CONSTITUTIONAL LAW—EQUAL PROTECTION—ABORTION FUNDING—STATE CONSTITUTION REQUIRES NEW JERSEY TO FUND HEALTH PRESERVING BUT NOT ELECTIVE ABORTIONS—*Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982).

Despite the fact that a woman's right to choose an abortion was firmly established by the United States Supreme Court in *Roe v. Wade*,[1] subsequent federal[2] and state statutes[3] have severely restricted the indigent's exercise of this right. This restriction has been accomplished through the proscription of funds through the Medical Assistance Program (Medicaid) for both elective and therapeutic abortions.[4] The Supreme Court of the United States has upheld these bans on the use of Medicaid funds for all but life saving abortions.[5] Recently, challenges to the constitutionality of these Medicaid restrictions have

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[1] 410 U.S. 113 (1973). This right, however, is not without qualification. *See infra* notes 35-38 and accompanying text.

[2] Since September, 1976, Congress has restricted the use of federal Medicaid funds to subsidize abortions through amendments to annual appropriations bills passed in accordance with the Federal Medicaid Act, 42 U.S.C.A. §§ 1396-1396p (West 1974 & Cum. Supp. 1975-1982) (Medicaid). Appropriations are made to the Department of Health and Human Services for distribution to states whose plans for providing medical assistance are approved by the Department. These restrictions against federally subsidized abortions, are termed "Hyde Amendments" after their original congressional sponsor, Representative Henry Hyde (R.-Ill.). The original amendment provided that "[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term." Act of Sept. 30, 1979, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434. Subsequent versions of the restriction contained exceptions for rape or incest, *see* Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926; Act of Oct. 12, 1979, Pub. L. No. 96-86, § 118, 93 Stat. 656, 662, and for "instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." *See* Act of Dec. 7, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460; Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586. The current Hyde Amendment, for fiscal year 1983, has eliminated the exceptions in returning to the most restrictive version which permits funding only if the mother's life "would be endangered if the fetus were carried to full term." *See* Act of Dec. 12, 1982, Pub. L. No. 97-377, § 402, 96 Stat. 1830, 1894.

[3] *See* Gold, *Publicly Funded Abortions in Fiscal Year 1980 and Fiscal Year 1981*, 14 FAM. PLAN. PERSP. 204 (1982). As of 1982, 34 states prohibited indigent women from obtaining abortion funding by adhering to the federal Hyde Amendment Standard. Ten states and the District of Columbia voluntarily funded medically necessary abortions. Five states, including New Jersey, funded medically necessary abortions under court order. *Id.* at 207. For purposes of this Note, New Jersey's statutory funding restriction will be termed a "Hyde Amendment."

[4] The Court of Appeals for the Second Circuit defined elective abortions as those "requested by a woman after consultation with her physician merely because, for whatever reason, she does not wish to bear the child." Roe v. Norton, 522 F.2d 928, 932 (2d Cir. 1975), *rev'd sub nom.* Maher v. Roe, 432 U.S. 474 (1977). The elective abortion, in contradistinction to the therapeutic abortion, is defined as one "necessary for the health of the patient." *Id.*

[5] Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

been premised on the notion that indigent women possess greater rights and protections under their respective state constitutions than under the Federal Constitution.[6] In *Right to Choose v. Byrne*[7] (*Right to Choose*), the New Jersey Supreme Court recognized that an indigent woman has the right under the New Jersey Constitution to a subsidized abortion to protect her life or health, but held that her rights are not sufficient to secure such funds for elective abortions.[8]

As a result of the revolutionary *Wade* decision in January 1973, New Jersey began providing Medicaid funds for all abortions under the existing Medicaid statute.[9] In December 1975, however, Governor Brendan Byrne signed into law New Jersey's version of the federal Hyde Amendment.[10] N.J. Stat. Ann. 30:4D-6.1, the New Jersey Hyde Amendment, prohibited the expenditure of state funds for abortion unless such a procedure was necessary to save the woman's life.[11] This statute was more restrictive than subsequent versions of its federal counterpart which permitted the use of federal Medicaid funds for abortion, not only if the pregnant woman were in danger of dying, but also if she had been the victim of rape or incest or would be severely damaged by giving birth.[12]

A federal district court preliminary injunction prevented the enforcement of the New Jersey Hyde Amendment for seventeen months; however, the district court vacated the injunction after the United States Supreme Court upheld similar state restrictions on Medicaid

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[6] *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). In addition to New Jersey, the supreme courts of California and Massachusetts have struck down mini-Hyde Amendments on state constitutional grounds. Comm. To Defend Reproductive Rights v. Myers, 29 Cal. 3d. 252, 625 P. 2d 779, 172 Cal. Rptr. 866 (1981); Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 417 N.E.2d 387 (1981). *See generally* State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980).

[7] 91 N.J. 287, 450 A.2d 925 (1982)

[8] *Id.* at 310, 450 A.2d at 937.

[9] N.J. STAT. ANN. § 30:4D-2 (West 1968) (amended 1979) provided that "[i]t is the intent of the Legislature to make statutory provision which will enable the State of New Jersey to provide medical assistance, insofar as practicable, on behalf of persons whose resources are determined to be inadequate to enable them to secure quality medical care . . . ."

[10] Right to Choose v. Byrne, I, 165 N.J. Super. 443, 449, 398 A.2d 587, 590 (Ch. Div. 1979); *see also* N.Y. Times, Dec. 19, 1975, at 1, col. 5.

[11] N.J. STAT. ANN. 30:4D-6.1 (West 1981) (Unconstitutional in part) provides that:

No payments for medical assistance shall be made under the act hereby supplemented for the termination of a woman's pregnancy for any reason except where it is medically indicated to be necessary to preserve the woman's life. In any case where a pregnancy is so terminated, the act shall be performed in a hospital and the physician performing the act shall submit in writing a report to the division stating in detail his reason for finding it necessary to terminate the pregnancy.

[12] *Id.*; *see supra* note 2.

funding for elective abortions.[13] Thereafter, the plaintiffs,[14] in *Right to Choose v. Byrne*[15] *(Right to Choose I)*, brought suit in the Superior Court, Chancery Division for state injunctive relief.[16] The plaintiff's challenge was based on two theories: that New Jersey's Hyde Amendment prevented the state from meeting its obligation under the Federal Medicaid Act,[17] and that the statute violated the due process, equal protection, and establishment of religion clauses of the Federal and state constitutions and the free exercise clause of the United States Constitution.[18] While not deciding the plaintiff's due process or equal protection claims,[19] Judge Furman found that the New Jersey statute conflicted with the Medicaid Act. He then enjoined the state from enforcing section 30:4D-6.1 and ordered the New Jersey Department of Human Services to issue new guidelines for the funding of "medically necessary" abortions.[20]

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[13] Right to Choose v. Byrne, I, 165 N.J. Super. 443, 449, 398 A.2d 587, 590 (Ch. Div. 1979). The injunction was issued on March 18, 1976 and vacated in August, 1977. *Id.*

[14] The plaintiffs were four pregnant women, two mothers on behalf of their pregnant minor daughters, a physician, two nonprofit associations protective of welfare and abortion rights, and a religious association for abortion rights. They sought funds for elective and therapeutic abortions. Right to Choose v. Byrne, I, 165 N.J. Super. 443, 448, 398 A.2d 587, 588 (Ch. Div. 1979).

[15] 165 N.J. Super. 443, 398 A.2d 587 (Ch. Div. 1979).

[16] *Id.* at 447, 398 A.2d at 589.

[17] The purpose of the Federal Medicaid Act, see *supra* note 2, is to enable "each . . . state to furnish medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396 (1976). The plaintiff argued that the New Jersey proscription of abortion funding could not be more restrictive than the federal standard which provided funding for "necessary medical services." 165 N.J. Super. at 451, 398 A.2d at 592. Thus, the plaintiffs maintained that because § 30:4D-6.1 limited funding for abortions to only life-threatening situations, it violated the Federal Medicaid Act. *Id.* at 452, 398 A.2d at 592.

[18] 165 N.J. Super. at 448, 398 A.2d at 589.

[19] *Id.* at 445-56, 398 A.2d at 594. Judge Furman found that the plaintiffs were foreclosed by Maher v. Roe, 432 U.S. 464 (1977), "from arguing as a matter of federal constitutional law that the withholding of Medicaid funding for elective nontherapeutic abortions is a denial of equal protection of the law or that N.J.S.A. 30:4D-6.1 lacks a reasonable relationship to a constitutionally permissible purpose or is vague and indefinite in violation of due process of law." 165 N.J. Super. at 455-56, 398 A.2d at 594; *see* United States v. Vuitch, 402 U.S. 62 (1971) (rejecting claim that state criminal abortion statutes violate due process because they are vague or indefinite). *But see* Roe v. Wade, 410 U.S. 113 (1973) (holding that state criminal abortion statutes violate due process since they infringed woman's right to privacy). Further, the plaintiffs' claims that § 30:4D-6.1 established the views of the Roman Catholic Church as a state policy and that the Roman Catholic Church had become excessively entangled in the legislative process were also rejected. 165 N.J. Super at 459-60, 398 A.2d at 597.

[20] 165 N.J. Super. at 454, 398 A.2d at 592. Courts had defined "medically necessary" broadly enough to encompass services not limited to saving lives. *See* Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978); Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill.)(*vacated and remanded*, 596 F.2d 196 (7th Cir. 1979), *vacated sub nom.* Williams v. Zbaraz, 448 U.S. 358, *cert. denied*, 448 U.S. 907

In response, the Department of Human Services issued guidelines that mirrored the standards of the Hyde Amendment enacted by Congress in 1978.[21] The plaintiffs in *Right to Choose v. Byrne*[22] (*Right to Choose II*), reasserted their statutory and constitutional arguments put forth in *Right to Choose I* in challenging the proposed guidelines.[23] Striking down the proposed guidelines on constitutional grounds, Judge Furman held that "[e]njoyment of one's health is a fundamental liberty," protected by both the fourteenth amendment to the Federal Constitution and the equal protection provision of the New Jersey Constitution "against unreasonable and discriminatory restriction."[24] The court then ordered revised guidelines that insured state Medicaid funds for all life and health preserving abortions.[25]

(1980); Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978), *aff'd*, 623 F.2d 829 (3d Cir. 1980); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977), *aff'd*, 619 F.2d 557 (5th Cir. 1980)(overruled by Williams v. Zbaraz, 448 U.S. 358 (1980); Harris v. McRae, 448 U.S. 297 (1980)).

[21] Right to Choose v. Byrne, II, 169 N.J. Super. 543, 546, 405 A.2d 427, 428-29 (Ch. Div. 1979); *see also supra* note 2.

[22] 169 N.J. Super. 543, 405 A.2d 427 (Ch. Div. 1979).

[23] *Id.* at 547, 405 A.2d at 492; *see supra* notes 17-19 and accompanying text.

[24] 169 N.J. Super. at 551, 405 A.2d at 431. Judge Furman wrote:

> The proposed guidelines would discriminatorily infringe upon a fundamental right, the right to public benefits for the protection of one's health which have been provided heretofore in general legislation, and may be sustained as valid only on the basis of a compelling state interest justifying the withholding of Medicaid funding for medically necessary abortions but for no other medically necessary treatment or procedure.

Id. at 551-52, 405 A.2d at 481.

[25] *Id.* at 552, 405 A.2d at 432. The new regulations resulting from the injunction, N.J. ADMIN. CODE tit. 10, § 53-1.14 (Supp. 1980), provided that:

> (a) Effective May 1, 1980, Medicaid will pay for all medically necessary abortions.
> (b) A physician may take the following factors into consideration in determining whether an abortion is medically necessary:
> 1. Physical, emotional, and psychological factors;
> 2. Family reasons;
> 3. Age.

Despite Judge Furman's order in *Right to Choose II*, the litigation continued over the issue of attorney fees. In Right to Choose v. Byrne, III, 173 N.J. Super. 66, 413 A.2d 366 (Ch. Div. 1980), the chancery division ruled that under the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (Supp. IV 1980), the plaintiffs' counsel were entitled to fees pursuant to the court's evaluation of time spent on the prevailing constitutional issue. 173 N.J. Super. at 74, 413 A.2d at 370. The New Jersey Supreme Court, however, in *Right to Choose* denied the plaintiffs these attorneys' fees. The court reasoned that because it is necessary to prevail on a federal claim in order to collect attorneys' fees under § 1988, no basis for the plaintiff's claim remained after Harris v. McRae, 448 U.S. 297 (1980). 91 N.J. at 316, 450 A.2d at 940; *see infra* notes 51-57 and accompanying text. Despite the fact that the plaintiffs had succeeded in obtaining a preliminary injunction, the court ruled that this, like the pendent state claim on which the plaintiffs prevailed, was insufficient grounds upon which to award counsel fees. 91

The legal waters surrounding Medicaid funding for abortions in New Jersey remained troubled as the United States Supreme Court, in *Harris v. McRae*,[26] undermined *Right to Choose II*.[27] The *McRae* Court rejected all federal constitutional claims against a denial of funding for any abortion which did not endanger a woman's life, thus limiting future challenges of state Hyde Amendments to state constitutional grounds.[28] Thus, in *Right to Choose*, the plaintiffs were relegated to arguing only that New Jersey's Hyde Amendment violated the equal protection, free exercise, and establishment provisions of the New Jersey Constitution.[29] The *Right to Choose* court held that N.J. Stat. Ann. § 30:4D-6.1 violated the state constitution's equal protection clause, as a woman's right to protect her health by abortion outweighed the state's asserted interest in protecting potential life.[30]

The legal controversy over abortion, culminating in New Jersey in *Right to Choose*, is rooted in the United States Supreme Court decision of *Roe v. Wade*.[31] In *Wade*, the Supreme Court expanded the area of a person's freedom from governmental interference[32] by holding that a woman's fundamental right[33] to an abortion falls within this protected zone of privacy.[34] Although the *Wade* Court recognized that serious harms[35] could result from state interference with a wom-

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N.J. at 317-18, 450 A.2d at 941. *But see* Westfield Centre Serv., Inc. v. Cities Serv. Oil Co., 86 N.J. 453, 472, 432 A.2d 48, 58 (1981) (attorney awarded fees after obtaining preliminary injunction).

[26] 448 U.S. 297 (1980).

[27] *See* 91 N.J. at 298, 450 A.2d at 930-31.

[28] 448 U.S. at 311; *accord* Williams v. Zbaraz, 448 U.S. 359, 369 (1980).

[29] 91 N.J. at 299, 450 A.2d at 931; *see* N.J. CONST. art. 1, para.1 (equal protection provision); N.J. CONST. art. 1, para.3 (free exercise provision); N.J. CONST. art. 1, para.4 (establishment of religion provision).

[30] 91 N.J. at 310, 450 A.2d at 937.

[31] 410 U.S. 113 (1975); *see supra* text accompanying note 1. In *Wade's* companion case, Doe v. Bolton, 410 U.S. 179 (1973), the Court held unconstitutional specific procedural requirements which curtailed the availability of abortions. *Bolton* provided states with guidelines for drafting future abortion legislation.

[32] *See* Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, the Court, explicitly recognizing for the first time a privacy right, struck down a 1938 Connecticut statute which proscribed the use of any contraceptive device or the counseling of another in the use of contraception. *Id.* at 485-86; *see also* Union Pac. Ry. v. Botsford, 141, U.S. 250, 251 (1890).

[33] Justice Blackmun wrote "that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' [are] included in this guarantee of personal privacy.' " 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[34] 410 U.S. at 153.

[35] Justice Blackmun identified "specific and direct harm medically diagnosable," "a distressful life and future" due to raising an unwanted child, psychological harm, and "the stigma of unwed motherhood." *Id.*

an's right to procreative choice,[36] it noted that "important state interests" nonetheless qualified this right.[37] The Court made clear, however, that these state interests did not become compelling until after the first trimester and, therefore, a woman's decision to abort before this point could not be obstructed by the state.[38] While this decision established the right to have an abortion, it did not preclude states participating under the Medical Assistance Program[39] from denying funds to indigent women seeking to exercise this right. Challenges to these state obstructions came before the Supreme Court four years after *Wade* in the "Medicaid Trilogy" of *Beal v. Doe*,[40] *Poelker v. Doe*[41] and *Maher v. Roe*.[42]

In *Beal*, the Court upheld a Pennsylvania statute which provided financial assistance only for abortions defined as "medically necessary"[43] and held that the Federal Medicaid Act did not necessitate a state's funding of elective abortions as a requirement for participation in the Medicaid program.[44] The *Beal* Court interpreted the language

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[36] The specific provision creating this impediment struck down by the *Wade* Court was the Texas criminal abortion statute which proscribed obtaining or attempting an abortion except with medical approval for the purpose of saving the mother's life. *Id.* at 164. Therefore, New Jersey's criminal abortion statute, N.J. STAT. ANN. § 2A:87-1 (West 1969) (repealed 1978), which was virtually identical to Texas', was also invalidated. Young Women's Christian Ass'n v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972), *aff'd*, 493 F.2d 1402 (3d Cir.), *cert. denied*, 415 U.S. 989 (1974).

[37] 410 U.S. at 154-55. During the second trimester, the state's interest in protecting the mother's health becomes compelling and the state may regulate the abortion procedure to protect that interest. *Id.* at 163. The state's interest in protecting the "potential life" of the fetus reaches the compelling point at viability, usually at about seven months. *Id.* at 160, 164-65. Beyond the point of viability, a state may prohibit all abortions except those necessary to save the mother's life. *Id.* at 164-65.

[38] *Id.* at 163. Even at this point, however, the *Wade* Court did not appear to grant the woman the sole decision: "For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Id.* at 164.

[39] *See supra* note 2; text accompanying notes 1-4. *See generally* Note, Beal v. Doe, Maher v. Roe, and *Non-Therapeutic Abortions: The State Does Not Have To Pay The Bill*, 9 LOY. U. CHI. L.J. 288 (1977).

[40] 432 U.S. 438 (1977).

[41] 432 U.S. 519 (1977).

[42] 432 U.S. 464 (1977). For over two years after *Wade*, the Supreme Court refused to become involved in the abortion area as litigation mounted. Courts dealing with the same facts and legal issues often reached opposite results. *See* Note, *supra* note 39, at 291 & nn. 23-25.

[43] 432 U.S. at 447. Under the Pennsylvania Medicaid program an abortion is "medically necessary" if the pregnancy is certified by the attending physician and two concurring physicians as threatening to the health of the mother. Also, "medically necessary" includes pregnancies in which documented evidence shows that the child may be born with physical or mental defects, or pregnancies resulting from rape or incest. *Id.* at 441 n.3.

[44] *Id.* at 444.

of the statute to confer upon the states "broad discretion" to determine the extent of medical assistance to indigents.[45]

In *Poelker*, the Court found that the city of St. Louis' refusal to provide publicly financed hospital services for elective abortions in city-owned hospitals did not violate any constitutional rights.[46] The Court held that a state or city could express a preference for normal childbirth by denying public funds for elective abortions.[47]

In *Maher*, the Court rejected an equal protection clause challenge to a Connecticut Welfare Department regulation, which, like the Pennsylvania regulation at issue in *Beal*, permitted Medicaid funding only for first trimester abortions that were "medically necessary."[48] Justice Powell, writing for the Court, used a traditional two-tier analysis, and found no discrimination against a suspect class.[49] Further the Court decided that the Connecticut regulation was not violative of the fundamental right to privacy recognized in *Wade*, reasoning that it did not impinge at all upon a pregnant woman's right to an abortion.[50] The Connecticut statute was deemed to be

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[45] *Id.* Reasoning that the state has a strong interest in encouraging normal childbirth, the Court concluded that Pennsylvania's refusal to extend Medicaid coverage to nontherapeutic abortions was not inconsistent with the Medicaid Act. *Id.* at 446-47. The Court stated: "Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary* —though perhaps desirable—medical services." *Id.* at 444-45 (emphasis in original). Justice Brennan, joined by Justices Marshall and Blackmun in a strongly worded dissent, argued that there was no rational reason for distinguishing between nontherapeutic abortions, therapeutic abortions, and live births, as all are legitimate medical responses to the condition of pregnancy. *Id.* at 449 (Brennan, J., dissenting). Further, the dissent stated that "the legislative history of [the Medicaid Act] and our abortion cases compel the conclusion that elective abortions constitute medically necessary treatment for the condition of pregnancy." *Id.*

[46] 432 U.S. at 521. The *Poelker* Court rejected the court of appeals' finding that the city's restriction was violative of the equal protection clause since the restriction resulted in the creation of two classes: nonindigent women who could obtain abortions in private hospitals and indigent women who could not. *Id.* at 520.

[47] *Id.* at 521.

[48] 432 U.S. at 466. Under the Connecticut regulation, the term "medically necessary" included psychiatric necessity. *Id.* at 466 n.2.

[49] *Id.* at 480.

[50] *Id.* at 474. Justice Powell, writing for the majority as he did in *Beal*, distinguished *Maher* from *Wade* to demonstrate that the regulation did not violate a woman's zone of privacy. At issue in *Wade* was a Texas statute which totally abridged a woman's constitutional freedom by imposing harsh criminal penalties on physicians who performed abortions, "a stark example of impermissible interference with the pregnant woman's decision to terminate her pregnancy." *Id.* at 472. The *Maher* Court reasoned that the Connecticut regulation was "different in kind" as it did not even mildly interfere with the pregnant woman's right to an abortion. *Id.* at 474. "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." *Id.* Justice Brennan, dissenting, found that the Connecticut scheme clearly impinged upon that area

rationally related to a legitimate state objective of encouraging childbirth and consequently within the bounds of equal protection.[51]

Although the Supreme Court found that the denial of public funds for elective abortions did not impinge upon the fundamental right guaranteed in *Wade*, an important question remained as to whether federal or state governments could restrict Medicaid funds for abortions in circumstances where a woman's health was threatened by pregnancy. That question was answered three years later in *Harris v. McRae*.[52] In *McRae*, a divided Court upheld the constitutionality of the Hyde Amendment, ruling that it violated neither the due process and equal protection guarantees of the fifth amendment,[53] nor the first amendment's establishment clause.[54] The result of this decision was to validate a restriction on federal funds for all abortions except those undertaken to save the life of the mother.[55] The Court also addressed the statutory argument that the Hyde Amendment did not relieve participating states from a duty to provide funding for

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of privacy by "bringing financial pressures on indigent women that force them to bear children they would not otherwise have." *Id.* at 484 (Brennan, J., dissenting). According to the dissent, the majority's position that the Connecticut regulation was not an absolute bar to preventing all needy women from having abortions was not nearly as important as the fact that the state had interfered with a woman's choice in exercising a fundamental right. *Id.* at 488 (Brennan, J. dissenting).

[51] *Id.* at 475-77.

[52] 448 U.S. 297 (1980).

[53] *Id.* at 322. Regarding the due process protection afforded a woman's right to procreative choice, Justice Stewart stressed that it was not the government that placed an obstacle in the woman's path to an abortion, but rather, her own indigency.

> Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all. We are thus not persuaded that the Hyde Amendment impinges on the constitutionally protected freedom of choice recognized in *Wade*.

Id. at 316-17.

[54] *Id.* at 319-20. The Court held that the Hyde Amendment did not violate the establishment clause because it "happened to coincide or harmonize with the tenets of some or all religions.' " *Id.* at 319 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)). Because the Court found that the appellees lacked standing to bring a free exercise clause challenge, the Court never reached whether the Hyde Amendment unconstitutionally prevented a woman from exercising her right to choose an abortion under compulsion of religious belief. *Id.* at 320. *See generally* Note, *The Hyde Amendment: An Infringement Upon the Free Exercise Clause?*, 33 RUTGERS L. REV. 1054 (1981).

[55] 448 U.S. at 325 n.27. The version of the Hyde Amendment upheld by the *McRae* Court was the most restrictive, since federal funds were only available for the abortion if "the life of the mother would be endangered if the fetus were carried to term." *Id.* This federal version was identical to New Jersey's Hyde Amendment. *See supra* note 11 and accompanying text.

medically necessary abortions under the Federal Medicaid Act and found that since Congress did not intend to burden a participating state with the cost of fully funding a health service within an approved Medicaid plan, the state was not required to include in its health funding scheme services for which Congress had cut off appropriations.[56]

Although the *McRae* Court recognized that a pregnant woman's interest in protecting her health was central to the fundamental right recognized in *Wade*, it rejected the contention that this right carried with it a constitutional requirement of public funding.[57] Relying heavily on *Maher*, Justice Stewart decided that the Hyde Amendment was similar to the Connecticut welfare regulation in that it did not constitute government impingement on a woman's right to procreative choice, but rather encouraged activity deemed to be in the public interest by means of unequal funding.[58]

Faced with the identical constitutional arguments as the *McRae* Court, the Supreme Court of New Jersey in *Right to Choose* was able to draw upon a considerable body of state case law which had developed a constitutional " 'zone' of privacy protecting individuals from unwarranted government intrusion into matters of intimate personal and family concern."[59] In *State v. Saunders*,[60] for instance, the court overturned on privacy grounds[61] a statute which made fornication a

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[56] 448 U.S. at 303-09. Two federal courts of appeals reasoned that even though the Federal Medicaid Act would have required a participating state to fund medically necessary abortions, the Hyde Amendment eliminated this state obligation by substantively amending the Act. *See* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *vacated sub nom.* Williams v. Zbaraz, 448 U.S. 358, *cert. denied*, 448 U.S. 907 (1980); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979).

[57] 448 U.S. at 315.

[58] *Id.*

[59] State v. Saunders, 75 N.J. 200, 216, 381 A.2d 333, 341 (1977). Writing for the majority, Justice Pashman attempted to define the right of privacy:

> Any discussion of the right of privacy must focus on the ultimate interest which protection the Constitution seeks to ensure—the freedom of personal development. Whether one defines that concept as a "right to 'intimacy' and a freedom to do intimate things," or "a right to the 'integrity' of one's personality," . . . the crux of the matter is that governmental regulation of private personal behavior under the police power is sharply limited.

Id. at 213, 381 A.2d at 339 (citations omitted).

[60] 75 N.J. 200, 381 A.2d 333 (1977).

[61] *Id.* at 213-14, 381 A.2d at 342-43. The majority in *Saunders* held that the fornication statute, N.J. STAT. ANN. § 2A:110-1 (West 1969) (repealed 1978), violated both the right to privacy found by the United States Supreme Court to exist in the first, third, fourth, fifth, ninth, and fourteenth amendments of the United States Constitution, 75 N.J. at 212 n.5, 381 A.2d at 339 n.5, and also guaranteed by article 1, paragraph 1 of the New Jersey Constitution. Yet, Justice Schreiber, in a concurrence, posited that the court's finding the New Jersey fornication

criminal offense.[62] The *Saunders* court reasoned that the extensions of constitutional protection to the "fundamental personal choice"[63] of whether to engage in sex between adults was consistent with the protection from government interference already granted under the United States Constitution to the "intimate and personal" choices of whether to bear or conceive children.[64] In *In re Grady*,[65] the New Jersey court extended the scope of an individual's zone of privacy to include the right to voluntary sterilization.[66] The *Grady* decision thus ratified the holding of a lower New Jersey court that a married woman possessed the right to be sterilized without her husband's consent.[67]

In *In re Quinlan*,[68] the court extended the right to privacy beyond matters of procreative choice to include the decision to allow "non-cognitive, vegetative existence to terminate by natural forces."[69] In so doing, the court affirmed the "independent right of choice"[70] to die by discontinuing artificial life support devices even though one is "grossly incompetent."[71] The court's rationale in *Quinlan* was recognized by the supreme court in *Grady* to stand for the idea that "under some circumstances, an individual's personal right to control her own body and life overrides the state's general interest in preserving life."[72]

Furthermore, New Jersey's recognition of "wrongful birth"[73] in *Berman v. Allen*[74] demonstrated the court's commitment to the notion

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statute unconstitutional should rest squarely on the statute's conflict with article 1, paragraph 1 of the New Jersey Constitution. *Id.* at 220, 381 A.2d at 343 (Schreiber, J., concurring).

[62] *Id.* at 226-27, 381 A.2d at 346 (Schreiber, J. concurring).

[63] *Id.* at 213, 381 A.2d at 339. The *Saunders* court concluded "that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice." *Id.*

[64] *Id.*

[65] 85 N.J. 235, 426 A.2d 467 (1981).

[66] *Id.* at 249-50, 426 A.2d at 474; *see, e.g.*, Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973) (striking down on equal protection grounds hospital regulations barring elective sterilization).

[67] 85 N.J. at 248-49, 426 A.2d at 474; *See* Ponter v. Ponter, 135 N.J. Super. 50, 342 A.2d 574 (Ch. Div. 1975).

[68] 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

[69] *Id.* at 41, 355 A.2d at 664.

[70] *Id.*

[71] *Id.* at 42, 355 A.2d at 664.

[72] 85 N.J. at 249, 426 A.2d at 474.

[73] Wrongful birth is a term used to describe the cause of action the parents of an unwanted child have against those persons whose alleged negligence proximately caused the birth. This is distinguished from a claim of wrongful life, not recognized in New Jersey, which is the assertion of the infant that absent the defendants' negligence he or she would never have come into existence. *See* Note, *Damages for Emotional and Mental Anguish Are Available in an Action for Wrongful Birth—Cause of Action for Wrongful Life Is Not Cognizable at Law*, 10 SETON HALL L. REV. 952, 952 nn. 7&8 (1980).

[74] 80 N.J. 421, 404 A.2d 8 (1979).

that a woman's opportunity to abort, guaranteed in *Wade*, must be "meaningful."[75] In the same view, the New Jersey Supreme Court's decision in *Doe v. Bridgeton Hospital Association*[76] held that legislatively sanctioned regulations[77] proscribing the use of their facilities for elective abortions were inapplicable to "quasi-public"[78] hospitals, thus demonstrating New Jersey's judicial distaste for state action which made a woman's choice less meaningful.[79]

The question of New Jersey's obligation to fund abortions for indigent women was first addressed by the supreme court in *Planned Parenthood of New York City v. State*.[80] Although the court held that neither the Federal Medicaid Act nor the equal protection clause of the fourteenth amendment required New Jersey to reimburse Planned Parenthood for the costs of abortions performed on New Jersey residents in New York before the *Wade* decision,[81] Justice Pashman, in a concurring opinion, questioned the constitutional validity of New Jersey's Hyde Amendment.[82] He posited that the United States Supreme Court decision in *Maher* had not settled the abortion funding issue since "[t]he protections emanating from [the New Jersey Constitution] can be broader than those in the United States Constitution."[83]

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[75] *Id.* at 431-32, 404 A.2d at 14.

Justice Pashman, writing for the *Berman* majority, posited:

> The Supreme Court's ruling in *Roe v. Wade*, . . . clearly establishes that a woman possesses a constitutional right to decide whether her fetus should be aborted, at least during the first trimester of pregnancy. Public policy now supports, rather than militates against, the proposition that *she not be impermissibly denied a meaningful opportunity to make that decision.*

Id. at 431-32, 404 A.2d at 14 (emphasis added); *see* Comras v. Lewin, 183 N.J. Super. 42, 44, 443 A.2d 229, 230 (App. Div. 1982)("enhanced risks of an abortion delayed to the second trimester are of such nature and magnitude that, even though abortion remains lawfully available, the parent is effectively 'denied a meaningful opportunity' to decide whether the fetus should be aborted").

[76] 71 N.J. 478, 366 A.2d 641 (1976), *cert. denied*, 433 U.S. 914 (1977).

[77] *See* N.J. STAT. ANN. §§ 2A:65A-1 to-3 (West Cum. Supp. 1982-1983).

[78] The *Bridgeton* court defined "quasi-public" hospitals as those that are "private, non-profit, non-sectarian" receiving substantial financial support from federal and local governments and the general public. 71 N.J. at 487, 366 A.2d at 645.

[79] *Id.* at 490, 366 A.2d at 647.

[80] 75 N.J. 49, 379 A.2d 841 (1977).

[81] *Id.* at 54-55, 379 A.2d at 843.

[82] *Id.* at 56-57, 379 A.2d at 844-45 (Pashman, J., concurring).

[83] *Id.* at 57, 379 A.2d at 845 (Pashman, J., concurring) (citing Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973)). Justice Pashman reasoned that the New Jersey Supreme Court had rejected the concept "that the equal protection guarantees of the Fourteenth Amendment and those in the New Jersey Constitution are . . . coterminous." *Id.* at 59, 379 A.2d at 846 (Pashman, J. concurring). He noted that in *Robinson*, Chief Justice Weintraub had ignored the federal two-tier test in which fundamental rights are involved and

Thus, while the United States Supreme Court stopped short of recognizing an indigent's right to subsidized abortions, Justice Pashman suggested that such a right might exist under the state constitution.

Five years later, in *Right to Choose*, the New Jersey Supreme Court took that extra step and recognized the right to an abortion for Medicaid-eligible women whose health is jeopardized by pregnancy.[84] Preliminarily, Justice Pollack, writing for the majority, focused on the role of state courts and their protection of individual liberties,[85] and observed that the New Jersey Supreme Court had firmly established that the state constitution may afford the individual greater protection than the Federal Constitution.[86]

In analyzing the equal protection issues,[87] the *Right to Choose* court employed the traditional two-tier analysis used in *McRae* but expanded the *McRae* Court's concept of "class."[88] Under the conventional approach, only statutes which impinge upon a fundamental right or a suspect class are subjected to strict scrutiny,[89] while other statutes need only satisfy a rational relationship to a legitimate state interest to pass constitutional muster.[90] Whereas *McRae* neither found a fundamental right to a subsidized abortion, nor recognized suspect class status in either proverty or pregnancy,[91] the *Right to Choose*

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instead adopted a balancing test similar to that subsequently advocated by Justice Marshall in his dissent in Beal v. Doe. *Id.* at 59-60; *See Beal*, 432 U.S. at 454 (Marshall, J., dissenting).

[84] 91 N.J. at 310, 450 A.2d at 937.

[85] *Id.* at 299, 450 A.2d at 931; *see also supra* note 6.

[86] 91 N.J. at 300-01, 450 A.2d at 932. Observing that "[a]lthough the state Constitution may encompass a smaller universe than the federal Constitution, our constellation of rights may be more complete," *id.* at 300, 450 A.2d at 931, Justice Pollack enumerated the various areas in which the New Jersey Court had expanded individual rights. *Id.* at 300-10, 450 A.2d at 932; *see* State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981) (standing to challenge illegal search and seizures); State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980) (speech and assembly); State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979) (right of unrelated persons to cohabitate in single dwelling); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (consent searches); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (striking down local exclusionary zoning ordinances that effectively excluded low and moderate income housing); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973) (fundamental right to thorough and efficient education); *supra* notes 60-72 and accompanying text (right to privacy).

[87] The Supreme Court's holding in *McRae* and the supremacy clause of the United States Constitution, U.S. CONST. art. VI, cl. 2, prevented the *Right to Choose* court from holding that New Jersey's Hyde Amendment violated the fourteenth amendment's equal protection clause. 91 N.J. at 303, 450 A.2d at 933.

[88] 91 N.J. at 305-06, 309-10, 450 A.2d at 934-36.

[89] *Id.* at 305, 450 A.2d at 934. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §16-6 (1978).

[90] 91 N.J. at 305, 450 A.2d at 934. *See generally* L. TRIBE, *supra* note 89, § 16-5.

[91] 91 N.J. at 305, 450 A.2d at 934; *see* Maher v. Roe, 432 U.S. 464 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

majority perceived the class in question to be pregnant women entitled to Medicaid funds.[92] Within this novel class, the court held that the New Jersey Hyde Amendment impinged upon the rights of those women for whom an abortion was medically necessary.[93]

Realizing that the conflicting interests of the individual and government are often not well resolved by a strict scrutiny or rational basis analysis, the *Right to Choose* court employed a middle-tier balancing test it considered ideal for situations in which a statute indirectly impinged upon a fundamental right.[94] The court weighed the state's interest in protecting fetal life against a woman's need to protect her own health and her right to procreative choice, and concluded that the woman's interests prevailed.[95] Conversely, for elective, nontherapeutic abortions in which a woman's health is not at stake, the court found that the state's interest prevailed.[96]

The court, applying the federal standard,[97] held that the New Jersey Hyde Amendment did not violate the provisions in the state constitution which forbid both interference with free exercise of religion[98] and the establishment of any religion.[99] The court concluded that the statute's purpose was secular since its purpose is the encouragement of childbirth and protection of potential life.[100] Furthermore, the court noted that the statute's consistency with the teachings of Roman Catholicism and other religions did not necessarily make its principal effect religious.[101] The *Right to Choose* court defended the right of religious groups to pressure legislators, noting that lobbying, a constitutionally protected activity, does not in itself create an excessive

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[92] 91 N.J. at 305-06, 450 A.2d at 934.

[93] *Id.* at 306, 450 A.2d at 934.

[94] *Id.* at 308-09, 450 A.2d at 936. This more flexible approach to the abortion funding problem was suggested by Justice Pashman in *Planned Parenthood*, 75 N.J. at 5, 379 A.2d at 846-47 (Pashman, J., concurring); *see also supra* note 83.

[95] 91 N.J. at 310, 450 A.2d at 937.

[96] *Id.*

[97] The court noted that its previous holdings had found the New Jersey Constitution's ban on the establishment of religion as less encompassing than that found in the United States Constitution. 91 N.J. at 313, 450 A.2d at 938. Nevertheless, it applied the federal standard which inquires: "(1) whether the statute has a secular legislative purpose; (2) whether its primary effect neither advances nor inhibits religion; and (3) whether it fosters excessive government entanglement with religion." *Id.*; *see* Lemon v. Kurtzman, 403 U.S. 602 (1971). With regard to the free exercise clause, the court applied the standard set forth in State v. Fass, 62 N.J. Super. 265, 162 A.2d 608 (Hudson County Ct. 1960), *aff'd*, 36 N.J. 102, 175 A.2d 193 (1961), *appeal dismissed and cert. denied, per curiam* 370 U.S. 47 (1962).

[98] N.J. CONST. art. 1, para. 3.

[99] 91 N.J. at 313, 450 A.2d at 938; *see* N.J. CONST. art. 1, para. 3.

[100] 91 N.J. at 313, 450 A.2d at 938.

[101] *Id.*

entanglement between church and state.[102] In answering the plaintiff's contention that the statute tampered with the free exercise of religion by denying funds to women who believe abortion, under certain circumstances, to be divinely mandated, the court held that, while the government may not interfere with the free exercise of religion, the state is not required to foster religious practices and decisions by providing funding.[103]

In holding that New Jersey's Hyde Amendment could be preserved by "judicial surgery," the *Right to Choose* court considered the legislature's initial intent in passing the bill.[104] The court reasoned that because the legislature's primary purpose was to prohibit public financing of abortions "on demand," a return to public funding of elective abortions would be anathema to the legislature.[105] Thus, the court assumed that the lawmakers would prefer to see the statute survive with its coverage extended only to abortions necessary to preserve a woman's health.[106]

Concurring in part and dissenting in part, Justice Pashman posited that the majority's holding should also extend to elective abortions.[107] Justice Pashman determined that the New Jersey Supreme Court had previously blurred the difference between therapeutic and elective abortions,[108] and reasoned that there was no medically valid distinction that justified the funding of one and not the other.[109] Further, Justice Pashman stated that not only does a woman's right to procreative choice outweigh any state interest in protecting fetal life,[110] but that the New Jersey Constitution requires abortion funding for all indigents who so choose.[111]

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[102] *Id.*at 314, 450 A.2d at 939. The Court noted that the Roman Catholic Church was not the only religious organization that lobbied for the statute and that some Catholic legislators had voted against the bill. Accordingly, the court determined that the allegations of entanglement by a single religious group were unfounded. *Id.*

[103] *Id.* at 314-15, 450 A.2d at 939.

[104] *Id.* at 312, 450 A.2d at 937-38.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 318-19, 450 A.2d at 941 (Pashman, J., concurring in part and dissenting in part).

[108] *Id.* at 320-21, 450 A.2d at 942 (Pashman, J., concurring in part and dissenting in part). Justice Pashman relied on Roe v. Wade to point out the harms beyond those specifically health related which may result from an unwanted pregnancy. *Id.; see* 410 U.S. at 153.

[109] 91 N.J. at 320-21, 450 A.2d at 942-43 (Pashman, J., concurring in part and dissenting in part); *accord Bridgeton Hospital*, 71 N.J. at 489, 366 A.2d at 641 ("Medically there is no valid distinction which justifies permission to utilize hospital facilities and equipment for therapeutic, but not elective abortions").

[110] *Id.* at 324, 450 A.2d at 944 (Pashman, J., concurring in part and dissenting in part).

[111] *Id.* Reasoning that "[t]he freedom to act is meaningless if it is not coupled with the ability to effectively enjoy that freedom," Justice Pashman argued that poor women require affirmative government funding in order to have a "meaningful opportunity" to abort. *Id.*

Justice O'Hern dissented, taking a position diametrically opposed to that of Justice Pashman on the abortion funding issue. Following the *McRae* rationale, he found that New Jersey's Hyde Amendment does not impinge upon a poor woman's freedom to control her own body.[112] Additionally, Justice O'Hern perceived the legislature's distinction between life and health in N.J. Stat. Ann. § 30:4D-6.1 to be rationally related to a legitimate state objective.[113]

Arriving at the "halfway" position of funding abortions when the indigent's health is threatened, but denying such funds to the indigent who elects to exercise her constitutional right to abort,[114] the *Right to Choose* court rested its analysis on two strong pillars: the right to privacy[115] and the "high priority" given to the preservation of health.[116]

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[112] *Id.* at 336, 450 A.2d at 950-51 (O'Hern, J., dissenting). Justice O'Hern stated: "To translate the limitation on governmental power to interfere in this matter of personal choice into an affirmative funding obligation is an unprecedented result." *Id.*, 450 A.2d at 951 (O'Hern, J., dissenting).

[113] *Id.* at 336-37, 450 A.2d at 951 (O'Hern, J., dissenting).

[114] *Id.* at 310, 450 A.2d at 937.

[115] *Id.* at 303, 450 A.2d at 933.

[116] *Id.* at 304, 450 A.2d at 934. New Jersey courts have historically protected both public and individual health in variety of contexts. *See Right to Choose*, 91 N.J. at 287, 450 A.2d at 925. Recently, New Jersey courts have defined the scope of the state's interest in protecting both individual and public health by weighing this interest against various other rights. In John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971), the New Jersey Supreme Court found the state's interest in protecting life to override an individual's right to religious freedom in the context of administering blood transfusions to save the life of a 22 year old Jehovah's Witness woman, badly injured in an automobile accident. *Id.* at 578-79, 585, 279 A.2d at 671, 674.

New Jersey courts have broadened the scope of the state's interest in protecting health beyond life-threatening situations to areas in which the individual or public would suffer potentially serious harm. In Mountain Lakes Bd. of Ed. v. Maas, 56 N.J. Super. 245, 152 A.2d 394 (App. Div. 1959), the court upheld an injunction restraining a Christian Scientist who refused to have her children vaccinated from entering them in the public school system. In *In re* J.S. & C., 129 N.J. Super. 486, 324 A.2d at 90 (Ch. Div. 1974), *aff'd*, 142 N.J. Super. 499, 362 A.2d 54 (App. Div. 1976), a New Jersey court restricted the visitation rights of a divorced father who was an avowed homosexual. The injunction forbade the father while visited by his three children from being in the presence of his homosexual lover, or involving the children in any homosexual-related activity or publicity. *Id.* at 498, 324 A.2d at 97. The order was grounded on the belief that such exposure might be "deleterious" to the children's emotional or physical health. *Id.* at 497-98, 324 A.2d at 97. In Young v. Borough of Somerville Bd. of Health, 61 N.J. 76, 293 A.2d 164 (1972), the Supreme Court of New Jersey found that state sanctioned decisions by local boards of health to flouridate the public water supply did not deprive any persons of their personal constitutional liberties by forcing medication upon them against their will. *Id.* at 83, 293 A.2d at 167. *See generally* Livingston v. New Jersey Bd. of Medical Examiners, 168 N.J. Super. 259, 402 A.2d 967 (App. Div.), *cert. denied*, 81 N.J. 406, 408 A.2d 800 (1979); Muhlenberg Hosp. v. Patterson, 128 N.J. Super. 498, 320 A.2d 478 (Law Div. 1974); Leimpeter's Disposal Serv., Inc. v. Mayor & Council, Carteret, 121 N.J. Super. 18, 295 A.2d 411 (Law Div. 1972), *modified*, 125 N.J. Super. 535, 312 A.2d 162 (App. Div. 1973).

Although the court retreated from Judge Furman's holding in *Right to Choose II* that the right to health is "fundamental,"[117] the New Jersey Supreme Court's interest in health is the critical element in its holding.[118] This ultimate reliance on health, however, is masked by powerful and sweeping rhetoric concerning a woman's right to privacy. The court found that under the New Jersey Constitution, a woman possesses a "fundamental right . . . to control her body and destiny,"[119] a right which "encompasses one of the most intimate decisions in human experience, the choice to terminate a pregnancy or bear a child."[120]

Nevertheless, the court's holding compels the conclusion that the right of a woman to make "[t]his intensely personal decision"[121] which should be made "without undue government interference"[122] is insufficient in itself to counterbalance the government's interest in "protecting potential life."[123] The *Right to Choose* court perceived govern-

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The state's interest in the protection of health and life, however, is not without limitation, notably when matched against an individual's right to privacy. *See supra* notes 60-72 and accompanying text. In *In re* Quackenbush, 156 N.J. Super. 282, 382 A.2d 785 (Morris County Ct. 1978), the court considered a hospital's petition for the appointment of a guardian to consent to the amputation of the severely gangrenous legs of a 72 year old recluse who wanted to return to his trailer home and "live out his life." *Id.* at 288, 383 A.2d at 788. Although the man's refusal of medical treatment would mean certain death within three weeks, *id.* at 285, 383 A.2d at 787, the court, finding the man mentally competent, denied the hospital's petition. The court followed the *Quinlan* rationale that "the State's interest weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims, until the ultimate point when the individual's rights overcome the State's interest in preserving life." *Id.* at 289, 383 A.2d at 789 (citing *Quinlan*, 70 N.J. at 41, 355 A.2d at 664); *See In re* Conroy, 188 N.J. Super. 523, 457 A.2d 1232 (Ch. Div. 1983); *In re* Schiller, 148 N.J. Super. 168, 372 A.2d 360 (Ch. Div. 1977).

[117] 91 N.J. at 304, 450 A.2d at 934. Rather than finding a fundamental right to health guaranteed by the New Jersey Constitution, the majority found preservation of health to be a "high priority." *Id.* Judge Furman, in *Right to Choose II*, held that "[e]njoyment of one's health is a fundamental liberty which is shielded by the Fourteenth Amendment to the Federal Constitution and by Article 1, paragraph 1 of the State Constitution against unreasonable and discriminatory restriction." 169 N.J. Super. at 551, 405 A.2d at 431.

[118] *See* 91 N.J. at 310, 450 A.2d at 937. Justice Pollack stated:

> Our holding is not that the State is under a constitutional obligation to fund all abortions. Rather, we hold that the State may not jeopardize the health and privacy of poor women by excluding medically necessary abortions from a system providing all other medically necessary care for the indigent. A woman's right to choose to protect her health by terminating her pregnancy outweighs the State's asserted interest in protecting a potential life at the expense of her health.

Id.

[119] *Id.* at 306, 450 A.2d at 934.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

ment interference as being "undue" solely when the funding restriction jeopardizes the pregnant woman's health.[124] Conversely, the court concluded that the state's refusal to subsidize elective abortions, which stem solely from the right to privacy, was not "undue."[125] Thus, the government's failure to ensure the right to privacy, though fundamental, is not undue government interference. If it were, then the court would have had to accept Justice Pashman's position that the state is obligated to fund all abortions, therapeutic and elective alike.

The centricity of health to the court's reasoning is also demonstrated by the majority's use of two equal protection analyses, the first of which implicitly recognized an indigent woman's right to health care. Unlike *McRae* and *Maher* in which the United States Supreme Court found the "indigent" and "pregnant" to be the classes in question[126] and thus not suspect, the *Right to Choose* court recognized the class in question as *pregnant women entitled to Medicaid funding.*[127] By formulating such a class, the New Jersey Supreme Court not only recognized an indigent's qualified right to health care,[128] but also enabled itself to find the New Jersey Hyde Amendment to be discriminatory.[129] The court was, therefore, able to conclude that within the discrete class of women who are pregnant and entitled to Medicaid funds, the statute unconstitutionally denied those women whose pregnancy was complicated by other medical problems, the necessary funds to abort and to preserve their health.[130]

Further, the use of a balancing test to decide the equal protection issue also evidenced that the *Right to Choose* court viewed the statute's threat to a woman's health as determinative.[131] The court found that a woman's right to an elective abortion does not outweigh the state's interest in protecting potential life.[132] Only when the state's interest is balanced against a woman's right to privacy *and* interest in protecting her health does it succumb.[133]

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[124] *Id.*

[125] *Id.* at 306-07 & n.5, 450 A.2d at 935 & n.5.

[126] *See McRae*, 448 U.S. at 316; *Maher*, 432 U.S. at 470.

[127] 91 N.J. at 305, 450 A.2d at 934.

[128] *See id.* at 306, 450 A.2d at 935; *cf.* Abrahams v. Civil Serv. Comm'n, 65 N.J. 61, 66-67, 319 A.2d 483, 486 (1974) (suggesting "fundamental right of an indigent resident to physical survival").

[129] 91 N.J. at 305-06, 450 A.2d at 934.

[130] *Id.* at 306, 450 A.2d at 934.

[131] *Id.* at 310, 450 A.2d at 937.

[132] *Id.*

[133] *Id.*

Although the majority claimed that the legislature has no general duty to fund any of the medical costs incident to pregnancy, even those that are "medically necessary,"[134] the *Right to Choose* court, nonetheless, adhered to a general welfare rights thesis under the New Jersey Constitution. This thesis, initially proposed by Professor Michelman within the federal context,[135] is that individuals possess a constitutional right to minimal food, health care, housing, and perhaps education;[136] in short, the "rock bottom prerequisites" for participation in the democratic process.[137] Yet, under this theory, the welfare right does not explicitly exist in the United States Constitution; it must be "triggered" by state action.[138] Thus, in areas where the state has already acted to provide people with some form of subsistence benefit, if the distribution of this benefit is challenged, the courts may intervene to insure that the government largesse is fairly distributed.[139]

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[134] *Id.* at 306, 450 A.2d at 935.

[135] Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); [hereinafter cited as Michelman, *Constitutional Welfare Rights*] Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659 (1979) [hereinafter cited as Michelman, *Constitutional Democracy*].

[136] Appelton, *Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U.L.Q. 715, 717.

[137] *Id.* at 717, 729. The Michelman thesis has been a subject of heavy attack in recent years. Michelman, *Constitutional Democracy*, *supra* note 136, at 659-60. Six basic objections to the "welfare rights" thesis are: (1) that the idea of welfare rights is not explicitly stated in the Supreme Court's decisions; (2) that there is no justiciable standard to determine when the right is satisfied; (3) that, because there is no such standard, the courts can only enforce these rights by usurping legislative power; (4) that judicial enforcement of these rights would be undemocratic and illegitimate; (5) that the claim of such rights are not in the best interests of the rights-holders; and (6) that the claim of welfare rights subverts the basic liberties of those who are required to satisfy them. *Id.* Additionally, Professor Appelton has pointed out that Harris v. McRae has severely damaged the thesis and its recognition and acceptance by the Supreme Court. Appelton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 756-57 (1981). *McRae*, according to Appelton, provided the Supreme Court with an ideal vehicle for enforcing necessary health care, a key welfare right, arguably recognized, in Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974).

[138] Appelton, *supra* note 136, at 722; *see also* Michelman, *Constitutional Welfare Rights*, *supra* note 135, at 1012-15.

[139] Appelton, *supra* note 136, at 723. Professor Appelton points out that the need for initial state action to activate a "welfare right" is a serious problem. She argues if a "welfare right" were a true substantive constitutional right, it would need no state action to trigger it, rather it would be "enforceable independent of state action or even in spite of it, but not solely because of it." *Id.*

Although the *McRae* decision illustrates the United States Supreme Court's retreat from finding a welfare right,[140] the Supreme Court of New Jersey made use of the abortion-funding issue to enforce such a right in the form of necessary medical care.[141] The *Right to Choose* court reasoned that once the legislature acts by providing some medically necessary services for pregnant women, e.g., the cost of childbirth, it must act in a "neutral manner."[142] The court perceived that this obligation of neutrality arose after state action penetrated the zone of privacy which protects and surrounds the pregnant woman's right to choose.[143] The state action "triggered" the duty to fund abortions for those pregnancies which present a risk to the mother's health.[144] Significantly, the court considered Medicaid funding "neutral" and not an undue interference if it fails to provide for elective abortions, thus denying all pregnant indigent women without related health problems the effective choice of whether or not to abort.[145] Therefore, the *Right to Choose* court, like the United States Supreme Court in *Maher*, viewed a woman's right to privacy in controlling her own body to be a "negative" right,[146] shielded from state interference

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[140] Appelton, *supra* note 137, at 756. *But cf.* Plyler v. Doe, 102 S. Ct. 2382, 2398 (1982) (extending benefits of equal protection clause and public education to children not "legally admitted" into United States).

[141] 91 N.J. at 310, 450 A.2d at 937; *see also* New Jersey Ass'n of Health Care Facilities v. Finley, 83 N.J. 67, 73, 415 A.2d 1147, 1150 (1980) (unanimously upholding administrative regulations which required "nursing homes to make available 'a reasonable number of [their] beds to indigent persons' as a condition of licensure"); *id.* at 73-74, 80, 415 A.2d at 1150, 1153 ("[all] nursing homes should be required to share in the burden of caring for indigent patients [as] [p]roperty rights have always been held to be subject to the common good and the public welfare").

[142] 91 N.J. at 306-07, 450 A.2d at 935.

[143] *See id.* at 307 n.5, 450 A.2d at 935 n.5.

[144] *Id.* Justice Pollack concluded:

> [I]t is not neutral to fund services medically necessary for childbirth, while refusing to fund medically necessary abortions. Nor is it neutral to provide one woman with the means to protect her life at the expense of a fetus and to force another woman to sacrifice her health to protect life.

Id.

[145] *Id.*

[146] *See Panel Discussion*, 1979 WASH. U.L.Q. 735 [hereinafter cited as *Panel Discussion*]. Professor Michelman defined negative and positive rights:

> Negative rights include the right to be let alone, to plan a family the way you want to, to not take an oath of public allegiance if you don't want to, and the like. Positive rights consist of claims against other people that they provide you with the things you need. . . . A negative right does not draw on a limited supply of resources; we can be prevented from interfering with one another to an absolutely limitless degree. But the idea of a positive right to a minimum level of health maintenance . . . [or] to a minimally adequate level of education is highly troublesome and problematic; indeed, we do not want to recognize rights where performance of the duty might itself

or impingement but which the government has no affirmative duty to fund,[147] even after entering a woman's zone of privacy.[148] Conversely, the New Jersey Supreme Court, unlike the United States Supreme Court in *McRae*, found a woman's right to protect her health through abortion to be a "positive" right,[149] one that the government has a constitutional obligation to subsidize, once it enters the protected zone by funding childbirth.[150]

If health funding is not an explicit welfare right constitutionally guaranteed under these circumstances to indigents, then its denial under New Jersey's mini-Hyde Amendment exacts a severe punishment or penalty against indigent women, which the *Right to Choose* court found unacceptable.[151] This argument, made by Justice Stevens, who dissented in *McRae* but voted with the majority in *Maher*, is given considerable weight by the New Jersey Supreme Court.[152] Yet this high penalty rationale is greatly limited by the *Right to Choose* majority's concepts of "penalty" and "health." For the New Jersey court, the penalty occurs because the statute forces a woman to relinquish her health, when a woman's health is not threatened by the pregnancy alone, but rather by other medical problems in conjunction with the pregnancy.[153] A penalty, however, logically occurs any time one is forced to relinquish something which he already has.[154] Using this test, the majority's interpretation of the New Jersey statute forces a pregnant woman to suffer an enormous penalty when her condition does not fit within the court's definition of "health" threatening pregnancy.[155] Indeed, an indigent woman is forced to surrender her "right to choose" and forced to carry to term an unwanted pregnancy.[156] Furthermore, the court's definition of health fails to come to terms with the physical and psychological problems of any unwanted pregnancy.[157]

> go beyond the limits of what a general act of free will or sense of justice might indicate.

Id. at 735.

[147] *See* Appelton, *supra* note 137, at 734-37.

[148] 91 N.J. at 307 n.5, 450 A.2d at 935 n.5.

[149] *See supra* note 146.

[150] 91 N.J. at 307 n.5, 450 A.2d at 935 n.5.

[151] *Id.* at 302, 450 A.2d at 932.

[152] *Id.*

[153] *Id.* at 307 n.6, 450 A.2d at 935 n.6.

[154] Appelton, *supra* note 137, at 733.

[155] 91 N.J. at 323-24, 450 A.2d at 943-44 (Pashman, J., concurring in part and dissenting in part).

[156] *Id.* at 323, 450 A.2d at 943 (Pashman, J., concurring in part and dissenting in part).

[157] *Id.*; *see* Appelton, *supra* note 137, at 734 n.96; *see also supra* note 108.

Although the *Right to Choose* majority asserted that the statute's original distinction between the life and health of the mother was untenable,[158] the court failed to recognize the inherent difficulty in distinguishing therapeutic and elective abortions.[159] Thus, the New Jersey court construed "health" narrowly enough to exclude it from encompassing elective abortions while asserting that its deprivation is a severe enough penalty to require the state to affirmatively subsidize abortions.[160]

If the *Right to Choose* court, in requiring the legislature to subsidize abortions protective of health, has found a positive "welfare right," one might question why such a right exists for health preservation but not for abortion despite New Jersey's recognition of a broad right to privacy.[161] One answer might be that proponents of the welfare thesis contend that only those particular needs required for effective participation in the political process are favored.[162] Within the past decade the New Jersey Supreme Court has ruled that education and housing rights, both of which fall within the scope of the democratic participation requirement,[163] are protected under the New Jersey Constitution,[164] and either state or local governments must take affirmative measures to nurture. Construing a ninety-eight year old constitutional provision which guaranteed a "thorough and efficient system"[165] of public education, the New Jersey Supreme Court, in *Robinson v. Cahill*,[166] struck down a method of school financing based primarily on local property taxes.[167] The *Robinson* decision, requiring that there be equal educational opportunity for children in New Jersey,[168] came in the immediate wake of *San Antonio Independent*

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[158] 91 N.J. at 307 n.6, 450 A.2d at 935 n.6.

[159] *Id.* at 321, 450 A.2d at 942 (Pashman, J., concurring in part and dissenting in part); *see also supra* note 109 and accompanying text.

[160] 91 N.J. at 310, 450 A.2d at 937.

[161] See *supra* notes 59-79 and accompanying text.

[162] Appelton, *supra* note 136, at 728.

[163] *See Panel Discussion*, *supra* note 146, at 735-36.; *see* Servano v. Priest, 5 Cal. 3d 584, 601, 487 P.2d 1241, 1258, 96 Cal. Rptr. 601, 618 (1971) (education is so "crucial to participation in, and the functioning of a democracy" that it warrants treatment as fundamental right).

[164] *See infra* notes 166-75 and accompanying text.

[165] N.J. CONST. art. 8, § 4, para. 1 provides: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." *See generally* Ruvoldt, *Educational Financing in New Jersey*: Robinson v. Cahill *and Beyond*, 5 SETON HALL L. REV. 1 (1973).

[166] 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973).

[167] *Id.* at 508-09, 515-16, 303 A.2d at 291-92, 295-96.

[168] *Id.* at 481, 515-16, 20, 303 A.2d at 277, 291-92, 297-98.

School District v. Rodriguez.[169] In *Rodriguez*, the United States Supreme Court, using an equal protection analysis, upheld the constitutionality of an unequal funding scheme quite similar to that struck down in New Jersey.[170] Recognizing the "importance of appropriate housing and the long-standing pressing need for it, especially in the low and moderate cost category,"[171] the court in *Southern Burlington County NAACP v. Township of Mount Laurel*,[172] ordered that developing municipalities provide for the "general welfare"[173] by using their zoning power to help create such housing.[174] The *Mount Laurel* court concluded that "[i]t is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation."[175] Therefore, although never explicitly recognizing a welfare right to housing, education, or health, the New Jersey Supreme Court has played an activist role during the past decade in requiring affirmative government action to provide these essential needs.

Ultimately, the majority's rejection of Justice Pashman's plea for a New Jersey constitutional right to affirmative government funding for all abortions may be explained by the court's sensitivity to judicial legitimacy.[176] After both *Robinson* and *Mt. Laurel*, the New Jersey Supreme Court encountered not only difficulty in effectively implementing its decisions but also heavy criticism for overstepping its proper bounds.[177] As with most welfare rights cases, the overriding

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[169] 411 U.S. 1 (1973).

[170] *Id.* at 54-55. Justice Powell, writing for the Court, found that the Texas system of funding public education did "not operate to the peculiar disadvantage of any suspect class." *Id.* at 28.

[171] Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 213, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[172] 67 N.J. 151, 180, 336 A.2d 713, 728, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[173] *Id.* at 174-75, 336 A.2d at 725.

[174] *Id.* at 179, 336 A.2d at 727.

[175] *Id.* This broad language may be construed as guaranteeing decent housing under the substantive due process and equal protection clauses of the New Jersey Constitution. *See* Comment, *Exclusionary Zoning: The* Mount Laurel *Doctrine and the Implications of the* Madison Township Case, 8 SETON HALL L. REV. 460, 467 n.22 (1977).

[176] *See* Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 436 (1974); *see also* THE FEDERALIST No. 47 (J. Madison); Note, Robinson v. Cahill: *A Case Study in Judicial Self-Legitimization*, 8 RUT.-CAM. L. REV. 508, 521 (1977).

[177] *See* Note, *supra* note 176, at 508, 514. The initial *Robinson* decision was met by both legislative dilatory tactics and defiance, necessitating five additional Supreme Court holdings which culminated in an injunction freezing spending for all New Jersey public schools. Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976). The *Mt. Laurel* decision, too, has presented the court with difficulties in enforcing its decision at the local level, suggesting that the solution to

legal issue in *Right to Choose* is the constitutional power of the judiciary to order the lawmakers to spend money for a particular purpose which the court deems necessary when the New Jersey Constitution confers the power of the purse solely upon the legislature.[178] Assuming that there are limits to such judicial activism which conceivably could endanger the court's legitimacy,[179] the *Right to Choose* court has avoided confrontation with the legislature over the funding issue for abortion by drawing a safe line that clearly falls within these bounds.[180] Therefore, the reason why health and not abortion has been included by the New Jersey Supreme Court within its package of welfare rights may be the court's realization that there are limits to antimajoritarian judicial power.[181]

The New Jersey Supreme Court's use of a balancing test/equal protection analysis also suggests that the court is striving for an articulated rationale that is credible and restrained. The use of this middle-tier analysis, though arguably opening the door to greater judicial creativity and interventionism,[182] in reality enables the New Jersey court to sidestep the major fear of the *McRae* majority: that the constitutional necessity of funding one fundamental right would produce the domino effect of requiring the funding of all rights.[183] Had the *Right to Choose* court utilized the two-tier approach of *McRae*, the result would have been identical to that in *McRae* unless the court found a new positive right or created a new class to be afforded special

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the problem of exclusionary zoning lies beyond the judiciary's province. Comment, *supra* note 175, at 471. Like *Robinson*, *Mount Laurel* has required further judicial action to implement the original holding. *See* Southern Burlington County NAACP v. Township of Mont Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mount Laurel II).

[178] *See* Hardy, Harris v. McRae: *Clash of Nonenumerated Right with Legislative Control of the Purse*, 31 CASE W. RES. 465, 487-91 (1981).

[179] *See* Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decision*, 1980 B.Y.U. L. REV. 811, 833 (1980). Professor Wardle contends that judicial activism threatens the legitimacy of the judiciary as an institution unless two of the following three elements are met: (1) The decision must be supported by an influential and judicially active group in society. (2) The judicial action must not be perceived by the executive or legislative branches of government as threatening their authority. (3) The court must articulate a credible rationale for its action. *Id.*

[180] *Cf. id.* at 829. Professor Wardle suggests that the United States Supreme Court avoided a certain confrontation with Congress by holding as they did in *McRae* after more than a majority of the House of Representatives filed an *amicus curiae* brief which argued that Congress, rather than the Court, had the power of the purse which included the level of public funding of abortions.

[181] *See* Appelton, *supra* note 136, at 729.

[182] *See* Yarbrough, *The Abortion Funding Issues: A Study in Mixed Constitutional Cues*, 59 N.C.L. REV. 611, 625 (1981).

[183] *Id.*

protection.[184] Either of these alternatives not only would have had a continuing, far-reaching, and powerful impact on the legislature's purse strings, but also would have made the court vulnerable to charges of usurption of legislative power and the accompanying loss of judicial respect. If, however, by requiring that the lawmakers subsidize abortions to preserve the health of indigent women, the New Jersey Supreme Court has set itself up as a super-legislature, it has not yet perceived that a woman's right to control her own body is as important as her rights to health, education, and housing.

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[184] *Id.* The court's recognition of the class in question as "pregnant woman entitled to Medicaid funding," is arguably a new class, *see supra* notes 91-93 & 126-30 and accompanying text, however, it is too narrow to have a sweeping impact on future litigation.