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The Hyde Amendment: An Analysis of Its State Progeny

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COMMENTS

THE HYDE AMENDMENT: AN ANALYSIS OF ITS STATE PROGENY

I. INTRODUCTION

In the landmark case of *Roe v. Wade,*[1] the Supreme Court held that the constitutional right to privacy included a woman's decision on whether to terminate her pregnancy.[2] The right to terminate the pregnancy, however, was not absolute, and had to be weighed, at various stages of the pregnancy, against the state's "important and legitimate interest in preserving and protecting the health of the pregnant woman, . . . [and] in protecting the potentiality of human life."[3] Justice Blackmun, at the outset of his majority opinion, acknowledged the Court's "awareness of the sensitive and emotional nature of the abortion controversy, and of the vigorous opposing views, . . . and of the deep and seemingly absolute convictions that the subject inspires."[4] In view of this aura of emotionalism that surrounds the topic of abortion, it is not surprising that *Roe* has born the progeny it has in the six years since the case was decided.

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

2. *Id.*

3. *Id.* at 162. In determining that a Texas abortion statute, which failed to distinguish between abortions in the first trimester of pregnancy and abortions occurring later in the pregnancy, was in violation of the due process clause of the fourteenth amendment, the Court set forth a tripartite standard to which a state abortion statute must comply to withstand constitutional attack:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 114. For in-depth discussion of *Roe v. Wade,* see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82 YALE L.J. 920 (1973); Tribe, *The Supreme Court, 1972 Term, Foreward: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1 (1973).

4. Roe v. Wade, 410 U.S. 116 (1973).

A rather predictable problem, once the Court has declared that a woman has a right to choose to undergo an abortion, is the source of the funds that will enable indigent women to exercise their right. The first attack on this issue, in *Beal v. Doe*,[5] focused on whether states participating in the Medicaid program should be required to provide indigent women with funds for abortions which were nontherapeutic.[6] The *Beal* Court held that the states were not so required.

Congress' enactment of the Hyde Amendment,[7] a rider to the 1977 Health, Education and Welfare (HEW) Appropriation Act, precluded states in the Medicaid program from receiving federal funding for abortions except where the abortion was necessary to save the life of the mother. This limitation on funding goes beyond the holding of *Beal* in that *Beal* merely allowed states to withhold funds for purely elective abortions. Under the Hyde Amendment, women seeking abortions which would be considered medically necessary, that is, necessary for the mental or physical well-being of the mother, could not receive money through state Medicaid programs unless the state was willing to absorb the cost.

Several states have not been willing to absorb the costs of those abortions made ineligible for federal funding by the Hyde Amendment, and herein lies a new, vital area of litigation. In reaction to the federal Hyde Amendment, states have begun to enact their own "Hyde-type" amendments. These state statutes, insofar as they deprive Medicaid recipients of the ability to obtain "necessary" therapeutic abortions, are currently being attacked.[8] These attacks, the most recent progeny of the abortion issue, will serve as the focus of this comment.

II. AN OVERVIEW OF THE ABORTION FUNDING ISSUE

One vital issue which has been raised as a result of the *Roe* decision

5. 432 U.S. 438 (1977).

6. *Id.* at 440. Nontherapeutic abortions are abortions which are purely elective. A qualified physician would determine them not to be medically necessary.

7. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434.

8. *See* Hodgson v. Board of County Commissioners, 48 U.S.L.W. 2476 (8th Cir. Jan. 9, 1980); Reproductive Health Services v. Freeman, 48 U.S.L.W. 2475 (8th Cir. Jan. 9, 1980); Preterm, Inc. v. Dukakis, 463 F. Supp. 222 (D. Mass. 1978), *aff'd,* 591 F.2d 121 (1st Cir.), *cert. denied,* 99 S.Ct. 2181, 2182 (1979); Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978); Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Doe v. Busbee, 471 F. Supp. 1362 (N.D. Ga. 1979); Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *on remand,* 469 F. Supp. 1212 (N.D. Ill. 1979), *juris. postponed,* 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-5); Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978); D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978); Emma G. v. Edwards, 434 F. Supp. 1048 (E.D. La. 1977); Right to Choose v. Byrne, 169 N.J. Super. 543 (1979).

is whether states could be compelled to provide aid to indigent women who wish to exercise their right to terminate their pregnancy. Title XIX of the Social Security Act[9] and the states' obligations thereunder has been the prime source of litigation with respect to this issue.

In *Beal v. Doe,*[10] the Court held that Title XIX did not require the states to fund nontherapeutic abortions.[11] In *Beal,* the Court was construing a Pennsylvania statute which limited funding provided under the Medicaid program only to those abortions deemed medically necessary.[12] The Court said that the state statute was sufficient to comply with the primary objective of Title XIX, that being to furnish

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9. Social Security Act (Medicaid Assistance Programs), 42 U.S.C. § 1396 *et. seq.* (1976). There is nothing specifically in the language of Title XIX which requires that abortions be funded at all. In fact, there are no specific references made to any medical procedures. The Court in Beal v. Doe, 432 U.S. 438 (1977), dealt with this issue by stating that the Act does not compel states to fund "every medical procedure" and the state is given "broad discretion . . . to adopt standards for determining the extent of medical assistance." *Id.* at 444. The standards need only be "reasonable" and "consistent with the objectives" of Title XIX. *Id., quoting* 42 U.S.C. § 1396a(a)(17) (Supp. V 1970). The *Beal* Court did not specifically say abortions were includable procedures, but the fact that it considered the issue and analyzed the state statute's reasonableness and consistency leads to this inference. Additional support for this inference is also derived from the Third Circuit Court of Appeals in Doe v. Beal, 523 F.2d 611, 622-23 (3d Cir. 1975). The Third Circuit noted that upon amending the Medicaid statute in 1972 to include family planning services, Act of Oct. 30, 1972, Pub. L. No. 92-603, § 299E, 86 Stat. 1462, *amending* 42 U.S.C. § 1396d(a)(1970), Congress did not specifically exclude abortion. The court said that the failure to exclude abortions indicated that Congress intended for abortions to be included as a family planning service.

10. 432 U.S. 438 (1977).

11. *Id.* at 447.

12. It is important to note the breadth of the Pennsylvania statute that was upheld in *Beal* in comparison to the restrictive funding statutes enacted by the states in response to the Hyde Amendment. As the *Beal* Court noted:

> An abortion is deemed medically necessary under the Pennsylvania Medicaid program if:
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> "(1) There is documented medical evidence that continuance of the pregnancy may threaten the health of the mother;
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> "(2) There is documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency; or
>
> "(3) There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest, may constitute a threat to the mental or physical health of a patient; and
>
> "(4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and
>
> "(5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals."

Id. at 441 n.3.

The Pennsylvania statute allows for funding of medically necessary abortions, whereas the state "Hyde-type" statutes currently under attack preclude funding for a medically necessary procedure. *See, e.g.,* note 22 *infra.*

assistance to individuals who are financially unable to obtain "necessary medical services."[13] The Court found further support for its interpretation of Title XIX from the fact that at the time Title XIX was passed in 1965, nontherapeutic abortions were illegal in most states and it could not have been Congress' intent to require states participating in the Medicaid program to fund illegal medical procedures.[14] The Court also relied on the position taken by HEW, the agency in charge of administration of the Social Security Act. The agency's position was that funding of nontherapeutic abortions was allowed under the Act, but was not mandated.[15]

While holding that a state was not required to fund nontherapeutic abortions, the *Beal* Court said that a state may provide such funding if it wished.[16] Shortly after the *Beal* decision was announced however, the Hyde Amendment[17] to the HEW Appropriations bill for 1976-1977 went into effect. The original version of the Hyde Amendment limited federal funding reimbursement for abortions to states participating in the Medicaid program to those abortions that were necessary to save the mother's life.[18] For fiscal years 1978 and 1979, Congress did expand the category of abortions that could be federally funded to include situations where an abortion is "necessary for victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service . . . or where severe and

13. 432 U.S. at 444. A similar Connecticut statute withstood an equal protection challenge in the companion case of Maher v. Roe, 432 U.S. 464 (1977). The Court upheld a statute similar to the one in *Beal*. The equal protection challenge was based on the fact that Connecticut funded therapeutic abortions and that this distinction between therapeutic and non-therapeutic abortions deprived a woman of her constitutional right to an abortion. The *Maher* Court began its analysis by interpreting the nature of the right created in *Roe v. Wade*. The *Maher* Court said that rather than granting an unrestricted constitutional right to an abortion, *Roe* protects a woman "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Id.* at 473-74. The Court determined that the Connecticut regulation did not interfere with the woman's right to choose to have an abortion, stating that "the indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation." *Id.* at 474. In applying the rational basis test, the Court said the regulation rationally furthered the state's "legitimate interest in encouraging normal childbirth." *Id.* at 478, *citing* Beal v. Doe, 432 U.S. 444, 446 (1977).

14. Beal v. Doe, 432 U.S. 444, 447 (1977).

15. *Id.* The Court noted the deference to be paid to an administrative agency's interpretation of its own statute absent indications such construction is wrong. *See, e.g.*, N.Y. State Dep't of Social Services v. Dublino, 413 U.S. 405, 421 (1973), *quoting* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969).

16. 432 U.S. at 447. The Court bases this election of the states on Title XIX, rather than as a matter of the constitutional right to an abortion decision.

17. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1434.

18. *Id.*

long-lasting physical health damage to the mother would result if the pregnancy were carried to term . . . ."[19] But the net cutback on federal funding for abortions would require states to fully absorb the cost of "non-Hyde-type" abortions,[20] quite likely to be a burdensome task.[21] In response to the Hyde Amendment, many states have enacted similar statutes which severly limit funding of abortions. These state statutes[22] are far more restrictive than the funding preclusions upheld in *Beal*,[23] and in many instances are even more restrictive than the fiscal years 1978 and 1979 version of the federal Hyde Amendment.

On its face, the Hyde Amendment appears to be Congress' attempt to codify the *Beal* decision in that it sets forth the categories of abortions the federal government will fund. However, whereas *Beal* holds that states have no duty to fund nontherapeutic abortions, the Hyde Amendment has exceeded the scope of *Beal* by effectively denying funds for abortions that would qualify as medically necessary.[24] Whether such denial is constitutionally permissible is the focus of the attacks on the state "Hyde-type" statutes. Indeed, Justice Powell, in *Beal*, warned that "serious statutory questions might be presented if a

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19. Act of Dec. 9, 1977, Pub. L. No. 95-205, § 101, 91 Stat. 1460. Act of Oct. 18, 1978, Pub. L. No. 95-482, § 101, 92 Stat. 1603. It is under this enactment of the Hyde Amendment that attacks to subsequently enacted state Hyde-type laws were brought. For fiscal year 1980, Congress has deleted the circumstance of federal funding for abortions necessary to preserve the mother's health. Act of Oct. 12, 1979, Pub. L. No. 96-86, § 118, 93 Stat. 662.

20. "Non-Hyde-type" abortions are those abortions that are not necessary to save the mother's life, preserve her health, or to terminate pregnancy resulting from rape or incest.

21. An indication that such funding would be burdensome on the states comes from the fact that states often assert their interest in allocating their limited funds as justification for the state's "Hyde-type" statutes. *See* D.R. v. Mitchell, 456 F. Supp. 609, 618 (D. Utah 1978).

22. The statutes seem to be of three types. *See, e.g.*, D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978) (the Utah statute, an example of the most restrictive type abortion statute, precludes funding of abortions unless necessary to save the life of the mother); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979) (the Massachusetts statute, an example of an intermediate type abortion statute, precludes funding of abortions unless the abortion is necessary to save the mother's life or in cases of rape or incest if reported within 30 days); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979) (the Georgia statute, an example of the most liberal type of abortion statute, permits abortion funding in the 1978-1979 Hyde Amendment circumstances; that is, in those situations where an abortion is necessary to save the mother's life, in cases of rape or incest if promptly reported, or where a full term pregnancy would result in severe physical damage).

23. *See* note 12 *supra*.

24. *See, e.g.*, Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529, 533 (S.D. Ohio 1979) (Physicians may consider an abortion medically necessary to preserve the mental, as well as the physical, health of the mother).

state Medicaid plan excluded necessary medical treatment from its coverage . . . ."[25] While there have been some constitutional challenges to the Hyde Amendment itself,[26] the majority of responses has been to

25. 432 U.S. at 444.

26. Woe v. Califano, 460 F. Supp. 234 (S.D. Ohio 1978). In *Woe,* the federal district court was asked to determine the constitutionality of the original version of the Hyde Amendment. That version allowed federal funding for abortions to states in the Medicaid program only when the abortion was necessary to save the life of the mother. The court saw the issue to be whether the government funding provisions under Hyde impaired the woman's "constitutionally protected interest" in choosing abortion as an alternative to childbirth. *Id.* at 235. The court concluded that the Hyde Amendment placed "no constitutionally impermissible obstacles in the pregnant woman's path to an abortion." *Id.* at 236. Applying the principles set forth in Maher v. Roe, 432 U.S. 464 (1977), *see* note 15 *supra,* the *Woe* court implied that although the government could not directly interfere with a woman's choice of abortion, it could encourage "an alternative activity [childbirth] consonant with legislative policy." 460 F. Supp. at 235. *See also* Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979). The district court in *Zbaraz* held the Hyde Amendment unconstitutional on equal protection grounds. *See* notes 131 through 147 and accompanying text *infra.*

In McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y.), *stay denied,* 429 U.S. 935, 1085 (1976), *vacated and remanded,* 433 U.S. 916 (1977), federal district court Judge Dooling declared the 1976 version of the Hyde Amendment, which limited abortion funding to life endangering circumstances, unconsistitutional. The court said the effect of the appropriations bill was to "deny [indigent pregnant women] reimbursement for medical assistance only if they elect to exercise their constitutionally protected right to terminate their pregnancies." 421 F. Supp. at 541-42. Judge Dooling issued an injunction against enforcing the Hyde Amendment, and said the federal government was required to fund all abortions, both therapeutic and nontherapeutic, to eligible Medicaid recipients. This judgment was vacated, however, in light of the decision of Beal v. Doe, 432 U.S. 438 (1977), which held that the federal government was not required to fund nontherapeutic abortions. *See* 433 U.S. 916 (1977).

Recently, however, Judge Dooling declared the 1978-79 version of the Hyde Amendment unconstitutional. McRae v. HEW, 48 U.S.L.W. 2492 (E.D.N.Y. Jan. 15, 1980), *stay denied sub nom.* Harris v. McRae, 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-1268), *prob. juris. noted,* 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980) (No. 79-1268). The court noted that the amendment, which denied funding for abortions except where the abortion was necessary to save a woman's life, preserve her physical health, or in cases where the pregnancy was the result of rape or incest, violated the fifth amendment. Circumstances may arise when an abortion may be deemed medically necessary to preserve a woman's mental health. The exclusion of this category of medically necessary abortions from the Hyde Amendment "is not reasonable, and it has no support in the permissible legislative purpose" of protecting fetal life, since the woman's interest in her own health overrides this state interest. *Id.* By not providing funds for all medically necessary abortions, a woman was unduly inhibited in exercising her constitutional right to decide whether or not to choose abortion as an alternative to pregnancy, a "part of the liberty protected by the 5th Amendment." *Id.*

The court also noted that because "certain religious groups approve of abortion as a matter of responsible personal decision," the Hyde Amendment may also violate the first amendment. *Id.*

Judge Dooling issued an injunction against enforcing the Hyde Amendment and ordered the federal government to begin paying for all medically necessary abortions under the Medicaid Act. *McRae v. HEW* will be consolidated with the Seventh Circuit Court of Appeals decision of Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *juris. postponed,* 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-5).

the "Hyde-type" statutes of the various states.[27] The constitutional challenges to these amendments have been primarily based on violations of the supremacy clause,[28] and the equal protection clause[29] of the fourteenth amendment.[30]

Emerging from these attacks is a tripartite view with respect to the constitutionality of the "Hyde-type" state statutes. Several of the courts have taken a liberal view of the states' obligation to fund abortions and have held that states must fund all medically necessary abortions, thereby finding the restrictive state statutes unconstitutional.[31] The primary basis upon which such decisions rest is violation of the supremacy and equal protection clauses of the Constitution.[32] At the opposite extreme, at least one court has held that states need not fund any abortions.[33] The court stipulated, however, that if indeed the states were required to fund any abortions at all, the requirement would extend only to those abortions necessary to save the life of the mother.[34] Supremacy and equal protection challenges were rejected under this view. Finally, a middle ground approach contends that states need fund only those abortions for which they are eligible to receive federal funding under the Hyde Amendment.[35] These decisions rested on the ground that the state statutes were not inconsistent with the Medicaid Act and therefore did not violate the supremacy clause.

III. SUPREMACY CLAUSE CHALLENGES TO STATE "HYDE—TYPE" STATUTES

Several of the decisions concerning state statutes that restrict the funding of abortions under the Medicaid program have been decided on statutory grounds. That is, the issue in such cases has been whether

27. *See* note 8 *supra*.

28. U.S. CONST. art. 6, cl. 2.

29. U.S. CONST. amend. XIV, § 1.

30. *See* note 8 *supra*. The cases generally join both type challenges to the state statutes.

31. Reproductive Health Servs. v. Freeman, 48 U.S.L.W. 2475 (8th Cir. Jan. 1, 1980); Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp 529 (S.D. Ohio 1979); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978); Right to Choose v. Byrne, 169 N.J. Super. 543 (1979). Note that Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979) is a variant of the liberal view in that it bases the state's abortion funding obligation on the stage of fetal viability. *See* notes 133 through 147 and accompanying text *infra*.

32. *See* notes 88 through 130 and accompanying text *infra* for a discussion of the supremacy clause cases that have adopted the liberal view. For a discussion of the equal protection cases, see notes 131 through 156 and accompanying text.

33. D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978).

34. *Id.* at 624.

35. Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979).

the state statutes as enacted conflict with the federal Medicaid Act, thereby violating the principle of the supremacy clause. An analysis of the tripartite view which has emerged as a result of these challenges will illustrate the current treatment of the abortion funding issue on the state level.

A. D.R. v. Mitchell[36] - *An Extreme Case for Withholding Virtually All Funds for Abortions*

A Utah statute limited state funding of abortions for Medicaid recipients to cases where the abortions were necessary to save the life of the mother.[37] The plaintiffs challenged the constitutionality of the

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36. 456 F. Supp. 609 (D. Utah 1978). *Mitchell* was a class action brought by a 19-year old pregnant woman who was a Medicaid recipient. Although she and her physician decided that an abortion was in her best interest, she was unable to procure one because area medical centers would not be reimbursed for performing the abortion due to a recently enacted statute by the Utah legislature which precluded funds for abortions unless the mother's life was endangered. Plaintiff thereafter sought injunctive and declaratory relief in federal district court.

In addition to supremacy clause challenges, plaintiff alleged violations of the equal protection and due process clauses of the federal Constitution. Plaintiff asserted that due process was violated in that by not providing funds for abortions that were medically necessary, the Utah statute infringed upon her exercise of a "constitutionally protected fundamental right." 456 F. Supp. at 612. Equal protection was alleged to have been violated because the statute discriminated between therapeutic and non-therapeutic abortions, and that by refusing to fund therapeutic abortions, the state impermissibly limited the plaintiff in exercising her constitutional right to an abortion. *Id.*

The court had to determine the exact nature of the right that the plaintiff alleged was violated. Relying on Maher v. Roe, 432 U.S. 464 (1977), the court determined that the abortion "right" established by Roe v. Wade, 410 U.S. 113 (1973), was not a fundamental one, at least "in the context of state funding of abortions." 456 F. Supp. at 613. Rather, the plaintiff only had a right to make her abortion decision free from any undue interference by the state. The *Mitchell* court also found that the plaintiff was not a member of a recognized suspect class. Therefore, a strict scrutiny standard was not to be applied in evaluating the Utah statute; rather, the statute would only be subjected to a rational relation test. *Id.*

The court first rejected the plaintiff's argument because the Utah statute did not *per se* prohibit abortions, but rather, only prohibited the funding of abortions. Relying on *Maher*, the *Mitchell* court said that the Utah statute did not unduly interfere with a woman's right to have an abortion merely because it withheld funding for certain of the procedures. *Id.* at 614.

Second, the *Mitchell* court determined that Utah had legitimate interests in "protecting the potential life of the fetus, encouraging normal childbirth and appropriately using state funds." *Id.* at 615. If indeed there was any discrimination, it was justified by these valid interests which were "furthered by and are rationally and reasonably related to" to the Utah statute. *Id.*

Other courts that have considered equal protection challenges to state statutes limiting abortion funding have held that the statutes violated equal protection standards. *See* notes 133 through 156 and accompanying text *infra*.

37. D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978).

statute, arguing that it was inconsistent with Title XIX of the Social Security Act[38] and was therefore violative of supremacy clause principles. In *D.R. v. Mitchell,* the court rejected the challenge to the statute's constitutionality and held that a state could limit funding of abortions to those which endangered the life of the mother.

In reaching its conclusion, the *Mitchell* court engaged in an analysis of Title XIX and the requirements it places upon the states. The court noted that nowhere in the Medicaid Act is a state required *per se* to fund abortions. Rather, the Act sets out five categories of medical treatment for which a state must provide aid to the "categorically" and medically needy.[39] The court said that a state is not required to fund every medical procedure that may fall within these five categories of treatment. They also noted that the states are given great discretion in deciding which procedures to fund and the extent of the funding that they will provide.[40] In so determining, the state must use reasonable standards and these standards must be consistent with the objectives of the Medicaid Act.[41] The only other restriction put on the state by the Act was that the "funds must be distributed equally and equitably among Medicaid recipients."[42] If a state complied with these requirements, it could choose the type and extent of medical procedures it wanted to fund.

To determine whether the Utah statute met these requirements, the *Mitchell* court relied primarily on the *Beal* case.[43] In upholding the

38. 42 U.S.C. § 1396 (1976).

39. 456 F. Supp. at 617. The five categories are outlined in 42 U.S.C. § 1396a(a)(13)(B) and 1396d(a)(1)-(5) (1976):

1. Inpatient hospital services.
2. Outpatient hospital services.
3. Laboratory and X-ray services.
4. (a) Skilled nursing facility services for individuals 21 years and older.
   (b) Early and periodic screening and diagnosis for persons under 21 years of age.
   (c) Family planning services and supplies.
5. Physicians services (whether furnished in the office, patient's home, a hospital, skilled nursing facility or elsewhere).

40. 456 F. Supp. at 617-18.

41. *Id.* at 617, *citing* 42 U.S.C. § 1396a(a)(17) (Supp. V 1970).

42. 456 F. Supp. at 618, *citing* 45 C.F.R. § 249.10(a)(5)(i) (1976) (now at 42 C.F.R. § 440.230 (1978)).

43. 456 F. Supp. at 618. Recall that the *Beal* case dealt only with the constitutionality of a statute that denied funding for nontherapeutic, and hence not medically necessary, abortions. *See* notes 10-17 and accompanying text *supra*. The challenged statute here, however, concerns a denial of funds for abortions that may be medically necessary. Recall Justice Powell's statement in *Beal* that such an issue may well raise a constitutional question. *See* note 25 and accompanying text *supra*. In *Mitchell,* Chief Judge Anderson referred to Powell's statement as mere dicta and said that the issue of the constitutionality of a denial of funding for medically necessary abortions had not been decided by the Supreme Court in *Beal*. 456 F. Supp. at 619-20.

statute under the reasonableness standard, the *Mitchell* court recognized two valid state interests. First, Utah had a legitimate interest in applying the limited available state and federal funds to the most appropriate use.[44] Secondly, as the *Beal* Court recognized, the "state has a valid and important interest in encouraging childbirth."[45]

The court summarily dismissed any challenge under the equal disbursement requirement.[46] The *Mitchell* court saw no difference between the "alleged disparate treatment in the disbursement of funds" which the *Beal* Court had upheld and the alleged inequality in the present case.[47] Even if the disbursements in the present case were unequal, the *Mitchell* court noted an exception to the requirement made in *Maher v. Roe*[48] which said that "disparate treatment in pregnancy related procedures may presumptively be more justified than such treatment in other medical procedures."[49] The reason given for the exception to the requirement of equitable distribution of funds for pregnancy-related procedures is because the "termination of a potential human life"[50] is involved.

The *Mitchell* court had the most difficulty with trying to construe the Utah statute as consistent with the primary objective of Title XIX. The *Beal* Court had identified the purpose of the Medicaid Act to be the enabling of "each State, as far as practicable under the conditions in such state, to furnish . . . medical assistance on behalf of [properly qualified recipients] whose income and resources are insufficient to

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44. *Id.* at 618. It is interesting to note the *Mitchell* court's response to the often unpersuasive "fiscal frugality" argument. States may assert that they have a legitimate interest in appropriating limited funds in the most efficient manner. The rebuttal by those favoring abortions is that it is less expensive to provide funding for abortions than to fund the more costly childbirth procedures. It can be argued, as it was in *Mitchell*, however, that if abortions are so easily obtained as a result of being funded by Medicaid programs, persons eligible for such funds may be encouraged to rely on abortion as a contraceptive. Additionally, abortions may lead to "long term complication on future deliveries," thereby creating further expenses. Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams,* 18 ARIZ. L. REV. 903, 927 (1976). As additional support for accepting the "fiscal frugality" argument as a valid state interest, the *Mitchell* court noted that the *Beal* Court did not directly respond to the "fiscal frugality" argument, since *Beal* found valid state interests in other areas.

45. 456 F. Supp. at 619, *citing* Beal v. Doe, 432 U.S. 438, 445 (1977). The court recognized two aspects of this interest; the state has both an interest in protecting fetal life and in the "rate of population growth." 456 F. Supp. at 619.

46. See note 42 and accompanying text *supra.*

47. 456 F. Supp. at 619. The *Mitchell* court doubted the seriousness of the equal disbursement requirement because, as it noted, the Supreme Court in *Beal* did not even discuss it.

48. 432 U.S. 464 (1977).

49. 456 F. Supp. at 619, *citing* 432 U.S. 464 (1977).

50. *Id., citing* 432 U.S. at 480.

meet the costs of necessary medical services."[51] The key phrase which the *Mitchell* court had to construe was "necessary medical services."[52] It distinguished *Doe v. Bolton,*[53] thereby declining to accept *Bolton's* standard test for medical necessity. *Bolton* said that a determination that an abortion is necessary is for a doctor to decide in light of all relevant factors, including "physical, emotional, psychological, familial, and the woman's age."[54] The *Mitchell* court refused to apply the *Bolton* standard since *Bolton* dealt with an interference with a woman's right to have an abortion. Funding of abortions, the court said, was quite another matter and the same test does not apply.[55] Unable to come up with a proper definition from other sources, the *Mitchell* court was compelled to develop a definition of "medically necessary" within the meaning of Title XIX. The court, again relying on a determination by the *Beal* court, defined therapeutic abortions as those which were legal at the time Title XIX was enacted.[56] The court reasoned that if Title XIX required a state to fund any abortions at all in order to participate in the federal Medicaid program, the requirement would be only for those abortions which were legal at the time Title XIX was enacted in 1965.[57] At that time, the only abortions which were legal were those required to save the life of the mother.[58] Since Congress could not have intended the Medicaid program to cover illegal abortions, the court concluded that the Medicaid Act, to the extent that it placed any funding obligations on the states at all, only required the states to fund those abortions necessary to preserve the mother's life.

The court also placed weight on the Hyde Amendment in determining the categories of abortion that states are required to fund pursuant to the Medicaid Act. In its original version, the amendment restricted

51. *Id.* at 620, *citing* 42 U.S.C. § 1396 (1970).

52. 456 F. Supp. at 620. The court determined that the statute itself provided no answer. It also rejected the notion that the proper meaning of medical necessity was that given by the medical community—"[that care] which is responsive to the problem for which it is offered." *Id., citing* Butler, *The Right to Medicaid Payment for Abortion,* 28 HASTINGS L.J. 931, 955 (1977). Such a definition would likely require funding of even elective abortions, and according to *Beal,* a state need not fund those type abortions.

53. 410 U.S. 179 (1973).

54. *Id.* at 192.

55. 456 F. Supp. at 621. The court supported its statement by pointing out the Supreme Court in both *Maher* and *Beal* said "that the right to an abortion acquires an entirely different hue and brings into play a wholly different set of factors in the funding context." *Id.*

56. 456 F. Supp. at 623.

57. *Id.* at 624.

58. *Id.* at 623.

funding to life-saving abortions. The court felt that the original version was a clear indication of the intended scope of abortion funding under Title XIX.[59]

In comparison with other cases, the *Mitchell* decision represents one end of the tripartite view. The *Mitchell* court doubts that states are required to fund any abortions at all. Even in its broadest sense, *Mitchell* stands for the proposition that, in order to comply with constitutional mandates, states need only fund those abortions necessary to save the mother's life. Thus, under *Mitchell,* even the most restrictive state statutes that limit the funding of abortions would be upheld.[60]

B. Preterm, Inc. v. Dukakis[61] - *A Middle Ground Approach to State Funding of Abortions*

Taking a middle-ground approach to the issue of state funding of medically necessary abortions, the United States First Circuit Court of Appeals held that although the states were free to fund whatever abortions they so chose, they were only required to fund those abortions which were included under the 1978-1979 version of the Hyde Amendment.[62] Thus, the court enjoined enforcement of a Massachusetts statute only insofar as it denied funds for abortions that were otherwise eligible for federal reimbursement.[63] The Massachusetts statute provided aid to Medicaid recipients for abortions only when the pregnancy resulted from promptly reported instances of rape or incest, or when an abortion was necessary to save the life of the mother.[64] The court ordered the legislature to modify the Statute so as to also require funding for abortions in those instances where a full-term pregnancy would result in serious and long lasting physical injury to the mother.[65] Such addition would make the statute comport with the 1978-1979 version of the Hyde Amendment. Before reaching its conclusion, however, it was necessary for the *Preterm* court to decide on three issues.

First, the court determined that the Massachusetts statute, as it

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59. *Id.* at 624. The *Mitchell* court's reliance on the Hyde Amendment to support its decision was strengthened by the fact that the *Beal* Court, in holding that a refusal to fund nontherapeutic abortions is not inconsistent with Title XIX, made specific reference to the then newly enacted amendment which precluded funding unless the mother's life was endangered. The *Beal* Court did not mention anything to the effect that the amendment may be unconstitutional. *See* 432 U.S. 438 n.14 (1977).

60. *See* note 23 *supra.*

61. 591 F.2d 121 (1st Cir. 1979).

62. *Id.*

63. *Id.*

64. *Id.* at 122-23.

65. *Id.* at 134.

stood, was inconsistent with the requirements of the Medicaid Act.[66] Initially, the *Preterm* court's analysis of the Medicaid Act was similar to the *Mitchell* court's analysis. The *Preterm* court, in accord with *Mitchell*, noted that the purpose of the Medicaid Act, as set out in the appropriations section of the statute,[67] did not require states to fund all medically necessary procedures. The court also relied, albeit to a more limited degree than did *Mitchell,* on the *Beal* decision. In accordance with *Beal,* the *Preterm* court held that when adopting a statute restricting the funding of certain abortions, the state legislature must do so in a reasonable fashion, not inconsistent with the objectives of the Medicaid Act.[68] To determine whether the Massachusetts statute was reasonable and consistent with the federal funding program, the *Preterm* court relied on the regulation promulgated by HEW that set forth the means by which states could permissibly limit funding of medical services.[69] *Mitchell* had not relied on this regulation, but rather, decided the issue of consistency on an interpretation of "necessary medical services" as stated in a section defining the Medicaid Act's purpose. It is at this point, therefore, that the *Mitchell* and *Preterm* analyses diverge. The *Preterm* court held that the discrimination made by the Massachusetts legislature between abortions which were necessary to save a mother's life and those which would be necessary to preserve her health was not a permissible discrimination under the HEW regulation.[70] The regulation provides that funds cannot be denied "to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition."[71] Applying this regulation to the present situation, the *Preterm* court said the state had singled out a particular medical condition, a complicated pregnancy, and restricted the funding of such condition to instances of life and

66. *Id.* at 126.
67. *See* note 45 and accompanying text *supra.*
68. 591 F.2d 121, 125, *citing* Beal v. Doe, 432 U.S. 438, 441 (1977).
69. 42 C.F.R. § 440.230 (1979). This section provides:
(a) The plan must specify the amount and duration of each service that it provides.
(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
(c)(1) The medicaid agency may not aribtrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
(2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.
70. 591 F.2d at 126.
71. *See* note 69 *supra.*

death circumstances only.[72] Thus, by this impermissible discrimination, the statute was unreasonable and inconsistent with the objectives of Title XIX.

The court did not, however, end its analysis here.[73] Instead the court thought it necessary to consider a second issue, that of the impact of the Hyde Amendment on state laws that deal with abortion funding under the Medicaid Act. The plaintiffs in *Preterm* argued that the federal amendment had the effect of shifting the burden to the states to provide funding for all abortions not covered under Hyde.[74] The state, however, argued, and eventually the court held, that Hyde was a "policy decision" on abortion funding, requiring the state to fund only those abortions federally reimbursed under the Hyde Amendment.[75]

Although conceding that the plain meaning of the language of the Hyde Amendment supported the plaintiff's position,[76] the court said that such a construction of the Hyde Amendment would produce a result at variance with the "basic policy" of the Medicaid system, under which there is mutual participation by the federal and state governments in funding medical services.[77] Where such a variant result arises from a plain meaning reading of the statute, the court said it may resort to outside aids to help determine the true meaning of the statute.[78] Therefore, the *Preterm* court analyzed the legislative history of the Hyde Amendment.[79] As a result of its analysis of the legislative

72. 591 F.2d at 126. The court rejected the contention that such restriction was rationally related to a state's objective of saving money. The court cited Maher v. Roe, 432 U.S. 464, 478-79 (1977) for the proposition that it is considerably more expensive to fund a pregnancy to full term than to provide funds for either therapeutic or elective abortions. *But see* note 44 *supra*.

The court also based its finding of the statute's inconsistency on the fact that a life and death requirement substantially infringed on a physician's judgment as to medical necessity, as medical practice does not require necessity to be based upon life or death. 591 F.2d at 127.

73. Indeed, if the court had ended its analysis here, the Massachusetts statute would have been deemed unconstitutional in violation of the supremacy clause since, by its impermissible discrimination based upon medical condition, it would have contravened a federal statute, Title XIX.

74. 591 F.2d at 127. Plaintiff's argument was that the Hyde Amendment did not affect the state's obligation to fund procedures in accordance with the Medicaid Act.

75. *Id.* at 128.

76. "The Amendment states that 'none of the funds provided for in this paragraph shall be used' to perform abortions, unless they fall within specified categories, and thus reads as a mere withdrawal of federal funds for certain purposes. No mention is made in the provision of any impact on the state's obligations." *Id.*

77. *Id., citing* 42 U.S.C. § 1396 (1976).

78. 591 F.2d at 128, *citing* U.S. v. Am. Trucking Ass'ns, Inc., 310 U.S. 534 (1939).

79. In discussing the content of the debates relied upon, the *Preterm* court first noted that neither conference nor committee reports were available and all that could

be relied upon were the "debates and insertions in the Congressional Record." 591 F.2d at 128. It concluded, however, that what could be gleaned from these sources was sufficient to indicate Congress's intent in passing the Hyde Amendment.

The court began by noting that there were few comments which indicated that the Amendment was merely "concerned with . . . the expenditure of federal dollars." *See, e.g.*, 591 F.2d at 129. The court further believed that even these statements were "consistent with the conclusion that Congress utilized the [Hyde Amendment] as the means of making a substantive change in the law." *Id.*

The *Preterm* court also relied on a statement made by Congressman Hyde to the effect that an appropriations bill is the only way to reach "complex issues" such as abortion and the prohibiting thereof. *Id., citing* 123 CONG. REC. H. 6,083 (June 17, 1977). In a statement made in protest against any restrictions on abortion funds via the amendment, Senator Brooke urged that what was being done was "a blatant case of legislating on an appropriations bill." 591 F.2d at 129, *citing* 123 CONG. REC. S. 11,035 (June 29, 1977). Similar statements by other proponents and opponents of the amendment supported the court's interpretation that the Hyde Amendment was meant to be a substantive change in the law. *See, e.g.*, 591 F.2d at 129-30, *citing* 123 CONG. REC. S. 19,440, 19,441, 19,443, 19,445 (Dec. 7, 1977) (remarks of Senators Magnuson, Brooke, Javits, and Stennis).

The *Preterm* court also saw the "specific and detailed provisions" of the amendment as an indication of its "substantive nature." 591 F.2d at 130. Congressman Michel commented on the exclusion of damage to a woman's mental health as being eligible for abortion funding. 123 CONG. REC. H. 12,651, 12,656 (Dec. 6, 1977). Senators Brooke and Javits doubted the constitutionality of requiring a certificate from physicians that attested to long-lasting and severe physical health damage. 123 CONG. REC. S. 19,440-43 (Dec. 7, 1977). Congressman Michel also tried "to define what was meant by the prompt reporting requirement in cases of rape and incest." 591 F.2d at 130, *citing* 123 CONG. REC. H. 12,652-53 (Dec. 6, 1977).

The court felt it gained most of the support for its position from statements made by the Hyde Amendment's opponents. The court said that "[t]he universal assumption in debate was that if the Amendment passed there would be no requirement that states carry on the service." 591 F.2d at 130. The court quoted Congressman Stokes to say the Amendment was "tantamount to a constitutional amendment outlawing abortions for the poor." *Id., quoting* 123 CONG. REC. H. 6,085 (June 17, 1977). In the Senate, Senator Packwood commented on the discriminatory effects the legislation would have on the many poor women who now receive money for abortions. He argued that they would have unwanted children or be forced to have illegal abortions. 123 CONG. REC. S. 11,031 (June 29, 1977). The court also referenced similar comments by Senator McGovern, *id.* at S. 11,040; Senator Bayh, *id.* at S. 11,043; Senator Brooke, 123 CONG.REC. S. 13,672 (Aug. 4, 1977); and Senator Javits, 123 CONG. REC. S. 19,443 (Dec. 7, 1977).

The court also relied on statements made by Congressman Russo, a supporter of the Amendment. Russo said that although states would be free to fund abortions if they wished, the federally enacted Hyde Amendment would encourage the states not to do so. 123 CONG. REC. H. 6,097-98 (June 17, 1977). *See also* for similar statements 123 CONG. REC. S. 18,584-85 (Nov. 3, 1977) (remarks of Sen. Helms); 123 CONG. REC. H. 10,835 (Oct. 12, 1977) (remarks of Rep. Early); 123 CONG. REC. H. 12,653 (Dec. 6, 1977) (remarks of Rep. Smith). Note the rash of state enacted Hyde-type amendments which has, in fact, followed. *See* note 23 *supra.*

Finally, the court relied on the fact that nowhere in the congressional debates was it ever mentioned that the burden of funding abortions was being shifted to the states by enacting the Hyde Amendment.

Considering this legislative history, the court concluded that Congress "was using the unusual and frowned upon device of legislating via an appropriations measure to accomplish a substantive result." 591 F.2d at 131.

history, the court believed that Congress, in enacting the Hyde Amendment, was "engaging in substantive legislation" and not merely shifting the cost of abortions to the states.[80] The substantive result Congress was seeking to obtain through the appropriations measure was a cutback of federal funds for abortions when the abortion decision reflected only a woman's personal choice.[81] Since the Hyde Amendment was not aimed at shifting the cost of abortions to the state, the court concluded that the states were only required to fund abortions covered by the Hyde Amendment. It was left to the state to decide whether it wanted to fund abortions not eligible for reimbursement under Hyde. By interpreting the Hyde Amendment as a substantive piece of legislation which obligated a state to fund only those abortions for which it received reimbursement from the federal government, the court avoided having to invalidate the state law on the grounds that it was inconsistent with the Medicaid Act.

Having established the states' obligation with respect to abortion funding under the Hyde Amendment, the *Preterm* court faced a third issue. The plaintiffs contended that if the states' obligations were viewed as identical to the federal government's under the Hyde Amendment, then the amendment would be inconsistent with the Medicaid Act.[82] The plaintiffs argued that the Hyde Amendment and the Medicaid Act should, if possible, be construed as consistent with each other.[83] The court agreed that its construction of the Hyde Amendment's effect on the states' obligation was indeed inconsistent with the purposes of the Medicaid Act. The Hyde Amendment required the federal government to fund abortions only in cases of incest or rape when the incident was promptly reported, where the mother's life would be endangered if the pregnancy were carried to term, or where severe and permanent injury would result to the mother's *physical*[84] health. The court felt that this latter category contravened the objectives of the Medicaid Act by impermissibly discriminating between damage to a woman's physical health and her mental health. Such a distinction is not based on medical need but is rather based on "diagnosis, type of illness or con-

80. 591 F.2d 121 (1st Cir. 1979).

81. *Id.*

82. *Id.* at 131.

83. The only way the two acts can be consistently construed is by reading the Hyde Amendment to shift the burden to the state to pay for "non-Hyde-type" abortions.

84. Emphasis added. The court's analysis of the Hyde Amendment itself was proper here because, by its decision that states need only fund abortions for which federal reimbursement was available under Hyde, the validity of any challenged state law having the same standards as Hyde would depend upon an interpretation of the federal Amendment's constitutionality.

dition."[85] Conceding all of this, the *Preterm* court still refused to accept plaintiff's contention that in order to read the Hyde Amendment as consistent with the Medicaid Act, the amendment must be viewed as shifting the burden of funding all medically necessary non-Hyde Amendment abortions to the states. Rather, the court determined that the Hyde Amendment, to the extent that it conflicted with the Medicaid Act, impliedly repealed portions thereof so that they should be consistent.[86]

The holdings of *Mitchell* and *Preterm,* insofar as they pertain to the states' obligations to fund abortions, are restrictive in effect. *Mitchell* doubts that a state is required to fund any abortions, but if there is such a requirement, it only extends to situations in which the mother's life is endangered. *Preterm* widens the category of abortions that must be funded by requiring states to fund those abortions eligible for federal reimbursement. There is a trend, however, in this as yet sparsely litigated area, to regard a state's obligation for funding abor-

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85. *See* note 69 and accompanying text *supra.*

86. 591 F.2d at 134. *See* notes 106 through 130 and accompanying text *infra* for an example of how subsequent courts have criticized the First Circuit for this interpretation of repeal by implication.

Two other Courts of Appeals have agreed with the *Preterm* court's interpretation of the Hyde Amendment. The Seventh Circuit in Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), reversed a holding of the district court that Illinois was required to fund all therapeutic abortions under the Medicaid Act. Agreeing with the First Circuit that the Hyde Amendment was a substantive piece of legislation that impliedly repealed any inconsistent portions of the Medicaid Act, the *Zbaraz* court held that the state need only fund those abortions which are covered by the Hyde Amendment. *Id.* at 202. The court, however, remanded the case to the district court to then consider the constitutional issue of equal protection. The district court subsequently determined that both the Illinois statute and the Hyde Amendment violated equal protection standards. *See* notes 133-47 and accompanying text *infra* for a discussion of Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979). The United States Supreme Court has agreed to give plenary consideration to the *Zbaraz* decision. 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-5). The district court's decision on equal protection grounds, 469 F. Supp. 1212 (N.D. Ill. 1979), discussed at notes 133-147 and accompanying text *infra,* is pending appeal to the Seventh Circuit, no doubt awaiting Supreme Court action on the Seventh Circuit's holding as to the effect of the Hyde Amendment on the Medicaid Act.

Recently, the Eighth Circuit has also joined in the *Preterm* decision on the effect of the Hyde Amendment. In Hodgson v. Board of County Comm'rs, 48 U.S.L.W. 2476 (8th Cir. Jan. 9, 1980), the court held that since a Missouri statute denied funding for abortions to Medicaid recipients unless the abortion was necessary to save the mother's life or the pregnancy resulted from incest or rape, it was inconsistent with Title XIX of the Medicaid Act, even as amended by the Hyde Amendment. The state statute was thus held invalid. That same day, the Eighth Circuit also ruled that a state statute identical with the 1978-79 version of the Hyde Amendment was unconstitutional in violation of the equal protection clause. *See* notes 148-55 and accompanying text *infra.*

tions under Title XIX as being broader than *Preterm* and *Mitchell* have defined it.[87]

C. *The Liberal View: Casey,*[88] *Busbee,*[89] *and Rhodes*[90]

Several courts have held that a state participating in the Medicaid program may not, by statute, deny funding for abortions which a physician has deemed to be medically necessary. These courts have primarily based their holdings on supremacy clause violations. The court in *Casey* does an in-depth statutory analysis, the rationale on which the liberal view is based. *Busbee* and *Rhodes* focus on why the

87. *See* Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Roe v. Casey, 464 F. Supp. 483 (E.D. Pa. 1978). In the same vein as these cases, which are discussed at notes 77-125 and accompanying text *infra,* but with a slightly different twist, is Doe v. Kenley, 584 F.2d 1362 (4th Cir. 1978). The challenged state statute in *Kenley* required states to fund abortions only where the mother's life would be endangered if the pregnancy were carried to term. This statute, however, was accompanied by an explicitly stated objective of eliminating any funding whatever for nontherapeutic abortions. In light of the fact that the state specifically stated this objective, the Fourth Circuit disposed of the case by requiring the legislature to amend the statute consonant with this stated objective by replacing the "life" endangerment standard with a "substantial health" endangerment standard.

88. 464 F. Supp. 487 (E.D. Pa. 1978). In *Casey*, the plaintiffs, who consisted of a group of indigent pregnant women, Planned Parenthood of Southeastern Pennsylvania, various "health care providers," and physicians, primarily alleged that a Pennsylvania statute which precluded abortion funding under the Medicaid program except where the mother's life was endangered, violated rights guaranteed them by article 6, clause 2 of the United States Constitution (supremacy clause), as well as under the due process and equal protection clauses of the 14th amendment. Because the court found a violation of the supremacy clause to be dispositive of the issue, it did not reach the other constitutional questions raised by the plaintiffs. In a final judgment on the merits, the district court granted the permanent injunction and declaratory relief sought by these plaintiffs.

89. 471 F. Supp. 1326 (N.D. Ga. 1979). Plaintiffs in *Busbee* included indigent pregnant women, physicians, and various health centers. The Georgia statute challenged was one substantively identical to the 1978-79 version of the Hyde Amendment. *See* note 20 and accompanying text *supra.* Plaintiffs alleged violation of the first, fifth, ninth and fourteenth amendments to the United States Constitution, and sought preliminary injunctive relief. Since an adequate basis for granting relief was found on statutory grounds, the other constitutional challenges were not considered by the court.

90. 477 F. Supp. 529 (S.D. Ohio 1979). Plaintiffs in *Rhodes* included Planned Parenthood Affiliates of Ohio, a Rape Crisis Center, a licensed physician, and two family-planning agencies. Plaintiffs alleged that it was in violation of the supremacy clause for Ohio to limit funding to those abortions necessary to preserve the mother's life or to those cases where the pregnancy was the result of rape or incest. They also urged that it was equally violative to fund abortions in Hyde-type circumstances which *added* to the aforementioned categories, instances where abortion is necessary to prevent severe and long-lasting physical health damage to the mother. See notes 117-18 and accompanying text *infra.* Plaintiffs sought preliminary injunctive relief for the alleged violations.

restrictive view of *Preterm* should not be followed. Although these three principal cases all reach the same conclusion, a discussion of the major focus of each of the cases best illustrates the thrust of the liberal view.

1. Rationale for the Requirement of Funding for All Medically Necessary Abortions—A Statutory Analysis

In *Roe v. Casey*,[91] the court held that a state was required to provide funding for all medically necessary abortions. Whether an abortion was considered to be medically necessary was to be determined in accordance with the test set forth in *Doe v. Bolton*.[92] *Bolton* held that a physician was to make the determination of necessity and he could rely upon factors "relevant to the well-being of the patient," such as the woman's "physical, emotional, psychological, and familial" background.[93] The *Casey* court's decision rested on its interpretation of substantially the same sections of Title XIX, and regulations promulgated thereunder, that were interpreted by the *Mitchell* and *Preterm* courts.

The *Casey* court, citing *Beal v. Doe*,[94] said that a state must provide assistance in a reasonable fashion for medical treatment in the five categories set out in 42 U.S.C. § 1396 (a) (1)-(5);[95] further, the assistance provided must be consistent with the objective of the Medicaid Act,[96] that being the provision of financial assistance for medically necessary services to those too poor to afford them.[97] It was the *Casey* court's construction of the phrase "necessary medical services" from the Medicaid Act's appropriations section which led it to the opposite conclusion reached by the *Mitchell* court. Whereas *Mitchell* construed the phrase "necessary medical services" very narrowly,[98] the *Casey* court took a broader view of the term and held that a state could not deny funds for any abortion deemed medically necessary under the *Bolton* test.[99] The court found support for its con-

91. 464 F. Supp. 487 (E.D. Pa. 1978).
92. 410 U.S. 179 (1973).
93. *Id.* at 192.
94. 432 U.S. 438 (1977).
95. *See* note 39 *supra.*
96. Beal v. Doe, 432 U.S. 438, 441 (1977). *See* notes 10-25 and accompanying text *supra.*
97. 464 F. Supp. 487 (E.D. Pa. 1978). The court relied on 42 U.S.C. § 1396 (1970), the appropriations section of Title XIX. *See* note 51 and accompanying text *supra.*
98. *See* notes 57-58 and accompanying text *supra.*
99. Note that although *Mitchell* and *Casey* are analyzing the same statutes and regulations, it is their difference in the construction of certain undefined terms in the statute (i.e., medically necessary) that leads these courts to different results. *See* notes

clusion in an implementation regulation of Title XIX, similar to the one relied on by the *Preterm* court.[100] The regulation was interpreted as requiring states to furnish "at least the minimum necessary medical services required for the successful treatment of the particular medical condition presented."[101] A state may not limit or prohibit funds for a medically necessary procedure unless the reason for doing so is not "solely because of the diagnosis, type of illness or condition."[102] The *Casey* court further held that the Hyde Amendment was merely a congressional enactment of the *Beal* decision[103] that funds need not be provided for nontherapeutic or elective abortions.[104] A permanent injunction was granted and the restrictive state statute was not enforced.[105]

2. Critique of *Preterm's* Analysis - Another Rationale for the Liberal View

In *Doe v. Busbee,*[106] a Georgia statute limiting abortion funding under the Medicaid program contained substantially the same provisions as the 1978-1979 version of the federal Hyde Amendment. Having come after the *Preterm*[107] decision, *Busbee* was one of the first

52-54 and accompanying text *supra* for the rationale behind *Mitchell's* refusal to follow the *Bolton* test. *See* note 93 and accompanying text *supra* for a discussion of the *Bolton* test.

100. 42 C.F.R. § 449.10(a)(5)(i) (1978). The regulation relied on by *Casey* is the earlier version of and contains substantially the same provisions as 42 C.F.R. § 440.230 (1979). *See* note 69 *supra.*

101. 464 F. Supp. at 501.

102. 42 C.F.R. § 449.10(a)(5)(i) (1978). The court found further support for its interpretation from the last part of this regulation which stated: "Appropriate limits may be placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures." *Id.* The court construed the term "such criteria as medical necessity" to mean that a state "may apply limits upon the medical procedure it supplies, such as nonmedical necessity, . . . but [does] not [limit] the other requirements and objectives of Title XIX that all medically necessary services be reimbursed." 464 F. Supp. at 501. The court also relied on the quote from *Beal v. Doe* that "serious statutory questions" may arise if a state denied funds under Medicaid for necessary medical procedures. *Id.* at 502.

103. 432 U.S. 438 (1977). *See* notes 10-25 and accompanying text *supra.*

104. 464 F. Supp. at 502. This interpretation of the Hyde Amendment may not be completely valid in light of the fact that under Hyde, some abortions which may in fact be deemed to be therapeutic or medically necessary are denied funds. For example, the court in Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979) pointed out that serious mental health problems may result from carrying a pregnancy to term. Such a disorder would not, under Hyde, bring an abortion within the realm of federal reimbursement.

105. 464 F. Supp. at 503.

106. 471 F. Supp. 1326 (N.D. Ga. 1979).

107. *See* note 86 and accompanying text *supra.* Recall that *Preterm* had ruled that the Hyde Amendment impliedly repealed portions of Title XIX.

cases that had to contend with the issue of whether Hyde actually impliedly repealed portions of Title XIX, thereby validating any state law which provided funding only for those abortions funded under the Hyde Amendment.[108] Indeed, the defendants in *Busbee* argued that if the court enjoined enforcement of the Georgia statute, the court would *a fortiori* find the Hyde Amendment itself to be unconstitutional,[109] which would not be proper since the federal government was not a party to the suit. The court, however, was not persuaded; such an argument rested on the adoption of the *Preterm* decision,[110] a decision which the *Busbee* court expressly rejected.[111] The basis for rejecting the *Preterm* analysis was two-fold.

First, the *Busbee* court felt that the *Preterm* court was unjustified in looking to the legislative history of the statute at all. The *Preterm* court had conceded that the words of the Hyde Amendment were unambiguous and that there would be no need to look to any extrinsic aids to help construe it.[112] It felt, however, that construing the amendment to impose the costs of "non-Hyde-type" therapeutic abortions on the state would be inconsistent with the basic policy of the Medicaid

108. The *Busbee* court engaged in substantially the same analysis of Title XIX as did *Casey, see* notes 91-105 *supra*; however, *Busbee* relied on 42 C.F.R. § 440.230 (1978), the regulation similar to 42 C.F.R. § 449.10(a)(5)(i) (1978). *Busbee* was in accord with the first part of the *Preterm* decision which had held that a state crosses the line of permissible discrimination when it singles out a medical procedure, such as pregnancy, and restricts funding thereof to only life and death circumstances. The *Busbee* court, however, did not agree with the implication that can be drawn from the *Preterm* holding, that discrimination of even medically necessary abortions is permissible if such discrimination is based on degree of need. *Busbee* held that it is impermissible to discriminate medically necessary abortions in any fashion. The reason for the divergence here is explained by the *Busbee* court as a difference in the sections of 42 C.F.R. § 440.230 upon which the two decisions rest. *Preterm* relies on § 440.230(c)(1) which prohibits a denial of funding "solely because of the diagnosis, type of illness, or condition." The *Preterm* court also made reference to the early version of the regulation, 45 C.F.R. § 249.10(a)(5)(i), which said discrimination is allowed based upon degree of medical necessity. 591 F.2d 121, 126 (4th Cir. 1979).

Busbee, on the other hand, relies on § 440.230(c)(2), which states that a state "may place appropriate limits on a service based on medical necessity." *Busbee* interprets this as meaning "a state may permissibly discriminate in its provision of services based on degrees of need, but only within that range of degrees of need which exceed the level of medical necessity." 471 F. Supp. at 1330 n.9.

109. 471 F. Supp. at 1331-32. The defendant's reasoning for this argument rests on the *Preterm* holding that the Hyde Amendment substantively alters parts of Title XIX, leaving the states free to fund abortions not eligible for federal reimbursement only if they so wished. Defendants asserted that Georgia's policy, as reflected in its abortion funding statute, that funding be provided only in federally reimbursed circumstances was not inconsistent with Title XIX.

110. *See* note 109 *supra*.

111. 471 F. Supp. 1326 (N.D. Ga. 1979).

112. 591 F.2d at 128, *citing* TVA v. Hill, 437 U.S. 534 (1978).

Act, that being a mutual participation of federal and state governments in funding medical procedures. Therefore, the *Preterm* court felt a need to look to the legislative history of the Amendment.[113] One problem the *Busbee* court had with this analysis was that a state voluntarily chooses to participate in the Medicaid program; thus, saying that any obligation "imposed" on a state runs counter to the elective nature of the participation.[114]

The *Preterm* court's interpretation of Title XIX's policy[115] has also met some criticism. In *Planned Parenthood Affiliates of Ohio v. Rhodes,*[116] the Southern District Court of Ohio held in accord with the *Busbee* case and issued injunctions against the enforcement of an Ohio statute and a state policy regulation. The Meshel Amendment,[117] a rider to an appropriations bill, was of the highly restrictive-type abortion statute, permitting Medicaid funds to be used only for abortions for pregnancies that endangered the mother's life or that resulted from rape or incest. The "Ohio State Plan"[118] was a letter sent to physicians, hospitals, and health care clinics setting forth the state's abortion funding standards. The policy of Ohio as expressed in this letter was to allow abortion funding in life endangerment and severe physical health damage situations. The Meshel Amendment superceded the "Ohio State Plan." The defendants argued that *Preterm* required that the "Ohio State Plan" covering the 1978-1979 "Hyde-type" abortions be allowed to stand. The *Rhodes* court held, however, that as a result of these state statutes restricting funds for abortions that are medically necessary, the plaintiffs would suffer irreparable harm. The largest part of its rationale was based on criticism of the *Preterm* decision.[119] As far as the basic policy behind the Medicaid program was concerned, the *Rhodes* court said that *Preterm's* reliance on the "federal-state cooperation" was misplaced.[120] Rather, the "basic policy" of Title XIX, as the *Rhodes* court saw it, was "to provide medical assistance and rehabilitation services for certain

113. The *Preterm* court relied on United States v. American Trucking Ass'n, 310 U.S. 534 (1939), which held that a court should not venture beyond the plain meaning of a statute unless that interpretation produces a result at variance with the basic policy of the statute. Preterm, Inc. v. Dukakis, 591 F.2d 121, 128 (1st Cir. 1979).

114. 471 F. Supp. at 1333.

115. *See* note 112 and accompanying text *supra.*

116. 477 F. Supp. 529 (S.D. Ohio 1979).

117. H.B. 204 § 210 (1979) (1979-80 biennial budget for the State of Ohio).

118. Ohio State Plan (Medical Assistance Letter 71), Ohio Dep't of Public Welfare (1978).

119. The *Rhodes* court's analysis of the Medicaid Act was substantialy the same as *Busbee* and *Casey.*

120. 477 F. Supp. at 538.

individuals."[121] The cooperative aspect, the "basic policy" upon which *Preterm* based its reason for looking to the legislative history, was merely a means to achieving this end. Nowhere in Title XIX was the possibility foreclosed that a state may have to fund 100% of certain medical services.[122]

Even assuming that *Preterm's* deviation from the plain meaning of the statute was justified, the *Preterm* court's reliance on the substance of the legislative history of Title XIX has met with equal disfavor.[123] This served as *Busbee's* second ground for rejecting the *Preterm* analysis. Judge Kinneary's discussion in *Rhodes* provides an even more thorough criticism of *Preterm's* use of legislative history than does *Busbee.*[124] The *Rhodes* court started with the premise than an implied repeal of an appropriations rider is "strongly disfavored," and was unpersuaded by *Preterm's* departure from that premise.[125] *Preterm* relied mainly on the content of debates which occurred prior to the enactment of the Hyde Amendment.[126] The *Rhodes* court noted that such debates were "the least reliable of enactment materials which can be used in interpreting statutes."[127] Not all Congressmen attended these debates and the contents thereof were likely to be edited.[128] Both *Rhodes* and *Busbee* criticized *Preterm's* reliance on the predictions of the effect of the Amendment given by those opposed to it. The *Rhodes* court, citing *Busbee,* said that "giving effect to the doomsday predictions of dissenters turns those predictions into self-fulfilling prophecies."[129] The *Rhodes* court also pointed out that the debates contained "express statements that all Congress was concerned with in the Hyde Amendment was federal dollars."[130] Finally, the *Rhodes* court concluded that had Congress intended the appropriations rider to be a substantive measure, it could have added express language to the effect that a state has no obligations greater than those of the federal government under Title XIX. Congress did not include such language.

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121. *Id.*

122. *Id. See also* Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979).

123. *See* Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979).

124. 477 F. Supp. at 539.

125. *Id.* at 538.

126. *Id.* The court went on to say that "committee and conference reports are much more productive legislative materials" than the floor debates. No such materials existed for the Hyde Amendment. *Id.* at 539.

127. *See* note 68 *supra.*

128. 477 F. Supp. at 539.

129. *Id. See* note 78 *supra* which sets forth the specific examples to which *Rhodes* refers.

130. 477 F. Supp. at 539, *citing* 591 F.2d at 134.

Both *Busbee* and *Rhodes* effectively dispose of the argument that states are only required to provide funding for abortions which are eligible for reimbursement under Hyde. The reasoning upon which that argument rests suffers from two flaws. First, there was no reason to look to the legislative history of the Hyde Amendment. Its language was not ambiguous, and the inconsistency the *Preterm* court saw between the plain meaning of the Hyde Amendment and the policy of Title XIX was based on a misinterpretation of that "policy." Thus, a deviation from the plain meaning of the amendment was not justified. Second, even assuming that the deviation was justified, the type of history upon which the argument relied was not of the quality that would be necessary to support the strongly disfavored vehicle of an appropriations bill impliedly repealing portions of a statute. Thus, *Busbee* and *Rhodes* have found unpersuasive the argument that the states have an obligation to fund only those abortions eligible for federal reimbursement. Instead, these courts have adopted a more liberal view of the states' obligation. That view, as it now stands, is that states must provide funds for all medically necessary abortions to eligible Medicaid recipients.

IV. EQUAL PROTECTION CHALLENGES TO THE HYDE AMENDMENT AND SIMILAR STATE STATUTES

In addition to supremacy clause challenges, state abortion statutes have also been attacked on the ground that they violate the equal protection clause of the fourteenth amendment.[131] Although most courts that have issued injunctions against the state funding laws have done so based on the supremacy challenge, there are a few courts which have been receptive to and have issued rulings on these equal protection challenges.[132]

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131. U.S. CONST. amend. XIV, § 1.

132. Reproductive Health Services v. Freeman, 48 U.S.L.W. 2475 (8th Cir. Jan. 9, 1980); Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979); Right to Choose v. Byrne, 169 N.J. Super. 543 (1979). *Byrne* was a state case in which a New Jersey abortion funding statute was challenged. The statute challenged by the plaintiffs was similar in scope to the Hyde Amendment. The *Byrne* court decided in favor of plaintiffs on equal protection grounds. The court said that the state statute was to be subjected to strict scrutiny since the fundamental right to enjoy one's health was involved. Funding of abortions through the Medicaid program furthers this fundamental right and any restrictions on the funds would have to be justified by a compelling state interest. 169 N.J. Super. at 551. The court relied on *Roe v. Wade* to determine that the asserted interest of protecting the potentiality of human life and "encouragement of normal childbirth" are not compelling "when the health of the pregnant women is threatened." *Id.* at 552. The *Byrne* court said that "health" is not restricted merely to the Hyde-type amendment's "severe and longlasting impairment," but extends "to protection against all significant threats to health." *Id. See* note 36 *supra* for a discus-

In *Zbaraz v. Quern,*[133] plaintiffs challenged an Illinois statute that restricted abortion funds for Medicaid recipients to life endangering circumstances on the ground, *inter alia,* that the statute violated their rights under the equal protection clause of the fourteenth amendment. The major thrust of the challenge was that indigent women who needed abortions were being treated differently than indigent women who needed other surgical procedures.[134] The court rejected plaintiff's contention that a fundamental right[135] was involved and that therefore the statute should be subjected to strict scrutiny. Rather, the court applied the rational relationship test.[136] The Illinois statute could withstand constitutional attack if it could be found to rationally further "some legitimate, articulated state purpose."[137]

The court easily disposed of the legitimacy of the state's articulated interest in "fiscal frugality."[138] Limiting public funds for abortions to life saving situations was not rationally related to "fiscal frugality" since the court found it to be more expensive to fund prenatal care, childbirth, and postpartum care than to provide funding for abortions.[139]

The second interest offered by the state to justify its statute was the state's concern in protecting fetal life through the encouragement of childbirth.[140] This led the court to a two-part holding. The *Zbaraz* court recognized that the United States Supreme Court has held the state's interest in protecting fetal life to be a legitimate one in some

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sion of a court that has upheld a state statute that was challenged on equal protection grounds.

133. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979), *on remand,* 469 F. Supp. 1212 (N.D. Ill. 1979), *juris. postponed,* 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-5).

134. 469 F. Supp. 1212 (N.D. Ill. 1979).

135. *Id.* at 1217. Plaintiffs, relying on Roe v. Wade, 410 U.S. 113 (1973), urged that the Illinois law posed an impediment to an indigent pregnant woman's fundamental right to an abortion decision. The *Zbaraz* court said that the case of Maher v. Roe, 432 U.S. 464 (1977) was dispositive of plaintiff's argument. The *Maher* Court said that the right protected by *Roe. v. Wade* did not limit the ability of a state, through allocation of its funds, to encourage one medical procedure (childbirth) over another (abortion). 432 U.S. at 474. "The indigency that may make it difficult . . . for some women to have abortions is neither created nor in any way affected by the [state] regulation." *Id.* at 475. Likewise, the *Zbaraz* court felt that the Illinois statute did not impinge on any fundamental right.

136. 469 F. Supp. at 1218.

137. *Id.*

138. *Id.*

139. *Id.* In footnote 8 to its opinion, the *Zbaraz* court recognized evidence from plaintiff that the average cost of an abortion is $145.00 versus $1,370.00 to fund a childbirth. *But see* note 44 *supra.*

140. 469 F. Supp. at 1219.

cirumstances.[141] In determining the weight to be given the interest however, the mother's interest in her own health must also be considered. As the Illinois statute and the Hyde Amendment itself stood, the state's interest in protecting the fetus in the early months of pregnancy was outweighed by the adverse effect on the mother's health.[142] The state's interest in protecting fetal life does, however, increase as the fetus becomes viable in later stages of pregnancy.[143] Relying on *Roe v. Wade,*[144] the *Zbaraz* court determined that after viability, the state may deny abortion funds, except in instances where abortion is necessary to save the life of the mother. Thus, the two-tiered holding of *Zbaraz* is that prior to fetal viability, a state must provide funds for all medically necessary abortions; after fetal viability, funds need only be appropriated for abortions which are necessary to save the life of the mother.[145] Insofar as the Illinois statute and the Hyde Amendment did not conform to these requirements, the court held them unconstitutional.[146] By hinging the determination of abortion funding on the stage of fetal viability, it appears that the *Zbaraz* case is the one most consistent with past Supreme Court analysis of the abortion issue in general.[147] The decision is also unique with regard to where it fits in the spectrum of cases that have decided the issue of states' obligations to fund abortions. It encompasses the most restrictive view, since it requires only life-preserving abortions to be funded once the point of fetal viability is reached. Prior to fetal viability, however, the court

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141. *See* Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Roe v. Wade, 410 U.S. 113 (1973).

142. 469 F. Supp. at 1219-20. The court explained:

> As a consequence of the state's viewing the fetus apart from the mother, the mother may be subjected to considerable risk of severe medical problems, which may even result in her death. Under the Hyde Amendment standard, a doctor may not certify a woman as being eligible for a publicly funded abortion except where "the life of the mother would be endangered . . . or . . . where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term. . . ." Most health problems associated with pregnancy would not be covered by this language, . . . and those that would be covered would often not be apparent until the later stages of pregnancy, when an abortion is more dangerous to the mother . . . . At the earlier stages of pregnancy, and even at the later stages, doctors are usually unable to determine the degree of injury which may result from a particular medical condition. . . . The effect of the new criteria, then, will be to increase substantially maternal morbidity and mortality among indigent pregnant women. . . .

143. *Id.* at 1221.

144. 410 U.S. 113 (1973). *See* notes 1-3 and accompanying text *supra.*

145. 469 F. Supp. at 1221.

146. *Id.*

147. Roe v. Wade, 410 U.S. 113 (1973), the major abortion case of our time, was similarly patterned. *See* note 3 *supra.*

adopts the most liberal view, requiring states to fund all medically necessary abortions.

Taking a somewhat different approach from *Zbaraz,* the Eighth Circuit Court of Appeals in *Reproductive Health Services v. Freeman*[148] recently held that a Missouri statute which provided funding for only those abortions eligible for federal reimbursement under the 1978-1979 version of the Hyde Amendment violated the equal protection clause of the United States Constitution.[149]

The statute was held to violate equal protection principles in two ways. First, the court viewed the statute as discriminating between indigent pregnant women "who seek either childbirth or a Hyde Amendment abortion"[150] and those pregnant indigents seeking "medically necessary non-Hyde Amendment abortions."[151] The court noted that in addition to a "woman's fundamental interest in seeking an abortion,"[152] she had additional concern in protecting her health, an interest the court said may itself be fundamental. Given these substantial concerns, the court said that a more scrutinizing standard than "minimal rationality"[153] must be used to test the statute's constitutionality. The court said that the state's interest in protecting fetal life, legitimate though it may be, was not promoted by the Missouri statute. Since the statute required the state to fund medically necessary abortions for pregnancies resulting from incest or rape, it was invidious discrimination not to fund all other medically necessary abortions.

Secondly, the *Freeman* court stated that the statute also violated equal protection in that it discriminated between indigent women seeking medically necessary procedures other than abortions and those seeking non-Hyde Amendment abortions. In both groups, the women are seeking aid to procure medical procedures which are necessary to preserve their health. There is no legitimate state interest furthered by the discrimination.[154] The state's interest in preserving fetal life is not a permissible objective if "the pregnant woman's life or health is at stake."[155] Thus, the state statute, even though it complied with the Hyde Amendment, was held unconstitutional.

In sum, the *Zbaraz* court found a state Hyde-type statute to violate equal protection, depending on the stage of fetal viability. The

148. 48 U.S.L.W. 2475 (8th Cir. Jan. 9, 1980).
149. U.S. CONST. amend. XIV, § 1.
150. 48 U.S.L.W. at 2475.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.* at 2476.
155. *Id.*

Freeman court found a similar state statute to violate equal protection, but did not tie its holding into stages of fetal viability. Although these two holdings differ in their form, the result of the decisions is that a state statute which patterns itself after the 1978-1979 version of the federal Hyde Amendment is unconstitutional. The holdings of the equal protection cases, *Freeman, in toto*, and *Zbaraz*, in part, are in accord with those supremacy clause cases which have taken the liberal view.[156] Together these cases form a majority view that states are required to fund *all* medically necessary abortions.

V. CONCLUSION

As Justice Blackmun noted in the major abortion case of our time, the issue is a sensitive, emotional one.[157] Perhaps the most effective way that those opposed to abortion could inhibit one's choice of that procedure is by withholding the financial means to procure an abortion. Unfortunately, it would appear that the ones most hurt by this are the indigent.[158]

Although the *Beal* decision provided one way for monies for abortions to be withheld,[159] its holding was limited in scope since it applied only to funding of elective abortions. However, the effect of the Hyde Amendment and its state progeny was much more restrictive. These enactments would prevent indigent women from obtaining abortions which physicians may deem medically necessary, a result thought to be grossly unfair in view of the fact that other medically necessary procedures are not denied to the recipients of the Medicaid Act.

The challenges to these state-enacted abortion funding statutes have been based mainly on supremacy and equal protection clause grounds. The decisions lie on a spectrum from the most restrictive, which would deny funding of any abortions except those necessary to save the mother's life, to the most liberal, which would require states to fund all medically necessary abortions. In the middle are the decisions maintaining that states need only fund those abortions covered by the Hyde Amendment. The two courts that have taken this "middle" approach to abortion funding first had to determine the effect the Hyde Amendment had on the states' obligations under the Medicaid

156. *See* notes 88-130 and accompanying text *supra*.

157. Roe v. Wade, 410 U.S. 113 (1973).

158. Courts have not, however, viewed the withholding of funds for abortions as inhibiting one's abortion decision. *See* note 15 *supra*.

159. Beal v. Doe, 432 U.S. 438 (1977). *See* notes 10-23 and accompanying text *supra*.

Program. In order for the state statutes to withstand a supremacy clause challenge, the courts had to determine that the Hyde Amendment was a vehicle used by Congress to limit the spending of funds on abortions. According to these courts, Hyde did not serve to shift the burden of funding all abortions not eligible for federal reimbursement to the states. To the extent that the Hyde Amendment conflicted with Title XIX, it was said to have repealed inconsistent portions thereof.

It may be that resolution of the entire state abortion funding issue will lie in a determination of whether this repeal by implication is accepted. Indeed, the United States Supreme Court has agreed to give plenary consideration to the *Zbaraz* case,[160] in which the Seventh Circuit Court of Appeals had interpreted the Hyde Amendment to impliedly repeal inconsistent portions of Title XIX. If the Supreme Court holds that the Hyde Amendment does repeal inconsistent portions of Title XIX, then the supremacy clause challenges to any state statute that includes at least those abortions covered by the Hyde Amendment will no longer be available. The courts could read the Hyde Amendment as setting the state's standards for funding abortions, and since Hyde would be consistent with Title XIX, no statute, federal or state, would contravene it. Of course, the very restrictive state laws which preclude reimbursement even for Hyde-abortions could still be challenged on supremacy clause grounds. Even if the Hyde Amendment is held to impliedly repeal portions of Title XIX, however, equal protection challenges on the constitutionality of Hyde itself will still remain. At least three cases[161] have struck down state statues precluding funds for medically necessary abortions on equal protection grounds.

On the other hand, if the Supreme Court decides that Hyde is inconsistent with and does not impliedly repeal Title XIX, then states will thereafter be compelled to fund all medically necessary abortions, since any statute limiting the funding of such abortions would be in contravention of Title XIX of the Medicaid Act.[162] Several cases have

160. *See* 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (No. 79-5).

161. Reproductive Health Services v. Freeman, 48 U.S.L.W. 2475 (8th Cir. Jan. 9, 1980); Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill. 1979); Right to Choose v. Byrne, 169 N.J. Super. 543 (1979).

162. 456 F. Supp. 609 (D. Utah 1978). If, however, a statutory analysis similar to the one used by the court in D.R. v. Mitchell, 469 F. Supp. 609 (D. Utah 1978), is adopted, the effect would be that states would not be required to fund any abortions except perhaps those necessary to save the mother's life because Hyde and similar state statutes would be viewed as being consistent with Title XIX. No other court has as yet adopted the approach taken by *Mitchell*. See notes 36-60 and accompanying text *supra* for an analysis of *Mitchell*.

decided the issue in just this way.[163] In any event, the final resolution of this issue will have to await the outcome of the Supreme Court's decision in *Zbaraz*.

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163. Planned Parenthood Affiliates of Ohio v. Rhodes, 477 F. Supp. 529 (S.D. Ohio 1979); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979); Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978).