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David T. Hardy

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*Harris v. McRae*: Clash of a Nonenumerated Right with Legislative Control of the Purse

**Erratum**

Page 492, line 6. For *Ornstein v. Schwab Ortwein v. Schwab*. The Review apologizes to the author for any misunderstanding that arose from its insertion of the "He or She" language on page 384, line 1.
Harris v. McRae: Clash of a Nonenumerated Right with Legislative Control of the Purse

David T. Hardy*

One of the most controversial issues surrounding abortion is whether the government has a duty to finance abortions for indigents. This Article examines that issue by juxtaposing the nonenumerated right of privacy with legislative preeminence in the allocation of public funds. The author reviews the history of the abortion right, the right of privacy, and legislative preeminence in public funding. The author then asserts that the nonenumerated right to obtain an abortion is subordinate to legislative preeminence in the funding area. The author explores this conclusion under first amendment, equal protection, and due process analyses and finally concludes that there is no convincing argument in favor of a governmental duty to finance abortions for indigents.

INTRODUCTION

While most constitutional issues are controversial, the legal and moral issues relating to abortion and its procurement have been subject to especially uncompromising conflict. The extreme view each side has of the other is evidence of this ideological dichotomy. Those individuals opposed to abortion, for example, are characterized as puritanical "Neanderthals," while those persons favoring abortion are referred to as baby-murdering servants of a new Reich. This conflict becomes even more intense when the issue of whether the government has a duty to finance the procurement of abortion by indigents is injected into the debate. Those individuals who resist the involuntary payment of taxes to support abortion clash with those persons who want the right to abortion equally available to all members of society. What was formerly only violent invective escalates to total intellectual war, with dispassionate analysis and historical perspective as the first casualties.

The origin of the abortion conflict can be traced to its statutory

* B.A. (1972), J.D. (1975), University of Arizona College of Law. The author is a partner in the law firm of Sando & Hardy.
proscription during the latter half of the 19th century.\textsuperscript{1} That pro-
scription had historical basis in the ancient and common law tra-
ditions\textsuperscript{2} and went unexamined until the American Law Institute's
Model Penal Code recommendations in 1962.\textsuperscript{3} Thereafter, many
groups sought the liberalization of abortion statutes, and they
achieved their first major legislative success in New York in 1970.\textsuperscript{4}
It was inevitable, however, that the Supreme Court would be
asked to reconcile the statutory disputes and rule on the abortion
issue.\textsuperscript{5} This adjudicatory process began in 1973, by which time
only a quarter of the states had adopted Model Penal Code provi-
sions,\textsuperscript{6} when the Supreme Court, in the companion cases of \textit{Roe v.
Wade}\textsuperscript{7} and \textit{Doe v. Bolton},\textsuperscript{8} effectively imposed a judicially drafted
uniform statute on every American jurisdiction.

\textbf{Roe v. Wade}

The Court's landmark decision in \textit{Roe} involved a challenge to
a "first generation" abortion ordinance.\textsuperscript{9} The 1871 Texas statute
in question completely outlawed the performance of abortions
which were not undertaken to save the life of the prospective
mother.\textsuperscript{10} The Court, speaking through Justice Blackmun, struck
down the statute as violative of a constitutional right of privacy
that had its roots in the first, ninth, and fourteenth amendments
and the penumbras of the Bill of Rights.\textsuperscript{11}

The Court acknowledged, however, that this right of privacy

\textsuperscript{2} See Byrn, \textit{An American Tragedy}, 41 Fordham L. Rev. 807 (1973).
\textsuperscript{3} Model Penal Code § 230.3(2) (Prop. Official Draft, 1962) permitted abortion
when a substantial threat to the woman's physical or mental health existed, when there was
a substantial threat that the fetus would be deformed, or when the pregnancy resulted from
rape or incest.
\textsuperscript{4} N.Y. Penal Law § 125.05(3) (McKinney Supp. 1970–1971). California, Colorado,
and North Carolina adopted the ALI proposal, see note 3 supra, in 1967 when it was
still considered far-reaching. By 1970, New York exceeded the proposal by giving elective
abortion across-the-board approval. Charles & Alexander, \textit{ Abortions for Poor and Non-
DeTocqueville perceptively noted a century and a half ago that most American political
conflicts eventually end in the judicial branch. \textit{Id}.
\textsuperscript{7} 410 U.S. 113 (1973).
\textsuperscript{8} 410 U.S. 179 (1973).
\textsuperscript{9} \textit{Roe v. Wade}, 410 U.S. at 116. A "first generation" abortion statute is exemplary
of the legislative proscription of abortion which occurred during the latter half of the 19th
century. See notes 1–3 supra and accompanying text.
\textsuperscript{10} 410 U.S. at 117.
\textsuperscript{11} Id. at 129, 152–53.
was not absolute. At some point during pregnancy, the state interests in safeguarding health, maintaining medical standards, and protecting potential life could become sufficiently compelling to sustain the regulation of abortion.\(^{12}\) The Court discussed three rationales that could justify Texas' restriction of abortions. The first rationale, discouragement of sexual activity, was neither advanced by the state nor has it been seriously suggested by any commentator.\(^{13}\) The second rationale, medical hazards to women stemming from abortion, may have represented a compelling state interest when the legislature first enacted the Texas statute, but the medical advancements since that time limit the rationale to the latter stages of pregnancy.\(^{14}\) The third rationale, protection of the life of the unborn child, presented more difficulty for the Court in *Roe* and represented the focus of the majority's discussion.\(^{15}\)

In addressing the state's interest in protecting prenatal life, Blackmun began by noting that the fetus does not constitute a "person" within the meaning of the fourteenth amendment because the equal protection and due process clauses safeguard political rights which cannot be exercised until after birth.\(^{16}\) The state, therefore, is not compelled constitutionally to protect the life of unborn children under that amendment. States do use their discretion, however, to extend protection to objects which are not clearly "persons".\(^{17}\) Thus, the Court's inquiry into the protection of prenatal life could not end with an analysis of "personhood" under the fourteenth amendment.

Although the unborn child may not be a "person," the Court continued, it is a potential life which the state may have a vital interest in safeguarding.\(^{18}\) The Court faced the problem, therefore, of determining the point at which the protection of that potential life becomes a compelling state interest. This determination was difficult because the Court asserted it did not want to speculate as to the moment life begins.\(^{19}\)

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12. *Id.* at 154.
13. *Id.* at 147-48. If this reason had been asserted by Texas as a valid state purpose, the statute could have been challenged on overbreadth grounds for its failure to distinguish between married and unmarried persons.
14. *Id.* at 148-50.
15. *Id.* at 150-52.
16. *Id.* at 157.
19. *Id.* at 159. Texas urged that life begins at conception and, therefore, the state has a compelling interest to protect life from that point onward. The Court noted, however,
Thus, Blackmun seemed to paint himself into a juridical corner. If the right to life could override the right to abortion, and reasonable persons could differ as to the point at which life begins, then a state could define the right to life without fear that the judiciary would impose its own legal interpretation of that right. A statute similar to Texas', therefore, surely would survive judicial scrutiny.

In contrast to this line of reasoning, however, Blackmun, seeking to escape this trap, also noted that "in areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations . . . ."20 This inconclusive statement suggests that since the common law of torts does not recognize the fetus as having life, the statutory criminal law of Texas cannot. This implication, however, merely led to another problem: What if the state modified both tort and criminal law to treat the fetus as a full human being?

Finally, Blackmun addressed the issue of whether a state could protect the fetus from abortion by modifying its statutes to recognize that the unborn child possesses legally protected rights in every context. Blackmun simply stated: "We do not agree that, by adopting one theory of life, Texas [or any other state] may override the rights of the pregnant woman that are at stake."21 Thus, Blackmun's reasoning came full circle: the state may restrict abortion to preserve life; reasonable persons may differ as to the theory of when life begins, and the judiciary cannot impose its own theory; but the state cannot override the right to abortion by adopting a definition of life which would supercede that right.

The majority then outlined a statute which would meet the requirements of its circular analysis. The proposed statute conveniently divided the nine month human gestation period into three trimesters and applied a different standard to each trimester.22 During the first trimester, the state could impose no limitations on the abortion decision.23 During the second trimester, the state's interest increased and it then could "regulate the abortion proce-

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20. Id. at 161.
21. Id. at 162.
22. Id. at 162-66.
23. Id. at 163-64.
due to the extent that the regulation reasonably related to the preservation and protection of maternal health." Requirements of special licensing of persons or hospitals performing abortions, for example, could be imposed. Finally, at the beginning of the third trimester, when the fetus became "viable" and able to survive outside the womb, the state could acquire a "compelling interest" in protecting prenatal life and then could "go so far as to proscribe abortion during that period except when it [would be] necessary to preserve the life or health of the mother." 

Doe v. Bolton

In *Doe v. Bolton*, the Court, again writing through Justice Blackmun, struck down a Georgia "second generation" abortion statute. The Georgia statute was patterned after the American Law Institute's Model Penal Code and had been adopted as a liberalization measure only five years before being challenged in the Supreme Court. The statute permitted licensed physicians to perform abortions where pregnancy "would endanger the life of the pregnant woman or would seriously and permanently injure her health," where the fetus would "very likely" be born with "a grave, permanent and irremediable mental or physical defect" or where the pregnancy resulted from rape. Additionally, the statute required that the woman be a state resident, the hospital be accredited by the Joint Commission on Accreditation of Hospitals (JCAH), and the physician's judgment be confirmed by two other physicians and the hospital's abortion committee. The majority held that the requirements of JCAH approval, two doctor concurrence and abortion committee approval were unconstitutional because these special protections were not required for other surgical procedures.

The concurring and dissenting opinions in the companion cases of *Roe* and *Doe* were virtually identical. Justice Stewart

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24. *Id.* at 163.
25. *Id.*
26. *Id.* at 163–64.
28. *Id.* at 182. A "second generation" abortion statute is exemplary of the wave of legislation which sought to liberalize the proscriptive "first generation" abortion statutes of the latter half of the 19th century. See note 9 *supra* and accompanying text.
29. 410 U.S. at 182. See notes 3–4 *supra* and accompanying text.
30. 410 U.S. at 183.
32. *Id.* at 193–200.
concurred only in *Roe*, but Chief Justice Burger and Justice Douglas filed concurrences in both cases. Both Stewart and Burger based their positions on substantive due process grounds rather than on a broad constitutional right of privacy.\(^33\) In so doing, Stewart intimated that the Court was substituting its social belief about abortion for that of the legislature—a process the Court explicitly denounced in *Ferguson v. Skrupa*.\(^34\) Stewart then asserted, however, that the substantive due process approach was necessary to ensure women the liberty to decide whether to terminate their pregnancies and to protect such liberty from abridgment through sweeping laws such as the Texas statute at issue.\(^35\)

In contrast, Douglas rested his concurrence entirely on a broad right of privacy. This privacy right, articulated in *Griswold v. Connecticut*\(^36\) and inextricably woven into the concept of liberty, governed three classes of activity: (1) the intellect, taste, or personality; (2) the basic decisions of life, such as marriage; and (3) the health and well-being of the individual, including the “freedom to walk, stroll or loaf.”\(^37\) Thus, Stewart, Douglas and Burger agreed that endangering the life of the woman or seriously injuring her health were standards too narrow to be upheld on either substantive due process grounds or under a broad constitutional right to privacy.

Justices Rehnquist and White dissented from the companion cases of *Roe* and *Doe*. White’s dissent was brief, noting that the effect of the decisions was to deny legislatures the right to weigh the competing interests of life and liberty.\(^38\) Rehnquist discussed the issue more extensively, challenging the assumption that the commercial decision to purchase an abortion could be described as “private” and noting that the fourteenth amendment’s guarantee of liberty only extends to deprivation “without due process.”\(^39\) Rehnquist also concluded that the Court’s concession that abortion had been outlawed in a majority of states for over a century suggested that “the asserted right to an abortion is not ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . .'”\(^40\)

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36. 381 U.S. 479 (1965).
38. *Id.* at 221–23 (White, J., dissenting).
40. *Id.* at 164.
The Court's decisions in *Roe* and *Doe* settled only one aspect of the abortion conflict—whether state legislatures could constitutionally criminalize abortion. Within two years, litigation commenced on a more difficult question: Whether the right to abortion included not only a ban on the state criminalization of abortion, but also an affirmative state duty to subsidize abortion for indigents. In 1977, the Supreme Court answered this question in the negative in three cases: *Beal v. Doe*, *Maher v. Roe*, and *Poelker v. Doe*.

**Companion Cases of Beal, Maher & Poelker**

In *Beal*, the Court held that Title XIX of the Social Security Act, which established the Medicaid program, does not require a state to fund nontherapeutic abortions. Title XIX requires only that state medical plans be consistent with the title and "include reasonable standards" for determining "the extent of medical assistance under the plan." The majority, writing through Justice Powell, decided that the state's interest in prenatal life does not become a "compelling" one until the third trimester, and since the statute requires only a reasonable classification rather than one justified by a "compelling interest," the distinction was upheld.

In *Maher*, the court rejected a constitutional challenge to a Connecticut statute limiting medical benefits for first trimester abortions to situations where "[i]n the opinion of the attending physician the abortion is medically necessary." The Court noted that the Constitution guarantees no right to subsidized medical services, although where the state chooses to provide such services, it must do so in a manner which does not violate the equal protection clause.

The *Maher* plaintiffs argued that the state statute accords disparate treatment to abortion and childbirth by funding only the medical expenses incident to the latter, thereby violating their fundamental right to abortion as guaranteed by *Roe*. The Court,

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44. Beal v. Doe, 432 U.S. at 438.
46. 432 U.S. at 445-46.
47. Maher v. Roe, 432 U.S. at 466 n.2.
48. Id. at 469–70.
49. Id. at 467–68.
however, found no fourteenth amendment violation. The state statute did not discriminate because the distinction on which it was based, financial need, does not constitute a suspect classification.\textsuperscript{50} Furthermore, the court found no fundamental right, such as that articulated in \textit{Roe}, to be implicated by the Connecticut statute.\textsuperscript{51}

\textit{Roe} concerned a statute imposing severe criminal punishment for the performance of an abortion and not with a decision concerning the allocation of limited public funds. \textit{Roe} did not declare an \textit{unqualified} constitutional right to abortion, but only the right to be free from burdensome state interference in making a decision to terminate a pregnancy. Thus, no limitation on a state's authority to make a value judgment favoring childbearing over abortion through the allocation of public funds could be implied from \textit{Roe}. The Court drew upon distinctions made in earlier decisions\textsuperscript{52} to demonstrate that:

\textit{[T]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the state attempts to impose its will by force of law; the state's power to encourage actions deemed to be in the public interest is necessarily far broader.}\textsuperscript{53}

It was this ability to differentiate between the more critical constitutional concerns of \textit{Roe} and the lesser concerns of \textit{Maher} that led the majority in \textit{Maher} to apply a rational relation test to the statute at issue.\textsuperscript{54} The application of that test, as opposed to strict scrutiny, coupled with the Court's holding in \textit{Beal}, resulted in the conclusion that the funding limitation bears a rational relationship to the state's interest in encouraging childbirth and can be constitutionally upheld.\textsuperscript{55} Thus, the \textit{Maher} Court did not retreat from its decision in \textit{Roe}.

With the decisions in \textit{Maher} and \textit{Beal} as background, the \textit{Poelker} majority easily could hold that the city of St. Louis could

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 470–71.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} For this proposition, the \textit{Maher} court cited \textit{Buckley v. Valeo}, 424 U.S. 1 (1976).
\item \textsuperscript{53} \textit{Id.} at 475 n.9. The Court also could have relied on earlier cases upholding federal grants-in-aid intended to influence state decisionmaking on issues arguably of sole state concern under the tenth amendment. \textit{See} \textit{Stewart Mach. Co. v. Davis}, 301 U.S. 548, 580–85 (1937); \textit{Carmichael v. Southern Coal & Coke Co.}, 301 U.S. 495, 525–26 (1937); \textit{Massachusetts v. Mellon}, 262 U.S. 447, 482 (1923).
\item \textsuperscript{54} \textit{Id.} at 475.
\item \textsuperscript{55} \textit{Id.} at 478–79.
\end{itemize}
constitutionally limit the performance of abortions in city hospitals except in situations where there was a threat of grave injury or death to the mother. The *Poelker* majority, expressly relying on *Maher*, asserted that it found "no constitutional violation by the City of St. Louis in expecting, as a policy choice, to provide publicly financed hospital services for childbirth without providing for nontherapeutic abortions."\(^{56}\)

Justices Brennan, Marshall, and Blackmun dissented in the companion cases of *Beal, Maher* and *Poelker*. Brennan attacked the majority's premise that a distinction should be made between assisting and criminally penalizing an activity. Brennan instead regarded the limitation of financial assistance as infringing on privacy rights "by bringing financial pressures on indigent women that force them to bear children they would not otherwise have. That is an obvious impairment of the fundamental right established by *Roe v. Wade*."\(^{57}\) In Brennan's view, such legislation "unduly burdens the right to seek an abortion" and must be justified by a compelling interest.\(^{58}\) Under *Roe*, however, the statute would fail because of its conclusion that the interest in prenatal life cannot meet such a high level of scrutiny during the first trimester.

Marshall's dissent was based more on social considerations than on standard concepts of constitutional law. Marshall criticized the dichotomy between the strict scrutiny and rational basis standards of review, suggesting that while poverty alone should not entitle a class to claim government benefits, "it is surely a relevant factor" in the consideration.\(^{60}\) Marshall also noted that non-white women obtain abortions at twice the rate of white women and are more heavily dependent on Medicaid.\(^{61}\) In rather intemperate language, Marshall criticized the Court's decision not to sanction the funding of abortions as "an invitation to public offi-

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58. *Id.*
59. *Id.* at 489.
61. *Id.* at 459-60. Marshall based this conclusion on the statistic that non-white individuals are five times more dependent on Medicaid than white individuals. *Id.* Query whether this assumption, that coincidence should be treated as causation, might be taken to indicate that the Medicaid program itself unconstitutionally discriminates against white individuals, rather than that its exclusions (presumably, any exclusions, not just those for abortion) discriminate against non-white individuals.
cials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions” and chastised the elected officials as choosing to “cower before public pressure.”

Justice Blackmun, who had written the majority opinion in Roe, was even more caustic. The legal analysis of his dissent was limited to citations to Roe and Doe and statements that the majority now “concedes the existence” of a right but “denies the realization and enjoyment of that right.” Blackmun characterized the majority’s opinion in Beal as “punitive and tragic” and “disingenuous and alarming” because it ensured that “the cancer of poverty will continue to grow.” In addition, Blackmun attacked the electorate, which had elected the appellant in one of the cases, as “a presumed majority” which “punitive ly impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of devil-take-the-hindmost.”

Even while the Maher trilogy of cases was under consideration, however, another confrontation was incipient. On September 30, 1976, Congress enacted a restriction on the use of federal funding for elective abortion as a rider to an appropriation bill. The restriction, known as the “Hyde Amendment” because of its chief sponsor in the House, Henry J. Hyde, provided that none of the funds appropriated should be used to perform non-medically needed abortions.

**A Judicial Challenge to the Hyde Amendment**

As might be expected, the Hyde Amendment soon elicited a judicial challenge. Two actions which ultimately reached the

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62. *Id.* at 462.
63. *Id.* (Blackmun, J., dissenting).
64. *Id.* at 462–63.
65. *Id.*
66. Hyde Amendment to Medicaid Act of 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1430. The “Hyde Amendment” is used as a generic term for a series of amendments which varied each fiscal year. The first form of the amendment prohibited the use of Medicaid funds for abortion except where the pregnancy would endanger the mother’s life. The form used in most of fiscal 1978 and all of 1979 additionally funded abortions where pregnancy would cause “severe and long-lasting physical health damage” to the mother. The fiscal 1980 version omitted this provision but added an exception for pregnancy resulting from rape or incest. Harris v. McRae, 448 U.S. 297, 302–03 (1980). The last version of the amendment was at issue in McRae.
Supreme Court were filed the very day of its enactment.68 These challenges were based on both the due process and the equal protection clause. The challenging parties, however, faced a more difficult fact situation than in the nonfunding-related abortion cases. In earlier challenges to the state laws, plaintiffs had been able to argue consistently that abortion costs less than normal delivery for which financial assistance can be received, and, therefore, the state has no financial interest in refusing to pay for elective abortion.69 Such an argument becomes considerably more difficult to assert, however, when plaintiffs seek to challenge a federal grant program which does not actually provide those services but only attempts to reimburse state funding made available by the state’s election. To argue that a limitation on the federal grant ultimately would cause a decrease in state-provided abortion would require an argument that the absence of partial federal reimbursement constitutes a financial barrier to states choosing to fund abortion rather than childbirth. If abortion were indeed less expensive than childbirth, however, the withdrawal of federal funding certainly would not alter the financial balance and preclude, on fiscal grounds, state provision of abortion instead of childbirth.

The opinion in Harris v. McRae,70 written by Justice Stewart, upheld the Hyde Amendment and relied heavily on Maher. The challengers in McRae sought to distinguish the earlier opinion on the ground that the forms of the Hyde Amendment in effect for 1976 through 1978 only permitted abortion to protect the health of the mother71 and thus constituted a broader restriction than the state plan at issue in Maher. The McRae majority found, however, that the Maher approach was applicable, noting generally that “although government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.”72 The Court accordingly rejected the due process challenge.

The majority in McRae had even less difficulty rejecting the

68. See notes 70–80 infra and accompanying text.
70. 448 U.S. 297 (1980).
71. See note 66 supra.
72. 448 U.S. at 316.
claims that the Hyde Amendment either establishes religion, by allegedly reflecting Catholic doctrine, or infringes on the exercise of religion, by requiring childbearing where religion requires abortion. The latter challenge failed because the challengers were unable to find any individuals seeking abortions under compulsion of religious belief. The former challenge failed because, whatever the coincidence of the Hyde Amendment and the beliefs of any particular religion, its principal purpose did not advance or inhibit any particular religion or foster an entanglement with such.

The majority then considered the equal protection question, relying heavily on the fundamental right and suspect classification tests of *Maher*. First, the Court held that a woman's fundamental right to freedom of choice does not embody a constitutional entitlement to financial resources, even when such finances are necessary for her to have an abortion to protect her own health. In holding that the Connecticut statute did not discriminate against a suspect class, the Court in *McRae* reasoned that it had never regarded financial need as a suspect classification.

In holding also that the statute did not implicate the fundamental abortion right as articulated in *Roe*, the Court sought to differentiate the two cases. *Roe*, it reasoned, did not declare an unqualified constitutional right to an abortion, but instead it declared the right to be free from burdensome state interference in making a decision to terminate a pregnancy. According to the Court in *Maher*, this right to be free from state interference was violated by the statute in *Roe*, which imposed severe criminal punishment for the performance of an abortion, but was not violated by the statute in *Maher*, which evidenced the state's decision to favor childbirth over abortion through the allocation of public funds. The statute in the latter case placed no obstacle before a woman seeking her fundamental right to an abortion. Indigent women continued to be dependent on private funding sources, just as they were prior to the enactment of the statute. Thus, the Connecticut statute violated no fundamental right to abortion.

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73. *Id.* at 319–20.
74. *Id.*
75. *Id.* at 312–18.
77. 448 U.S. at 312–18. For a discussion of this right, see notes 11–26 *supra* and accompanying text.
thermore, the *Maher* Court found no suspect classification based on wealth.\textsuperscript{79} The Hyde Amendment, therefore, was held not to violate the equal protection clause by withholding public funding for certain medically necessary abortions while providing funding for certain other medically necessary services. With this decision behind the Court, it is easy to understand its ruling in the companion case of *Williams v. Zbaraz*\textsuperscript{80} which held that a state is not obligated under Title IX of the Social Security Act to pay for medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment.\textsuperscript{81}

Justices Brennan, Marshall, Blackmun, and Stevens dissented from the *McRae* opinion. Blackmun's and Marshall's dissents\textsuperscript{82} merely echoed their earlier statements in *Beal, Maher,* and *Poelker.*\textsuperscript{83} Justice Brennan, however, expanded on his earlier dissent which treated the Hyde Amendment as an attempt to circumvent, through indirect legislation, the fundamental right to abortion guaranteed by *Roe.* In Brennan's view, the majority's opinion was flawed by "its failure to acknowledge that the discriminatory distribution of benefits of government largesse can discourage the exercise of fundamental liberties just as effectively as can outright denial of those rights through criminal and regulatory sanctions."\textsuperscript{84}

The most creative and well-drafted dissent, however, came from Justice Stevens, who had joined the majority in *Maher.* Stevens distinguished *Maher* from *McRae* by noting that the challengers in *Maher* sought subsidies for purely nontherapeutic, elective abortions, whereas in *McRae* the challengers sought such assistance for abortions which might be in the broad health interests of the mother whose life was not at stake.\textsuperscript{85} To Stevens, the state might refuse constitutionally to fund purely elective abortions, but might not refuse to fund abortions necessitated by therapeutic but not life-threatening reasons. Stevens reasoned that if a woman has a constitutional right to place higher value on avoiding serious health harm than the state does on protecting potential life, then that balance should hold whether criminal sanctions or

\textsuperscript{79.} *Id.* at 470–71.
\textsuperscript{80.} 448 U.S. 358 (1980).
\textsuperscript{81.} *Id.* at 369.
\textsuperscript{82.} See 448 U.S. at 337 (Marshall, J., dissenting); *id.* at 348 (Blackmun, J., dissenting).
\textsuperscript{83.} See notes 58–65 *supra* and accompanying text. Fully half of Blackmun's brief dissent consisted of quotations from his *Maher* dissent. See note 63 *supra.*
\textsuperscript{84.} 448 U.S. at 334 (Brennan, J., dissenting).
\textsuperscript{85.} *Id.* at 349–50 (Stevens, J., dissenting).
differential funding is involved.\textsuperscript{86} In Stevens' view, therefore, the Hyde Amendment violated the duty of a sovereign to "govern impartially."\textsuperscript{87}

Collectively, the abortion decisions reflect the difficulty of defining the scope of a nonenumerated constitutional right. \textit{Roe} and \textit{Doe} recognized the right to obtain an abortion as constitutionally based on the right of privacy,\textsuperscript{88} and the \textit{Maher} trilogy denied that the state has an affirmative duty to subsidize abortion to protect the exercise of that constitutional right.\textsuperscript{89} Furthermore, \textit{McRae} relieved the federal government of the duty to appropriate funds for abortion.\textsuperscript{90} All of these decisions were accompanied by strong concurrences and dissents which took issue with the concept and scope of the constitutional nonenumerated right.\textsuperscript{91} A discussion of the history surrounding the concept of nonenumerated rights should be helpful, therefore, in understanding the Court's reasoning concerning abortion and its funding.

I. Evolution of the Concept of Nonenumerated Rights

The concepts of "rights of the citizen against the government" and "constitutional rights" are co-extensive to most Americans. The rights possessed by the citizen, in the sense that there are activities with which the government cannot legally interfere, are viewed as having been \textit{created} by the Constitution—the compact between citizens and the government. Thus, courts which seek to recognize a nonstatutory right must do so either by reference to the Constitution or to a gloss placed on that document. By relying on constitutional text, history, modern analogues of "Constitutional norms", or the general notions of "due process" and "equal protection," the courts can usually recognize, limit,\textsuperscript{92} or even abol-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 351.
\item Id. at 357.
\item See notes 9–40 supra and accompanying text.
\item See notes 41–65 supra and accompanying text.
\item See notes 70–80 supra and accompanying text.
\item See notes 33, 58–65 supra and accompanying text.
\item See, e.g., U.S. Const. amend. II, which provides that "[a] well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." Several federal courts have limited this right to the \textit{creation} of a militia, narrowly defining the term "militia." United States v. Miller, 307 U.S. 174 (1939). See Cases v. United States, 131 F.2d 916 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943); United States v. Tot, 131 F.2d 261 (3d Cir. 1942). But see U.S. Const. amend. I, which recognizes a "right of the people peaceably to assemble and to petition the Government for a redress of grievances." Although the purpose ("for a redress of grievances") is expressly made a limitation, courts consistently have extended this right to persons or
\end{enumerate}
\end{footnotesize}
ish the proposed right in question.\textsuperscript{93}

It is vital to recognize, however, that this interpretation of strict constructionism was totally alien to the framers of the Constitution; in their eyes, rights were found in "natural law." Constitutions and similar documents might recognize those rights or provide guarantees that the government would not infringe them, but the texts do not create the rights. As Alexander Hamilton, scarcely a spokesman for individual liberties, stated: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with the sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power."\textsuperscript{94}

The wording of the Constitution also reflects the concept that enumerated rights were not created by the text of the Constitution, but existed prior to the reduction of these principles to written form. Thus, the first amendment does not speak of granting a freedom of expression, but rather prohibits Congress from "abridging the freedom"\textsuperscript{95} of speech or press; the second amendment does not provide that the people shall have a right to keep and bear arms, but rather that this existing right "shall not be infringed;"\textsuperscript{96} and the seventh amendment does not state that a right to trial by jury shall be available in civil actions, but rather mandates that in such actions that right "shall be preserved."\textsuperscript{97}


\textsuperscript{94} I \textit{Pamphlets of the American Revolution} 108 (B. Bailyn ed. 1965). Another proponent of the natural law philosophy was an antifederalist who identified himself as "a Columbian Patriot" and who was believed to have been either Elbridge Gerry or Mercy Warren. He stated that "the principal aim of society is to protect individuals in the absolute rights which were vested in them by the immediate laws of nature . . . ." \textit{Observation by a Columbian Patriot}, in \textit{Antifederalists Versus Federalists: Selected Documents} 181, 182 (J. Lewis ed. 1967). For a discussion of the possible author of this quotation, see P. Ford, \textit{Pamphlets on the Constitution of the United States} (1888); The \textit{Antifederalists} (C. Kenyon ed. 1966); C. Warren, Elbridge Gerry, James Warren, Mercy Warren and the Ratification of the Federal Constitution in Massachusetts, \textit{Proceedings, Mass. Hist. Soc'y}, LXIV (March 1931).

\textsuperscript{95} U.S. CONST. amend. I.

\textsuperscript{96} U.S. CONST. amend. II.

\textsuperscript{97} U.S. CONST. amend. VII.
The concept of nonenumerated constitutional rights also can be examined within the context of the Bill of Rights. Initially, the American Constitution contained no bill of rights, an omission which had been rationalized on the ground that the framers were creating a government of limited powers. Additionally, since no power was given to the government to infringe certain rights, no such power existed; any listing of rights, therefore, would have been superfluous. Indeed, some of the supporters of the Constitution argued vehemently that the express listing of specific rights might act as a threat to freedom since such enumeration could be interpreted as conferring on government the power to infringe any right not delineated expressly.

During the preliminary ratification process for the Constitution, however, the movement for a bill of rights gained momentum. A variety of rights were designated as appropriate for this special recognition. Pennsylvania demanded a constitutional right to hunt and fish; New Hampshire asked for prohibitions against government-chartered monopolies; and Virginia sought provisions for the re-election of officials, a broadening of the right of suffrage, a prohibition against the suspension of law enforcement without the consent of the legislature, and a requirement that jury verdicts be unanimous for criminal convictions. As a

98. John Jay, for example, rejected the argument that the Constitution did not adequately secure the right of jury trial because "it expressly secures it in certain cases, and takes it away in none," stating it "is absurd to construe the silence of this as authorizing infringements of such a right, or of the right of expression." 1 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 497-98 (2d ed. 1888). See also 2 id. at 78.

99. See J. Madison, Notes of Debates in the Federal Convention of 1787, at 640 (A. Koch ed. 1966). See also Address by James Wilson at the State House in Philadelphia, October 10, 1787, reprinted in Confederation and Constitution 1781-1789, at 190 (F. McDonald & E. McDonald eds. 1968) in which Wilson voiced his concern that the specific inclusion of a particular right in the Constitution might be viewed "to imply that some degree of power was given [to the government] since we undertook to define its extent." Id.

100. The movement began in Pennsylvania where a minority of delegates to the state convention pushed for ratification conditioned upon the adoption of a bill of rights. 2 M. Jensen, The Documentary History of the Ratification of the Constitution 596-99 (1976). While unsuccessful in the Pennsylvania convention, these proposals were widely circulated and influenced the decision of the later conventions to demand a federal bill of rights. E. Dumbauld, The Bill of Rights and What It Means Today 11 (1957).

101. Jensen, supra note 100, at 598, 624.


103. Id. at 1029.
result, when the task of drafting the Bill of Rights was assigned to James Madison, he was faced more with an editing problem than one of creative thinking.

Ultimately, only a small number of substantive rights were given express recognition in the Bill of Rights. These rights were placed in the first three amendments and were limited to the rights of expression, assembly (for petitioning the government), and the keeping and bearing of arms, as well as the prohibition against the peacetime quartering of troops in the homes. The remaining amendments focused on procedural rather than substantive matters. The ninth and tenth amendments, however, recognized the existence of “constitutional rights” other than those expressly listed and provided that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people” and that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Thus, the Bill of Rights recognized only a few substantive rights, and continued to recognize the “natural law” distinction between a constitutional and an enumerated right.

Over the last century, the general expansion of federal powers has made the concept of “a government of limited powers” an empty slogan. Additionally, the triumph of utilitarianism has undermined both the ability of the courts to look to “natural law” and, at least at the theoretical level, the importance of the judiciary as a constitutional policymaker. Traditionally, the legislature has been regarded as the best body for determining what is conducive to “the greatest good for the greatest number.” As a result, the ninth and tenth amendments, which could have been defined by the judiciary, have vanished from the Constitution. The practical effect of this philosophical shift is that the written text of the Constitution has become enshrined as the sacred writ of a secular,
legalistic religion. Likewise, claims that rights exist even though they are not recognized within the text of the Constitution increasingly are viewed as antiquated sophistry. This approach, however, is obviously impractical because recognition of plenary power limited only by the few express strictures of the Bill of Rights ultimately is inconsistent with a liberal democracy.

During the 20th century, the courts have responded to this limited interpretation of constitutional rights by creating a series of glosses on the constitutional text. Thus, the guarantee that no person "shall be compelled in any criminal case to be a witness against himself" became both a "right against self-incrimination" and a "right to remain silent" which could be waived only after hearing certain warnings and responding to specified questions in a certain manner. Likewise, rights against warrantless searches and seizures and the stationing of troops in private dwellings were interpreted as creating a "penumbra" which included a "right of privacy." This privacy right, essentially a protection of physical seclusion, then was defined as a "right to be

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109. The concept of the Constitution as a secular religion is developed in Levinson, "The Constitution" in American Civil Religion, 1979 Sup. Ct. Rev. 123. Levinson notes that the different treatments of constitutional "scripture" tend to divide along traditional Catholic-Protestant religious lines. The literalist interpretation, for instance, relies solely on the textual tradition. This school takes the position that everyone must interpret the text for himself (e.g., a President may hold to an interpretation of the Constitution contrary to that of the Court) and rejects the view that the Supreme Court is essentially "infallible" on matters of constitutional dogma. Id.

110. There is nothing on the face of the Constitution, for instance, which would prohibit the federal government from freely engaging in any form of racial discrimination.

111. U.S. CONST. amend. V.

112. See In re Gault, 387 U.S. 1, 47 (1967) (the "privilege reflects the limits of the individual's attornment to the state"); Tehan v. United States, 382 U.S. 406, 415-16 (1966) (discussing the "basic purpose" behind the privilege against self-incrimination); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (referring to "the Fifth Amendment's exception from compulsory self-incrimination").

113. Malloy v. Hogan, 378 U.S. 1, 8 (1964) (referring to a right "to remain silent unless [the defendant] chooses to speak in the unfettered exercise of his own will"). The distinction between a right against being compelled to speak and a right to remain silent may seem nonexistent, yet it lies at the heart of later cases such as Miranda v. Arizona, 384 U.S. 436 (1966). If the right is one against being compelled to speak, the notion of "waiver" is obviously inapplicable; how can one ever consent to being compelled to take an action? The waiver concept is applicable only if the underlying right is one to remain silent and not merely to be free from being forced to speak.

114. See Miranda v. Arizona, 384 U.S. 436 (1966). Paradoxically, while requiring full warnings and free decision in an area which does not involve a true waiver, see note 113 supra, the Court has refused to extend these requirements to consent to a warrantless search which does involve a waiver of a right. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

let alone," and further defined as a right to be free from the enforcement of certain statutes which infringe family relationships. Eventually, the courts came to rely on constitutional glosses and lengthy opinions were written that failed to quote the constitutional provision in question.

This approach for determining constitutional rights was not without merit; it placed further restrictions on a government which had become one of general powers under a constitution providing only the minimal express restraints appropriate for a government of limited powers. This approach also tended, however, to create a hodgepodge of inconsistent rulings, dependent on no more than the values and social inventions of a majority of the court. Yet it was exactly this link to subjective values which had caused a significant objection to the notion of “natural law.”

The concept of constitutional rights utilized by the 20th century judiciary frequently lacks the universality found in the natural law concept of constitutional rights. Accordingly, it becomes possible for a right of privacy to protect one who obtains an abortion pursuant to a medical procedure in a public clinic but not protect one who possesses marijuana for personal use in the basement of his or her home. Remarkable exercises in constitutional “newspeak” become possible as the gloss placed on the Constitution is expanded. Legislatures can pass laws which un-

117. See, e.g., Griswold v. Connecticut, 381 U.S. at 479.
118. The observation of one recent commentator that the Court was relying on a “rather unusual source for First Amendment doctrine” when “it looked at and relied on the text of the First Amendment” is not entirely ironic. Schauer, “Private” Speech and the “Private” Forum: Givhan v. Western Line School District, 1979 Sup. Ct. Rev. 217, 226. Schauer explains: “In the past the text has hardly been a popular source for free speech methodology.” Id.

In Harris v. McRae, 448 U.S. 297 (1980), the majority opinion, one concurring opinion, and four dissenting opinions established a minimum of three constitutional tests and never quoted from the text of the Constitution, with the exception of two references to the fourteenth amendment and an implicit reference to constitutional “liberty” in the majority opinion. 448 U.S. at 312.

119. See, e.g., Doe v. Bolton, 410 U.S. at 221 (White, J., dissenting). See also note 34 supra and accompanying text.
questionably restrict the right to freedom of speech or of the press if they can claim such restrictions will ultimately increase the totality of freedom of expression.\textsuperscript{122} Government employees may be prohibited from engaging in political activities if the justification is that their supervisors might otherwise exert pressure on them, thereby infringing their political liberties.\textsuperscript{123} Indeed, in view of a substantial minority of the Court, some government officials may be fired because of their membership in a political party to promote free political involvement and association.\textsuperscript{124} Thus, many of the “natural law” constitutional rights no longer are protected under the Constitution due to the inconsistencies in the interpretive glosses of the modern judiciary.

II. THE RIGHT OF PRIVACY AS A NONENUMERATED RIGHT

The right of privacy ultimately recognized in \textit{Roe v. Wade}\textsuperscript{125} can be regarded as the archetypal constitutional right based on elaboration of a textual constitutional right.\textsuperscript{126} In analyzing the history of the right of privacy, it is vital to distinguish between the different concepts encompassed within the legal notion of privacy. The concept of a physical privacy, in which certain physical areas are protected legally from intrusion, probably antedates written records of English law. In the early Anglo-Saxon law, for instance, minor criminal offenders received double and triple penalties if the crime was committed within the boundaries of a person’s home.\textsuperscript{127} When the English writ system, under Henry II, began to expand into the “common law,” writs for the protection of physical possession of real estate and the security of that possession against physical intrusion and trespass were among the first of such rules to be expanded.\textsuperscript{128}

The development of this right of physical privacy into a personal right to be free from intrusion, not only from other individuals but from the ruling power, is of a more recent origin. Although officials frequently searched the homes of “disaffected per-

\textsuperscript{122} See Buckley v. Valeo, 424 U.S. 1 (1976).
\textsuperscript{124} See Branti v. Finkel, 445 U.S. 507, 520–21 (1980).
\textsuperscript{125} 410 U.S. 113 (1973). See also notes 9–26 supra and accompanying text.
\textsuperscript{126} See notes 110–24 supra and accompanying text.
\textsuperscript{127} J. Jolliffe, \textit{The Constitutional History of Medieval England From the English Settlement to 1485}, at 5 (1937).
\textsuperscript{128} 2 W. Holdsworth, \textit{A History of English Law} 516–17 (3d ed. 1927).
sons” for arms in the period between 1660 and 1688, the Declaration of Rights of 1688 makes no mention of a right against unreasonable search and seizure by the sovereign. The fourth amendment to the Constitution, however, expressly recognizes that right as a fundamental part of American constitutional law.

The recognition of a right of privacy which would protect more than physical interests is a development of the last century. The pivotal thinking regarding the right of privacy is found in an article written by Samuel D. Warren and Louis D. Brandeis in 1890. These authors argued for the recognition of a civil remedy for the invasion of certain forms of “privacy.” The first form of “privacy” concerned the use of a person’s name or photograph in commercial advertising without that person’s consent. The second form of privacy dealt with the portrayal of that person or his or her opinions in a “false light”. Finally, the third form of privacy sought to protect individuals against the surveillance or publication of activities they sought to keep private. While the concepts of Warren and Brandeis ultimately secured acceptance by the American judiciary, it is noteworthy that while these arguments were designed to create a civil, nonconstitutional remedy against private infringements, none of them had any reference to invalidating statutes, and only the third form of “privacy” had even tangential reference to criminal enforcement techniques.

It took the expansion of modern electronic technology to initi-


130. The Declaration of Rights did complain that James II had forfeited his right to rule by causing Protestant subjects “to be disarmed” while Catholics were not and resolved that “the subjects which are Protestant may have arms for their defense suitable to their conditions and, as allowed by law.” 1 Gul. & Mar., sess. 2, c.2 (1688). Only a year before the adoption of the American Bill of Rights, the great English constitutionalist Edmund Burke referred to the 1688 Bill as the “cornerstone of our Constitution.” L. Brevold & R. Ross, The Philosophy of Edmund Burke 192 (1970).

131. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.” U.S. Const. amend. IV.


134. See Abernathy v. Hutchinson, 3 L.J. Ch. 209 (1825).


137. Warren & Brandeis, supra note 132, at 213.
ate the incorporation of the Warren and Brandeis form of privacy into constitutional law. With the development of electronic surveillance techniques, it became possible to eavesdrop on conversations without physically intruding into the area of conversation. Initially, the eavesdropping activity was held constitutionally permissible since it did not involve a physical intrusion, even though the practical effect of that activity had the potential to be more invasive than the traditional search.

In 1967, however, nearly eight decades after the publication of the Warren and Brandeis article, the Supreme Court concluded that the fourth amendment's prohibition against warrantless searches protected a "zone of privacy" which might be invaded by electronic forms of surveillance. Later, in Stanley v. Georgia, the Court recognized the possibility that a right of privacy independent of the fourth amendment might exist which would protect against enforcement of certain criminal laws that required the invasion of a private household in a search for pornography.

The express elevation of the right of privacy to an independent constitutional right was accomplished in Griswold v. Connecticut where the Court concluded that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees . . . ." As a result, the Court ruled that a Connecticut statute banning the sale or possession of contraceptive devices was unconstitutional. The Court provided two rationales for its decision. First, enforcement of the state statute, which apparently had not been enforced for many years, would involve a physical invasion of the home and the marital bedroom. Second, and more importantly, the underlying principle of the statute, restricting the choice of couples with regard to having children, invaded the family relationship. The third rationale was particularly helpful in expanding the constitutional protection of privacy be-

140. Id. at 565.
141. 381 U.S. 479 (1965). Pardoxically, the right to possess pornography in the home, articulated by the Court in Stanley, has not achieved such status; the Court has ruled that fourth amendment protections do not extend outside the physical confines of the home. United States v. Orito, 413 U.S. 139, 141–42 (1973). Cf. Wishart v. McDonald, 500 F.2d 1110, 1114 (1st Cir. 1974) ("the right to be left alone extends only to the home and not to conduct displayed under the street lamp on the front lawn").
142. 381 U.S. at 484.
143. Id. at 485.
144. Id.
145. Id. at 486.
cause it prohibited an invasion which was detached entirely from physical intrusion. This second theory also recognized that certain intangible relationships might be protected under the concept of "privacy," regardless of the method of intrusion. It was through its reasoning in Griswold, therefore, that the Court opened the door to its decision in Roe v. Wade.\textsuperscript{146}

An analysis of the historical foundations of the right of privacy has shown that the modern notion of this right is largely a result of judicial glosses placed on the constitutionally enumerated right against unreasonable searches and seizures.\textsuperscript{147} Although the interpretive gloss approach to the determination of constitutional rights is not without merit, it has been criticized for creating inconsistent rulings.\textsuperscript{148} Two examples of this inconsistency are the judicial recognition of a privacy right to obtain an abortion\textsuperscript{149} and the judicial recognition of a governmental right to limit the subsidization of abortion even when the state prevents a woman from obtaining an abortion.\textsuperscript{150} Before examining this inconsistency further, some background on the constitutional basis for governmental financial allocations is needed.

III. \textsc{The Constitutional Basis For Legislative Preeminence In Governmental Financial Allocations}

If the antecedents of a right of privacy can be traced to early English law,\textsuperscript{151} then the origins of a special preference for financial decisionmaking by elected representatives can be traced to a similar origin. Throughout most of the formative period of the common law, the concept of the central government as an institution financed by the people and operated for their benefit did not exist. The king's affairs—waging of wars to extend his domain, enforcement of his peace, maintenance of his household, and reward of his supporters—were expected to be financed out of his own funds. The king amassed these funds chiefly from his land revenues and specialized fees which he would exact from the nobility on such occasions as the death of a nobleman or the mar-

\begin{flushright}
146. 410 U.S. 113 (1973).
147. See notes 125–46 supra and accompanying text.
148. See notes 118–24 supra and accompanying text.
149. See notes 9–40 supra and accompanying text.
150. See notes 41–87 supra and accompanying text.
151. See notes 127–28 supra and accompanying text.
\end{flushright}
riage of his eldest son.\textsuperscript{152}

To secure revenue or "aids" beyond these amounts, however, the king was obliged to convene representatives of the people and request the granting of an aid "per commune consilium et assensum concillii."\textsuperscript{153} As this request was a matter of grace with the representatives, they were free to refuse. The king had only a few powers of retaliation, as demonstrated by John's 1199 order to turn out grazing animals and resisting abbots from his forest pastures.\textsuperscript{154} John's attempts at more serious retaliation and greater exploitation of the aids resulted in the creation of the Magna Carta which reestablished the requirements of consent to sovereign actions and placed limits on the king's demands. Even after the great centralization efforts of the kings in the 13th and 14th centuries, "[t]he governing rule is that of the past: aid is by the free will of the subjects. The King should live of his own."\textsuperscript{155}

This fundamental notion that people had power over finances lay at the very heart of the elected representative governing body. The substantive parliamentary power was limited initially to petitioning the king for recognition of a law.\textsuperscript{156} By 1340, the future House of Commons was using "the power of the purse" to gain control of more substantive powers. This legislative body then began to give aid to the king "on the condition that the King would grant their petitions" for laws.\textsuperscript{157} The "power of the purse" was thus the original function and primary power of the elected legislature under the English system. The American colonists who protested against taxation without representation and who demanded their right to legislative representation acted against a background of political thought which was a contemporary of the common law itself.

The preeminence of the legislature in financial matters thus became part of the foundation of the American governmental system. The Declaration of Independence listed both the imposition of taxation\textsuperscript{158} and the forced payment of funds to erect new offices\textsuperscript{159} among the most evil of injuries and usurpations aimed at

\begin{itemize}
  \item \textsuperscript{152} J. Jolliffe, supra note 127, at 220–21.
  \item \textsuperscript{153} Id. at 243.
  \item \textsuperscript{154} Id. at 244.
  \item \textsuperscript{155} Id. at 395.
  \item \textsuperscript{156} Id. at 377.
  \item \textsuperscript{157} Id. at 380 n.6 (quoting Rotuli Parliamentorum, ii. 113); B. Lyon, A Constitutional and Legal History of Medieval England 550 (2d ed. 1980).
  \item \textsuperscript{158} Declaration of Independence § II, cl. xvii.
  \item \textsuperscript{159} Id. § II, cl. x.
\end{itemize}
creating an absolute British tyranny. The tradition that only elected representatives could control financial matters was carried into Article I, Section 7 of the Constitution which provides that all revenue bills must originate in the House of Representatives. This provision, however, did not satisfy everyone and the dissatisfaction found voice in the Virginia proposal for a Bill of Rights which was echoed almost identically by North Carolina and Rhode Island. The proposal stated:

[E]lections of Representatives in the legislature ought to be free and frequent, and all men having sufficient evidence of permanent common interest with, and attachment to the community ought to have the right of suffrage: and no aid, charge, tax or fee can be set, rated, or levied upon the people without their own consent, or that of their representatives, so elected, nor can they be bound by any law, to which they have not in like manner assented for the public good.

While rarely citing this constitutional and legal background, the modern Supreme Court repeatedly has acknowledged the pre-eminence of the legislative branch in judgments concerning fiscal matters and, more particularly, public funding of social programs. The Court generally has imposed the "rational relationship" test rather than the "strict scrutiny" test for such programs, thereby reducing judicial input and increasing legislative input into the decisions in this area. The Court also has refused to recognize indigency as a "suspect classification" to avoid the invocation of strict scrutiny. As a result, the Court has narrowly

160. Id. § II.
162. When the Constitution was adopted, Senators were not elected directly by the people. Article I, § 3 provided that the Senate should be composed of Senators chosen by the legislatures of their respective states. U.S. CONST. art. I, § 3. This provision was superseded by the seventeenth amendment. U.S. CONST. amend. XVII.
163. H. R. Doc. 398, supra note 102, at 1029. See also id. at 1045 (North Carolina proposal) and 1052 (Rhode Island proposal).
circumscribed the authority of the judiciary regarding legislative fiscal matters.

In a series of cases beginning the year before *Roe v. Wade*, the Court continued in its tradition of deferring to legislative judgment in financial matters and upheld legislative fiscal decisions against a variety of challenges. In *Jefferson v. Hackney*, the Court considered the constitutionality of a state welfare program which compensated Aid to Families with Dependent Children (AFDC) recipients at a substantially lower rate than persons receiving other forms of welfare. In upholding this compensation scheme, notwithstanding the fact that the majority of the AFDC recipients (87%) who received this reduced compensation were black or Mexican-American, the Court noted that the number of minority members in all categorical assistance programs is substantial. Furthermore, "given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial composition of each grant class was identical to that of the others." 

In *United States v. Kras*, the Court permitted the government to refuse a bankruptcy discharge to an indigent who could not pay the bankruptcy filing fee. While the Court had indicated earlier that the government could not constitutionally charge indigents for services on which it held a legal monopoly (e.g., marriage and divorce), Kras suggested an extremely narrow construction for this rule in deference to the legislative scheme.

Thus, the constitutional basis of legislative preeminence in governmental fiscal matters is rooted deeply in the English common law, American political philosophy, and the American judi-

169. *Id.* at 548.
171. The plaintiff in *Kras* had been unemployed for four years, had a child suffering from cystic fibrosis, owned $50 in nonclothing assets, and owed several thousand dollars in debts. The plaintiff was, in short, the model plaintiff for a challenge to indigency-related discrimination. *Id.* at 438.
173. Justice Blackmun, writing for the Court, took the position that the government has no monopoly on bankruptcy relief. Blackmun reasoned that while bankruptcy, like marriage, only can be obtained by an act of government, a debtor can achieve a similar result by negotiating with creditors. 410 U.S. at 445-46. Precisely how Kras, with $50 in assets and several thousand dollars in debts, was to undertake such negotiations was not explained.
ciary. This traditional authority of the legislature in financial affairs must be examined in light of the expanding notion of constitutional nonenumerated rights to determine whether a grave constitutional inconsistency exists between the two concepts.174 The next section of the Article will address this question as it relates to abortion.

IV. PUBLIC FUNDING OF ABORTION AND CHILD DELIVERY: INDIVIDUAL RIGHTS OF PRIVACY VERSUS LEGISLATIVE PREEMINENCE IN FUNDING

The traditional legislative role in public finance policymaking175 and the judicially expanded right of privacy176 conflict with the allocation of public finances to provide abortion for indigents. In Roe v. Wade,177 the Court struck down a statute imposing a criminal ban on abortion based on the right of privacy. Justice Blackmun, writing for the majority, was joined by Justices Brennan, Marshall, and Powell,178 with Justices Stewart and Burger concurring on substantive due process principles179 and Justice Douglas concurring on privacy grounds.180 Four years later, the Maher trilogy of decisions upheld state statutory restrictions of governmental funding for abortion when the two dissenters in Roe, Rehnquist and White, were joined by Stewart, Burger, Powell, and Stevens.181 These differing alignments of Justices on the abortion issue suggest that the scope of the constitutional nonenumerated right to obtain an abortion is curtailed significantly when juxtaposed to the traditional legislative right to allocate public funds.

The minority opinions in the Maher trilogy also mirrored the ideological conflict underlying the public funding of abortions, reflecting the unsettled nature of the traditional legislative right to allocate funds. Although two of the Maher dissenters, Brennan and Marshall, remained consistent with their majority position in Roe, the third dissenter, Blackmun, broke sharply with his prior opinions in governmental funding matters.182 Blackmun did not

174. See notes 147–48 supra and accompanying text.
175. See notes 151–74 supra and accompanying text.
176. See notes 125–46 supra and accompanying text.
177. 410 U.S. 113 (1973).
178. Id. at 113–202.
179. Id. at 207–08.
180. Id. at 209–20.
181. Justice Stevens had since replaced Justice Douglas on the Court.
182. Justice Blackmun criticized not only the public official who had restricted abortion
attempt, for example, to reconcile his position in *Maher* with his majority opinion in *Kras*.

In *Kras*, Blackmun upheld a refusal of a discharge in bankruptcy to an indigent who could not afford to pay the bankruptcy filing fee. Blackmun also did not reconcile his viewpoint in the abortion area with his prior decisions to join the majority in *Jefferson v. Hackney* and *Ornstein v. Schwab*. Thus, Blackmun's varied positions on legislative pre-eminence in public funding underscore the conflict that exists when the issue of the public funding of abortions is before the Court.

Even though the Court has declared that the legislative right to allocate public funds is preeminent over the constitutional nonenumerated right to obtain an abortion, the context in which this decision was made warrants closer examination. To so examine, it is necessary to analyze the first amendment, due process, and equal protection arguments brought forward in the *Maher* and *McRae* series of cases.

**V. Does the First Amendment Impose a Constitutional Duty to Fund Abortion for Indigents?**

The challengers in *Harris v. McRae* began their attack on the Hyde Amendment, which restricted the use of federal funds for elective abortion, with a two-pronged argument based on the religion clauses of the first amendment. These individuals argued initially that the Hyde Amendment was a violation of the establishment clause since it legally codified Roman Catholic doctrines which were highly antagonistic to abortions other than those necessary to save the mother's life. The challengers' second position...
was that the Hyde Amendment violated guarantees of the free exercise of religion because it restrained a person whose religion required abortion from obtaining one. Both the district court and the Supreme Court quickly rejected these challenges. Although the Hyde Amendment may coincide with certain religious beliefs, the Court held that this fact, without more, would not support a finding that the amendment contravened the establishment clause of the Constitution. The Court rejected the second prong of the challengers' argument on standing grounds because the challengers were unable to locate a party who expected to be pregnant, was eligible to receive Medicaid, and whose religious beliefs compelled her to obtain an abortion.

The Court's rejection of the challengers' two-pronged argument is justified by both a factual and legal analysis. Factually, it is difficult to accept the proposition that opposition to nonlifesaving abortions is purely a religious response based on the tenets of Catholicism or that religious support is mustered only on one side of the issue. Individuals belonging to religious groups frequently have chosen their positions without regard to group mores. Religious organizations also have been grouped on both sides of the question in largely unpredictable fashion. Although Catholic teachings oppose abortion in most cases, Justice Brennan, the sole Catholic on the Supreme Court, voted with the majority in two critical abortion decisions. Although Jewish groups have generally supported the free availability of abortion, one of the best treatises opposing such a procedure on moral grounds was authored by a Jewish physician. Thus, it is highly unlikely that all members of a religious group will shape their moral decisions solely on the basis of the doctrine of their religious organization.

189. Id. at 318-20.
190. Id. at 320-21. The Court divided the named challengers into three categories: "(1) the indigent pregnant women who sued on behalf of other women similarly situated, (2) the two officers of the Women's Division [of the Board of Global Ministries of the United Methodist Church], and (3) the Women's Division itself." Id. at 320. The first category of challengers lacked standing because they did not show that their religious beliefs compelled them to have an abortion. The other two categories of challengers did not have standing because they failed to show that they anticipated becoming pregnant or were eligible for medical funding under a federal program. Id.
191. Five years before Wade-Bolton, for example, the Unitarian Universalist Association decided to urge "that efforts be made to abolish existing abortion laws except to prohibit performance of an abortion by a person who is not a duly licensed physician." Tentative Agenda, Seventh Annual General Assembly of the Unitarian Universalist Association, May 23, 1968.
The Court also can justify its rejection of the challengers' two-pronged argument from a legal standpoint. Most American laws import some manner of moral judgment, primarily Judeo-Christian in nature. The Constitution's commands of equality can be traced to theological concepts of the soul, and its prohibition on self-incrimination can be linked to the ecclesiastical proscription of suicide. The Court's refusal to strike down a law which may have a moral component, but which does not advance or inhibit religion, is a rational response to these considerations.

A further problem with this two-pronged challenge is that it fails to acknowledge the unusual structure of the first amendment's religion clauses. These clauses prohibit not only the establishment of religion but also infringements on religion. The legislature would not "establish" a religion; if anything, it avoids "infringing" on the beliefs of the members of any religious group. The Hyde Amendment offers a similar observation since it does not prohibit abortion but rather avoids the use of legal coercion (taxes) against those individuals who would not contribute voluntarily to the funding of such a procedure. Thus, the Hyde Amendment embodies the rationale of the establishment clause since it prohibits the financial support of a procedure where a step necessary to that support infringes on religious beliefs.

The rejection of the first amendment argument in *McRae*,

194. Deism represents the root of the constitutional doctrine developed by the framers and their contemporaries. See note 94 supra and accompanying text.


The insight of the Talmud that a man is closest to himself, his own relative, recognizes that the instinct for self-preservation governs the actions of any normal person. Consequently, only a mentally deranged individual, heedless of his own life, would admit to a capital crime. His confession was a form of suicide, which was sinful and violative of the instinct of self-preservation. *Id.* at 438-39.


197. U.S. CONST. amend. I. Few would argue that the legislature is constitutionally prohibited from permitting conscientious objectors to avoid military service when such service conflicts with their consciences.


The intervening defendants, who defended the Hyde Amendment, were quick to take advantage of this argument. "Indeed, to the extent that abortion may be a religious practice—as the District Court appears to hold for some—the state is positively forbidden to provide funds to facilitate its effectuation." Brief of Intervening Defendants-Appellees James L. Buckley, Jesse Helms, Harris v. McRae, 448 U.S. 297 (1980).
however, did not materially weaken the challenge to the Hyde Amendment. The main strength of that challenge came in its equal protection and due process arguments.

VI. **DOES THE EQUAL PROTECTION CLAUSE REQUIRE THE GOVERNMENT TO FINANCE ABORTION?**

The challengers to the Hyde Amendment in *McRae*¹⁹⁹ and to the Connecticut appropriation statute in *Maher*²⁰⁰ successfully maintained an equal protection argument in the district courts, but failed on appeal. This failure was largely the result of the proponents' inability to establish that governmental discriminatory action was imposed on a suspect category or that the statutory provision inequitably infringed on a fundamental right.²⁰¹ An examination of the constitutional standards in this area suggests this failure was inevitable.

A successful equal protection challenge often requires the challengers to demonstrate that the allegedly unconstitutional action has a disproportionate impact on a "suspect category." The purpose of this initial burden is to limit the excessive judicial intrusion which can result from the individual Justices making subjective judgments about the social impact of given laws. If the inequality is imposed on a "suspect category," then the legislation must be supported by a compelling state interest.²⁰² If the inequality is not imposed on a "suspect category," then the legislation need only have a rational basis to survive a constitutional challenge. Since it is rare to find either that a law has no rational basis or that it serves a compelling state interest, the test in practice dictates that legislatures may treat other groups, but not suspect categories, in differing manners.²⁰³

The Court consistently has refused to establish any threshold test for what constitutes a "suspect category," leaving this defini-

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¹⁹⁹. *See* notes 70–90 *supra* and accompanying text.
²⁰⁰. *See* notes 47–69 *supra* and accompanying text.
²⁰³. Strict scrutiny also is invoked where the discrimination concerns a "fundamental right." This invocation will be the subject of due process rather than equal protection analysis.
tion to be formulated on a case-by-case basis. Professor Winter's perceptive article concerning the economic implications of the equal protection clause has crystallized three underlying characteristics of suspect classifications. Race, for example, is a suspect classification because it is unalterable by the individual, bears no relation to individual merit, and, in the case of blacks, has "served as a systematic vehicle of governmental discrimination." These criteria do not constitute a legal "test" because the Court never has stated the elements warranting a "suspect classification." As a hypothesis, however, Winter's criteria do explain the Court's decisions on this subject and may even be broader than the Court's determinations. It seems unlikely, therefore, that a category which does not meet Winter's three criteria would be listed among the comparatively limited number of suspect categories the Court has recognized.

The challengers in both *Maher* and *McRae* sought to establish indigency as a suspect classification, thereby making the appropriation statutes limiting the availability of abortion to indigents subject to strict scrutiny. While the indigency issue derived support from most of the dissenters, the majority remained unimpressed. Much earlier, the Court had rejected indigency as a suspect classification and refused to make an exception in this context. If Professor Winter's test for determining a "suspect classification" is accepted, however, then the *Maher* and *McRae* decisions are amply justified because indigency fails all three criteria.

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205. Sex, for example, easily meets all three criteria but is not yet accepted as a suspect classification. A plurality of the Court accepted sex as a suspect category in *Frontiero v. Richardson*, 411 U.S. 677, 686-88 (1973), but the following year, a majority treated sex discrimination as subject to a rational basis test. *See* *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

206. In *Maher*, Brennan mentions indigency, while placing primary emphasis on due process objections. 432 U.S. at 482-525. Marshall's dissent in *Beal* stressed the importance of indigency. *Id.* at 455-62. Dissenting in *Beal*, Blackmun—being in a much worse position to argue indigency in light of his opinion in *Kras* (see notes 170-73 *supra* and accompanying text)—emphasized due process objections and general references to indigency which were not coupled with any specific arguments on its constitutional status. *Id.* at 462-63.


209. *See* note 204 *supra* and accompanying text. Indigency often is alterable by the individual, is related to quality of economic decisions of marketplace "merit" and, while
Furthermore, the recognition of indigency as a suspect category would pose almost insurmountable practical difficulties for the Court because it is very difficult to define indigency. Virtually everyone at some time experiences the inability to secure an essential good or service which may concern vital rights. Defining adequate levels of such goods and services, therefore, is extremely difficult. The demand may vary with price and the price itself may vary with the demand and be subject to increase by the government's purchase of the item in question; likewise, since the poor bear the brunt of many local taxes, a tax-paid service is financed largely by reducing their budgets for other needs.

Even if it could be demonstrated that a suspect classification for indigency exists, it also would have to be shown that the government discriminates against that class before a constitutional requirement of abortion funding could be secured. A statute providing that no one should perform an abortion for a person earning less than $5,000 a year, for example, is a clear case of governmental discrimination against the indigent. This type of legislation, however, is not at issue in the abortion funding cases. Instead, the government simply has failed to make any provisions for public funding of abortions; it neither prohibits nor finances.

the poor have always received less political consideration than the wealthy, they have never been lynched, placed in relocation camps or imprisoned purely for their economic status.


211. Query: what is the duty of the legislature when the provision of one commodity requires the reduction of another (e.g., expanding meat production decreases grain supplies or necessitates shifts of capital away from durable goods production), such that an indigent enjoys easy access to one commodity while another good is priced beyond his or her reach. In at least one jurisdiction, free elective abortions were provided while free elective sterilizations were discontinued due to a lack of funding and medical resources. Hardy, Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams, 18 ARIZ. L. REV. 903, 925 n.119 (1976).

The regressive effect of most state and local taxes which are derived largely from the poor also cannot be ignored. Property taxes, for instance, take about 6.43% of the income of those earning under $2,000 a year and only 2.29% of the income of those earning over $15,000. D. Netzer, Economics of the Property Tax 50 (1966). Even allowing for the progressivity of income taxes, the first income group pays about 27% of their income in taxes—nearly the same proportion as that of the higher income brackets. C. Green, Negative Taxes and the Poverty Problem 27 (1967). If the incomes of the poor were not subject to such taxation, approximately 3.3 million families would be raised above the poverty line. Id. at 26-29. Thus, funding one service for the poor out of tax revenues inevitably decreases the ability of the poor to purchase other goods and services by decreasing their disposable income.
Thus, under this analysis, the equal protection challenges would not satisfy the threshold requirement of governmental discrimination.

Consider the private physician who, as a matter of business economics and not as a matter of law, refuses to provide "medically necessary" services to an indigent without prior payment. Under this approach, the question becomes whether the government has a constitutional duty to meet the private physician's business demands to prevent the creation of a barrier to the indigent woman's requests. Framed in this way, the Court appears to be in a difficult position since a discriminatory barrier is established and maintained through governmental inaction. To hold, however, that the government has a duty to remedy private acts which would be unconstitutional if undertaken by the government itself essentially would annihilate the state action doctrine. Accordingly, even though the legislature has failed to remedy a discrimination created by a private physician, this inaction cannot be considered governmental discrimination against indigents. Thus, the threshold requirement of a successful equal protection challenge has not been met.

The Court's rejection of the suspect classification challenges to the Hyde Amendment is consistent with the prevailing constitutional standards utilized to assess the sufficiency of an equal protection challenge to legislative action. The statutory restrictions on the public funding of abortion neither create a suspect classification of indigency nor result in direct discriminatory action by the government. There is, however, an alternative means of invoking equal protection strict scrutiny against legislative action. This second type of equal protection challenge concerns inequita-

212. Hardy, supra note 211, at 910-12. The actions of the physician can scarcely be considered "state action" merely because that individual is licensed by the state. Such an argument has been repeatedly rejected as applied to attorneys similarly licensed. See Steward v. Meeker, 459 F.2d 670 (3d Cir. 1972); Dyer v. Rosenberg, 434 F.2d 648 (9th Cir. 1970); Mulligan v. Schlacter, 389 F.2d 231 (6th Cir. 1948). Moreover, if the physicians are viewed as state agents practicing fiscal discrimination, they should have been defendants rather than plaintiffs in the actions.

213. The essence of the state action doctrine is that the fourteenth amendment's requirements of due process and equal protection apply to the states and, thereby, to parties closely allied with them, but not to private acts. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); Civil Rights Cases, 109 U.S. 3 (1884). If the state has an affirmative obligation to remedy private discriminatory acts, an obligation enforceable as a matter of constitutional law, then the most private act would have to comport with the standards of due process and equal protection.
ble infringements on fundamental rights and asserts that the discrimination is not against the indigent, but against those women seeking an abortion rather than delivery.

The challengers to the government restrictions on abortion also failed to support a strict scrutiny standard of review based on the infringement of a fundamental right. Again, it was the traditional constitutional standards of equal protection which prohibited the application of the fundamental right theory to the abortion funding issue. The Court's earlier imposition of strict scrutiny in the equal protection context had been limited mainly to political rights involving franchise, freedom from criminal sanctions, and other governmentally imposed penalties.214 The Court failed to designate education, one of the older concerns of American government and one the Court conceded was of greatest importance in a democracy,215 a fundamental right. Mothers challenging Aid to Families with Dependent Children payments because they were limited as to total number of children covered argued that this characteristic of the program infringed their choice to bear children. These challenges uniformly met with rejection, even when the state admitted that a purpose of the legislation was to give negative incentives toward childbearing.216 The distinction between a right against governmental interference, which could be deemed fundamental, and a right to governmental aid, which could not, had been drawn clearly in *San Antonio Independent School District v. Rodriguez*217 and governed in

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216. In Dandridge v. Williams, 397 U.S. 471 (1970), for instance, the challenge to limiting AFDC payments to large families was based in part on the claim that it imposed a discriminatory burden on those who chose to bear children. *Id.* at 475. The state sought to justify the discrimination as creating an incentive against childbearing. *Id.* at 484. Reasoning that Texas had not engaged in invidious discrimination and had promoted the legitimate interest of education, the Court refused either to strike down the statute or to apply strict scrutiny. *See also* Taylor v. Hill, 420 F. Supp. 1020, 1031 (W.D.N.C. 1976) (rejecting a similar argument on denial of AFDC payments to mothers of unborn children as "so wholly without merit it is difficult to articulate").

217. 411 U.S. 1 (1973). The Court stated:

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. . . . Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. . . . A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. Mr. JUSTICE BRENNAN, writing for the Court in *Katzenbach v. Morgan*, . . . expresses well the
Accordingly, the Court did not recognize statutory limitations on the funding of abortions as governmental interference with a fundamental right. Thus, the Court rejected the second type of equal protection challenge, the fundamental right theory, in the abortion funding cases.

In addition to these equal protection arguments, the challengers in *Maher* and *McRae* asserted arguments based on substantive due process. The substantive due process argument for government funding of abortion implicated the fifth and fourteenth amendments and also raised theoretical concerns over a possible distinction between a textual constitutional right and a nonenumerated constitutional right. In many respects, this distinction was the most significant weapon in the challengers' arsenal because it, and not the first amendment or equal protection arguments, was at the heart of *Roe v. Wade*, which recognized the nonenumerated constitutional right of a woman to obtain an abortion.

VII. DO THE DUE PROCESS REQUIREMENTS OF THE FIFTH AND FOURTEENTH AMENDMENTS IMPOSE A GOVERNMENTAL DUTY TO FINANCE ABORTION?

While the Court in both *McRae* and *Maher* focused its attention on due process considerations, the sole attempt to quote these clauses consisted of two references to the "liberty" which they guaranteed. At issue, however, is whether a state's failure

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219. *Id.* at 474; *Harris v. McRae*, 448 U.S. at 311.
221. *See* notes 224-31 *infra* and accompanying text.
222. *See* notes 105-42 *supra* and accompanying text.
223. 410 U.S. 113 (1973). *See* notes 9-26 *supra* and accompanying text.
225. *Harris v. McRae*, 448 U.S. at 312. The opinion also makes reference to "the equal protection component of the Fifth Amendment." *Id.* at 311. The fifth amendment contains no equal protection clause; this "component" is a judicial gloss. Although, in constru-
to pay physicians to perform abortions on indigents may be considered a deprivation "of life, liberty, or property, without due process of law." In addressing that question, it seems that a failure to provide payments to private sellers is scarcely the type of deprivation "of life, liberty, or property" which the framers intended. The content of the fifth amendment appears more related to punishment than to a guarantee of liberty against all private economic obstacles. Furthermore, in the past, the Court has refused to hold that this guarantee against government interference is a guarantee of a state-imposed utopia. If the guarantee of a right implies the guarantee of the economic means to enjoy that right, then the framers' formulation of the first amendment, for example, is inconsistent. That amendment guarantees the right to study and exercise religion, yet, in it, the framers prohibited congressional action respecting the establishment of religion. Thus, the framers saw no inconsistency in proclaiming a right while proscribing government assistance of that right.

The issue can be recharacterized, however, to emphasize not the failure to fund abortion, but the funding of childbirth without funding abortion. One may argue that the funding of one alternative is a penalization of the other. The inequitable funding is not, however, a penalty on the exercise of the disfavored right; the person choosing to exercise the right is in no worse condition because of the government program than he or she would be in the absence of that program. First amendment standards, designed to protect intellectual rights and expression on which the government must remain impartial, are inapposite. The relationship between a first amendment right and a penumbral right is no more

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226. See cases cited in note 208 supra. Any such effort would create a most significant departure from the intent of the framers. See notes 227–28 infra and accompanying text.

227. The state, for example, is not obliged to provide clergy to indigent prisoners confined in its jails since that might constitute the establishment of religion by the state. Cf. Gittlemaker v. Prasse, 428 F.2d 1 (3d Cir. 1970) (the requirement that a state impose no unreasonable barriers to the free exercise of an inmate's religion cannot be equated with an affirmative duty to provide each inmate with a clergyman of his or her choice).

228. Even the first amendment's purpose—to create the maximum dissemination of varying viewpoints—does not justify a "right of reply" statute which requires newspapers to print replies to certain personal attacks. Miami Publishing Co. v. Tornillo, 418 U.S. 241, 257–58 (1974).

229. Cf. Marker v. Shultz, 485 F.2d 1003 (D.C. Cir. 1973) (grant of a tax exemption to a labor union did not constitute the kind of establishment of political support impliedly prohibited by the first amendment).
close than that between a religious right, which may neither be aided nor restricted, and other first amendment rights.

Moreover, there is a serious factual objection to the argument over the inequitable funding of abortion and childbirth. The assertion that failure to fund abortion at full cost favors childbirth assumes that the economic balance between childbirth and abortion is naturally equal. Yet, in response to claims that the exclusion of abortion serves the state interest of saving money, the dissenters in both *McRae* and *Maher* argued that the state would expend a considerable amount of welfare dollars to support the children who otherwise would not have been born.230 Presumably, the private costs of childrearing also exceed the cost of abortion. Furthermore, the Court’s earlier rejection of an equal protection challenge to a statute limiting family welfare benefits231 indicated that economic factors weigh heavily against childbirth and in favor of abortion. The Court has not viewed this limitation, even when expressly justified as a disincentive to childbearing, to create an infringement on the choice of childbearing.232 Accordingly, legislative aid in meeting childbirth costs may, in fact, be little more than a partial redressing of the cost imbalance, increasing existing free choice between abortion and childbirth. Thus, an insufficient constitutional basis on which to challenge a legislative refusal to finance abortion, coupled with the economic realities of financing childbirth and abortion, suggests the absence of a governmental duty to fund the programs at issue in *McRae* and *Maher*.

VIII. DOES THE WADE-BOLTON RIGHT COMPEL THE GOVERNMENTAL FUNDING OF ABORTION?

The rejection of the argument for funding abortion under the constitutional requirements of due process and equal protection as

230. “[T]he cost of an abortion is only a small fraction of the costs associated with childbirth.” Harris v. McRae, 448 U.S. at 355 (Stevens, J., dissenting). “The District Court correctly held, however, that the asserted interest was ‘wholly chimerical’ because the ‘state’s assertion that it saves money when it declines to pay the cost of a welfare mother’s abortion is simply contrary to undisputed facts.’” *Maher* v. Roe, 432 U.S. at 490 (Brennan, J., dissenting).


232. One of the challenges rejected by the Court in *Dandridge* was the argument that the statute, by fixing a maximum allotment regardless of family size, in effect paid less per capita for large families than for small ones, penalizing the choice to procreate. *Id.* at 475. The Court declined to apply strict scrutiny to this situation. *Id.* at 483–87. The exclusion of AFDC benefits to children conceived but not yet born was likewise sustained against a similar attack in *Taylor* v. *Hill*, 420 F. Supp. 1020 (W.D.N.C. 1976).
well as the first amendment does not indicate necessarily that the issue is closed. The Wade-Bolton right is, as noted above, sui generis.\textsuperscript{233} The Court can be criticized for its dispositive treatment of tests devised in other constitutional contexts. A discriminating review of \textit{Maher} and \textit{McRae} is required, therefore, to examine the Wade-Bolton right,\textsuperscript{234} the right asserted in \textit{Maher}\textsuperscript{235} and \textit{McRae},\textsuperscript{236} and the constitutional and governmental contexts in which those rights exist.\textsuperscript{237}

The Wade-Bolton right originates from a nonenumerated "right of privacy."\textsuperscript{238} That right, as enunciated in the two cases, is not primarily a right of seclusion\textsuperscript{239} nor a right against statutes enforced by an invasion of privacy\textsuperscript{240}, but rather a right "to be let alone."\textsuperscript{241} As the Court noted, the moral issues surrounding abortion have been the subject of great controversy for centuries.\textsuperscript{242} The nature of the Wade-Bolton right to choose may evince a duty either to fund abortion and childbirth or to equalize the real costs of the two procedures. The right also weighs against such funding, however, because the "right to be let alone" may imply a power of restriction on the government to indeed "let alone." Moreover, taxpayers whose ethical standards are offended by the nature of abortion may have a legitimate claim that their "right to be let alone" is infringed by the government's use of their tax dollars to fund abortion.\textsuperscript{243} Accepting this argument does not neces-


\textsuperscript{234} \textit{Id.}

\textsuperscript{235} See notes 52–54 supra and accompanying text.

\textsuperscript{236} See notes 70–74 supra and accompanying text.

\textsuperscript{237} See notes 189–231 supra and accompanying text.

\textsuperscript{238} See note 233 supra.

\textsuperscript{239} Brandeis, however, originally envisioned the right of privacy to be a right of seclusion. Warren & Brandeis, supra note 132, at 193.

\textsuperscript{240} Griswold v. Connecticut, 381 U.S. 479 (1965); see notes 141–42 supra and accompanying text.

\textsuperscript{241} See notes 115–17 supra and accompanying text.

\textsuperscript{242} Roe v. Wade, 410 U.S. at 130–52.

\textsuperscript{243} In Flast v. Cohen, 392 U.S. 83 (1968), the Court noted that standing concerns whether the party invoking federal court jurisdiction has a personal stake in the outcome and whether the dispute touches on the legal relations of parties having adverse legal interests. \textit{Id.} at 101. The Court then articulated the double nexus approach: First, the taxpayer must establish a logical link between that status and the type of enactment under attack; second, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. \textit{Id.} at 102.

The standing requirement is not satisfied, however, if the taxpayer is seeking to employ a federal court as a forum for his or her generalized grievances about the conduct of gov-
sarily mean that the government must refuse to tax for a service it considers beneficial when certain taxpayers object. The argument does indicate that the government may, through its use of the democratic process, have an interest in respecting those rights—an interest in protecting its citizens' consciences with which the courts ought not to interfere.  

The specific remedy sought in *Maher* and *McRae*—an injunction from an undemocratic court ordering democratic legislatures to provide funding for projects their electors presumably found morally repugnant—also must be viewed in its historical context. Anglo-American constitutional thought has stressed the requirement of no taxation without the consent of elected legislators and has sought to place fiscal decisions at the level of representation closest to the people. The judiciary acts beyond its customary boundaries in weighing such matters. Judicial intrusion is only warranted when the legislature funds in a manner inconsistent with free institutions. It is difficult to argue, however, that the legislature's decision to respect the ethical qualms of a large part of the citizenry constitutes a decision of that nature.

Additionally, the assessment of the programs at issue in *Maher* and *McRae* requires an analysis of economic matters not available to the judiciary. The minority, in its cursory rejection of the argument that the state has an economic interest in financing childbirth and not abortion, assumed that because each abortion costs less than each delivery, the cost to the state is less for abortion. The Court failed to recognize, however, that the availability of abortion may discourage contraception or that medical con-
considerations may necessitate several abortions for each birth prevented.247

The decision whether to provide funding for abortion, therefore, involves a number of economic considerations: the cost to the individual of childbearing or abortion; the availability of private groups to fund or reduce the cost of childbearing or abortion;248 whether the increase in demand for abortion would increase its present cost, unnecessarily divert medical resources,249 or interfere with medical training at school-run hospitals;250 and the impact of repeat abortions on the cost of care for a mother who later decides to bear children.251 It also is theoretically possible that reductions in the birth rate will have an economic impact

cent of aborting patients were using any form of contraception at the time of conception. Stallworthy, Moolgaoker & Walsh, Legal Abortion: A Critical Assessment of its Risks, 2 LANCET 1245 (1971). Similar findings have been reported in Australia, Bulgaria, Hungary, and Japan, suggesting that the phenomenon approaches universality. See Hardy, supra note 211, at 928 n.128.

247. Repeat abortions have been noted in the United States (where, within five years of legalization, 25% of the abortions in New York were being performed on persons having had previous abortions) as well as in other nations. In Japan, for instance, one study showed patients electing abortion to average 1.1 abortions per patient per year. Hardy, supra note 211, at 928–29. A woman terminating a pregnancy by abortion will conceive, on the average, once every nine months. A woman terminating a pregnancy in childbirth will only conceive on the average of once every 18 to 27 months. D. CALAHAN, ABORTION: LAW, CHOICE AND MORALITY 290 (1970); Frederikson & Brackett, Demographic Effects of Abortion, 83 PUB. HEALTH REP. 999 (1968). One birth, therefore, may in fact be replaced by two to three abortions.

248. In one test case, for instance, it was shown that the witness whose affidavit was relied on to show that abortions were not available to indigents was shown elsewhere to have made public statements that because of physicians' willingness to act pro bono, indigents seeking abortion no longer had to worry about financial barriers. Hardy, supra note 211, at 911 n.43.

249. See note 211 supra. The British Royal College of Obstetricians and Gynecologists likewise has complained, following a survey of 233 departments performing 27,000 abortions annually, that the additional burden disrupts some gynecologists' work. "If [a gynecologist] is asked to assess 5 to 10 new cases a week, which is not uncommon, in the course of two outpatient sessions, serious dislocation of his other work results, and delays in his attending to other patients suffering from gynecological complaints are inevitable." The Abortion Act, supra note 246, at 533.


251. Various studies of abortion have indicated that repeat abortions can increase the probability of tubal pregnancies, which require emergency surgical intervention, and approximately double the probability of surgical intervention during future pregnancies. Hardy, supra note 211, at 930. Where the abortion is accomplished by hysterectomy, which does not involve removal of the uterus but only its opening, many physicians think that future deliveries should be by caesarian section. Abortion: Hearings on S.J. Res. 119 Before the Subcomm. on Const. Amendments of the Senate Comm. on the Judiciary, 93d Cong., pt. 2, 2d Sess. 80 (1976).
later when the percentage of the population which is retired increases and that which is of working age declines. The Supreme Court is poorly suited to determine these pragmatic issues since its focus is limited to the information presented by the parties.

Furthermore, reality must be permitted occasionally to intrude into the domain of law and scholarship. Legislators do not refuse to fund abortion because of its cost, because they favor childbirth, or because they fear an increase in medical complications. These representatives refuse funding because large numbers of voting constituents consider abortion to be a form of homicide which, if financed through taxation, denotes them as moral “accessories before the fact.” This position is not irrational. According to constitutional provisions at issue demand an assessment of whether the legislature can consider the conscientious objections

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252. The fetus exhibits heartbeat, EEG patterns, and reaction to touch and pain within the first trimester. Hefferman, *The Early Biography of Everyman*, in *Abortion and Social Justice* 5–17 (T. Hilgers & D. Horan eds. 1973). Live births following abortion have been noted frequently. During the first year of New York's liberalized statutes, for example, 49 live births occurred in the course of abortions; two of these aborted fetuses survived the year. *Hearings on S.J. Res. 119 Before the Subcomm. on Const. Amendments of the Senate Comm. on the Judiciary*, 93d Cong., pt. 2, 2d Sess. 133 (1976). Another study, spanning a six month period, found 27 live births and one long-term survival; another fetus, aborted by saline early in the second trimester, nonetheless survived another five months. Horan, Gorby & Hilgers, *Abortions and the Supreme Court*, in *Abortion and Social Justice*, supra at 316.

Two letters, submitted to the International Correspondence Society of Obstetricians and Gynecologists in response to the survival of a second trimester fetus for 27 minutes after an abortion, illustrate the measures which might be taken during the abortion procedure. The first letter counselled that:

*Management of the woman and fetus with signs of life must be appropriate to the major object of therapeutic abortion: To terminate the woman's pregnancy as rapidly as possible with the least physical and psychological injury.*

*Since viewing the abortus may be traumatic to the patient, the abortus should be separated from the patient and removed from her room.*

*If respirations or other movements continue for a few minutes, and are not just reflex movements, the patient's physician, if he is not in attendance, should probably be contacted and informed of the situation. The pediatrician on call should probably be appraised of the situation if signs of life continue.*


Another response noted that such survivals are rare in saline abortion, but occur in about ten percent of abortions induced by prostaglandin:

*With Prostaglandin, fetal demis usually occurs during the process of labor and delivery. At the time of delivery, it has been our policy to wrap the fetus in a towel. The fetus is then moved to another room while our attention is turned to the care of the gravida. She is examined to determine whether complete placental expulsion has occurred and the extent of vaginal bleeding. Once we are sure that her condition is stable, the fetus is evaluated. Almost invariably all signs of life have ceased.*

*Id.*
of its taxpayers against the services which it is argued they must finance.

The Court has consistently recognized the importance of such matters of conscience. Justice Brandeis, the sire of the right of privacy, noted in later years that "[t]he makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and of his intellect . . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." Justice Blackmun, writing for the Court in Doe, recognized that the state has a valid interest in protecting denominational hospitals from infringement on their conscientious objections to abortion. There is no reason that the same analysis should not apply to the taxpayer. In other contexts, the Court frequently has observed that rights of freedom do not necessarily include the right to infringe on the freedom of others. It appears,

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253. See, e.g., Gillette v. United States, 401 U.S. 437 (1970) (draft exemption provision focuses on individual conscientious belief and not on sectarian affiliations); United States v. Ballard, 322 U.S. 78 (1944) (freedom of thought includes freedom of religious belief and embraces the right to maintain theories of life and death which rank as heresy to followers of orthodox faiths); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of conscience and freedom to adhere to religious worship can be restricted by law); Arver v. United States, 245 U.S. 366 (1918) (statute upheld which exempted members of sects whose tenets exclude the moral right to engage in war from military service).


[The hospital is free not to admit a patient for an abortion . . . . Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.

Id.

The Ninth Circuit has relied on this language to refuse to require the performance of an abortion at a hospital operated by a religious institution. "Plaintiff fails to distinguish between action taken to preserve the 'government's' neutrality in the face of religious differences' and action which affirmatively prefers one religion over another. . . . Here Congress quite properly chose to protect the freedom of religion of those with religious or moral scruples against sterilizations or abortions." Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311–12 (9th Cir. 1974). See also Doe v. Bellin Memorial Hosp., 479 F.2d 756, 760 (7th Cir. 1973).

256. Even the right of privacy, for example, is subject to limitations when it infringes on the right to freedom of the press enjoyed by others. Time v. Hill, 385 U.S. 374 (1967). Conversely, the freedom of the press is subject to limitations when it invades privacy. FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (limitation on broadcasting of offensive but not obscene materials upheld, since the offensive material "confronts the citizen, not only in public, but in the privacy of the home, where the individual's right to be left alone plainly outweighs the first amendment rights of an intruder"). Id. at 748; Rowan v. Post Office Dept., 397 U.S. 728 (1970) (statutes upheld which barred mailing of offensive materials into home where owner objected). Likewise, the right to speak does not include the right to use
therefore, that when the rights asserted in *Maher* and *McRae* are viewed in isolation, there are strong constitutional and practical reasons for confining the resolution of those conflicts to the legislature, not the judiciary.

**IX. CONCLUSION**

The Supreme Court in *Maher* and *McRae* reached a correct result based on deficient analysis. The argument for a constitutional duty to finance abortion for indigents is exceedingly weak under the first amendment and the prevailing standards of due process and equal protection.257 By treating the *Wade-Bolton* right as the equivalent of an enumerated right, however, the Court failed to account for the unusual characteristics of that right.258 Furthermore, the Court completely ignored the real basis for the legislation at issue—conscientious objection by the legislators' constituents.259 The Court, as a result, was forced to substitute judicially constructed state interests with no basis in reality for legitimate interests worthy of consideration.

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257. See notes 224--29 *supra* and accompanying text.
258. See notes 10--40 & 234--51 *supra* and accompanying text.
259. See notes 251--52 *supra* and accompanying text.