native Americans, among others.¹²⁷

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Some of the restrictions are even more stringent than those applicable to poor women eligible for Medicaid. For example, women serving in the military cannot obtain a federally funded abortion even when the pregnancy results from rape or incest; military doctors and health care facilities cannot provide abortion even if the woman is willing to pay.¹²⁸ Military women cannot obtain medical leave to travel to a place where she can obtain an abortion, even if she is willing and able to pay for the travel and the medical costs, even if she is pregnant as the result of rape.

Comment [JBL9]: I just want to make sure that this is not referring to overseas service women, since the website says, "Current law forbids military hospitals from providing abortion services except in cases of rape, incest, or life endangerment. Federal funding is only available for abortions needed in cases of life endangerment."

*"C.A.'s husband is a soldier deployed in Iraq. They support [their] five children on his military pay of \$800 per month. C.A. felt that another child would create an unbearable strain on her mental health and she and her husband decided on an abortion. When she sought care, she was dismayed to find that her husband's military insurance, upon which the family relies, is forbidden to pay for abortion."*¹²⁹

The restrictions have been challenged by women with life threatening pregnancies and by women carrying fetuses that are unlikely to survive after birth. Following *McRae*, federal courts have upheld the denial of insurance coverage even in these extreme circumstances.¹³⁰

¹²⁶ For text of the Hyde Amendment, see Consolidated Appropriations Act, 2008, H.R. 2764, 110th Cong. Div. G – Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2008 §§ 507–508 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2764enr.txt.pdf.

¹²⁷ Discriminatory Restrictions on Abortion Funding Threaten Women's Health (NARAL Pro-Choice Am. Found., Washington, D.C.), Jan. 1, 2009, at 1, available at www.prochoiceamerica.org/assets/files/Abortion-Access-to-Abortion-Women-Government-Discriminatory-Restrictions.pdf.

¹²⁸ National Abortion Federation, Service Women Overseas Deserve Better Access to Safe and Legal Health Care (2006), at http://www.prochoice.org/policy/congress/women_military.html (last visited Dec. 3, 2009).

¹²⁹ **Error! Main Document Only.** Susan Schewel, *The Hyde Amendment's Prohibition of Federal Funding for Abortion—30 Years is Enough!*, Women's Health Activist, Sept./Oct. 2006, at 1, 3.

¹³⁰ See, e.g., *Doe v. United States*, 372 F.3d 1308 (Fed. Cir. 2004) (unanimous decision denying payment to a Navy wife with anencephalic fetus); *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004) (denying payment to a federal employee with anencephalic fetus and reaffirming State's interest in promoting potential life controls even though no possibility exists that the fetus will survive.)

*“In January 1994, [Maureen] Britell and her husband, a Captain in the Air National Guard, were expecting their second child. A routine checkup about twenty weeks into her pregnancy revealed that Britell’s fetus suffered a rare condition, anencephaly. . . . [T]he Britells consulted their family, doctors, grief counselors, psychiatrists, and their parish priest, all of whom agreed that they should abort the fetus. . . . Britell had an abortion . . . after thirteen hours of physically and [exceptionally] painful labor, the fetus died during delivery.” The New England Medical Center submitted a bill for \$4000 and the Britell’s insurer, the federal Civilian Health and Medical Program (CHAMPUS) refused to pay. The district court held that Harris v. McRae did not apply to the facts of this case. The First Circuit Court of Appeals reversed.*¹³¹

In 2009, abortion remains inaccessible for many women. For example, in New York City, where abortion is legal, Medicaid funds abortions for poor women, and there are more abortion providers than other areas of country, women still seek illegal abortions because they do not know that legal services are available or fear that their privacy will be sacrificed.¹³² The Medical Director of a clinic in northern Manhattan reports that she sees at least one patient every week who has tried to end a pregnancy on her own, often with tragic results.¹³³

The National Network of Abortion Funds provides help to some of the women who cannot afford abortions.

*“Christa” was 14 and had never had a period when she had unprotected sex. She did not realize she was pregnant until her second trimester. Her parents were strict Christian Scientists who would not help her, but her older siblings raised \$900. By the time she reached a clinic, Christa was nearly 21 weeks pregnant and needed \$1,600. Abortion funds provided \$525.*¹³⁴

*“Gina,” a 28-year-old mother with one child, had just left a violent relationship. She was receiving therapy and medication for depression. Her ex-partner was in prison for beating her. She relied on Medicaid and had not been able to raise money for the abortion on her own. The fund provided the \$350 she needed.*¹³⁵

*“Marie,” a young mother with two children, found out she was pregnant in late December. She needed to collect two paychecks before she could pay for the abortion. By the time she had enough money and got an appointment for February 3, she had just missed the first trimester cutoff.*¹³⁶

¹³¹ *Britell*, 372 U.S. at 1372–75 (Fed. Cir. 2004) (citations and footnote omitted).

¹³² Jennifer 8. Lee & Cara Buckley, *For Privacy’s Sake, Taking Risks to End Pregnancy*, N.Y. Times, Jan. 5, 2009, at <http://www.nytimes.com/2009/01/05/nyregion/05abortion.html>.

¹³³ Anne Davis, Letter to the Editor, N.Y. Times, Jan. 12, 2009, at A22.

¹³⁴ National Network of Abortion Funds, *Abortion Funding: A Matter of Justice* 10 (2005), available at <http://www.nnaf.org/pdf/NNAF%20Policy%20Report.pdf>.

¹³⁵ *Id.* at 11.

¹³⁶ *Id.* at 13.

“Sarah,” a 31-year-old Alaska mother, worked full time, making \$1,000 a month. She had no health insurance. At 15 weeks, she was unable to get an abortion in Alaska and had to use her rent money to fly to Washington. A friend provided a place to stay in Seattle.¹³⁷

Conclusion

Will these policies change as Democrats control the White House and the Congress, and as the nation moves to address national health insurance reform? The Democratic Platform affirms that the Party “strongly and unequivocally supports *Roe v. Wade* and a woman’s right to choose a safe and legal abortion, regardless of ability to pay, and we oppose any and all efforts to weaken or undermine that right.”¹³⁸ As an Illinois State Senator, President Obama voted against a state version of the Hyde Amendment and criticized the Supreme Court decision upholding the federal ban on “partial-birth” abortion. NARAL Pro-Choice America has given Obama a 100% rating for each year he has been in the U.S. Senate. In 2008, a national coalition of more than sixty pro-choice organizations launched the *Hyde – 30 Years is Enough! Campaign*.¹³⁹ Nonetheless, no serious political movement to reverse Hyde or the other restrictions on abortion federal funding for abortion has emerged.

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The early signs that Democrats would end discrimination against women regarding contraception and abortion were not encouraging. In January 2009, the White House introduced a large stimulus package to promote economic productivity and help states confronting fiscal crisis. It included \$550 million over ten years to allow states to expand contraceptive services. The Congressional Budget Office and others estimated that expanded contraception would save millions of dollars in direct state expenditures.¹⁴⁰ It is well established that access to contraception increases the productivity of women by opening access to higher education and better-paying jobs.¹⁴¹ Nonetheless, when Republican Minority Leader John Boehner ridiculed the notion that “taxpayer funding for contraceptives and the abortion industry”¹⁴² creates economic stimulus, the Democratic leadership quickly deleted funding for contraception to

¹³⁷ *Id.* at 15.

¹³⁸ “Renewing America’s Promise,” Democratic Party Platform, 2008.

¹³⁹ National Network of Abortion Funds, *Hyde – 30 Years is Enough! Campaign Home Page*, at <http://www.hyde30years.nnaf.org/> (last visited Dec. 3, 2009).

¹⁴⁰ Editorial, *Sins of Omission: The Forgotten Poor*, N.Y. Times, Feb. 2, 2009, at <http://www.nytimes.com/2009/02/02/opinion/02mon2.html>.

¹⁴¹ Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women’s Life Cycle Labor Supply*, 121 Q. J. Econ. 289 (2006); Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 J. Pol. Econ. 730 (2002).

¹⁴² John Boehner, House Republican Leader, Congressional Democrats’ “Stimulus” Bill Includes Taxpayer Funding for Contraceptives, Abortion Industry: Boehner: “You Can Go Through a Whole Host of Issues That Have Nothing to Do with Growing Jobs in America and Helping People Keep Their Jobs” (Jan. 23, 2009), at <http://gopleader.gov/News/DocumentSingle.aspx?DocumentID=109313>.

garner by-partisan support. The stimulus package passed without funding for contraception or a single Republican vote.

In a May 17, 2009 speech at Notre Dame, President Obama's words demonstrated political balancing act that characterizes the administration's approach to reproductive rights.

So let's work together to reduce the number of women seeking abortions by reducing unintended pregnancies, and making adoption more available, and providing care and support for women who do carry their child to term. Let's honor the conscience of those who disagree with abortion, and draft a sensible conscience clause, and make sure that all of our health care policies are grounded in clear ethics and sound science, as well as respect for the equality of women.¹⁴³

Every pro-choice person supports these proposals, but the persistent reality is that the U.S. pursues policies that produce more unintended pregnancies than other nations, and the people who oppose abortion also oppose effective measures to reduce them. When Obama later addressed the Congress to encourage passage of a health care act, he decisively abandoned the platform, stating that his plan did not include abortion.

Learning from the failed Clinton effort at health reform, Democrats in Congress under the leadership of Senator Ted Kennedy of Massachusetts, have been meeting for several years to build a coalition in support of health care reform. The effort includes advocates for vulnerable people, business, labor, the insurance industry, and many religious organizations, including the Catholic Church. Obama appreciated this effort and held back from offering any comprehensive proposals for health care reform. This chapter is not the place to dissect the debates about the Administration's strategy, employer mandate, individual mandate, public option, or the alternative of a single payer system that was taken off the table. Nonetheless, access to insurance that includes abortion funding continues to be a central issue in the health care reform debate.

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As Congress began considering health care reform, it soon became clear that the Catholic Church would use the health care reform debate to expand the exclusion of abortion from insurance and would threaten the entire package if it did not get its way. By contrast, most of the mainstream pro-choice organizations made the judgment that "the time to fight on the notion of federal funding for abortion was not this political moment—the health care reform bill is hard enough."¹⁴⁴ Feminists, women, and pro-choice people appreciate the importance of health care reform. As Carol Gilligan has taught a generation, we are good at compromising and finding the common ground that makes practical accommodations work. But this facilitative strategy left the Hyde Amendment's standards in place as to poor women and others who depend on the federal government for insurance. It also created an imbalance of lobbying forces, pro and con.

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¹⁴³ Peter Baker & Susan Saulny, *At Notre Dame, Obama Calls for Civil Tone in Abortion Debate*, N.Y. Times, May 18, 2009, at A1.

¹⁴⁴ Julie Hirschfeld Davis, *The Influence Game: Abortion Rights' Scramble*, Wash. Post, Nov. 14, 2009, at ?? (quoting Laura MacCleery, Director of Government Affairs, Center for Reproductive Rights).

Lois Capps, pro-choice democrat from California, proposed an amendment to “preserve the status quo” in relation to public funding of abortion. The Capps Amendment affirming all of the existing restrictions on federal funding for poor women eligible for Medicaid, federal employees, and military personnel. It also reaffirmed existing “conscientious clause” rules allowing health care professionals to refuse to participate in providing services they find morally objectionable. It sought to blunt the Church’s effort to extend the current federal rules to deny coverage by private insurance, which now covers abortion as a surgical procedure. The Capps Amendment addressed the health insurance exchange, designed to enable individuals and small businesses to buy insurance at a reasonable cost, since it would involve the government in marketing insurance. Tax exemption and subsidies have long involved the government in financing virtually all private insurance. The Capps Amendment would have required that “in each region of the country there is at least one plan in the Health Exchange that offers abortion services but also one plan in the Health Exchange that does not offer abortion services.”¹⁴⁵

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The anti-choice community, led by the Catholic Church, attacked Capps as an expansion of insurance coverage for abortion. Despite the flaws in the Capps proposal, most of the pro-choice community defended Capps, arguing that it preserved the status quo.¹⁴⁶ On November 13, the House, in an historic vote, passed health care reform by a vote of 220 to 215. At the last minute, Bart Stupack, a Democrat from Michigan, offered an alternative to the Capps bill that passed by 240 to 194, with sixty-four Democrats voting in favor. Stupack makes plain that any plan that covers abortion in any form is disqualified from federal subsidy, however small and indirect. Any plan that covers abortion would therefore be excluded from the exchange and thus affect those most unable to pay for health insurance, estimated to begin with at close to forty million.¹⁴⁷ Further, Stupak prohibits the exchange from offering any plan which covers abortion and thus reaches those who do not need federal subsidies and who are currently able to buy abortion-inclusive policies.

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“At first, many of the people using the exchange will be those who are unable to pay for health insurance on their own. For them, the government will offer a sliding scale of subsidies. It is largely these subsidies which will increase the availability of insurance; estimates of how many people will gain coverage vary, but it may be close to forty million.”

If the Stupak approach survives the process, the impact on the availability of insurance for abortion, and thus the cost of abortion, will be stunning. Beyond that, the exclusion of abortion from the federalized health care program, Stupak writes abortion out of regular health care despite abortion being one of the most frequent and the safest surgical procedures. And there is no reason to believe, given the attack on contraceptive funding in the stimulus package, that the Church and its allies will stop with abortion. Jeffrey Toobin comments:

It may be that the endurance of Roe and Democratic control of the federal government have led to a certain complacency among abortion-rights supporters. . . . The opponents of abortion . . . are mobilized, focused, and driven to succeed. The Catholic bishops took the lead in pushing for the Stupak amendment, and they squeezed legislators in a way that would do any K Street Lobbyist proud. (One never seeks that kind of effort on behalf of other aspects of Catholic teaching, like opposition to the death penalty.) Meanwhile, the

¹⁴⁵ [website] <http://www.realitycheck.org/commongroud/2009/09/16/the-truth-about-abortion>.

¹⁴⁶ The Congressional Budget Office affirmed that Capps preserved the status quo.

¹⁴⁷ Jeffrey Toobin, *Not Covered*, New Yorker, Nov. 23, 2009, at http://www.newyorker.com/talk/comment/2009/11/23/091123taco_talk_toobin.

pro-choice forces temporized. But as Supreme Court Justice Ruth Bader Ginsburg observed not long ago, abortion rights “center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.” . . . With stakes of such magnitude, it is wise to weigh carefully the difference between compromise and surrender.¹⁴⁸

Hopefully, this new assault on abortion rights, which threatens to diminish further the accessibility and legitimacy of abortion, will have the effect of mobilizing the constituencies that believe in women’s autonomy, health, and equality as well as the freedom from religious imposition. The issue, in our view, however, is not simply to roll back Stupak and protect the ability of people to buy the only insurance available to them with abortion coverage. The issue is that even if Stupak is defeated (and the reader will know the answer to that), the Hyde Amendment still restricts the poorest of women from obtaining what will now become an increasingly expensive procedure. Judge Dooling described the right to choose abortion and the access provided by funding as “nearly allied to [a woman’s] right to be,” and Justice Ginsburg emphasized that it is essential to women’s ability “to enjoy equal citizenship stature.”

It is hard not to look back to 1980 and rue the failure of the liberal communities to brand *Harris v. McRae*, writing poor women out of constitutional citizenship, as a shameful decision that must be reversed as opposed to accepting it as a baseline. It is hard not to criticize the mainstream pro-choice movement’s failure to keep poor women at the center of its agenda, not only for lobbying but also for movement building. The Hyde Amendment did not produce the anticipated blood bath, but rather heaped largely invisible pressures on the lives of poor women and their children. Where empathy with and respect for the rights of the poor and minorities is insufficient, it is a hard lesson—learned over and over—that when we allow rights to be taken from a less powerful group, the erosion does not stop there.

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Health reform that prohibits insurance coverage for abortion is certainly an improvement for women without insurance. Perhaps the debate will energize, a new pro-choice coalition to fight for a world in which reproductive choice and justice is not simply a theoretical right but also a lived reality and human right for all women. Thirty years is enough! Too much!

¹⁴⁸ *Id.*