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Committee to Defend Reproductive Rights v. Myers: Medi-Cal Funding of Abortion

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COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS V. MYERS: MEDI-CAL FUNDING OF ABORTION

by Elizabeth Hendrickson*

In 1976, Congress passed the first "Hyde"[1] amendment and effectively limited the access of indigent women to legal abortions by prohibiting the use of federal funds for virtually all abortions.[2] Attempts to forestall implementation of these restrictions were initially successful,[3] but were finally thwarted by actions of the United States Supreme Court. In June 1977, the Court decided a trilogy of cases in which it held that neither Title XIX of the Social Security Act (Medicaid)[4] nor the Constitution require states to fund abortion for poor women,[5] and that public hospitals need not perform abortions, even though they receive federal

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1. The Hyde amendment altered the 1977 HEW appropriations bill, Pub. L. No. 94-439 § 209, 90 stat 1434; and provided reimbursement for abortions only "where the life of the mother would be endangered if the fetus were carried to term." A second, more "liberal" Hyde amendment was passed in the summer of 1977 allowing for funding where the pregnancy resulted from rape or incest in addition to the earlier exception for cases in which the woman's life was endangered. However, the actual impact of this second amendment was virtually the same as that of the first, almost no abortions were approved for Medicaid reimbursement.

2. Writers discussing government funding of abortion often employ the terms "non-therapeutic" or "elective" to describe the categories of abortions being excluded. However, preliminary figures show that Hyde restrictions resulted in at least a 96.8% decrease in publicly funded abortions: a "virtual wipe-out." A.C.L.U. Report: The Impact of The Hyde Amendment on Medically Necessary Abortions at 3-4 (1978) on file at Golden Gate University Law Review office). Thus, because use of the term elective abortion incorrectly implies that there might be other types of abortion fundable under Hyde, the term has been avoided.

3. An injunction was issued prohibiting implementation of the Amendment in McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976). The stay was lifted by the Supreme Court in Califano v. McRae, 433 U.S. 916 (1977).

4. Beal v. Doe, 432 U.S. 438, 447 (1977)(per Powell, J; Brennan, Marshall, Blackmun, J.J., dissenting).

5. Maher v. Roe, 432 U.S. 464, 478 (1977)(per Powell, J; Burger, C.J., concurring; Brennan, J., dissenting; Marshall, J. and Blackmun, J., dissents in Beal v. Doe incorporated).

funds.[6] Thus, determination of the question of public funding of abortions for poor women has been left to the states. A majority of the states, including California, have restrictions on abortion funding similar to the Hyde amendment. However, implementation of the California restrictions, which will eliminate funding of 95% of abortions previously funded,[7] has been stayed since August, 1978 by a suit brought by a coalition of San Francisco groups, *Committee to Defend Reproductive Rights (C.D.R.R.) v. Myers,*[8] which is currently pending before the California Supreme Court.[9]

This article will not only discuss the legal issues before the court in *C.D.R.R. v. Myers,* but will also describe the broader political and social ramifications of those issues. Both the United States Supreme Court and the California court of appeal decided the funding issue on narrow legal grounds, which ignored or minimized the practical effect of these decisions. In contrast, the dissenting Justices in all four cases spoke of the human tragedy caused by the funding restrictions and of the majority's attack on the *Roe v. Wade*[10] right to choose abortion. Hopefully, the California Supreme Court will face the full implications of the funding controversy and rule in favor of continued public funding of abortions for poor women.

I. BACKGROUND OF THE FUNDING PROBLEM

A. Historical Context

The history of abortion as viewed by the common law and the rationale of early abortion statutes are highly relevant to the current funding controversy.[11] Two conflicting historical perspectives of abortion law emerge from the current literature: one version views the period of 1860 to 1973, when abortion was outlawed in this country, as an historically brief period with respect to the

6. Poekler v. Doe, 432 U.S. 519, 521 (1977)(per curiam; Brennan, J, dissenting; Marshall, J., and Blackmun, J., dissents in Beal v. Doe incorporated).

7. California's restrictions were passed as part of the annual Budget Act. The current statute can be found at 1978 Cal. Stats. ch. 359 § 2. The parties stipulated that 95% of the 105,000 abortions Medical funded the previous year would no longer be MediCal reimbursable. Committee To Defend Reproductive Rights (C.D.R.R.) v. Myers, 93 Cal. App. 3d 492, 498, 156 Cal. Rptr 73, 77 (1979).

8. *Id.*

9. C.D.R.R. v. Myers, S.F. No. 45066 (hearing granted September 20, 1979).

10. 410 U.S. 113 (1973).

11. The Supreme Court considered the history of American abortion law in Roe v. Wade, 410 U.S. 113, 129, 140 (1973).

age old right to an abortion,[12] while the other version identifies the period of 1973 to 1978, during which abortion was legal and accessible, as the aberrant period.[13] The basis for these conflicting views can best be understood by an analysis of three significant questions: (1) what common law rights regarding abortion do American women retain under the Constitution; (2) what was the legal rationale for the criminal abortion statutes formulated in the 19th century, and (3) is that rationale still valid in light of recent advances in medical procedures.

At early common law, abortion was an unregulated activity.[14] Women were not criminally liable for injury to themselves or to the fetus in the course of an abortion,[15] and abortionists were not criminally liable for the injury or death of their patients.[16] However, by the mid-19th century, a number of forces combined in this country to create a shift in attitudes toward abortion. These forces included: a declining birthrate, especially among white women;[17] the emergence of the American Medical Association (AMA);[18] the licensing of medical practitioners;[19] a backlash to the suffragist and women's movements;[20] the use of abortion as a means of birth control by married and upper-class women;[21] and increasingly bold abortionist advertising and publicity.[22]

State by state, criminalization of abortion was largely advo-

12. J. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 1800-1900 (1978) at 258; Means, *The Phoenix of Abortional Freedom,* 17 N.Y.L.F. 335, 375 (1971).

13. Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807 (1973).

14. "English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy, from the reign of Edward III to that of George III. This common-law liberty endured, in England, from 1327 to 1803; in America, from 1607 to 1830." Means, *supra* note 12 at 336.

15. MOHR, *supra* note 12, at vii.

16. Means, *supra* note 12, at 362.

17. MOHR, *supra* note 12, at 91. In 1810, there were 1358 children under five years of age for every 1,000 white women in the United States. By 1890, this ratio had fallen to 685 to 1,000 - barely half the 1810 rate. In 1800, the average woman bore 7.04 children; in 1900 she bore 3.56. *Id.* at 82. Meanwhile, the incidence of abortion had increased from 1 for every 25 to 30 births in 1840 to 1 for every 5 to 6 births in 1860. *Id.* at 50. This shift from a high birth and death rate to a lower birth and death rate and the use of abortion to lower the birth rates has been witnessed in other countries as they undergo modernization *Id.* at 83-84.

18. *Id.* at 147.

19. *Id.* at 160-64.

20. *Id.* at 106-07, 168.

21. *Id.* at 96.

22. *Id.* at 47.

cated by the medical profession,[23] with eleventh hour support from the clergy.[24] Criminalization of abortion was closely associated with the licensing of medical doctors,[25] and once licensing laws were passed, anti-abortion pressure subsided.[26] The legal rationale for these original statutes was the protection of women.[27] These laws were not enacted to control promiscuity or protect the fetus.[28] Anti-abortion publicity centered on horror stories of the death and mutilation of women at the hands of abortionists,[29] despite the fact that *any* surgery performed in the 19th century was highly dangerous.[30]

In 1973, the United States Supreme Court, in *Roe v. Wade*[31] and *Doe v. Bolton,*[32] found all criminal abortion statutes and most restrictions on early abortion to be unconstitutional. Thereafter, abortions could only be prohibited in the third trimester of pregnancy.[33] The number of women who obtained legal abortions following these decisions steadily increased each year, until in 1977 they numbered 1,270,000.[34] In the years following *Roe v. Wade,* decriminalization of abortion was challenged on many fronts. Recent attempts to reinstate restrictions on the right to abortion run counter to the original purpose of the anti-abortion statutes in that abortion is no longer the dangerous procedure it was in 1830.[35] Since normal childbirth exposes women to greater risks

23. *Id.* at 157.

24. *Id.* at 182-87.

25. *Id.* at 213. For example, the same forces that pushed to restrict or criminalize abortion also worked to expel homeopaths from the medical profession. *Id.* at 162-63; and anti-abortion campaigns often started with restrictions on abortion advertising by unlicensed practitioners. The result was that licensed doctors enjoyed a monopoly on the lucrative practice of abortion. *Id.* at 181-82.

26. Competition had been restricted and the practice of medicine, including abortion, had been monopolized. *Id.* at 238-39.

27. Means, *supra* note 12, at 382-83.

28. *Id.* at 381; MOHR, *supra* note 12, at 28-29.

29. *Id.* at 179-80.

30. *Id.* at 28-29; Means, *supra* note 12, at 383.

31. 410 U.S. 113 (1973).

32. 410 U.S. 179 (1973).

33. Legal and medical commentators divide a pregnancy into "trimesters." The medical characteristics of each trimester have greatly influenced judicial decisions, including Roe v. Wade, 410 U.S. 113 (1973). For definitions of these and other medical terms associated with abortion, *see* note 43, *infra.*

34. In 1973, 744,600 abortions were performed; in 1977, 1,270,000 were performed, an increase of 71%. Forrest, Tietze, and Sullivan, *Abortion in the United States, 1976-1977,* 10 FAM. PLANNING PERSPECTIVES 271 (1978).

35. Means, *supra* note 12, at 386; *see* notes 46 and 47 *infra.*

of death or health complications than early abortion,[36] a return to the laws enacted in the 19th century would give rise to the very dangers that anti-abortion laws originally sought to prevent.[37]

The constitutionality of abortion restrictions should have been resolved by *Roe v. Wade;* but opponents of legal abortion continue to portray decriminalization as a legal and moral mistake, soon to be rectified. However, recent research into the origins of abortion laws leads to a contrary conclusion.[38] A study commissioned by the state of New York,[39] when the state was considering decriminalizing abortion in the late 1960s, concluded that the common law right retained by women and physicians after abolition of criminal statutes on abortion was, in actuality, an unlimited right to an early abortion.[40]

The right to obtain or perform abortions is not a statutory or judicially created right but a common law right retained by women and physicians under the Constitution. This comment will examine how denial or restriction of that right requires the articulation of some significant state interest.

B. Medical Context

The medical aspects of abortion represent an important factor in judicial and legislative decisions on regulation of this right. Although reputable authorities are unanimous in their conclusion that early abortion is a simple and safe procedure,[41] many com-

36. Berger, *Abortion in America: The Effects of Restrictive Funding,* New Engl. J. Med. (June 29, 1978) *reprinted in* 124 Cong. Rec. 11,764 (1978).

37. "One ventures to think . . . that responsible and responsive courts could be persuaded to . . . [find unconstitutional statutes which were founded on assumptions no longer true] where, as here, penal statutes passed to shield pregnant women from danger to health and life now, when obeyed, endanger their health and life. Cessante ratione constitutionalitatis, cessat et ipsa constitutionalitas." Means, *The Law of New York Concerning Abortion and the Foetus, 1664-1968, A Case of Cessation of Constitutionality* 14 N.Y.L.F. 411, 515 (1968).

38. Mohr, *supra* note 12; Means, *supra* note 12; and note 37.

39. A member of the commission which conducted the study was Cyril C. Means, Jr., of New York Law School. His research into the common law basis of abortion was published in two articles in the New York Law Forum cited *supra* note 12 and note 37.

40. Means in his second article considered the question of whether the common law liberty retained by women and their doctors is restricted to early, before "quickening" or "viability" abortion, or is unlimited, and concluded that it is unlimited. Means, *supra* note 12, at 354.

41. Petitti and Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childrearing Age,* 67 Am. J. Public Health 860 (1977) *reprinted in* 124 Cong. Rec. 16,740 (1977).

mentators, politicians, and courts continue to base their arguments for further restrictions on claims of concern for women's health and safety.[42] Moreover, the arguments of anti-abortionists have often been premised on misleading medical assumptions.[43]

42. Comment, *State Funding of Elective Abortion: The Supreme Court Defers to the Legislature,* 46 U. OF CIN. L. REV. 1003 (1977) in which the author claims that repeated abortions are dangerous and that limited availability would encourage use of "cheaper" and "safer" methods of birth control. *Id.* at 1009.

43. Commentators use a number of unclear or misleading terms which sometimes confuses issues. The following definitions may clarify some of the more common abortion-related terms:

> *Spontaneous vs. Induced Abortion:* Abortions may result from causes such as disease of or injury to the mother or fetus. These are spontaneous abortions or miscarriages. All others, whether performed by a doctor or caused by actions of the woman or other layperson, are "induced" abortions.
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> *Methods of Abortion:*
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> *Vacuum Aspiration* is the most common method of abortion and the least expensive. It involves the removal of the fetus and other uterine material with a suction device and can be performed in a clinic or office in only a few minutes under local anesthesia. This method is employed only during the first trimester.
>
> *Dilation and Curretage:* also known as "D and C," is employed during the sixth through the fourteenth weeks of pregnancy and consists of scraping the inside of the uterus to remove the fetal material. It also may be done under local anesthesia in an office.
>
> *Saline:* used in the first part of the third trimester, (weeks 24-30), requires hospitalization and is the most expensive and least used method, involving inducement of labor by the injection of a salt solution into the uterus.
>
> *Lay Methods:* Most self-induced and illegal abortions involve attempts at damaging the fetus or fetal material or shocking the woman's system and causing a spontaneous abortion. Caustic chemicals, such as lye or cleaning solutions, or drugs are ingested orally or introduced vaginally. Foreign objects, such as catheters and other small rubber hoses, knitting needles and coat hangers, are inserted into the uterus. These methods are extremely painful and dangerous. Common results include perforation or tearing of the uterus, hemorraging and infection. Even if injury and infection are initially avoided, infection will still occur if all fetal material is not expelled during the abortion. Perforation or tearing of the uterus requires surgery sometimes resulting in the removal of the uterus. Infection requires hospitalization and can cause death.
>
> *Therapeutic Abortions:* The vacuum aspiration and "D and C" methods are also procedures used to treat other medical conditions such as incomplete spontaneous abortions or undiagnosed uterine bleeding. When so used these procedures are called "therapeutic" abortions. All abortions performed to terminate pregnancies are "elective" or "non-therapeutic."

The vast majority of legal abortions are performed during the first trimester.[44] "For unwanted pregnancies, legal abortion in the first trimester is the safest option available to women."[45] These abortions are as safe as many other common medical procedures. They are safer than normal childbirth in terms of both physical[46] and psychological[47] health. The effect of the legalization of abortion on pregnant women's health has been overwhelmingly positive.[48]

The medical consequences of restrictions on legal abortion are increased incidents of maternal death and injury. These consequences result whether pregnant women carry their pregnancies to term, obtain illegal abortions, or delay in obtaining legal abortions.[49] Reports of deaths and injuries clearly caused by the fund-

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From interviews with Education Department staff, Alameda-San Francisco Planned Parenthood, 1979.

44. Approximately 90% nationwide are first trimester abortions. Center for Disease Control (C.D.C.) Department of Health, Education and Welfare (H.E.W.), Abortion Surveillance Tables 6, 6a, 8, 10, 13, 15, 16 (1976) *cited in* Forrest, *supra* note 34 at 274. First trimester abortions number approximately 72% in California. State Department of Health Services phone survey, January 1973 *cited in* Planned Parenthood Affiliates of California Memo (May 1979) (on file at the Golden Gate University Law Review office).

45. Petitti, *supra* note 41, at 16,740.

46. "Mortality in pregnancy and childbirth is greater than that of legal abortion regardless of maternal age or race." Berger, *supra* note 36, at 11,764.

47. In its review of the literature on the mental-health effects of abortion in 1975, the Institute of Medicine of the National Academy of Sciences concluded that 'the feelings of guilt, regret, or loss elicited by a legal abortion in some women are generally temporary and appear to be outweighed by positive life changes and feelings of relief.'

A population-based study of post-abortion psychosis found an incidence of 0.3 cases per 1000 legal abortions, as compared to an incidence of post-delivery psychosis of 1.7 cases per 1000 deliveries.

Id. at 11,765.

48. "Soon after abortion laws were liberalized in the United States, reports appeared noting dramatic declines in infant mortality, deaths and complications from illegal abortions, numbers of newborns abandoned for adoption and rates of illegitimate births." *Id.* at 11,765.

49. If all pregnant women who could have obtained Medicaid abortions instead carried their pregnancies to term, the result would be more deaths due to the increased danger of childbirth over early abortion. However, if all these women obtain illegal abortions, a large number of excess deaths will result because the mortality rate for illegal abortion is 40 per 100,000 procedures compared to a rate of 4 per 100,000 for legal abortions. Due to the fact that even legal abortion becomes more dangerous when performed later in the pregnancy, a delay of even a few weeks to obtain the required two doctors' opinions for Medicaid or to raise the money for a non-Medicaid abortion will cause excess

ing controversy have already begun to appear.[50] Perhaps the most disturbing reports are of the first deaths from illegal abortions in New York City since 1973, deaths of women who mistakenly believed that abortions were no longer legal or funded in New York, even though that state has continuously funded abortions.[51]

Those seeking to restrict abortions often claim to be saving children by preventing destruction of the fetus. However, it is difficult to identify the benefits of restricting abortions for pregnant minors or for women in danger of giving birth to defective infants. Not only are these women exposed to increased health risks themselves, but their children are more likely to be abused, neglected or physicaly and mentally disabled. One-third of the women obtaining abortions each year are teenagers.[52] Pregnant minors experience increased obstetric complications[53] and generally produce less healthy infants.[54] Children of minors are more likely to be stillborn, die in infancy, or be developmentally im-

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deaths. The following are estimates of "excess" deaths which would result from a nationwide funding cut-off:

If all women now obtaining Medicaid abortions instead:

1.	carried the pregnancy to term	44 excess deaths
2.	obtained illegal abortion	90 excess deaths
3.	delayed two weeks in obtaining legal abortion	5 excess deaths

A combination of these changes will probably occur, resulting in some deaths from each category. Lincoln, Doring-Bradley, Lindheim, and Coterill, *The Court, Congress and the President: Turning Back the Clock on the Pregnant Poor,* 9 FAM. PLANNING PERSPECTIVES 207, 213 (1977).

50. Frankfort and Kissling, *Investigation of a Wrongful Death,* 7 Ms. MAG. 66 (Jan. 1979), regarding one death from complications due to an illegal abortion; *and see Rosie Isn't the Only Victim, id.* at 82, regarding another death in Louisiana, one mutilation in Kansas, two deaths in New York City, and a hysterectomy necessitated by complications of an illegal abortion in South Carolina.

51. *Id.*

52. This figure is approximately the same for both the country as a whole and the state; United States: 33.1%, Berger, *supra* note 36, at 11,764; California: 35%, Declaration of Sadja Goldsmith in support of Petitioner's Brief at 4, C.D.R.R. v. Myers, 93 Cal. App. 3d 492, 156 Cal. Rptr. 73 (1979) (on file in Golden Gate University Law Review office).

53. These include a higher incidence of toxemia, prolonged and precipitate labor, post-partum infection and hemorrhage. Berger, *supra* note 36, at 11,764.

54. A 1975 study found a correlation between age of the mother and birth weight of infants. The percentage of infants of low birth weight born to each age group decreased as maternal age increased, 14.9% at age 15, to 7.1% at age 20-25. The Ventura Study, Berger, *supra* note 36, at 11,764. In contrast, a history of prior induced abortion was found not to be related to low birth weight, premature delivery, stillbirth, neo-natal death, miscarriage or congenital malformations in subsequent pregnancies. Daling and Emanuel, *Induced Abortion and Subsequent Outcome of Pregnancy in a Series of American Women,* 297 N. ENGL. J. MED. 1241 (1977) *cited in* Berger, *supra* note 36 at 11,765.

paired.[55] In addition, they frequently become the victims of child abuse.[56]

C. Social Context

Since decriminalization by *Roe v. Wade* in 1973,[57] abortion has become the second most common surgical procedure in the country-only tonsillectomies are performed more often.[58] "One in every eleven women of reproductive age in the United States is estimated to have obtained an abortion in the 1973-1977 period."[59] In spite of this vast number, each year, an estimated half million women who desire abortions are unable to obtain them.[60] The major causes of this situation are both an inadequate distribution of the medical providers of abortions and physicians' attitudes toward poor and third world women. In 1976, eight of every ten counties in the United States had no providers of abortions.[61] Four of every ten women obtaining abortions that year had to travel to other counties, one-third of them to other states.[62] The need to travel to obtain an abortion increases the monetary cost of the procedure by adding the expenses of travel, lodging and lost wages. In addition, the consumption of time in travel exposes

55. "Low-birth-weight infants provide a disproportionate share not only of perinatal deaths but also of developmentally impaired children." Hardy, *Birth Weight and Subsequent Physical and Intellectual Development,* 289 N. Engl. J. Med. 973 (1973) *cited in* Berger, *supra* note 36, at 11,764. "Intellectual and behavioral deficits associated with low birth weight are also apparent on follow-up examinations at eight to ten years of age." Wiener, Rider, and Oppel, *Correlates of Low Birth Weight: Psychological Status at Eight to Ten years of Age,* 2 Pediatr. Res. 110 (1968), *cited in* Berger, *supra* note 36, at 11,764.

56. Lauer, Ten Broeck and Grossman, *Battered Child Syndrome: Review of 130 Patients with Controls,* 54 Pediatrics 67-70 (1974), *cited in* Berger, *supra* note 36, at 11,764.

57. 410 U.S. 113 (1973).

58. Between 1973 and 1977 the number of abortions performed each year increased 71% from 744,000 in 1973 to 1,270,000 in 1977. Forrest, *supra* note 34, at 271. Where 19% of pregnant women obtained abortions in 1973, 28% did so in 1977. Between 1969 and 1977 five million women had abortions, four million of them after 1972. *Id.* at 272.

59. *Id* at 271. The 1976 profile of the almost one million women who obtained abortions was: 65% were under 25, 67% were white, 75% were unmarried, 48% had no other children. *Id.* at 275, Table 3.

60. *Id.* at 279. Before the Hyde Amendments, access to abortion was steadily improving: in 1976 only 66% of the women desiring abortions were able to obtain them, compared to 70% in 1977. *Id.* at 274.

61. *Id.* at 279. Abortion providers were identified in just 698 U.S. counties in 1976. Providers were generally concentrated in large metropolitan areas. In 20 states, more than 70% of the state's abortions were performed in a single metropolitan area. In 11 other states, two areas accounted for 70% or more of the abortions performed. *Id.* at 277.

62. 340,000 women had to travel to other counties within their home states. 118,000 women had to travel to other states. *Id.* at 273.

women to the increased dangers of delayed abortions, hampers diagnosis of complications, and limits access to follow-up and counselling services.[63]

The great majority of women eligible for Medicaid are mothers supported by Aid to Families with Dependent Children (AFDC).[64] Both the added expense and increased danger of out-of-state abortions limit the availability of abortions for these women.[65] Restricted funding will further exacerbate this problem and put legal abortion beyond the reach of many women. Moreover, a recent study of physicians' practices[66] disclosed that the abortion patient's ability to pay is the major factor determining whether an obstetrician-gynecologist will perform the abortion or refer the patient elsewhere.[67] Evidence that private doctors are reluctant to treat women eligible for Medicaid indicates that the sources of legal abortions were already less accessible to poor women before the Hyde amendment was enacted.

One of every three minority women in this country is eligible for Medicaid,[68] compared with fewer than one in ten white women.[69] These statistics indicate that any change in Medicaid services will affect more "third world" individuals than members of the white population. In addition to being over-represented among those poor enough to qualify for Medicaid, minority women rely more heavily on abortion as a means of family planning. The abortion rate for minority women is almost twice that for white women.[70] The result is that these women obtain one-third of the abortions performed each year while comprising only one-sixth of the population.[71]

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63. Forrest, *supra* note 34, at 273.

64. 85% of the Medicaid-eligible women of childbearing age are AFDC mothers. Lincoln, *supra* note 49, at 209.

65. Forrest, *supra* note 34, at 273.

66. Nathanson and Becker, *Physician Behavior as a Determinant of Utilization Patterns: The Case of Abortion,* 68 AM. J. PUB. HEALTH 1104 (1978).

67. "Women . . . described as without money or on Medicaid [were] less likely to be seen and more likely to be referred elsewhere for the abortion procedure than women who [had] private insurance or for whom money [was] no object." *Id.*

68. "[T]he proportion of non-white women who must rely upon Medicaid is probably . . . about 38.5%." Beal v. Doe, 432 U.S. at 460, n.4 (1976) (Marshall, J., dissenting).

69. "The comparable figure for white women appears to be about 7%." *Id.*

70. "[N]onwhites secured abortions at the rate of 476 per 1,000 live births (in 1975), while the corresponding figure for whites was only 277." 432 U.S. at 459 n.3.

71. "In 1975, about 13.1% of the population was nonwhite. Statistical Abstract of

Although two-thirds of the women obtaining abortions each year are white, authorities predict that two-thirds of the deaths resulting from funding restrictions will be of third world women.[72] This disparity is the result of the inadequate health-care received by third world women which causes death rates three times that of white women in childbirth and five times that of white women for legal abortion.[73] Forcing this group to obtain illegal abortions, to delay legal abortions, or to give birth involuntarily is interfering in what is literally a life and death situation.

Finally, discretionary guidelines on abortion, such as certification of the pregnancy as a threat to the mother's health, have been historically construed more narrowly when applied to third world women.[74] This unequal application of abortion guidelines resulted in a racial breakdown of statistics on abortion that has been nearly reversed in the current statistics.[75] Under the restrictive laws in effect prior to 1973, white women obtained abortions at almost twice the rate of minority women.[76] Many third world women eligible for legal, health-related abortions before 1973 either did not obtain them or obtained illegal abortions.[77] Even in

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the United States, 1976, at 25. Yet 31% of women obtaining abortions were of a minority race." *Id.*

72. Of the 250,000 Medicaid-funded abortions performed in 1974, approximately 160,000 were among white women and 90,000 among third world women. Expected deaths from a funding cut-off would be 15 white women and 29 third world women. Petitti, *supra* note 41, at 16,740.

73. In 1974, the risk of death from pregnancy and childbearing was 10 deaths per 100,000 live births in white women and 35.1 deaths per 100,000 in third world women. The risk of death from abortion was 0.5 deaths per 100,000 for white women and 2.4 per 100,000 for third world women. *Id.*

74. Charles, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection?* 23 HASTINGS L. J. 147, 151-55 (1971).

75. Where formerly, white women obtained abortions at up to five times the rate for third world women, that ratio is now reversed with third world women obtaining abortions at almost twice the rate of white women. *Supra* note 70, *infra* note 76.

76. A nationwide survey of all short term hospitals in the United States participating in the Professional Activities Survey (a nationwide,hospital utilization project) in 1963-65, concluded that the "incidence of therapeutic abortion was almost twice as high among white women as among the nonwhite group." Tietze, 101 AM. JOURN. OBST. AND GYN. 784, 786 (1968) *cited in* 23 HASTINGS L. J. 147, 153; in some areas the margin was much wider, as in New York City, where white women obtained abortions at five times the rate for the general third world population and 26 times that of Puerto Rican women. Gold, *Therapeutic Abortions in New York City: A 20 Year Review,* 55 AM. J. PUB. HEALTH 964, 966 (1965) *cited in* 23 HASTINGS L.J. 147, 153.

77. *Id.* at 154-55.

states where some abortions were legal, more minority women than white women obtained illegal abortions.[78]

From an analysis of the foregoing factors, it can be concluded that limited legalization has benefitted white women more than minority women. Conversely, criminalization or restriction of abortion has traditionally impacted more heavily on third world women than on white women. These results indicate a staggering inequality in the effect of Hyde restrictions on minority women when compared with the effect on white women in similar circumstances.

D. Political Context

Both supporters and opponents of abortion recognize the funding controversy as but one aspect of an overall attempt to "keep the impact of these abortion decisions [*Roe* and *Doe*] within the narrowest possible confines."[79] Since the decisions in *Roe* and *Doe*

78. A dramatic example of this phenomenon is available in a long term study of abortion in New York City. In 1965, one-half the puerperal (septic infection) deaths among Black and Puerto Rican women were due to illegal abortions, compared to one-fourth such deaths among white women. At the same time, while four white women died from illegal abortions for every 1,000 who gave birth, 8.5 Puerto Rican and 16.2 other third world women died for every 1,000 who gave birth. Although legal abortion was available in New York at that time, in limited situations, third world women were obviously not benefiting from these discretionary exceptions. When abortion was totally decriminalized in 1970, the change in third world women's access to legal abortion was dramatic: where 90% of the abortions performed under the restrictions were obtained by white women, one-half the abortions performed during the first six weeks following the lifting of the restrictions were obtained by Black and Puerto Rican women. The overall maternal death rate during that period was 2.3 per 1,000 live births as compared to 5.2 per 1,000 under the restrictive law. Hall, *Abortion in American Hospitals,* 57 Am. J. Pub. Health 1933, 1934 (1967), *cited in* 23 Hastings L. J. 147, 152 n. 28, 155 n.43.

Another study in Georgia reached a similar conclusion. The state of Georgia passed an abortion reform law in 1968, providing for legal abortions in some situations. Prior to the passage of that law, 70% of the deaths from illegal, non-hospital abortions in the state were of black women (143 of 205 deaths from 1950-1969). Following passage of the reformed law, the abortion mortality rate fell 80% (from the 1950-1954 rate to the 1965-1969 rate), but the mortality rate for black women fell only 33%; 88% of the deaths from illegal abortions after the reform were among black women (22 of 25 during the period 1965-1969). C.D.C., HEW, Abortion Surveillance 10 (1970), *cited in* 23 Hastings L.J. at 155 n.43.

79. Schulte, *Tax Supported Abortions: The Legal Issues,* 21 Catholic Lawyer 1, 2 (1975). This candid appraisal of the relative strengths of the various fronts in the anti-abortion movement places the funding controversy high on the list:

> While most anti-abortion forces have concentrated on the rather nebulous goal of implementing a constitutional Right to Life amendment, other agencies have continued to concentrate on the courts in an attempt to keep the impact of these abortion decisions within the narrowest possible confines . . . . Perhaps

in 1973, anti-abortion lobbying has resulted in the passage of numerous congressional restrictions including measures prohibiting the Civil Rights Commission from studying government policy on abortion and preventing the Legal Services Corporation from helping indigents seek abortions.[80] Other anti-abortion activities have included: pressuring private organizations to withdraw support for programs related to abortion,[81] attempting to organize a Constitutional Convention to consider an amendment prohibiting abortion,[82] harassing abortion patients,[83] and attacking abortion clinics.[84] State legislatures have attempted to impose collateral restrictions on the right to an abortion such as reporting and consent requirements,[85] advertising restrictions,[86] laws requiring extensive and expensive efforts to save late-term fetuses,[87] and restrictions on the performance of abortions in public hospitals.[88]

Even though public funding represents but one aspect of the political battle being waged over legal abortion, both supporters and opponents view it as a crucial issue; and it has emerged as the most successful method to date of restricting legal abortion.[89]

> the most meaningful legal battle being waged is the one over the question of who is to pay for abortions and sterilizations.

Id.

80. Family Planning Services Research Act, 42 U.S.C. § 300a-b (1970) (Supp. IV 1974)(as amended); Legal Services Corporation, 42 U.S.C. § 2996f(b)(8)(Supp. IV 1974).

81. The March of Dimes announced in 1978 that it would phase out funding of programs to diagnose major birth defects. This action reportedly resulted from anti-abortion pressure, although this was denied by the organization. N.Y. Times, Mar. 9, 1978, § 1, at 18, col. 6.

82. Fourteen states had passed resolutions calling for such a convention as of March, 1979. Thirty-four are needed to convene one. The states in which resolutions have been passed and the years in which they were passed are: Indiana, 1973; Missouri, 1975; Louisiana, 1976; Arkansas, Massachusetts, New Jersey, Rhode Island, South Dakota, Utah, 1977; Delaware, Kentucky, Nebraska, Pennsylvania, 1978; Mississippi, 1979. National Abortion Rights Action League (NARAL) Newsletter (March 1979) at 10 (on file at the Golden Gate University Law Review office).

83. For one woman's story of receiving a right-to-life phone call after having an abortion, *see,* THE NEW YORKER, July 3, 1978, at 19.

84. As of March 1978, six clinics had closed or moved as a result of fire, firebomb or chemical bomb attacks, NARAL Report *cited in* N.Y. Times, Mar. 2, 1978, § 1, at 16, col. 3.

85. Bryant, *State Legislation on Abortions After Roe v. Wade: Selected Constitutional Issues,* 2 AM. J. OF LAW AND MED. 101, 109, 128 (1976).

86. Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation,* 74 Colum. L. Rev. 248 (1974).

87. Bryant, *supra* note 85 at 124.

88. Note, *supra* note 86 at 254.

89. Schulte, *supra,* note 79 at 1-2.

Depending upon which advocate is evaluating the situation, the question of public funding of abortion is characterized as either the "most vicious attack yet"[90] or as "the most meaningful legal battle being waged."[91]

A clear majority of Americans favor legalized abortion.[92] Millions of American women have obtained abortions either legally

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90. "The present cases [Beal, Maher, Poelker] involve the most vicious attacks yet devised." Beal v. Doe, 432 U.S. 438, 455 (1978) (Marshall, J., dissenting).

91. "Perhaps the most meaningful battle being waged is the one over the question of who is to pay for abortions and sterilizations." Schulte, *supra* note 79, at 2.

92. A National Abortion Rights Action League (NARAL) publication, "Public Opinion Polls on Abortion Issues, 1976-1977" surveys all major American polls during those two years. (Another NARAL publication analyzes the 1973-1976 polls.) The polls show:

1) A majority of those questioned in all known polls oppose a Constitutional Amendment to prohibit abortions:

NBC polls 2-26-76	for	45%	Gallup polls 3-76	for	45%
	against	49%		against	49%
	unsure	6%		unsure	6%
9-5-76	for	32%	8-20-76	for	33%
	against	56%		against	55%
	unsure	12%		unsure	12%

2) A narrow majority support a cut-off of government funding of abortion:

Harris Survey 7-23-77	for	47%	CBS News/NY Times Poll 10-23-77	for	47%
	against	44%		against	44%
	unsure	9%		unsure	9%

3) A majority support government funding of pregnancy, but a significant minority oppose even that:

CBS News/NY Times poll 7-19-77	for	64%
	against	26%
	unsure	10%

4) The July 1977 Harris poll found majority support for these arguments:

	for	against	unsure
Hyde interferes with right to make abortion decision	55%	34%	11%
Hyde unfair because forces poor women to have illegal abortions or give birth	51%	37%	12%
Hyde unfair because rich women can have abortions, poor cannot	51%	40%	9%

5) A January 1978 poll found a majority support legal abortion:

in any circumstances	22%
in certain circumstances	55%
in no circumstances	19%

Id.

or illegally. Nevertheless, elected officials appear engaged in a race to be the first to restrict access to legal abortion. During a period of less than thirty days in the summer of 1977, all three branches of the federal government withdrew their support for government funding of abortions[93] and state legislators rushed to follow suit.[94] An explanation of this reaction offered by many commentators[95] is that the funding controversy reflected a national crisis in leadership where elected officials succumbed to special interest group pressure.[96]

Formerly, the vulnerability of the executive and legislative branches to single issue lobbying had been counterbalanced by judicial leadership. Following *Roe v. Wade,* numerous lower courts struck down collateral restrictions on abortions, in essence ruling that states must pay for Medicaid abortions[97] and that public hospitals must perform such abortions.[98] Initially, the Supreme Court withstood attempts to limit the effect of the *Roe* decision through both the excessive regulation of abortion and the imposition of consent requirements.[99] However, these judicial acts

93. Support from elected officials crumbled quickly in the summer of 1977:

June 17	House passes Hyde Amendment.
June 20	Supreme Court rules on Beal, Maher and Poelker.
June 29	Senate passes Hyde Amendment.
July 12	Carter supports funding restrictions. (HEW Secretary Califano had already done so in March on "Meet the Press.")

Lincoln, *supra* note 49, at 207, 209.

94. "Encouraged by the actions of Congress, the nation's chief executive and its high court, officials from more than two dozen states announced that their states would no longer pay for abortions [unless the pregnant woman's life were threatened] . . . . Although most state legislatures were in recess during the summer, many legislators, courting the favor of right-to-life constituents, rushed to the media to announce that they would file bills to stop state payments for abortions." *Id.* at 209.

95. For a discussion of the end of broad-based party politics and the beginning of special interest group domination, *see Why Government Gets So Little Done Nowadays,* Chicago Sun-Times, Sept. 11, 1978 *reprinted in* 124 CONG. REC. 4939 (Sept. 12, 1978).

96. The anti-abortion lobby has emerged as a dramatic example of the new power of single issue, special interest groups. Recent elections have been won or lost on the single issue of abortion, *see Anti-Abortionists' Impact Is Felt In Elections Across the Nation,* N.Y. Times, June 20, 1978, § 1 at 1.

97. Roe v. Norton, 522 F.2d 928 (2d Cir. 1975); Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974), *rev'd on other grounds,* 428 U.S. 106 (1976); Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974).

98. Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), *rev'd,* 432 U.S. 519 (1977); Doe v. Hale Hospital, 500 F.2d 144 (1st Cir. 1974), *cert. denied,* 420 U.S. 907.

99. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69-75 (1976).

were criticized as usurpations of the legislative domain[100] and violations of "cooperative federalism."[101]

Eventually, in *Beal,*[102] *Maher,*[103] and *Poelker,*[104] the United States Supreme Court deferred to the executive and legislative branches which are "responsible to the people"[105] as the "appropriate forum[s]"[106] for resolving the "sensitive funding issues."[107] The Court's decision to remain "neutral" and leave the policy decisions to the orderly processes of democratic government[108] was followed almost immediately by the enactment of Hyde-type statutes in thirty-two states. Thus, the Court failed to defend the *Roe* and *Doe* decisions, despite the majority's statements to the contrary,[109] thereby giving legitimacy and encouragement to anti-abortion forces.[110] The result was "an invitation to public officials, already under extraordinary pressure from well financed and carefully orchestrated lobbying campaigns, to approve more . . . restrictions,"[111] and "accomplish indirectly what the Court in *Roe v. Wade* and *Doe v. Bolton* . . . said they could not do directly."[112]

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100. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L. J. 920, 937, 947 (1973).

101. Note, *Medicaid and The Abortion Right,* 44 GEO. WASH. L. REV. 404 (1976).

102. 432 U.S. 438 (1977).

103. 432 U.S. 464 (1977).

104. 432 U.S. 519 (1977).

105. Poelker v. Doe, 432 U.S. at 521.

106. Maher v. Roe, 432 U.S. at 479.

107. "Indeed, when an issue involves policy choices as sensitive as those implicated by the public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature." *Id.*

108. "[W]e leave entirely free both the Federal Government and the States, through the normal processes of democracy, to provide the desired funding. The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court." Beal v. Doe, 432 U.S. at 447-448, n. 15.

109. "Our conclusion signals no retreat from *Roe* or the cases applying it." Maher v. Roe, 432 U.S. at 475.

110. To declare that a statute is not intolerable because it is not inconsistent with principle amounts to a significant intervention in the political process different in degree only from a declaration of unconstitutionality. It is no small matter . . . to "legitimate" a legislative measure. The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception. . . .

Bickel, *The Passive Virtues,* 75 HARV. L. REV. 40, 48 (1961).

111. Beal v. Doe, 432 U.S. at 462 (Marshall, J., dissenting).

112. *Id.* at 462 (Blackmun, J., dissenting).

Where laws are enacted without majority consensus in response to pressure by special interest groups, judicial intervention is once again necessary to prevent inequity and abuse.[113] The California Supreme Court has been asked to recognize this need and assume, for this state, the protective, balancing role formerly occupied by the United States Supreme Court.

II. BACKGROUND OF *COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS V. MYERS*

A. CHRONOLOGY

C.D.R.R. v. Myers has had a controversial history that reflects the intensity and depth of feeling underlying the issues in the case. California's version of the federal Hyde restrictions was passed as part of the 1978 Budget Act.[114] Regulations written by the State Department of Health Services to implement the restrictions were scheduled to go into effect on August 15, 1978.

A week prior to the effective date, however, a group of community organizations, health care providers and individuals filed suit[115] against State Department of Health Services Director, Beverlee A. Myers, who was responsible for implementation of the restrictions. Although the Committee (C.D.R.R.) obtained a temporary restraining order, one month later their request for a preliminary injunction was denied, with the temporary restraining order extended pending appeal.[116] Simultaneously with the filing of their appeal, the Committee filed a petition for a writ of supersedeas that was granted.[117] The writ stayed the lower court order dissolving the temporary restraining order and prohibited implementation of the funding restrictions until the court of appeal ruled on the case.

Third party organizations and individuals representing anti-abortion interests made several attempts to stop Medi-Cal fund-

113. "Laws should reflect an ample consensus derived through a rational process that has considered their effects in practical terms. Laws that do not reflect this process can lead only to inequity and abuse." *Editorial: Abortions and Public Policy II,* 67 AM. J. PUB. HEALTH (1977) *reprinted in* 124 CONG. REC. 16740-41 (Oct. 7, 1977).

114. 1978 Cal. Stats., ch. 359, § 2 (expired June 30, 1979).

115. C.D.R.R. v. Myers, No. 741710 (S. F. Super., filed Aug. 7, 1978).

116. *Id.*

117. C.D.R.R. v. Myers, 1 Civ. 45066. Appeal was filed in the court of appeal on Sept. 15, 1978; the writ of supersedeas was granted on October 16, 1978. Docket at 1, *id.*

ing of abortion during the appeal. These attempts included requests to intervene in *C.D.R.R.*,[118] filing a petition to the state Supreme Court to dissolve the temporary restraining order,[119] and bringing an injunctive action in San Diego Superior Court. Ultimately all of these actions were unsuccessful.[120] However, on May 29, 1979, the court of appeal, in a 2-1 opinion, held that the Budget Act was constitutional, even though it did conflict in part with the applicable federal law.[121]

The legislature passed the new Budget Act on July 13, 1979, including slightly modified abortion funding restrictions.[122] Plain-

118. The California Pro-Life Council, Inc. filed an Application for Leave to Intervene with the San Francisco Superior Court that was granted October 16, 1978, although the case was already up on appeal. The Council then filed a Reply Brief on November 9, 1978, with the court of appeal, claiming intervenor status. The Court accepted the brief as an amicus curiae brief only. Raymond and Rebecca Robledo and state legislator Joseph Montoya also filed an Application for Leave to Intervene at the Superior Court level. This application was denied.

119. California Pro-Life Council, Inc. v. Court of Appeal, S.F. No. 23995. Petition for a writ to dissolve the writ of supersedeas and to prohibit the Department of Health Services from expending funds for abortions was denied on March 22, 1979.

120. Silva v. Cory, No. 430344 (San Diego Superior Court). Raul Silva, president of the California Pro-Life Council, and other individuals, sought injunctive relief from the San Diego superior court on February 14, 1979. The court issued a preliminary injunction on March 13, 1979, prohibiting State Controller Kenneth Cory from releasing funds for Medi-Cal abortions other than those delineated in the 1978 Budget Act. The injunction was stayed until March 20, 1979. C.D.R.R. sought to intervene and moved for coordination of the San Diego action with the pending appeal. These motions were denied by the San Diego Court on March 12, 1979. C.D.R.R. then sought relief from the court of appeal in C.D.R.R. v. Superior Court, No. 46414. The court of appeal stayed the San Diego injunction on March 20, 1979.

121. C.D.R.R. v. Myers, 93 Cal. App. 3d 492, 496, 156 Cal. Rptr. 73, 76 (1979) (per Scott, P.J.; Halvonik, J., dissenting).

122. 1979 Cal. Stats., ch. 259, § § 261.5, 261.6, read in pertinent part:

> None of the funds appropriated by this item shall be used to pay for abortions, except under any of the following circumstances:
>
> (a) Where the life of the mother would be endangered if the fetus were carried to full term.
>
> (b) Where the pregnancy is ectopic.
>
> (c) Where the pregnancy results from an act punishable under Section 261 of the Penal Code, and such act has been reported, within 60 days, to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency, and the abortion occurs during the first trimester.
>
> (d) Where the pregnancy results from an act punishable under Section 261.5 of the Penal Code, and the female is under 18 years of age, and the abortion is performed no later than the first trimester, provided the female's parent or guardian or, if none, an adult of the female's choice is notified at least five

tiffs petitioned the state Supreme Court for a hearing on the lower court opinion, filed a writ to enjoin the 1979 Act from taking effect, and filed for a further stay of the restrictions pending Supreme Court review.[123] The writ of supersedeas was granted. On September 20, 1979, a hearing was also granted. Medi-Cal has continued to reimburse providers of legal abortions for poor women pending this appeal.

B. Issues

The court of appeal considered five challenges to the restrictions in its opinion: 1) that under the United States Constitution, funding restrictions which pay for pregnancy-related medical expenses but not abortion infringe on the right to privacy and deny equal protection; 2) that, under the California Constitution, such restrictions infringe on the express right to privacy and deny state equal protection provisions; 3) that the restrictions violate both the establishment and free exercise of religion clauses of the first amendment of the United States Constitution by adopting a religious definition of the beginning of life as a result of the lobbying efforts of religious groups; 4) that the restrictions fail to

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days prior to the abortion by the physician who performs the abortion. Regulations governing the notice requirement shall be promulgated by the State Director of Health Services.

(e) Where the pregnancy results from an act punishable under Section 285 of the Penal Code, and such act has been reported to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency and the abortion occurs no later than during the second trimester.

(f) Where it is determined by prenatal studies limited to amniocentesis, fetal blood sampling, fetal antiography, ultrasound, X-ray, or maternal blood examination that the mother is likely to give birth to a child with a major or severe genetic or congenital abnormality due to the presence of chromosomal abnormalities, neural tube defects, biochemical diseases, hemoflobinopathies, sex-linked diseases, and infectious processes.

(g) Where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, when so certified under penalty of perjury by two physicians, one of whom, where practicable, is a specialist in the affected medical discipline, and documentation thereof is provided with the claim for payment.

The difference between the 1978 and 1979 Acts are: 1.) 1979 coverage expanded to include §§ f and g; 2.) first trimester abortions for teenagers was extended to include sixteen and seventeen year olds; 3.) a specific dollar amount was included in the 1979 Act.

123. Petition for Hearing, C.D.R.R. v. Myers, S.F. 24069; Petition for Writ of Mandate and Request for Stay, C.D.R.R. v. Cory, S.F. 24053.

conform to Title XIX of the Social Security Act (Medicaid) which requires that participating states fund all medically necessary services for eligible indigents; and 5) that the parental notification provision of the Act impermissibly infringes on minors' right to privacy and arbitrarily denies equal protection.

Of the five issues presented, three are significant: federal equal protection, state equal protection, and minors' right to privacy. Since the federal equal protection claim is controlled by *Maher v. Roe,*[124] and since this case is unlikely to be found distinguishable,[125] the discussion of the federal issue will largely provide background for a clearer understanding of the state claims. A discussion of state equal protection guarantees and minors' right to privacy will comprise the major portion of this note, since the case law and commentary on these two questions support reversal of the court of appeal's decision.[126] The remaining two issues will be addressed only briefly since they are fully explored elsewhere. The freedom of religion argument is thoroughly discussed in a companion note in this law review,[127] and the Title XIX conflicts were substantially resolved by the court of appeal which struck portions of the Budget Act to conform with federal statutes.[128]

III. FEDERAL EQUAL PROTECTION

Based on the federal constitution, the central argument against the funding limitations is that the restrictions deny poor women equal protection by infringing on their right to privacy. Both the federal and the state constitutions contain implicit rights of privacy upon which the fundamental right to choose abortion is founded.[129] Based on this right to choose, C.D.R.R. contended that the state's decision not to fund abortion, when it is committed to funding all other procreative choices (i.e., childbirth, sterilization, and contraception), impermissibly influences the pregnant woman's decision and, therefore, interferes with her

124. 432 U.S. 464 (1977) (examining the federal equal protection argument against state refusal to fund abortion).

125. 93 Cal. App. 3d at 500-01, 156 Cal. Rptr. at 79.

126. *Id.* at 513-20, 156 Cal. Rptr. at 87-91.

127. Note, *Denial of Medi-Cal Funding of Abortion: An Establishment of Religion,* 9 GOLDEN GATE U.L. REV. 421 (1979).

128. 93 Cal. App. 3d at 510-13, 156 Cal. Rptr. at 84-86.

129. Roe v. Wade, 410 U.S. 113, 152-54 (1973); Doe v. Bolton, 410 U.S. 179, 189 (1973); People v. Belous, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359, (1969).

right to freely choose the option of abortion protected by *Roe v. Wade.*[130]

The court of appeal, however, followed the United States Supreme Court's contrary decision in *Maher v. Roe,*[131] holding that *Maher* disposed of both the state and the federal constitutional claims.[132] The *C.D.R.R.* majority's evaluation of Justice Powell's opinion in *Maher* is not shared by a large number of jurists and legal scholars as evidenced by five impassioned dissenting opinions[133] and numerous commentaries.[134] This case has been widely criticized as both inconsistent with the court's previous abortion decisions and devastating in its practical impact on poor and minority women.[135]

Maher v. Roe involved a Connecticut regulation which limited abortions the state would fund to "medically necessary" first trimester abortions.[136] The Court, using well-established equal protection analysis, examined the regulations to see if they either affected a suspect class or infringed upon a fundamental right. The *Maher* Court found that the class affected by the funding restrictions, indigent pregnant women, did "not come within the limited category of disadvantaged classes so recognized by our cases."[137] "[E]very denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services . . . [b]ut this Court has never held that financial need alone identifies a suspect class . . . ."[138]

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130. 410 U.S. 113 (1972).

131. 432 U.S. 464 (1977).

132. 93 Cal. App. 3d at 501, 156 Cal. Rptr. at 79.

133. *See* notes 4-6 *supra.*

134. L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 931, n. 68 and 933-34, n. 77 (1978); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government,* 66 GEO. L. J. 1191 (1978); Note, *Abortion, Medicaid and the Constitution,* 54 N.Y.U.L. REV. 120 (1979); Note, *The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions only for the Rich?,* 6 FORDHAM U. L.J. 687 (1978); Note, *Denial of Public Funds for Non-Therapeutic Abortion,* 10 CONN. L. REV. 487 (1978); Note, *Indigent Women - What Right to Abortion?,* 23 N.Y.L.S. L. REV. 709 (1978); Note, *Denial of State Medicaid Funds for Abortion Not Medically Necessary Does Not Violate the Equal Protection Clause,* 21 HARV. L. J. 937 (1978).

135. *Id.*

136. 432 U.S. at 466.

137. *Id.* at 470-71.

138. *Id.* at 471. *See* Comment, *Beal v. Doe, Maher v. Roe, and Non-Theraputic Abortions: The State Does Not Have to Pay the Bill,* 9 LOYOLA U.L. J. 288, 303 (1977).

The Court next focused on the nature of the right to abortion recognized in *Roe v. Wade,*[139] asserting that "Roe did not declare an unqualified 'constitutional right to an abortion,' "[140] and that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity."[141] The Court, concluding that no fundamental right was infringed, found that the *Roe* right "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy, [but] implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion. . . ."[142] This distinction between outright prohibition and refusal to extend a benefit is at the heart of Justice Powell's argument for the *Maher* majority.[143] The Court further differentiated the laws invalidated in *Roe* from the Connecticut regulations by declaring that the funding restrictions "place[d] no obstacles - absolute or otherwise - in the pregnant woman's path to an abortion."[144] Because the indigency which makes it difficult or impossible for a poor woman to obtain an abortion is "neither created nor in any way affected" by the Connecticut restrictions, the fundamental right to private choice was not burdened by the statute eliminating funding.[145]

Since the regulation was deemed to neither affect a suspect class nor interfere with a fundamental right, the Court applied the rational basis test rather than the stringent strict scrutiny test. The *Maher* majority concluded that the restrictions were constitutional because they were rationally related to the state's interest in protecting potential life and encouraging normal childbirth.[146] But the *Maher* decision included vigorous dissents by Justices Blackmun, Marshall and Brennan, who argued that strict scrutiny applied because the fundamental right *was* infringed and no compelling state interest had been shown. Simi-

139. 410 U.S. 113 (1972).

140. 432 U.S. at 473. *See* Note, *Constitutional Law - Abortion - No Requirement to Provide Medicaid Funds for NonTherapeutic Abortions Under Title XIX of the Social Security Act of 1965 or the 14th Amendment,* 52 TULANE L. REV. 179, 186(1977).

141. 432 U.S. at 475. For further discussion, *see* Stefano, *Abortion for Indigent Women: A Meaningful Right to Abortion for Indigent Women?* 24 LOYOLA L. REV. 301, 304 (197).

142. 432 U.S. at 473-74.

143. *See, e.g.,* TRIBE, *supra* note 134 at 933 n. 77.

144. 432 U.S. at 472.

145. *Id.*

146. *Id.*

larly, *Maher's* reasoning has been severely criticized by legal scholars. This criticism has centered on four issues: the failure of the Court to adequately consider the destructive impact of its decision on poor women, the majority's failure to uphold the *Roe* right to privacy or to admit that *Maher* represents a retreat from that standard, the artificiality of the Court's distinction between "absolute obstacles" to exercise of a right and "mere" encouragement of an alternative activity, and the Court's refusal to identify the real state interest served by the funding restrictions — discouragement of abortion.

A. Practical Impact

The *Maher* dissent found distressing the majority's "insensitivity to the plight of impoverished pregnant women."[147] Even the majority recognized that the practical effect of the regulations would be to prevent "nearly all poor women from obtaining safe and legal abortions."[148] One dissenting Justice said, "implicit in the Court's holdings is the condescension that she may go elsewhere for her abortion. I find that disingenuous and alarming, almost reminiscent of: 'Let them eat cake.' "[149] Justice Marshall outlined the implications of the restrictions for racial minorities, chastizing the "ethical bankruptcy" of "those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children . . . ."[150] Arguing for stricter judicial scrutiny,[151] the Justice stated that "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be

147. *Id.* at 483 (Brennan, J., dissenting); Beal v. Doe, 432 U.S. at 457 (Marshall, J., dissenting).

148. Beal v. Doe, 432 U.S. at 455 (Marshall , J., dissenting).

149. *Id.* at 462 (Blackmun, J. dissenting).

150. *Id.* at 456-57 (Marshall, J., dissenting).

151. Justice Marshall took this occasion to once again urge adoption of a flexible, three-factor, equal protection analysis to replace the two-tier approach employed by the majority. Marshall's analysis would weight "the importance of the governmental benefits denied, the character of the class, and the asserted state interests." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 322 (1976) (Marshall, J., dissenting). This would prevent the minimizing of relevant factors such as occurred in *Maher* and would have resulted in the invalidation of the Connecticut regulations. 432 U.S. at 458 (Marshall, J., dissenting). *See also,* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972); Nowak, *Realizing the Standards of Review under the Equal Protection Guarantees - Prohibited, Neutral and Permissive Classifications,* 62 Geo. L.J. 1071 (1974).

relevant" to an equal protection analysis.[152] Justice Blackmun concisely summarized the dissent's criticism:

> There is another world "out there," the existence of which the Court, I suspect, either chooses to ignore or fears to recognize. And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us.[153]

B. Retreat From the *Roe* Right to Privacy

Although the majority claimed that *Maher* "signal[ed] no retreat from *Roe* or the cases applying it,"[154] the decision clearly called into question the basic right to choose abortion. The dissenting Justices expressed dismay at this step: "[u]ntil today, I had not thought the nature of the fundamental right established in Roe was open to question, let alone susceptible to the interpretation advanced by the Court."[155] One commentator has noted that the Court had only two choices, to uphold *Roe* or to overturn it.[156] The Court's attempt to chart a middle course was "confused and strained, and ultimately a failure."[157] Another scholar has said that, "if Roe was right, Maher was clearly wrong."[158] Justice Brennan stated that "[N]one can take seriously the Court's assurance that [*Maher*] "signals no retreat from Roe."[159]

C. Absolute Barrier vs. Mere Encouragement

One of the most critical problems with *Maher* is the Court's assertion that denial of Medicaid abortion benefits does not infringe on a woman's right of choice. In addition to being inconsistent with *Roe, Maher* is also inconsistent with recent Supreme Court pronouncements on infringements of the right to privacy. Three weeks before the *Maher* decision, the Court in *Carey v.*

152. *Id.* at 460, quoting from Jefferson v. Hackney, 406 U.S. 535, 575-76 (1972) (Marshall, J., dissenting).

153. *Id.* at 463 (Blackmun, J., dissenting).

154. Maher v. Roe, 432 U.S. at 475.

155. *Id.* at 488 (Brennan, J., dissenting).

156. Perry, *supra* note 134, at 1201.

157. *Id.*

158. L. Tribe, *supra* note 134, at 934 n. 77.

159. Maher v. Roe, 432 U.S. at 483 (Brennan, J., dissenting). *See also,* critiques, *supra* note 134.

Population Services International,[160] struck down a New York law forbidding the sale of contraceptives to minors, limiting sellers of contraceptives to pharmacists, and forbidding contraceptive advertisements or displays. Justice Brennan noted that, "[t]here was no . . . law forbidding *use* of contraceptives by anyone . . . and therefore no 'absolute' prohibition against the exercise of the fundamental right . . . to privacy."[161] Nonetheless, the *Carey* case held that "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[162] Justice Brennan concluded that "infringements of fundamental rights are not limited to outright denials of those rights."[163] The *Maher* Court failed to distinguish the funding restrictions from those struck down in *Carey* or previous abortion cases in which strict scrutiny was applied.

The *Maher* holding hinges on Justice Powell's questionable distinction between direct state interference with abortion, such as criminal sanctions, and state refusal to grant aid for abortion, while funding prenatal care, contraception, and sterilization in order to encourage childbirth.[164] This distinction, advocated by Justice Powell a year earlier in his dissent to *Singleton v. Wulff,*[165] was rejected by the majority in that case:

> Mr. Justice Powell would so limit Doe, and the other cases cited, explaining them as cases in which the State 'directly interfered with the abortion decision' . . . [t]here is no support in the language of the cited cases for this distinction . . . . Moreover, a 'direct interference' or 'interdiction' test does not appear to be supported by precedent . . . . For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the state's refusal

160. 431 U.S. 678 (1977). *See,* Comment, *State Funding of Non-Therapeutic Abortions, Medicaid Plans, Equal Protection, Right to Choose an Abortion,* 11 AKRON L. REV. 345 (1977).

161. 432 U.S. at 487 (Brennan, J., dissenting).

162. 431 U.S. at 686.

163. 432 U.S. at 487 (Brennan, J., dissenting).

164. 432 U.S. at 475.

165. 428 U.S. 106, 122 (1976).

> to fund an abortion is as effective an 'interdiction' of it was would ever be necessary.[166]

Justice Marshall likewise observed that the majority's distinction was "pull[ed] from thin air" in order to avoid subjecting the restrictions to strict scrutiny which would "almost surely result in [their] invalidation."[167] Prior to *Maher,* the Court had struck down many abortion restrictions which presented less than "absolute obstacles," including spousal consent requirements,[168] procedural requirements for hospital certification, and approval of the abortion procedure by a hospital committee or by other doctors.[169] Moreover, as one commentator has noted, criminal sanctions themselves are only one form of discouragement.[170]

In explaining the distinction in *Maher*, Justice Powell compared Connecticut's decision to fund childbirth, but not abortion, to policy choices regarding public education that had been examined by the Court in *Meyer v. Nebraska*[171] and *Pierce v. Society of Sisters.*[172] In *Meyer,* the Court held unconstitutional a criminal statute prohibiting the teaching of foreign language to elementary school children. In *Pierce,* criminal sanctions were imposed on parents who failed to send their children to public schools. The *Maher* majority noted that while both cases struck down sanctions against the activities involved, neither case held that the state had to provide foreign language classes or private school education.[173] Analogizing to the Connecticut regulations, Justice Powell reasoned that although criminal sanctions were impermissible obstacles to abortion, the state had no obligation to fund alternatives to childbirth.[174] This analogy fails to address an important distinction between the funding restrictions and the limitations examined in *Meyer* and *Pierce.*[175] In the education cases, the states' failure to provide foreign language instruction or private school alternatives was motivated by goals other than discouraging these activities. "One need not disapprove of private

166. *Id.* at 118 n. 7 (citations omitted).
167. Beal v. Doe, 432 U.S. at 457 (Marshall, J., dissenting).
168. Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).
169. Doe v. Bolton, 410 U.S. 179 (1973).
170. Perry, *supra* note 134, at 1197.
171. 262 U.S. 390 (1923).
172. 268 U.S. 510 (1925).
173. 432 U.S. at 476-77.
174. *Id.*
175. Perry, *supra* note 134, at 1198-1201.

schools to acknowledge the wisdom of providing free, public education . . . . Nor can the policy of funding public education be equated with disapproval of private education."[176]

If the restrictions considered in *Maher* were needed to increase the state's population or to conserve tax monies, then the regulations would have been recognizable as something other than a device to discourage exercise of the fundamental right of choice. But the state did not claim to be motivated by these concerns, and articulated no motive other than the "encouragement of childbirth." Thus, the legislative purpose that emerges is the discouragement of a constitutionally protected activity. This significantly differs from *Meyer* and *Pierce* where state support did not preclude the existence of alternate education systems nor serve mainly to discourage alternate activities. The *Maher* majority failed to consider the practical impact of the funding restrictions: denial of Medicaid abortion benefits is tantamount to prohibiting abortions to those women who are dependent on Medicaid for all their medical needs. Underlying the *Roe* and *Doe* decisions was the understanding that criminalizing abortion stopped only poor women from obtaining them; women of means could travel to obtain a legal abortion or afford the price of an illegal one.[177] Similarly, denial of Medicaid funding effectively eliminates the abortion option only for those who can least afford to support an unwanted child.[178] To assert that these women can still obtain abortions by merely paying for it themselves, is to blind oneself to the reality of poverty.

D. Rational State Interest

The *Maher* Court's analysis considered the state interests served by the funding restrictions. The need to increase state population and to conserve tax monies have been suggested as legitimate ends. However, these justifications are unconvincing,[179]

176. *Id.* at 1199.

177. L. Tribe, *supra* note 134, at 930-31.

178. As Justice Marshall stated, "[T]he impact of the regulations here falls tragically upon those among us least able to help or defend themselves . . . . [¶] The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives." Beal v. Doe, 432 U.S. at 455-56.

179. "[T]he cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the state for the new indigents and their support in the long, long years ahead."

if not "specious."[180] The major state interest identified by the Court was the state's decision to promote childbirth over abortion.[181] Yet, this interest is equivalent to discouraging poor women from choosing abortions.[182] In addition, the Court proposed that the state had an interest in protecting the potential life of the fetus.[183] This is a difficult goal to reconcile with the analysis in *Roe,* which held that the states' interest in potential life in the first trimester could not override the mother's right to choose abortion.[184] "[T]hat justification is totally foreclosed if the Court is not overruling . . . *Roe v. Wade.*"[185] Since such articulated interests fail to support the restrictions, the central issue is whether the goal of discouraging abortion represents a constitutionally permissible state interest.[186] For the *Maher* majority's opinion to be consistent with the *Roe* decision, Connecticut's regulations should have been "recognizable as something other than state discouragement of the potential right to abortion."[187]

Plaintiffs' attempt to distinguish *Maher* was unsuccessful in the court of appeal. The Committee argued that most women on Medi-Cal were recipients of Aid to Families with Dependent Children (AFDC). As such, they are required each month to report and deduct from their grants any additional income received. Money obtained from private sources to pay for an abortion would have to be reported, thereby reducing the woman's grant. Otherwise, the woman would be exposed to the risk of criminal

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432 U.S. at 463 (Blackmun, J., dissenting). "While it is conceivable that under some circumstances [demographic concerns] might be an appropriate factor to be considered as part of a state's 'compelling' interest, no one contends that this is the case here, or indeed that Connecticut has any demographic concerns at all about the rate of its population growth." *Id.* at 489 (Brennan, J., dissenting).

180. "The court's financial argument, of course, is specious." *Id.* at 463 (Blackmun, J., dissenting).

181. 432 U.S. at 478.

182. Connecticut's restrictions, "ostensibly taken to 'encourage' women to carry pregnancies to term, are in reality intended to impose a moral viewpoint that no State may constitutionally enforce." 432 U.S. at 454-55 (Marshall, J., dissenting).

183. 432 U.S. at 478.

184. 410 U.S. at 163.

185. 432 U.S. at 489 (Brennan, J., dissenting).

186. "Thus, the crucial issue, whatever the standard of review, is whether in light of Roe v. Wade the proferred state purpose of 'encouraging normal childbirth' is constitutionally permissible. Moreover, analysis must transcend semantics: articulating the purpose as 'encouraging normal childbirth' does not camouflage the simple fact that the purpose, more starkly expressed, is discouraging abortion. The ultimate question Maher presents, then, is whether, after Roe v. Wade, discouraging abortion is a constitutionally permissible pursuit of government." Perry, *supra* note 134, at 1196.

187. *Id.* at 1199.

prosecution. Yet, the court found that the proper remedy for such a case would be an attack on the prosecutions or the AFDC regulations rather than a change in the funding restrictions.[188]

In the state supreme court, plaintiffs have asserted that California need not be bound by *Maher* since independent state constitutional grounds exist on which to invalidate the funding ban. The *C.D.R.R.* appellate court concluded that a departure from the federal analysis was unwarranted based on the "sound reasoning and persuasive authority" of Maher.[189] But, on closer examination, *Maher* emerges as an incomplete and somewhat contradictory decision. In spite of the *Maher* trilogy, at least one lower court has found the Hyde Amendment to be unconstitutional.[190] Since the U.S. Supreme Court has agreed to hear that case,[191] the Court will have an opportunity to explain, reconsider, or modify the *Maher* opinion. Based on the dissents in *Maher* and on the sound criticism of other legal scholars, the California Supreme Court should closely examine the California Constitution's equal protection and privacy provisions before discounting the independent vitality of state law.

IV. STATE EQUAL PROTECTION

Several alternative state grounds are available to support reversal of *C.D.R.R.* These equal protection claims have been developed independent of federal law: 1) the California abortion cases[192] and the right to privacy amendment[193] in the state Constitution recognize and protect privacy as a fundamental right;

188. 93 Cal. App. 3d at 500-01, 156 Cal. Rptr. at 79.

189. *Id.*

190. Zbaraz v. Quern, 572 F.2d 582 (7th Cir. 1978)., *vacated and remanded,* 596 F.2d 196 (7th Cir. 1979), *on remand,* 47 U.S.L.W. 2750 (N.D. Ill. May 1979), *stay denied sub nom.* Quern v. Zbaraz, ___ U.S. ___, 99 S.Ct. 2095 (1979). On remand following *Beal,* the district court ruled that the Hyde amendment was unconstitutional on federal equal protection grounds. Justice Stevens, who upheld the funding restrictions in *Beal* as consistent with Title XIX, denied the *Zbaraz* stay.

191. The court will hear three cases on the constitutionality of the Hyde amendment: Williams v. Zbaraz, No. 79-4, Quern v. Zbaraz, No. 79-5, and U.S. v. Zbaraz, No. 79-491, *juris. postponed,* 48 U.S.L.W. 3356 (Nov. 1979). *See Curb on Abortion Payments for Poor Faces Review,* N.Y. Times, Nov. 27, 1979, at B18, col. 1.

192. People v. Barksdale, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

193. CAL. CONST. art. I, § 1 (amended 1974) reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

2) *Danskin v. San Diego Unified School District*[194] and its progeny hold that the state may not condition the grant of a benefit on waiver of a constitutional right; 3) alternatively, *Serrano v. Priest*[195] established that a wealth based classification involving a fundamental right should trigger strict scrutiny; and 4) California's impermissible purpose[196] doctrine invalidates statutes where the underlying state interest is constitutionally infirm.

Justice Scott recognized that California's equal protection guarantees are possessed of "an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable."[197] Moreover, the California Supreme Court has often recognized rights for Californians beyond those granted by the federal courts.[198] The high Court has been emphatic in declaring its power and responsibility to examine the scope of constitutional rights on separate state grounds:

> [I]n the area of fundamental civil liberties — which includes . . . all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualifications that our interpretations may not restrict the guarantees

194. 28 Cal. 2d 536, 171 P.2d 885 (1946). Danskin begins a long line of conditional benefit cases. For discussion of these cases see note 237 *supra* and accompanying text.

195. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976).

196. *See, e.g.,* Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), *aff'd sub nom.* Reitman v. Mulkey, 387 U.S. 369 (1967); Parr v. Municipal Court, 3 Cal. 3d 861, 479 P.2d 353, 92 Cal. Rptr. 153 (1971).

197. 93 Cal. App. 3d at 501, 156 Cal. Rptr. at 79 *citing* Serrano v. Priest, 18 Cal. 3d 728, 764, 557 P.2d 929, 950, 135 Cal. Rptr. 345, 366 (1976).

198. For instance, regarding freedom of expression on private property *compare* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 592 P.2d 341, 153 Cal. Rptr. 47 (1979), *juris. postponed*, 48 U.S.L.W. 3322 (Nov. 13, 1979) *with* Lloyd Corporation v. Tanner, 407 U.S. 551 (1972); equality in public education *compare* Serrano v. Priest, 18 Cal. 3d 728 (1976) *with* San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); privacy of bank records, *compare* Burrows v. Superior Court, 13 Cal. 3d 238 (1974) *with* California Bankers Association v. Shultz, 416 U.S. 21 (1974).

Two jurists have recently commented on the concept of independent state grounds. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Mosk, *Contemporary Federalism,* 9 PAC. L.J. 711 (1978). Commentary has been widespread. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); Note, *Camping on Adequate State Grounds: California Ensures the Reality of Constitutional Ideals,* 9 SW. U. L. REV. 157 (1977); Note, *The New Federalism: Toward a Principled Interpretation of the State Constitution,* 29 STAN. L. REV. 297 (1977). For historical background on California's constitutions, see David, *Our California Constitutions: Retrospections In This Bicentennial Year,* 3 HAST. CONST. L.Q. 697 (1976).

> accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.[199]

A. FUNDAMENTAL RIGHT

People v. Belous[200] and *People v. Barksdale*[201] established, in California, the fundamental right to private choice of abortion several years before this right was recognized under the federal constitution. These cases applied strict scrutiny which required the showing of a compelling state interest because of the infringement of a fundamental right. The history of the right of privacy indicates that the California right is broader than the federal right. Moreover, passage of the constitutional amendment adding an explicit right of privacy to the state constitution bolsters this assertion. However, while acknowledging that "[t]he breadth of the concept of privacy is illustrated by the wide variety of contexts in which [it] . . . has been employed,"[202] the court found that "the California right to privacy *as it relates to a woman's right to terminate her pregnancy* is coextensive with that guaranteed by the federal constitution."[203] In support of this contention the court notes that the California Supreme Court in *Belous* relied on the same line of cases[204] as the United States Supreme Court later did in *Roe.* This observation is hardly conclusive, however, since the state court recognized the right to choose abortion four years before the federal right was acknowledged.

The Court required the Committee to show that the state

199. People v. Longwell, 14 Cal. 3d 943, 951 n. 4, 538 P.2d 753 n.4, 758, 123 Cal. Rptr. 297, 302 n.4 (1975).

200. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

201. 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

202. 93 Cal. App. 3d at 503-04, 156 Cal. Rptr. at 80-81, *quoting* White v. Davis, 13 Cal. 3d 757, 774 n. 10, 533 P.2d 222, 233 n.10, 120 Cal. Rptr. 94, 105 n.10 (1975).

203. 93 Cal. App. 3d at 503, 156 Cal. Rptr. at 80 (emphasis in original).

204. That line of cases included: Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

privacy right has been expanded beyond the federally recognized right. C.D.R.R. pointed to the explicit right to privacy added to the state constitution in 1974,[205] long after the implicit federal right had been recognized.[206] The court dismissed the amendment's relevance to the case by asserting that the "moving force behind the amendment" was concern with "increased surveillance and data collection activity."[207] Although "the scope of the amendment has not been fully outlined," the court was not persuaded that it expands the right to abortion beyond the federally guaranteed right.[208] The court chose to ignore California's constitutional right to privacy on the grounds that it has not yet been held to relate to abortion. However, such a reading presumes "that the voters were engaging in an idle and superfluous act"[209] in passing the amendment.

The appellate court found first, that the state right to privacy "is the right to be free from unwarranted governmental intrusion or unnecessarily broad regulation . . ." and second, that to argue that a denial of funding amounts to an invasion of the right to privacy "is to turn the concept of privacy upside down and inside out, transmuting it into a right *to* governmental participation in one's life rather than a right to be free *from* such involvement."[210] The court mistakenly represented plaintiffs' claim as asserting a right to government funding of abortion rather than as the right to private choice free from discriminatory funding of government approved alternatives to pregnancy. C.D.R.R. simply asserted that once the state funds childbirth, sterilization, and contraception, it cannot refuse funding for abortions without denying equal protection to those who choose abortion. Even the *Maher* court recognized that a woman's federally

205. *See* note 193 *supra.* The amendment was passed by the voters on Nov. 4, 1974.

206. The United States Supreme Court recognized an implicit right to privacy in Griswold v. Connecticut, 381 U.S. 479 (1965). For a thorough discussion of the federal right to privacy, *see* L. TRIBE, *supra* note 134, at 886-990; J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW at 623-635; Clark, *Constitutional Sources of the Penumbral Right to Privacy,* 19 VILL. L. REV. 833 (1974); Rhoades & Patula, *The Ninth Amendment: A Survey of Theory and Practice In The Federal Courts Since Griswold v. Connecticut,* 50 DENVER L. REV. 153 (1973); *Notes on Privacy: Constitutional Protection for Personal Liberty,* 48 N.Y.U.L. REV. 670, 673-701 (1973).

207. White v. Davis, 13 Cal. 3d 757, 774, 533 P.2d 222, 233, 120 Cal. Rptr. 94, 105 (1975).

208. 93 Cal. App. 3d at 503, 156 Cal. Rptr. at 80.

209. *Id.* at 514, 156 Cal. Rptr. at 87 (Halvonik, J., dissenting).

210. *Id.* at 504, 156 Cal. Rptr. at 81 (emphasis in original).

recognized right to abortion is the right to be protected from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."[211] The line of cases recognized by the court of appeal as supporting *Roe v. Wade*[212] are "a series of decisions allocating to the woman the essentially unfettered choice of whether to bear a child. . . ."[213] Thus, *Roe* emerged "less a decision in favor of abortion than a decision in favor of leaving the matter . . . to women rather than legislative majorities — or . . . to the women's parents or to their spouses."[214] Likewise, the state right is just as clearly a right to "choose whether to bear children."[215]

The *C.D.R.R.* majority also mischaracterized the benefit involved as being the funding of childbirth expenses after the "choice" is made. Even if the Budget Act restrictions were already in effect, the benefits provided indigent women of childbearing age under Medi-Cal would not be limited to prenatal and childbirth care. Rather, contraceptive services, including related education and medical examinations, as well as prescriptions for the method chosen, would be funded. Sterilization, non-elective, and some elective abortions, as well as prenatal and childbirth care would also be provided for. These services historically have been part of the Medi-Cal system[216] and fly in the face of the court's statement that only childbirth-related services are being funded. Moreover, these benefits are in reality far more diverse than "funding for prenatal care and childbirth for the woman who has already chosen to carry her pregnancy to term."[217] The restrictions, thus, eliminate only one of several options previously funded. Far from demanding "government participation," the Committee asserts the right to even-handed administration of Medi-Cal, which allows women to choose free from governmental interference.

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211. 432 U.S. at 474.

212. *See* note 204 *supra.*

213. L. TRIBE, *supra* note 134, at 933.

214. *Id.*

215. People v. Barksdale, 8 Cal. 3d 320, 326, 503 P.2d 257, 261, 105 Cal. Rptr. 1, 5 (1972).

216. CAL. WELF. & INST. CODE §§ 14132, 14503, and 14191 *et seq.* (West 1972).

217. 93 Cal. App. 3d at 504, 156 Cal. Rptr. at 81.

B. Impairment of a Fundamental Right Triggers Strict Scrutiny

The court of appeal agreed with plaintiffs that the conditional benefits rule developed in the line of cases beginning with *Danskin v. San Diego Unified School District,*[218] required the showing of a compelling state interest where the state seeks to grant a public benefit conditioned on the recipient's waiver of a fundamental right. Requiring such a waiver infringes on the exercise of that right; although such a waiver falls short of an absolute prohibition, it is "close[ly] analog[ous]. . . ."[219] *Danskin* involved a request by the American Civil Liberties Union to use a school auditorium for a public forum on the Bill of Rights. The school district required that the organizers of the forum sign statements that they did not belong to subversive organizations. Even though the state admittedly had no right to suppress the ideas of subversive organizations, the district contended that its actions were permissible preconditions for using the school auditorium because the school officials were under no obligation to allow public use of the facilities. The *Danskin* court rejected this argument and held that "[i]t is true that the state need not open the doors of a school building as a forum and may at any time choose to close them. Once it opens the doors, however, it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable."[220]

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218. 28 Cal. 2d 536, 171 P.2d 885 (1946).

219. *Id.* at 551, 171 P.2d at 895.

220. *Id.* at 547, 171 P.2d at 892.

A related analogy is well developed in Canby, *Government Funding, Abortions, and the Public Forum,* 1979 Ariz. St. L.J. 11. The public forum cases he discusses go beyond *Danskin* et al., in that they not only hold that the government may not impose unconstitutional conditions on the receipt of a state benefit, but also that the government may not refuse to provide that benefit where government involvement has become so pervasive as to preclude alternatives. (Hague v. CIO, 307 U.S. 515 (1939), Edwards v. South Carolina, 372 U.S. 229 (1963); Brown v. Louisiana, 383 U.S. 131 (1966)). Thus, while the government is under no obligation to build streets and parks, once it does so it may not forbid public speech in these places.

This doctrine is responsive to increased public ownership of space suitable for large assemblies, leaving few alternative sites for public speech. The analogy can be made to government involvement in health care for the poor which has also become so pervasive as to eliminate many alternatives. Although the government need not provide comprehensive health care for the poor, once it does so it may neither condition receipt of the benefits upon waiver of constitutional rights, nor restrict the nature of those benefits. No right to public funding of abortion need be found; the provision of a comprehensive health care system is adequate for the public access rights to attach. And see, L. Tribe, *supra* note 134, at 688-93.

In *C.D.R.R.,* the Committee argued that the funding restrictions represent an attempt by the state to condition receipt of Medi-Cal payments on a woman's waiver of her right to an abortion. As in *Danskin,* the state is under no duty to provide the benefit at all, but once it does, it cannot condition the granting of Medi-Cal coverage upon the renunciation of the right to choose an abortion. The court of appeal sought to distinguish *C.D.R.R.* from *Danskin* by defining the nature of the benefit "*not* as medical care for pregnancy, but as funding for prenatal care and childbirth. . . ."[221] By so defining the benefit, the court could completely ignore any effect the state may have on the woman's right to choose abortion, since the benefit would not become available until after the woman decided to carry the pregnancy to term. "Once her decision has been made, if she is indigent she may receive financial aid from the state for the medical costs associated with childbirth."[222] Thus, the court disassociated the state from any interference in the protected right of a woman to make decisions concerning her pregnancy.

The court's treatment in *C.D.R.R.* differs somewhat from the analysis employed by the *Maher* Court. In *Maher,* the majority redefined the federal right to abortion as a "qualified" right which may be influenced, but not directly interfered with. The Court readily acknowledged that the funding of only childbirth expenses and not abortion would effect a woman's decision, but the court found this permissible.[223] Although the court of appeal in *C.D.R.R.* did not use the same analysis of the effect on the pregnant women's decision-making, it did use the *Maher* Court's distinction between direct state interference and encouragement of an alternative activity as described in the high court's public school analogy.[224] Just as the provision of free public education does not interfere with the right to a private education, the court reasoned, so also the provision of free medical care for childbirth does not interfere with the right to abortion. "[A] woman obviously cannot exercise her right to terminate her pregnancy and simultaneously accept state provided funding for prenatal care and childbirth."[225]

221. 93 Cal. App. 3d at 504, 156 Cal. Rptr. at 81 (emphasis in original).
222. *Id.* at 505, 156 Cal. Rptr. at 81.
223. 432 U.S. at 474.
224. *See* notes 171-176 and accompanying text.
225. 93 Cal. App. 3d at 505, 156 Cal. Rptr. at 82.

The central weakness of the court's analogy is its mischaracterization of the abortion right as separate and distinct from the right to childbirth. C.D.R.R. correctly asserts that "[T]here is no meaningful way to sever the right to bear a child from the right not to bear a child. Thus, a statutory scheme which funded abortion but not childbirth would be subject to the same constitutional infirmities as the present restrictions. The right is that of choice."[226] In contrast, the right to public education and the right to attend a private school "are entirely separate, and even have completely separate constitutional underpinnings."[227]

C.D.R.R. offered more appropriate analogies such as cases involving the right to free speech.[228] Essentially, the right of free speech is single and indivisible, like the right to choose. Providing benefits based on how one exercises the right is impermissible under *Danskin.* Likewise, the right to be free from governmental interference when making the decision to continue or terminate a pregnancy is a single right under either federal or state law and should not be interfered with.

In his dissent in *C.D.R.R.,* Justice Halvonik discussed at length the conditional benefits concept. The Justice identified the central question of the case:

> whether the state, once it provides [medical assistance to the pregnant poor], may condition its receipt on the waiver of a constitutional right; whether, in other words, the state may withhold its bounty and, in effect, substitute its judgment about the proper way to exercise a constitutional right for that of the individual. . . .[229]

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226. Petition for Hearing, supra note 123, at 22 n. 40.

227. *Id.* at 24. The right to a public education in California is found in the CAL. CONST., art. IX, §§ 1 and 5. The right to attend a private school is based on the 14th amendment of the United States Constitution and was recognized in Pierce v. Society of Sisters, 268 U.S. 510 (1924). Another example of "mutually exclusive" rights is the right to counsel under the sixth amendment and the right to refuse appointed counsel and represent oneself as recognized in Faretta v. California, 422 U.S. 806 (1975). As with the education rights, the criminal defendant may either accept publicly financed services or opt to pay for his or her own counsel or represent him or herself. There is nothing unconstitutional about such a system because, unlike the right to choose birth or abortion, the above rights "have never been phrased as the single constitutional right to choose between public and private education, or to choose among public, private, or no legal representation at trial." *Id.* at 25 n. 42.

228. L. TRIBE, *supra* note 134, at 933 n. 77; Perry, *supra* note 134, at 1197.

229. 93 Cal. App. 3d at 515, 156 Cal. Rptr. at 88 (Halvonik, J., dissenting).

The dissent relied on two cases that followed *Danskin: Bagley v. Washington Township Hospital District*[230] and *Parrish v. Civil Service Commission.*[231] In *Bagley,* public employees lost their jobs for engaging in "any political activity." The court held that the state's power to withhold employment "did not encompass a supposed 'lesser' power to grant such benefits upon arbitrary deprivation of a constitutional right."[232] This holding was extended in *Parrish* to the waiver of the right of privacy as a condition for welfare benefits. *Parrish* prohibited pre-dawn raids by welfare workers searching for "unauthorized males" in the homes of welfare recipients. The government claimed that since it had no obligation to provide welfare benefits at all, it could require that recipients waive their rights to privacy as a condition for receipt of benefits. The *Parrish* court outlined a three part test which must be met if "the conditions annexed to the enjoyment of a publicly conferred benefit require a waiver of rights secured by the Constitution": 1) the conditions must reasonably relate to the legislative purpose of the benefit; 2) the value to the public of the conditions must outweigh any impairment of constitutional rights caused by the conditions; and 3) an alternative means less subversive of constitutional rights must be unavailable.[233]

The dissenting Justice in *C.D.R.R.* concluded that the abortion funding restrictions failed to meet the *Parrish* test:

> For the state to condition the receipt of medical benefits upon whether the pregnant woman chooses to terminate or carry to term unquestionably intrudes on the exercise of that right. [citation omitted.] Indeed, the intrusion on the right of privacy is, if anything, greater here than it was in Parrish. Parrish involved a one-night raid. Here, the state extends its medical benefits only if the woman agrees to let her body be used to nurture something she does not wish to nurture. If the government, in Parrish, had proposed to camp in the recipient's house for nine months, the intrusion would still be less that that involved here.[234]

230. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).
231. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).
232. 65 Cal. 2d at 504, 421 P.2d at 413, 55 Cal. Rptr. at 405.
233. 66 Cal. 2d at 271, 425 P.2d at 230, 57 Cal. Rptr. at 630.
234. 93 Cal. App. 2d at 516, 156 Cal. Rptr. at 89 (Halvonik, J., dissenting).

On the other hand, the *C.D.R.R.* majority distinguished *Parrish* on the grounds that in *Parrish* the recipients stood to lose their general welfare benefits, while in *C.D.R.R.* "the state is merely not paying for elective abortions."[235] While the court agreed that denial of general welfare benefits or medical benefits to women who chose abortion would raise serious constitutional problems, it failed to acknowledge that the funding restrictions essentially deny any useful medical benefits to pregnant women who seek abortions.[236] While the conditional benefit cases may[237] not be precisely on point, they are more closely analogous to the funding ban than the majority's public school cases. The essence of a conditional benefit is present in *C.D.R.R.* and the state's failure to impose a more comprehensive restriction (i.e., to cut off *all* medical benefits to those who choose abortion) should not save the Budget Act restriction from strict scrutiny. The present restrictions are no less offensive to equal protection concepts than the conditions invalidated in *Danskin, Bagley,* and *Parrish.*

California does not require that interference with a fundamental right constitute an absolute barrier. Less than total deprivation, indeed, any infringement of a fundamental right, requires strict scrutiny and can be justified only upon a showing of a by two recent cases. In *Payne v. Superior Court*[238] the state

235. *Id.* at 506, 156 Cal. Rptr. at 82.

236. *See also* the discussion on prohibition/incentive distinction, *supra* notes 164-175 and accompanying text.

237. The conditional benefit cases include Atkisson v. Kern County Housing Authority, 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976). This case involved a housing authority policy which forbid the cohabitation of adults of the opposite sex who were not related by blood, marriage or adoption. When the housing authority sought to evict a woman under this policy for living with a man not her husband, she challenged the action as an invasion of her right to privacy and the court agreed with her.

The majority in *C.D.R.R.* distinguished *Atkisson* on the basis that the nature of the benefit provided is not comparable to that provided in *C.D.R.R.*: "[T]he benefit in Atkisson was public housing; nothing inherent in the nature of that benefit limits its usefulness to couples who are married. In contrast, . . . the benefit at issue here . . . is simply of no use to the woman who has decided to terminate her pregnancy." 93 Cal. App. 3d at 506, 156 Cal. Rptr. at 82. Once again, the majority's analysis of the issue hinges on characterization of the benefit provided as a funding for prenatal care and childbirth rather that a funding for medical care associated with pregnancy.

In addition to the cases discussed earlier, the conditional benefit standard was upheld in Finot v. Pasadena City Board of Education, 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967), where a teacher was reassigned for wearing a beard, and in King v. California Unemployment Insurance Appeals Board, 25 Cal. App. 3d 199, 101 Cal. Rptr. 660 (1972), where a man fired for wearing a beard was denied unemployment benefits.

238. 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976).

supreme court found that an indigent prisoner had a right to appointed counsel in a civil suit arising out of the same incident for which he was serving a jail sentence. The prisoner was not suffering a total deprivation of his right of access to the courts since he could seek representation through hired, legal aid, or pro bono counsel; yet, his practical ability to exercise this right was held to be impaired and counsel was granted.[239] Similarly, in *Salas v. Cortez,*[240] indigent defendants in paternity suits were found to be entitled to appointed counsel to protect against the "incorrect imposition of [the parent-child] relationship."[241] Unlike *Payne,* in *Salas* the state was already representing the mother in the paternity proceeding and was thus not "neutral" in relation to the fundamental right of privacy in parent-child relationships.

The fact that the funding scheme does not create an absolute barrier to abortion does not remove it from the scope of strict scrutiny.[242] Any interference with the exercise of a fundamental right has been held to require a compelling state interest in California; and the state's payment for childbirth and contraception, coupled with essentially no funding for abortion, creates an imbalance in the choices presented to poor pregnant women who rely upon Medi-Cal benefits for their health care. The state's system conditions receipt of Medi-Cal benefits for pregnancy on the recipient's willingness to forego the choice of abortion. Unlike the federal courts, California courts have recognized no distinction between direct state interference with a protected activity and encouragement of an alternative activity when the effect of either plan is to infringe upon a fundamental right. Rather, California courts have long held that the government is prohibited "from doing with carrots what it could not do with sticks."[243]

239. *Id.* at 919, 553 P.2d at 572, 132 Cal. Rptr. at 412.

240. 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979).

241. *Id.* at 28, 593 P.2d at 230, 154 Cal. Rptr. at 533.

242. Just as Justice Marshall has urged a middle level of scrutiny in federal equal protection analysis, *see* note 151 *supra,* Justice Mosk has advocated the flexible middle standard for California law. Hawkins v. Superior Court, 22 Cal. 3d 584, 595-607, 586 P.2d 916, 923-31, 150 Cal. Rptr. 435, 442-50 (1978) (Mosk, J., concurring). C.D.R.R. suggests that if the high court finds strict scrutiny inapplicable, middle tier scrutiny would more adequately reflect the importance of the constitutional rights involved. Petition for Hearing, *supra* note 123, at 44-45.

243. L. TRIBE, *supra* note 134, at 933 n. 77. *See also* Parrish v. Civil Service Commission, 66 Cal. 2d 260, 271, 425 P.2d 223, 230, 57 Cal. Rptr. 623, 630 (1967).

C. Wealth Based Classification

Alternatively, C.D.R.R. argued that the Budget Act involves the infirmity of a wealth based classification which has impact on the exercise of a fundamental right. This infirmity triggers strict scrutiny under *Serrano v. Priest*,[244] a case which holds wealth classifications to be suspect. Although the United States Supreme Court has never included wealth in the category of groups it has defined as "suspect," the California Supreme Court has done so independently. In *Serrano,* the court found California's system of financing public education unconstitutional because it was based on local property tax revenue which varied from district to district according to the assessed valuation of the real property or "wealth" of each district. While the Court was considering *Serrano* a second time (legislation passed following *Serrano* I failed to remedy the financing problem), the United States Supreme Court decided *San Antonio School District v. Rodriguez,*[245] an equal protection attack on Texas' public school financing. In *Rodriguez,* the Court held that the Texas system did not involve a suspect classification based on wealth and did not affect a fundamental interest since education was not guaranteed by the federal constitution.[246] However, the California Supreme Court, for a second time, found the state financing scheme unconstitutional, expressly refusing to be bound by the *Rodriguez* decision: "the fact that a majority of the United States Supreme Court have now chosen to contract the area of active and critical analysis under the strict scrutiny test for federal constitutional purposes . . . will have no effect upon the existing construction and application afforded our own constitutional provisions."[247]

244. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). For background and analysis of *Serrano, see* Lipson, *Serrano v. Priest, I and II: The Continuing Role of the California Supreme Court In Deciding Questions Arising Under the California Constitution,* 10 U.S.F. L. Rev. 697 (1976); Grubb & Midielson, *Public School Finance In a Post-Serrano World,* 8 Harv. Civil Lib. L. Rev. 550 (1973).

245. 411 U.S. 1 (1976).

246. *Id.* at 18, 29.

247. 18 Cal. 3d at 765, 557 P.2d at 950, 135 Cal. Rptr. at 366. *Rodriguez,* like *Maher,* was seen by many as a retreat from earlier cases recognizing fundamental rights. The *Serrano* Court, unlike the court of appeal in *C.D.R.R.,* confronted this fact directly: "[w]e do not think it open to doubt that the Rodriguez majority had considerable difficulty accommodating its new approach to certain of its prior decisions, especially in the area of fundamental rights" 18 Cal. 3d at 765 n. 44, and chose not to retreat but to continue to uphold state constitutional rights even in the face of eroding federal guarantees: "[n]or can the additional fact . . . that certain of the high court's former decisions (which may have been relied upon by us in Serrano I) may not be expected to thrive in

The court of appeal in *C.D.R.R.* distinguished *Serrano* on several grounds.[248] First, the system in *Serrano* was "established and perpetuated" by the state while the inequality found in *C.D.R.R.* existed outside of the state system. In addition, the financing scheme in *Serrano* actually benefitted wealthy districts while the restrictions in *C.D.R.R.* provide no benefit for wealthy women. Finally, the court found that the educational right involved in *Serrano* is a guaranteed fundamental interest, while the right to state funding of abortion, as identified by Justice Scott in *C.D.R.R.*, is not.

The Committee characterized these distinctions as "red herrings;"[249] and indeed they seem to relate more to the wording than the substance of *Serrano.* Certainly, the system invalidated in *Serrano* was more offensive because the state was intimately involved in formulating and administering it. But the disparity underlying the financing program was no more created by the state than the indigency of the women affected by the abortion funding restrictions. The *Serrano* Court held that the state must create a system which equalizes rather than exacerbates the underlying disparity of wealth among school districts.[250] If the *C.D.R.R.* court's analysis of *Serrano* is correct, the state might have been ordered merely to cease its involvement in school financing rather than to remedy the pre-existing inequality. Moreover, the *Serrano* scheme made wealthy districts wealthier; but the decision was not based on this aspect of the financing system and the court's decision was not limited to the curtailment of this practice. The central issue was the disparity in educational opportunity which resulted from the disparity of available revenues.

The court of appeal's misstatement of the nature of the right

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the shadow of Rodriguez cause us to withdraw from the principles we there announced on state as well as federal grounds." *Id.* at 765. For a discussion of *Rodriguez, see* L. TRIBE, *supra* note 134, at 1005, 1131.

In addition, the dissent points out that two cases support a higher level of scrutiny in California when welfare recipients' rights of privacy are involved: a pre-*Rodriguez* case, Wyman v. James, 400 U.S. 309 (1971) and Parrish v. Civil Service Commission, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

248. 93 Cal. App. 3d at 501-02, 156 Cal. Rptr. at 79. For a general discussion of the distinction between private and state action as it relates to the funding of fundamental rights, *see* Comment, *State Funding of Elective Abortion: The Supreme Court Defers to the Legislature,* 46 U. CIN. L. REV. 1003, 1004 (1977).

249. Petition for Hearing, *supra* note 123, at 43 n. 64.

250. 18 Cal. 3d at 772, 557 P.2d at 957, 135 Cal. Rptr. at 371.

C.D.R.R. sought to protect is at the heart of the problem. The court compared the *Serrano* right to a public education with the right to a publicly financed abortion and then noted that the abortion right guaranteed to California women is the right to choose abortion, as opposed to the right to a public subsidy of the procedure. The court seemed to be caught up in its own semantics and thus failed to deal with the equal protection question. Appellants were not asserting that any woman in California has a right to publicly funded abortions. Rather, they were asserting that the state must not interfere in the decision to terminate or continue a pregnancy — that it must fund either both options or neither.

D. State Interest

Once the strict scrutiny standard is applied, the state must exhibit a compelling state interest that, according to the *Bagley-Parrish* test,[251] also furthers the objectives of the California Medi-Cal program and is the least burdensome method of furthering those objectives. The dissent in *C.D.R.R.* points out that no such interest can exist: "[w]hat is the state's interest in forcing those who do not want children to have them?"[252]

The state's arguments in *C.D.R.R.* revealed the true interest being advocated. The Attorney General argued that taxpayers opposed to abortion should not be forced to fund it: "[t]he state may restrict use of public funds for purposes that might indicate a lack of tolerance for the beliefs of many of its taxpayers."[253] The state further argued that the United States Supreme Court in *Roe v. Wade* failed to adequately protect the sanctity of human life[254] and sought to replace the federal and state right to choice with an extreme anti-abortion definition of the options confronting pregnant women: "[c]hildbirth is the continuation of human life. Its legitimacy requires no explanation. Abortion on the other hand entails the termination of potential human life. To some it is the best, the kindest and the wisest solution to unwanted pregnancy. To others it is plainly murder."[255]

251. This is the test outlined in Bagley, 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401, and reaffirmed in Parrish v. Civil Service Commission, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) which Justice Halvonic discusses in his dissent, 93 Cal. App. 3d at 516, 156 Cal. Rptr. at 88. *See* note 232 and accompanying text.

252. 93 Cal. App. 2d at 517, 156 Cal. Rptr. at 89 (Halvonik, J., dissenting).

253. Answer to Petition for Hearing at 27, C.D.R.R. v. Myers, S.F. No. 45066.

254. *Id.* at 26.

255. *Id.* at 9.

The state failed entirely to consider the impact of this funding scheme on the state citizens involved — California's poor women. Nowhere are the projected increased death and complication rates or the estimated increased welfare costs compared to this asserted interest in potential life.[256] Instead, the victims of the funding restrictions are portrayed as having created their own dilemna by choosing to risk pregnancy through the use of dangerous and faulty contraceptive methods rather than practicing celibacy.[257] Such treatment of the fundamental right to choice is not only inadequate, but fails to describe a compelling state interest which outweighs the fundamental rights of all citizens.

Indeed, the rationale for the funding restrictions described by the Attorney General and acknowledged by jurists and legal commentators is not even a permissible state activity and would not survive even the lowest level of scrutiny. Under California's doctrine of improper purpose, enunciated in *Mulkey v. Reitman*[258] and *Parr v. Municipal Court,*[259] the court could hold the Act unconstitutional based on a finding of improper motive. As the dissent points out, the real purpose of this legislation must be clearly acknowledged:

> It is all very well to say that we cannot look to legislative motives, but when the state seeks to inhibit the exercise of constitutional rights and can support its action with nothing but platitudes, non sequiturs and eyebrow-raising pretexts a different rule takes over. At that point, 'we cannot shut out eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness,

256. *See* note 49 *supra* and accompanying text.

257. Answer to Petition for Hearing, *supra* note 253, at 15. The Attorney General echoes the words of Justice Scott in the *C.D.R.R.* majority opinion:

> Recognizing both the fallibility and the undesirable side effects of available methods of contraception, we nonetheless note that in reality, for many women the choice between alternatives begins not with the choice between childbirth and abortion, but with an initial decision to risk pregnancy. Appellants argue that the funding restrictions mean that indigent women will lose control of their reproductive capacity; that argument ignores this reality."

93 Cal. App. 3d at 505 n.3, 156 Cal. Rptr. at 82 n. 3.

258. 64 Cal. 2d 529, 411 P.2d 105, 49 Cal. Rptr. 377 (1966) *aff'd sub nom.* Reitman v. Mulkey, 387 U.S. 369 (1967).

259. 3 Cal. 3d 861, 479 P.2d 353, 92 Cal. Rptr. 153 (1971).

> and forbidden to know as judges what we see as men.' Why not simply say what everybody knows? That there are a number of people who do not want women to exercise their right to privacy if they are going to decide on abortion and, since these people can control the decisions of no one else, they are using the state to control the decisions of the poor.[260]

The Attorney General minimized the purpose and effect of the Budget Act restrictions: "[t]he failure of the state to fund elective abortions . . . may simply increase the number of childbirths."[261] This statement is similar to that of the court of appeal that portrayed the nature of the right to abortion and of the benefits provided under Medi-Cal in such a way that meaningful analysis of the effects of the funding restrictions would be precluded. Such incomplete and faulty analysis runs counter to the tradition of California's courts which have refused to disregard undeniable effects of measures clothed in unclear but seemingly legitimate purposes: "acts generally lawful may become unlawful when done to accomplish an unlawful end."[262] The California Supreme Court should follow this long-standing tradition in seeking to identify the true purpose of the Budget Act restrictions. But should the arguments of the state Attorney General or the predictions of state and national health officials fail to present a clear enough picture, the Court need only look to "pro-life" anti-choice commentators for an honest picture of the significance of the funding ban:

> The significance . . . does not lie wholly, even primarily, in the present power of the state to refuse to fund welfare abortions. Those who [oppose abortion] have been permitted access to the funding powers of the state . . . [T]he government carrot — is no small thing. Quite simply, those public and private agencies which adopt policies to encourage fetal survival through alternatives to abortion may be funded while funding is refused for agencies or programs promoting abortion . . .

260. 93 Cal. App. 3d at 517, 156 Cal. Rptr. at 89, *quoting* Ho Ah Kow v. Nunan, 12 Fed. Cas. 252, 255-56 (D. Cal. 1879) (citations omitted).

261. Answer to Petition for Hearing, supra note 253, at 21.

262. Parr v. Municipal Court, 3 Cal. 3d at 866-67, 479 P.2d at 357, 92 Cal. Rptr. at 157.

> [T]here is no longer any apparent requirement for governmental neutrality . . . ."[263]

Thus, the true purpose of the funding restrictions is to use state programs to manipulate poor women in the exercise of their fundamental right to choose whether or not to bear a child.[264] This state purpose cannot withstand any level of scrutiny. As Justice Halvonik concludes, "[t]he state is supposed to protect us from those hostile to the exercise of our constitutional rights, not join them."[265]

Therefore, based on California's own equal protection cases, the Budget Act restrictions offend the state constitution and should be invalidated. The California Supreme Court should remain the guardian of those special individual liberties found in our state constitution which are not recognized by the federal courts. To do other than accord poor women a real choice in exercising their fundamental rights would work a real injustice both to thousands of individuals and to California's long history of broad equal protection analysis.

V. CONSTITUTIONAL RIGHTS OF MINORS

The 1978 California Budget Act provided for the payment of

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263. Horan & Marzen, *The Moral Interests of the State in Abortion Funding: A Comment on Beal, Maher and Poelker*, 22 ST. LOUIS U. L. J. 566, 576 (1978).

264. According to the majority, the legitimate interest being advanced by denying abortion to Medi-Cal recipients is its interest in "normal childbirth." For those who choose childbirth, that is indeed a legitimate interest. For those who do not choose childbirth, it begs the question. What is the state's interest in forcing those who do not want children to have them? Just to show the poor who's boss?"

93 Cal. App. 3d at 517, 156 Cal. Rptr. at 89 (Halvonik, J., dissenting).

265. *Id.* In addition, the dissent notes that this opinion may prove a double-edged sword:

> The rule the court announces would also permit the state to flip the coin and provide the pregnant poor with medical services only if they agreed to abort, disdaining and discouraging those who wished to give birth. "The law, in its majestic equality," said Anatole France, "forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." If those hostile on principle to abortion do not realize that today's decision permits the state to manipulate the poor into abortion, as well as away from it, then they misapprehend the issue that has been tendered.

Id. at 514, 516 Cal. Rptr. at 87.

abortions for unmarried women aged 15 years and under only when the woman's parents were notified by the physician five days prior to the procedure. The 1979 Act eliminates the distinction between 15, 16, and 17 year olds by requiring notification of the parents of all pregnant minors applying for Medi-Cal abortions.[266] This provision presents two constitutional problems: first, whether the notice requirement impermissibly burdens the minor's federal right to privacy under recent United States Supreme Court cases;[267] and, second, whether requirement of notice denies equal protection to indigent minors who choose abortion since parental notice is neither required for private abortions for minors nor for other Medi-Cal pregnancy-related services that may be more hazardous.

A. Right to Privacy

The United States Supreme Court has held that parents, like spouses, may not be given veto power over a woman's choice of abortion, regardless of her age.[268] In *Planned Parenthood of Missouri v. Danforth,* the Court held that "the state may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."[269]

Recently, the Court rendered a decision in *Bellotti v. Baird,* holding unconstitutional a Massachusetts law requiring either parental consent or court order after parental notice for a minor's abortion.[270] Justice Powell, writing for the Court,[271] held that the statutory scheme "impose[d] an undue burden upon the exercise by minors of the right to seek an abortion."[272]

266. *See* note 122 *supra.*

267. Bellotti v. Baird, ___ U.S. ___, 99 S. Ct. 3035 (1979); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976).

268. *Id.*

269. *Id.* at 74.

270. ___ U.S. ___, 99 S. Ct. at 3050.

271. The *Bellotti* opinion was an 8-1 decision for affirmance of the district court's holding of unconstitutionality. However, the eight members of the majority were equally divided on the grounds: four signed the Powell opinion "announc[ing] the judgment of the court and delivering an opinion" in which Burger, C.J., Stewart and Rehnquist, JJ., concur. *Id.* at 3038. The other four Justices' views were represented by an opinion by Justice Stevens, which avoided the issue of how Massachusetts might legislate a constitutional consent requirement and held that the statute mandates "an absolute third-party veto" commensurate with that overturned in *Danforth, Id.* at 3053-55.

272. *Id.* at 3050.

> We conclude, therefore, that under state regulation such as that undertaken by Massachusetts, every minor must have the opportunity—if she so desires—to go directly to a court *without first consulting or notifying her parents.* If she satisfies the court that she is mature and well-informed enough to make intelligently the abortion decision on her own, the court must authorize her to act *without parental consultation or consent.* If she fails to satisfy the court that she is competent to make this decision independently, she must be permitted to show that an abortion nevertheless would be in her best interest. If the court is persuaded that it is, the court must authorize the abortion. [emphasis added].[273]

Bellotti stands for the proposition that minors have a constitutional right to seek an abortion without parental consent or notice. While the Budget Act requires parental notice but not consent, *Bellotti* also addressed the propriety of requiring notice; "every minor is entitled to go directly to the court for a judicial determination without prior parental notice, consultation or consent."[274]

The *Bellotti* Court was especially concerned with the importance of the minors' right to abortion; "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a state to act with particular sensitivity when it legislates to foster parental involvement in this matter."[275] The Court noted the severe consequences of teenage motherhood and the lack of financial, employment, educational, and emotional resources of most minors facing parenthood.[276] "In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible."[277]

Under the precedent of *Bellotti* and *Danforth*, the notice requirement of the Budget Act must in invalidated. The argument might be made that the prohibition/inducement distinction

273. *Id.*
274. *Id.* at 3051
275. *Id.* at 3047.
276. *Id.* at 3048.
277. *Id.*

distinguishes *C.D.R.R.* from *Bellotti* since the notice requirement does not impair privacy rights because pregnant indigent minors can pay for their abortions and thereby avoid the notice requirement. This argument not only contains the same weaknesses described above,[278] but it also raises equal protection problems. Can the state require notice for minors to obtain Medi-Cal funding when all other minors can obtain abortions without such notice to their parents? And, can the state require notice for minors' abortions when no notice is required for any other pregnancy-related medical procedures?[279]

B. Equal Protection

Medi-Cal Abortions vs. Private Abortions

The rights of minors are different from those of adults largely because the law sees minors as having certain disabilities. They are more vulnerable and less able to make mature decisions.[280] Often, parents are involved in decisions of minors since the law recognizes the role of parents in areas of childrearing, such as marriage, or having access to sexually explicit material.[281] However, the involvement of parents in the abortion decision may have a chilling effect on a minor's exercise of her fundamental right of private choice.[282]

The notice requirement in the Budget Act is imposed on indigent minors who seek abortion. This scheme is both arbitrary and wealth based. Why should indigent minors be subject to possible parental objection and advice when minors who can pay for their own abortions are not? Since financial ability is completely unrelated to mature decision-making, regarding readiness to bear children, even under minimal scrutiny, this classification should fail.

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278. *See* notes 165-178 *supra* and accompanying text.

279. Cal. Civ. Code § 34.6 (West 1972) gives minors the right to consent to all other pregnancy-related medical treatment. Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

280. Belotti v. Baird, ___ U.S. ___, 99 S. Ct. at 3043-46.

281. Ginsberg v. New York, 390 U.S. 629 (1968).

282. "It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties." Bellotti v. Baird, ___ U. S. ___, 99 S. Ct. at 3054 (Stevens, J., concurring).

Abortions Versus Other Reproductive Options

In *Ballard v. Anderson,*[283] the California Supreme Court examined the scope of a state law allowing minors to obtain pregnancy-related medical care without parental consent.[284] Justice Mosk, holding the hospital's parental consent requirement invalid, asserted: "[t]here is no rational basis for discriminatorily singling out therapeutic abortions as the only type of pregnancy-related surgical case which requires parental consent."[285] Since this law allows minors to consent to hazardous procedures (i.e., aminocentisis and Caesarian delivery) without parental notice, minors should likewise be able to consent to the less hazardous procedures generally used for first trimester abortions. The flaws in the notice schemes are perhaps best revealed through a practical analysis of who is and is not affected by it. Were the Budget Act restrictions in effect today, minors who are married,[286] even if separated or divorced, would not be required to notify their parents before obtaining an abortion, while minors in stable, but unmarried relationships would be required to do so. Pregnant minors who desire to have children may consent to the necessary related medical care, while minors who desire abortions, even if they have previously been able to consent to treatment, must now comply with the notice requirement. This creates the possibility of an ironic situation: a minor who is unable to obtain an abortion without notifying her parents is suddenly freed from that restriction upon deciding to have the child. A more sensible scheme would require minors who wish to continue their pregnancies to notify their parents. As the *Bellotti* Court warns, "[t]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences."[287] In addition, minors who seek prenatal or childbirth care, contraception, or treatment for veneral diseases need not notify their parents, while poor minors who seek abortions must do so. Finally, teenagers who can obtain the funds to pay for an abortion need not notify their parents, while those relying on Medi-Cal funding must. Is a system which allows a teenaged girl

283. 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

284. CAL. CIV. CODE § 34.6 (West 1972).

285. 4 Cal. 3d at 883, 484 P.2d at 1352, 95 Cal. Rptr. at 8.

286. CAL. CIV. CODE § 60 provides for emancipation of married minors; CAL. CIV. CODE § 34.7 provides for minors' consent to treatment for infectious diseases; and CAL. CIV. CODE § 34.5 provides for consent to pregnancy-related treatments.

287. ___ U.S. ___, 99 S. Ct. at 3048.

to have a child without her parents' knowledge, but not to obtain an abortion, a sensible one? This system seems illogical at best, in light of the severe health risks to mother and child involved in teenage pregnancy.[288]

VI. ALTERNATIVE GROUNDS FOR CHALLENGE

A. First Amendment

C.D.R.R. argued that California's restriction of funding for Medi-Cal abortions violated both the free exercise and establishment clauses of the first amendment of the United States Constitution.[289] These arguments are fully developed in a companion article in this issue[290] and therefore, only a cursory outline is offered here. Appellants suggested that the funding restrictions adopt one religious definition, of life, that life begins at the moment of conception, over other religious, scientific, and medical views. The court applied a three part test of "sponsorship, financial support, and active involvement,"[291] concluding that the restrictions do not further any of the primary evils which the first amendment religion clause was designed to avoid.[292] The court found that "the Legislature has not prohibited elective abortions; rather, the Legislature has decided not to use public funds to pay for the elective abortions of any women, whatever their religious persuasion."[293]

Alternatively, appellants asserted that the funding restrictions resulted from religious organizations pressuring lawmakers. The court responded that the motives or influences affecting legislation are not properly within the scope of the court's review — only the law itself is to be examined. Finally, appellants contended that the funding restrictions infringe upon the free exercise of religion of women who desire abortions. The court declined to rule on this question, finding no merit in it.[294]

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288. *See* note 55-56 *supra* and accompanying text.

289. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

290. Note, *Denial of Medical Funding Of Abortion: An Establishment of Religion,* 9 Golden Gate U.L. Rev. 421 (1979).

291. This test comes from Committee for Public Education v. Nyquist, 413 U.S. 765, 772 (1973) and was used in California Educational Facilities Authority v. Priest, 12 Cal. 3d 593, 599, 526 P.2d 513, 517, 116 Cal. Rptr. 361, 365 (1974).

292. 93 Cal. App. 3d at 507, 156 Cal. Rptr. at 83.

293. *Id.*

294. *Id.* at 508, 156 Cal. Rptr. at 83.

The dissenting Justice found the religion arguments somewhat more compelling:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> Today this court unhinges that star. It holds that the state may establish an orthodoxy respecting a woman's fundamental right to decide whether to terminate a pregnancy or carry it to term and that state funds may be used to induce conformity with that orthodoxy.[295]

However, even the dissent did not rely on the religion arguments to reach its result. And although the first amendment issues warrant more serious consideration than were accorded to them by the majority, the appellants have, by excluding freedom of religion arguments from their petition for hearing, chosen not to place this issue before California's high court.[296]

B. TITLE XIX

Title XIX of the Social Security Act[297] establishes the Medicaid Program by which the federal government provides states, through their own programs (i.e., Medi-Cal[298]), with money for medical care. If a state establishes a program, it must conform to federal guidelines.[299] While Title XIX lists several categories of services which states must provide,[300] it does not delineate them. Thus, the question of which, if any, abortions must be state funded is not explicitly resolved in Title XIX.

Prior to 1978, California's program included all legal abortions performed for eligible women. In 1978, the state legislature restricted Medi-Cal abortion funding, allowing for only about five

295. *Id.* at 513, 156 Cal. Rptr. at 87 (Halvonik, J., dissenting) (citation omitted).

296. Petition for Hearing, *supra* note 123.

297. 42 U.S.C. § 1396 *et seq.* (Supp. 1979).

298. CAL. WELF. & INST. CODE § 14000 *et seq.* (West 1972).

299. 42 U.S.C. §§ 1396a (a)(13)(B), 1396d (9)(1)-(5) (Supp. 1979).

300. These categories are: in patient hospital services; out patient hospital services; laboratory and X-ray services; skilled nursing facility services, family planning services and children's health screening; and physicians' services. 42 U.S.C. § 1396(a) (Supp. 1979).

percent of the previously funded procedures.[301] Eligible women were those whose pregnancies endangered their own life; resulted from rape, incest, or unlawful intercourse (statutory rape) which had been promptly reported to the proper authorities; led to children who were likely to suffer from certain specified abnormalities; or damaged the woman's health by one of ten specified medical conditions.[302] The ten specified conditions did not include sickle cell anemia, bleeding disorders, cancer of the breast or cervix, chronic lung disease, addiction to drugs or alcohol, psychological disorders, or many other serious conditions.[303]

These restrictions were attacked as failing to authorize payment for procedures mandated under Title XIX in two ways: first, Title XIX mandates provision of all "medically necessary" services, and second, the California Act denies funding even where the Hyde amendment to Title XIX requires it. The *C.D.R.R.* court first relied upon *Beal v. Doe* which held that Title XIX allows but does not require funding of all legal abortions.[304] But, because *Beal* left open the question of which abortions must be state funded, the court looked to the congressional intent of the Hyde Amendment, which indicated that funding was required for only those abortions specifically enumerated in the amendment.[305] Finally, following recent circuit court decisions,[306] the court held that Medi-Cal must fund those abortions enumer-

301. "Both appellants and respondent agree that the effect of the Budget Act will be to reduce Medi-Cal reimbursed abortions by approximately 95 percent." 93 Cal. App. 3d at 498, 156 Cal. Rptr. at 77.

302. 1978 Cal. Stats., ch. 359 § 2(g)(expired June 30, 1979).

303. *Id.* states:

> Where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, on account of any of the following conditions: toxemia; renal failure; diabetes with vascular degeneration; thrombosis; Addison's disease; high blood pressure with renal complications; high blood pressure with previous cardio-vascular accident; hydatidiform mole; congestive cardiac failure; and placentia previa, when so certified under penalty of perjury by two physicians, one of whom where practicable, is a specialist in the affected medical discipline, and documentation thereof is provided with the claim for payment.

304. 432 U.S. 438, 447 (1977).

305. 93 Cal. App. at 512, 156 Cal. Rptr. at 86.

306. Preterm. Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979); Zbaraz v. Quern, 572 F.2d 582 (7th Cir. 1978), 596 F.2d 196 (7th Cir. 1979), *on remand*, 47 U.S.L.W. 2750 (N.D. Ill. May, 1979), *stay denied sub nom.* Quern v. Zbaraz, ___ U.S. ___, 99 S.Ct. 2095 (1979), *juris. postponed*, 48 U.S.L.W. 3356 (Nov. 1979).

ated in the Hyde amendment since Hyde substantively alters Title XIX.[307] To implement this holding the court struck down as invalid the ten medical conditions listed in the State Budget Act and left only the general provision: "where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . ."[308]

Since the *C.D.R.R.* decision, a new Hyde amendment has been proposed and debated which would further restrict payment for abortions by entirely eliminating the three exceptions for pregnancies, resulting from rape or incest, those in which the mother's life would be endangered and those in which the mother's physical health is severely and long-lastingly damaged. This would permit funding only where the woman is likely to die.[309] The impact of this latest provision will remain unclear pending state legislative response and litigation.

Two Title XIX issues are presently before the state Supreme Court: first, whether the circuits which have found that Hyde substantively modifies Title XIX's "medically necessary" language are correct; and second, whether the California Act's health provision, as rewritten by the *C.D.R.R.* majority, is unconstitutionally vague. If the new proposal is passed, the first issue remains open, but the second is moot since the entire exception for "severe and long-lasting" health damage to the mother will be eliminated.

Medical Necessity

Plaintiffs argue that before Hyde, Title XIX clearly mandated the funding of abortions which constitute "medically necessary" procedures in the treatment of pregnancy. In his *Beal* dissent, Justice Brennan supported this view: "[t]he legislative history of the Medicaid statute and our abortion cases compel the conclusion that elective abortions constitute medically necessary treatment for the condition of pregnancy."[310] However, the *Beal*

307. 93 Cal. App. 3d at 513, 156 Cal. Rptr. at 86. On remand, however, the Hyde amendment was held unconstitutional as a denial of equal protection in Zbaraz v. Quern, 47 U.S.L.W. 2750 (N.D. Ill. May, 1979).

308. 93 Cal. App. at 513, 156 Cal. Rptr. at 87.

309. H. R. 2040 states: "Amends Title XIX (Medicaid) of the Social Security Act to prohibit Federal payments for abortion under such Title except when necessary to prevent the death of the mother." H.R. 2040, 96th Cong., 1st Sess., 42 C.F.R. § 441 (1979).

310. 432 U.S. at 449 (Brennan, J., dissenting).

majority defined the abortions subject to the funding cutoff as "unnecessary" and thus reconciled the restrictions with Title XIX's mandate to fund all medically necessary services.[311] The majority noted that abortion was illegal when the Social Security Act was passed and that the Department of Health, Education and Welfare has interpreted Title XIX as allowing, but not mandating, funding of abortions.[312] The majority never discussed the legislative history of the Act, however, nor did it attempt to reconcile the funding restrictions with the Court's previous decisions, except in reference to the states' recognized interest in protecting potential human life.[313]

Justice Brennan's definition of "medically necessary" included abortions and was supported by congressional intent as reflected in committee hearings on the Social Security Act.[314] He discounted the majority's reliance on the earlier illegality of abortion and on HEW's interpretation of the Act.[315] Citing the Court's other abortion decisions for support, he contended that a pregnant woman and her doctor have constitutionally protected discretion in deciding what treatment is appropriate and "necessary" for her:[316] "[t]he Court's original abortion decisions dovetail precisely with the congressional purpose under Medicaid to avoid interference with the decision of the woman and her physician."[317] Brennan persuasively contended that the major-

311. "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." 432 U.S. at 444-45. As discussed in the background section of this article, *see* note 2 *supra,* the terms "elective" and "non-therapeutic" can be used improperly. The majority did not examine the nature of the procedures it was labelling; although, in effect, the Court was saying that 98% of the previously funded abortions were "non-therapeutic" or "unnecessary."

312. 432 U.S. at 447.

313. "We expressly recognized in *Roe* the 'important and legitimate interest [of the State] . . . in protecting the potentiality of human life.' [Citations omitted] . . . [I]t is a significant state interest existing throughout the course of the woman's pregnancy." *Id.* at 445-46.

314. *Id.* at 450.

315. "[N]othing in the statute even suggests that Medicaid is designed to assist in payment for only those medical services that were legally permissible in 1965 and 1972 . . . . The principle of according weight to agency interpretation is inapplicable when a departmental interpretation, as here, is patently inconsistent with the controlling statute." [Citations omitted] *Id.* at 452-53.

316. "[T]he attending physician, in consultation with his [or her] patient, is free to determine, without regulation by the State, that, in his [or her] medical judgment, the patient's pregnancy should be terminated." Roe v. Wade, 410 U.S. 113, 163 (1973).

317. 432 U.S. at 450.

ity's assertion, that states need not fund abortions, means that they need not fund childbirth either, a result which "highlights the violence done the congressional mandate" by the decision.[318]

Assuming arguendo that Title XIX formerly mandated funding of abortion, in order to overturn the Budget Act restrictions, plaintiffs must show that the Hyde amendment does not alter Title XIX's provision for all medically necessary procedures. The plaintiffs contend that the court of appeal's interpretation represents the repeal of existing legislation by implication,[319] since Title XIX mandated funding all medically necessary abortions and the Hyde Amendment forbids federal funding of 95% of these procedures. Repeal by implication is a method disfavored by the United States Supreme Court,[320] and this disfavor "applies with even greater force when the claimed repeal rests solely on an appropriations act."[321] Fragmented legislative histories supporting such measures[322] have made congressional intent difficult to examine.

Furthermore, even if the method chosen to modify Title XIX were adequate, the Hyde Amendment cannot operate as the vehicle for such modification if it is unconstitutional because the amendment would be void and "powerless to work any change in the existing statute."[323] Plaintiffs relied upon *Zbaraz v. Quern*[324] in which an Illinois District Court held that the Hyde amendment is unconstitutional as a denial of equal protection: "[w]e cannot hold that the state has a legitimate interest in preserving the life of a non-viable fetus at the cost of increased maternal morbidity and mortality among indigent pregnant women."[325] As an uncon-

318. *Id.* at 452. *See also* note 265 *supra.*

319. Petition for Hearing at 58, C.D.R.R. v. Myers, S. F. No. 45066.

320. Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-90 (1978).

321. *Id.* at 90.

322. "The legislative history of the Hyde Amendment consists entirely of floor debates, which have been characterized as 'contradictory' and 'inconclusive' by the Attorney General, and by the Secretary of HEW as insufficiently clear to provide a basis for absolving states of their obligation to fund therapeutic abortions. [Citations omitted]" Petition for Hearing, supra note 123, at 60.

323. Frost v. Corporation Commission of Oklahoma, 278 U.S. 515, 526-27 (1928).

324. 572 F.2d 582 (7th Cir. 1978), *on remand*, 47 U.S.L.W. 2750 (N.D. Ill. May, 1979), *stay denied sub nom.* Quern v. Zbaraz, ___ U.S. ___, 47 U.S.L.W. 3772 (May 24, 1979). Interestly, Justice Stevens who concurred in the *Beal* opinion interpreting Title XIX as not requiring state funding of all medically necessary abortions, denied Illinois' application for a stay.

325. Slip Op. at 11.

stitutional law, the Hyde Amendment would be "inoperative as though it had never been passed"[326] and thus could not substantively amend Title XIX. The weakness of this argument, is however, that *Zbaraz* is presently pending on appeal and may be reversed.

Vagueness

The strongest Title XIX assertion is that of vagueness. In redrafting the 1978 regulations, the court of appeal eliminated certain specific conditions, thereby allowing funding for abortions "[w]here severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term."[327] Plaintiffs suggest that this language mirrors that found in earlier California abortion statutes struck down as unconstitutionally vague in *People v. Belous*[328] and *People v. Barksdale.*[329]

In *Barksdale,* the statute in question required a physician to certify that pregnancy would "gravely impair" a woman's health before she could legally obtain an abortion.[330] This standard was struck down as impermissibly vague and incapable of uniform application.[331] Plaintiffs contended in *C.D.R.R.* that the "severe and long lasting" standard is, in practice, identical[332] to the "gravely impair" standard struck down in Barksdale. The Attorney General responded that since the Budget Act restrictions do not expose physicians to the risk of prosecution as the Barksdale statute did, they need not be scrutinized as closely: "[i]t is one thing for a doctor to risk a possible fine, imprisonment, a ruined practice, and stigma. It is quite another for him (sic) to risk not getting reimbursed $200 or $300" [citations omitted].[333] This analysis is inconsistent with the *Barksdale* decision, which held that definitions of authorized abortions must be clear to every

326. Norton v. Shelby County, 118 U.S. 425, 442 (1885).

327. 93 Cal. App. 3d at 513, 156 Cal. Rptr. at 87.

328. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

329. 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

330. "[T]hat continuance of the pregnancy would gravely impair the physical or mental health of the mother . . ." CAL. HEALTH & SAFETY CODE § 25951 (c)(1)(West 1972).

331. 8 Cal. 3d at 327, 503 P.2d at 262, 105 Cal. Rptr. at 6.

332. Appellants further argued that the present regulation is even more seriously flawed than the *Barksdale* standard because it requires "severe" and "long-lasting" injury. "By combining an amorphous standard of degree ('severe health damage') and a flexible standard of duration ('long-lasting'), the Budget Act's inherent vagueness increases geometrically." Petition for Hearing, *supra* note 123, at 65.

333. Answer to Petition for Hearing, *supra* note 253, at 36.

class of persons affected, not just to physicians;[334] and that any regulation affecting the right to choose an abortion should be subject to strict scrutiny.[335]

The state, pointing to similar medical definitions found in other government codes, asserted that doctors routinely use terms such as short-term, temporary, long-lasting, slight, moderate and severe, with little difficulty.[336] This analysis is faulty because these terms are generally used to describe presently existing conditions, not to make predictions. Appellants noted that,

> While a physician may identify a high-risk group of patients, he [or she] cannot predict early in pregnancy whether a particular woman will — not "may," "is likely to" or "has a substantial risk of," but will — suffer severe and long-lasting physical damage. By the time the health problems have developed to the point where two physicians can confidently certify that a woman will indeed by subjected to prolonged and serious injury, it will often be too late.[337]

In addition, these regulations require physicians to practice medicine in a manner at odds with sound policy. As revealed in testimony during the federal suit to enjoin the Hyde amendment,[338] doctors aim for good health in their patients, not mere survival. To require a physician to recommend a procedure only to save a patient's life, but not to protect her from risks or to alleviate short-term conditions, is to ask him or her to engage in questionable and backward medical practice.[339]

Finally, the state argued that since doctors must have prior authorization, the physician will know before performing the abortion if the procedure is permissible.[340] However, this assertion raises an additional vagueness problem: if the regulations are too vague for physicians to consistently apply, they will be even more

334. The "requirements must be comprehensible both to the prospective patient and to those charged with the decision whether an abortion may be performed." 8 Cal. 3d at 333, 503 P.2d at 266, 105 Cal. Rptr. at 10.

335. *Id.* at 327.

336. Answer to Petition for Hearing, *supra* note 253, at 31, 38-39.

337. Petition for Hearing, *supra* note 123, at 67 n.108.

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

339. ACLU Report, *supra* note 2 at 21.

340. Answer to Petition for Hearing, *supra* note 253, at 39.

difficult for civil servants with less medical knowledge to uniformly enforce. A similar argument failed to redeem the *Barksdale* law[341] and should be equally ineffective in this case.

VII. CONCLUSION

The abortion funding controversy encompasses broad issues involving both constitutional rights and public policy, and goes to the heart of the right to procreative choice. American women and their physicians enjoyed a common law right to choose abortion before criminalization in the mid-nineteenth century. This right re-emerged when the criminal abortion statutes were struck down in *Roe v. Wade.*

After decriminalization, access to abortion remained limited, especially for poor and third world women, who suffered from a lack of services and the discriminatory attitudes and practices of health care providers. These practical obstacles have been exacerbated in recent years by the imposition of various legal barriers to abortion. Although most of these barriers have been invalidated by the courts, the United States Supreme Court and California's appellate courts have thus far allowed the restrictions on funding to stand. Critics of the funding decisions have charged that the courts can only reconcile these restrictions with *Roe* rights by re-defining the nature of the right to choose and by mischaracterizing the nature of the benefits provided under the new funding schemes.

Several well-established legal grounds exist on which the California Supreme Court could reverse the court of appeal decision. No new legal theory need be adopted. California courts have already applied strict scrutiny to cases involving the right to privacy and have recognized that the state right is broader than the federal right. Likewise, state courts have already developed an applicable conditional benefits doctrine and recognized wealth as a suspect classification in spite of the federal courts' refusal to do so. The California doctrine which requires that state interests relate to a permissible purpose may also invalidate the Budget Act. Although the state prevailed in its claim that the purpose of the funding scheme was to encourage childbirth, once the real purpose of the funding restrictions is recognized as the discour-

341. 8 Cal. 3d at 333, 503 P.2d at 266, 105 Cal. Rptr. at 10.

agement of abortions, the restrictions must be struck. Under no standard of scrutiny could an attempt to obstruct the exercise of a fundamental right be upheld.

If the Court chooses to let the funding limitations stand, California's independent interpretation of state constitutional doctrines will be significantly impaired. But the court's legal theories will have little meaning or significance for those most affected by the restrictions. Although some jurists and government officials may be persuaded that the right to choose abortion is unaffected by the funding ban, the women who rely on Medi-Cal will not be so easily convinced. They will understand that their right to procreative choice is not free from state pressure. They will feel the pervasive influence of the funds that are withheld. And unlike those who deal only with the legal issues surrounding this case, they will have to live with the consequences.