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*Beal v. Doe, Maher v. Roe*, and Non-Therapeutic Abortions: The State Does Not Have to Pay the Bill

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Beal v. Doe, Maher v. Roe, and Non-Therapeutic Abortions: The State Does Not Have To Pay The Bill*

[Abortion] involves the most basic and volatile principles about which men can differ: life, death, liberty, privacy, our traditions, our ideals, our moral values.¹

Medicaid funding of abortions has engendered disagreement among state and federal legislatures, legal commentators,² and courts.³ Opponents of abortion funding contend that abortion is murder and that, by providing federal or state subsidies for such action, the government becomes directly involved in the taking of a human life. Proponents of Medicaid payments maintain that the views of those who believe that abortion is immoral should not be thrust upon those who believe otherwise. These supporters argue that because a woman has a constitutionally protected right to choose whether or not to obtain an abortion, the government cannot infringe upon an indigent woman's exercise of this privilege or her fourteenth amendment equal protection right by withholding Medicaid payments for abortions.⁴

The United States Supreme Court addressed the issues of abortion, Medicaid, and equal protection in Beal v. Doe,⁵ Maher v. Roe,⁶ and Poelker v. Doe.⁷ In Beal, the Court stated that Title XIX of the

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7. 97 S. Ct. 2391 (1977)(per curiam).
Social Security Act\(^a\) does not require states that participate in the Medicaid program to fund non-therapeutic abortions.\(^8\) In *Maher*, a state's refusing to provide payment for elective abortions, while providing funds for childbirth, was found to be non-violative of the equal protection clause of the fourteenth amendment.\(^9\) In *Poelker*, the Court also addressed the equal protection issue, stating that a public hospital's policy of providing medical services for childbirth but not for elective abortions was constitutional.\(^10\)

These decisions place the question of whether non-therapeutic abortions will be funded with public monies into the hands of Congress and state legislatures. In theory, the legislative resolution will represent the will of the majority. In practice, however, this decision imposes the majority's will upon those with the least political power and the most to lose by such Medicaid restrictions—pregnant indigents.

This article will examine the statutory and constitutional issues presented in the Supreme Court's "abortion trilogy": whether Title XIX of the Social Security Act or the equal protection clause of the fourteenth amendment\(^12\) require a state that pays for the costs of childbirth and therapeutic abortions to also pay for non-therapeutic abortions under its Medicaid program. The article will focus on considerations, interpretations, and consequences generated by the Court's decisions. In addition, the discussion will include an examination of post-*Beal* developments.

**Overview of Abortion Litigation**

The Supreme Court initially addressed the abortion issue with its landmark decision in *Roe v. Wade*\(^13\) and its companion case, *Doe v. Bolton*.\(^14\) *Wade* and *Bolton* invalidated state criminal abortion statutes that prohibited abortions. In *Wade*, the Court declared that a

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9. 97 S. Ct. at 2366. Non-therapeutic abortions are also referred to as elective abortions.
11. 97 S. Ct. at 2391.
14. 410 U.S. 179 (1973). In *Bolton*, certain abortion procedures which restricted the availability of abortions were declared unconstitutional. This decision established several guidelines that could be used in the future by states drafting new abortion legislation.

The only abortion case to be considered by the Court prior to this time was United States v. Vuitch, 402 U.S. 62 (1971). The Court, however, did not have to reach the abortion issue in arriving at its decision that the District of Columbia abortion statute at issue, 11 D.C. Code Encycl. § 22-201 (West), was not unconstitutionally vague.
woman's decision to terminate her pregnancy is encompassed within the constitutionally protected right to privacy. The right to make such a decision, although not absolute, is a fundamental right, and therefore state regulation is justified only by a compelling state interest. The Court declared that during the first trimester of pregnancy a woman may exercise this right free from any state interference. However, during the second trimester the state's in-

15. 410 U.S. at 153. Although the word privacy appears nowhere in the Constitution, the right to privacy has long been a topic of interest among legal commentators. See, e.g., Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1980).

The right of privacy was first recognized as a constitutional right in Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, a Connecticut law which prohibited the use of contraceptives was found to be an unconstitutional invasion of an individual's right of marital privacy. There was disagreement among the seven concurring justices regarding the source of this right. Justice Douglas believed the source to be a penumbral "zone of privacy" which emanated from the first, third, fourth, fifth, and ninth amendments. 381 U.S. at 484. Justices Goldberg, Brennan and Chief Justice Warren relied on the ninth amendment, Id. at 499, while Justices Harlan and White cited the fourteenth amendment. Id. at 500, 502. See also Emerson, Nine Justices in Search of a Doctrine, 64 Mich. L. Rev. 219 (1965).

The decision in Eisenstadt v. Baird, 405 U.S. 438 (1972) expanded the concept of the right of privacy. In Eisenstadt, a Massachusetts statute which proscribed the distribution of contraceptives to single individuals was held unconstitutional. The Court stated that the right of privacy includes "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.

The First Circuit has interpreted the right of privacy to include the right to voluntary sterilization. Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973). See also Comment, Prohibition of Sterilization: Hospital Prerogative or Negative Pregnant?, 54 B.U.L. Rev. 828, 833-37 (1974).

Most recently, the right of privacy was further enhanced by the decision in Carey v. Population Services International, 97 S. Ct. 2010 (1977). In Carey, a New York statute which prohibited the sale and distribution of contraceptives to persons under sixteen years of age was found unconstitutional. The Court stated that a minor's right to privacy is constitutionally protected from unreasonable state interference. It noted that "since the state may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed." Id. at 2021. The state's interest in discouraging early sexual behavior was found to be insufficient to justify the governmental intrusion. Id. Relying on Griswold and Eisenstadt, the Court declared unconstitutional that portion of the statute which made it a crime for anyone but a licensed pharmacist to distribute contraceptives to persons under sixteen years of age. The Court reasoned that the law impinged upon the fundamental right of individuals to decide whether or not to bear or beget children and that the law was not justified by any compelling state interest. Id. at 2019.


18. "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." 410 U.S. at 164. The only exception acknowledged by the Court was that the state may impose a requirement that the physician performing the abortion be one currently licensed by the state. Id. at 165.
terest in protecting the health of the mother becomes compelling, and the state may implement any reasonable regulation of the abortion procedure to protect this interest. The state’s interest in protecting the life of the fetus becomes compelling at the point of viability of the fetus. After that point the state may regulate the abortion procedure to the degree of prohibiting all but those abortions necessary to save the life of the mother.

Unfortunately, Wade and Bolton did not resolve the controversy surrounding the abortion issue. A wealth of litigation arose attempting to define the scope of a woman’s fundamental right articulated by the Wade Court. Courts dealing with the same issue and similar circumstances often reached opposite conclusions. For years, the Supreme Court deliberately avoided reinvolution in this area. Nevertheless, during the past year, the Burger Court heard several abortion cases prior to its consideration of Beal, Maher and Poelker.

In Planned Parenthood Association of Missouri v. Danforth, the Supreme Court considered “a logical and anticipated corollary to Roe v. Wade . . . and Doe v. Bolton . . . .” The holding affirmed and expanded a woman’s right to be free from state interference with her abortion decision. The Court found unconstitutional a Missouri statute which required as a condition for abortion the consent of the woman’s spouse or, in the case of an unmarried minor, the consent of a parent or person in loco parentis. The Court reasoned...
that, as a result of its holding in *Wade*, a state does not have the constitutional authority to delegate to itself or to a third party, an absolute veto over the abortion decision of the woman and her physician during the first trimester of pregnancy. However, two other statutory provisions were upheld. A provision requiring the woman's written consent before receiving an abortion was not an infringement on the woman's exercise of her abortion decision, despite the fact that prior written consent was not required for any other surgical procedure under Missouri law. The basis for the Court's decision was the belief that because the abortion decision is such an important one, it is imperative that it be made with full knowledge of its nature and consequences. Additionally, the Court found that a statutory provision requiring various reports and records to be kept by physicians and clinical facilities performing abortions created no interference with either a woman's abortion decision or the physician-patient relationship. Rather, it served the state's interest in protecting maternal health.

In *Bellotti v. Baird*, the Court confronted the constitutionality of a state law which regulated a minor's access to abortions. The Court, however, refused to address this issue until the state courts had an opportunity to interpret the statute and determine whether the law gave the minor's parents an absolute veto over the abortion decision, or merely required parental consultation.

Finally, in *Singleton v. Wulff*, two physicians who provided abortion services for Medicaid recipients challenged the constitutionality of a Missouri statute which prohibited the use of Medicaid funds for elective abortions. The Supreme Court affirmed the appellate court's finding that the physicians had standing to assert the rights of their female patients with regard to governmental interference with the abortion decision. In so doing, the Court expanded the concept of a physician's standing from the purely criminal context, as it was originally enunciated in *Bolton*, to the broad civil area as well. The *Singleton* Court, nevertheless, refused to rule on the

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29. *Id.* at 74.
30. *Id.* at 69.
31. *Id.* at 67.
34. *Id.* at 151.
36. *Id.* at 118.
constitutionality of the statute in question because of a procedural error by the appellate court. Therefore, the lower court’s holding that the statute was “obviously unconstitutional” was reversed, and the case was remanded to the district court for further proceedings.

As a result of the decisions in Danforth, Bellotti, and Wulff, many issues raised by Wade and Bolton were finally resolved. However, an important question remained unanswered: whether or not a statute which prohibits Medicaid funding of first trimester elective abortions unconstitutionally interferes with an indigent woman’s abortion decision, and her equal protection right. Shortly thereafter the Court addressed both the constitutional and statutory issues presented by a state’s refusal to pay for elective abortions with Medicaid funds. Beal v. Doe settled the judicial controversy regarding the construction of Title XIX and paved the way for the resolution of the constitutional question in Maher v. Roe.

MEDICAID AND THE STATE

Title XIX of the Social Security Act establishes the Medical Assistance Program (Medicaid). The purpose of the Medicaid program is to implement medical assistance programs for individuals unable to pay for the costs of “necessary medical services.” In order to achieve this purpose, Congress authorized the appropriation of federal funds to states that elect to participate in the plan. The program operates as a vendor payment program, i.e., providers of health care services are reimbursed by Medicaid. Because Medicaid does not directly provide health care services, it cannot guarantee that providers of such services will be available or accessible in a given area.

The Medicaid program is based on a scheme of “cooperative federalism.” Under this system states have generally been given wide

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37. The Court decided that the Eighth Circuit Court of Appeals had erred in reaching the merits of the case and should have remanded it to the district court for determination of the statute’s constitutionality. Id. at 119-21.
38. Id. at 121.
40. See note 3 supra.
43. Id. § 1396 (1970), as amended, (Supp.IV 1974).
44. Id.
45. Id. § 1396d(a) (1970), as amended, (Supp.IV 1974).
46. Under a scheme of cooperative federalism, the state and federal government work together to attain a common objective. See Dandridge v. Williams, 397 U.S. 471, 478 (1970); King v. Smith, 392 U.S. 399, 316 (1968).
administrative discretion, limited only by expressed and implied congressional policies. On the federal level the Medicaid program is administered by the Secretary of Health, Education and Welfare, and Medicaid distributions are handled by the Health Care Financing Administration. On the state level, only one agency is required to perform administrative services for the program.

State participation in the Medicaid program is voluntary. However, once a state joins, certain statutory requirements must be met. Although a state may determine to whom and to what extent medical assistance will be provided, it must do so under standards that are reasonable and consistent with the objectives of the program. These standards must provide for simplicity of administration and the best interest of the recipient and must prevent the unnecessary utilization of services. Additionally, participating states must provide specified minimum aid to certain groups of people classified as "categorically needy," including the blind, aged, disabled, and families with dependent children. Assistance must be furnished to the categorically needy in the following areas: outpatient hospital services, in-patient hospital services (except for those in mental or tuberculosis institutions), screening and diagnosis of minors, laboratory and X-ray services, family planning serv-

47. See New York Dep't of Soc. Servs. v. Dublino, 413 U.S. 405 (1973) (upholding as consistent with the Social Security Act (SSA) one state's requirement that individuals receiving Aid to Families with Dependent Children (AFDC) accept employment as a condition for receipt of aid); Jefferson v. Hackney, 406 U.S. 535 (1972) (upholding as consistent with SSA a state's policy of computing and granting different standards of need to different categorically needy groups); Dandridge v. Williams, 397 U.S. 471 (1970) (upholding as consistent with SSA a state's regulation of establishing a maximum amount of AFDC benefits available to any one family).


49. 2 Medicare & Medicaid Guide (CCH) ¶ 14,755 (1977). As of March 8, 1977, the administrative duties for the Medicare program were transferred from the Social and Rehabilitation Services division to the Health Care Financing Administration (HCFA). The HCFA has assumed the duties for the Medicare program as well.

51. Id. § 1396a (1970), as amended, (Supp.IV 1974).
52. Id. § 1396a(a)(17) (1970), as amended, (Supp.IV 1974).
53. Id. § 1396a(a)(19) (1970).
55. Id. § 1396a(a)(10)(A) (1970), as amended, (Supp.IV 1974). The term "categorically needy" is derived from the fact that these individuals receive assistance under other categories of the Social Security Act.
ices and supplies, and physicians’ services.  

In addition to the categorically needy, the “medically needy” may also receive services under the Medicaid program. Generally, the medically needy are those individuals whose incomes preclude them from being considered categorically needy, but who are still unable to pay their own medical expenses. A state has the discretion to determine what type of assistance it can afford to supply to the medically needy. However, once a state decides to provide a particular service to both the categorically and the medically needy, the services provided to all recipients must be equal.

The Cases

Beal v. Doe: Factual Background

Participating in the aforementioned Medicaid program, the state of Pennsylvania elected to provide medically needy persons with the same benefits that were provided for the categorically needy, with the exception of screening and diagnosis of children. One of the state’s Medicaid regulations limited assistance to cover only certifiable medically necessary abortions.

Respondents qualified for Pennsylvania medical assistance, but were denied Medicaid funding for their abortions because they failed to obtain a physician’s certificate stating that the abortions were medically necessary. Thereafter, respondents filed suit against the Pennsylvania Department of Public Welfare, seeking declaratory and injunctive relief. They alleged the state Medicaid regul-

58. 2 Medicare & Medicaid Guide (CCH) ¶ 14,211 (1976).
59. For the medically needy, the state may provide any one or all of the services required to be provided for the categorically needy, as well as other optional services. 42 U.S.C. § 1396a(a)(13)(C)(1970), as amended, (Supp.IV 1974).
60. Id. § 1396a(a)(10)(B), (C) (1970), as amended, (Supp.IV 1974). This provision is commonly referred to as the “comparability standard.”

61. Under the Pennsylvania Medicaid program, an abortion is considered to be medically necessary if:

1. There is documented medical evidence that continuation of the pregnancy may threaten the health of the mother; (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 a 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.


tion was inconsistent with Title XIX because it permitted the state to circumvent the funding of a necessary medical service and unreasonably interfered with the professional judgment of the attending physician regarding the appropriate method of treatment for his/her patient. Furthermore, the respondents claimed that the regulation was violative of the equal protection clause of the fourteenth amendment and the woman’s right to privacy articulated in Wade.

A three-judge district court decided that the Pennsylvania regulation limiting Medicaid funding to medically necessary abortions was consistent with Title XIX. This decision was predicated upon congressional silence concerning specific authorization of medical assistance for abortions and the pervasive scheme of cooperative federalism. The court, however, agreed with the respondents’ constitutional argument and declared the regulation unconstitutional as applied during the first trimester of pregnancy, because it created “an unlawful distinction between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by abortion.”

On appeal, the Third Circuit reversed the lower court decision on the statutory issue and did not, therefore, reach the constitutional claim. The appellate court held the regulation to be inconsistent with Title XIX because it accorded unequal treatment to pregnant women by prohibiting funding of non-therapeutic abortions while allowing payment for therapeutic abortions. Additionally, the regulation imposed upon pregnant women seeking abortions the “least voluntary method of treatment,” while failing to impose any similar limitation upon other Medicaid recipients. The court also noted

64. 97 S. Ct. at 2370.
65. 376 F. Supp. at 182-86.
66. The Wohlgemuth court reasoned that “while nowhere in the Act is there a specific provision authorizing medical assistance payments for abortions, there are a number of sections that, when considered together with corollary regulations, must be interpreted to permit reimbursement for the costs of abortions performed.” 376 F. Supp. at 184. Among the sections listed by the court are 42 U.S.C. § 1396d(a)(1), pertaining to in-patient hospital services, 42 U.S.C. § 1396d(a)(5), pertaining to physician’s services, 42 U.S.C. §1396d(a)(6), pertaining to medical care or other remedial care recognized by state law and furnished by a licensed practitioner within the scope of his practice as defined by state law, and 42 U.S.C. § 1396d(a)(4), pertaining to family planning services.
67. 376 F. Supp. at 184.
68. Id. at 186-92.
69. Id. at 191.
70. Doe v. Beal, 523 F.2d 611 (3d Cir. 1975). The case caption was changed pursuant to Fed. R. Civ. P. 25(a)(1), after the appeal had been docketed in the court of appeals.
71. 523 F.2d at 619.
72. Id.
73. Id. at 621-23.
that the Pennsylvania regulation unreasonably interfered with the professional judgment of the attending physician.\textsuperscript{74}

In reaching this decision, the court was of the view that under the Medicaid program a state has the discretion to select the necessary medical conditions to be covered. However, in order to be consistent with congressional intent, the specific treatment of those conditions must be left to the judgment of the attending physician.\textsuperscript{75} Furthermore, reasonable regulations of the methods of treatment are allowed if they are consistent with Title XIX.\textsuperscript{76}

When the Pennsylvania regulation was compared to these standards, the appellate court found that the state, by electing to pay for childbirth and therapeutic abortions, had determined that pregnancy was a necessary medical condition covered by the Medicaid program. Once this determination had been made, Pennsylvania could not, consistent with Title XIX, limit the methods available to an attending physician for the treatment of this condition.\textsuperscript{77}

\textit{Supreme Court Opinion}

In deciding whether Title XIX requires states to subsidize the costs of non-therapeutic abortions, the United States Supreme Court considered the language of the statute, the state interests involved, congressional intent, and existing HEW interpretations. The Court’s examination revealed two key factors: (1) the absence of any mention of abortion, or other medical procedure, in the language of Title XIX; and (2) a state’s wide discretion under the Medicaid program to select the type of medical assistance available.\textsuperscript{78} The Court declared that “nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care.”\textsuperscript{79} It acknowledged that “serious statutory questions” would be raised if a state refused to provide necessary medical services, as opposed to “unnecessary—though perhaps desirable—medical services.”\textsuperscript{80}

\textsuperscript{74} Id. at 621-22.
\textsuperscript{75} Id. at 620. In support of its determination that it was the intent of Congress to confer upon the attending physician the primary authority for determining the proper treatment for an individual, the court referred to the report by the Senate Committee on Finance concerning the role of the physician in the Medicaid and Medicare program: “The committee’s bill provides that the physician is to be the key figure in determining utilization of health services—and provides that it is a physician who is to decide upon admission to a hospital, order tests, drugs, and treatments, and determine the length of stay.” S. Rep. No. 404, 89th Cong., 1st Sess., reprinted in \textit{1965 U.S. CODE CONG. & AD. NEWS}, 1943, 1986; 523 F.2d at 618.
\textsuperscript{76} 523 F.2d at 621.
\textsuperscript{77} Id. at 621-22.
\textsuperscript{78} 97 S. Ct. at 2371. See notes 43, 49-58 \textit{supra}, and accompanying text.
\textsuperscript{79} 97 S. Ct. at 2371.
\textsuperscript{80} Id.
However, after examining the state regulation, the Court found that Pennsylvania’s rule did provide for medically necessary services and, thus, was consistent with Title XIX.81

The Court’s decision was made without benefit of a clear-cut definition, since Congress has never stated what constitutes a medically necessary service within the meaning of Title XIX. One federal district court rejected the contention that the term defines the type of assistance to be provided under the Medicaid program, and suggested that the term modifies a person’s eligibility for Medicaid assistance.82 Apparently, the Supreme Court placed some reliance on the fact that Pennsylvania’s definition of a medically necessary abortion included the standards set forth in Doe v. Bolton;83 Bolton enumerated the factors that a physician should take into consideration in determining whether an abortion is medically necessary.84

The Court also found the statute reasonable because it promoted a valid state interest in fostering childbirth.85 This interest was sufficient to overcome the argument that the regulation was inconsistent with the standards of Title XIX because it could not be justified on a health86 or economic87 basis.

The contention that the regulation interfered with the professional judgment of the physician was relegated to footnote discussion.88 This regulation did not interfere with the physician’s determination of the necessary treatment. The attending physician was still free to determine the best treatment for the patient. The regulation merely precluded state financial coverage for those abortions that did not meet the medical necessity requirements.89

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81. Id. at 2371-72.
83. 97 S. Ct. at 2369 n.3. See also note 84 infra.
84. Whether “an abortion is necessary” is a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.
410 U.S. at 192.
85. Id. at 2372.
86. An abortion during the first trimester of pregnancy poses less of a threat to the woman’s health than childbirth. See note 156 infra.
87. Under Medicaid, the average cost of an abortion during the first trimester of pregnancy is $150.00 and during the second trimester, $350.00. See generally HEW Memorandum, 120 Cong. Rec. 19678 (daily ed. Nov. 20, 1974). On the other hand, the average costs of childbirth and care for the child’s first year is $2200.00. See generally Senate Debate on § 209 of Department of Labor, Health, Education and Welfare Appropriations Act, 122 Cong. Rec. 10795 (daily ed. June 28, 1976).
88. 97 S. Ct. at 2371 n.9.
Furthermore, the Court found no congressional intent to mandate the funding of elective abortions through Title XIX. This position is correct. At the time Title XIX was passed, elective abortions were illegal in most states; thus, it is improbable that Congress proposed mandatory, rather than optional funding of elective abortions under their Medicaid programs. Moreover, it is consistent with the wide administrative discretion afforded the states under the Medicaid program to infer that when Congress amended Title XIX by adding family planning services to the categories of required minimum coverage for the categorically needy, the intent was to permit, but not require, coverage of elective abortions. If Congress had wanted to require the funding of non-therapeutic abortions under this or any other section of Title XIX, it could have either specifically included abortion as a method of family planning or explicitly mentioned that elective abortions would be covered under one or more of the categories of services offered. However, Congress did not do so, despite the fact that on other occasions it expressly declared that elective abortions were excluded from federal funding.

Finally, the Court relied on the statutory interpretations adopted by the Department of Health, Education and Welfare that abortion subsidies may be allowed, but are not required by Title XIX:

The position taken . . . on abortion is that the Social Security Act and the HEW regulations provide for federal matching of state

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89. One section of the Pennsylvania regulation, which requires the concurring opinions of two physicians besides the woman's attending physician before the funding of a therapeutic abortion would be approved, was considered as possibly violative of Title XIX. Therefore, the Court, after vacating the appellate court decision, remanded the case for further consideration of this requirement. 97 S. Ct. at 2373.
90. 97 S. Ct. at 2372.

The constitutionality of § 209, commonly known as the Hyde Amendment, was challenged in McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976); Doe v. Mathews, 420 F. Supp. 865 (D.N.J. 1976); Doe v. Mathews, Civil No. 76-1835 (D.D.C. Oct. 21, 1976). In McRae, § 209 was declared unconstitutional and an injunction, effective nation-wide, was issued prohibiting the enforcement of § 209. The court was of the view that the section infringed upon the exercise of a woman's fundamental right to decide whether or not to obtain an abortion. However, as a result of the holdings in Beal and Maher, the decision in McRae was vacated and the case remanded to the district court for further consideration. Califano v. McRae, 97 S. Ct. 2993 (1977).
expenditures for all kinds of medical care and services, including inpatient hospital services, outpatient hospital services, physician services, drugs, etc. If the state Medicaid program pays for these services whether for abortion, or any other medical procedure, the federal Government shares the cost with the state.\textsuperscript{44}

Unable to uncover any errors that would render the agency's interpretation invalid, the Court adhered to case precedent\textsuperscript{45} and affirmed this administrative interpretation. Thus, the \textit{Beal} decision does not prohibit a state from electing to provide Medicaid coverage for non-therapeutic abortions; it merely holds that a state is not required to afford such coverage.\textsuperscript{46}

Justice Brennan, in a dissenting opinion joined by Justices Marshall and Blackmun, believed that an elective abortion constitutes a medically necessary treatment for the condition of pregnancy.\textsuperscript{47} The dissenters reasoned that abortion and childbirth are two alternate methods for treating pregnancy.\textsuperscript{48} Title XIX,\textsuperscript{49} congressional intent,\textsuperscript{50} and judicial precedent\textsuperscript{101} leave the abortion decision up to the woman and her doctor, free from state interference, at least during the first trimester of pregnancy. Consequently, if a state should elect to fund childbirth and therapeutic abortions as necessary medical services under its Medicaid program, logically it should be required to fund elective abortions as well.\textsuperscript{102}

The minority also was of the view that Congress, by enacting the 1972 amendment to Title XIX, had evidenced an intent to require the funding of abortions by Medicaid.\textsuperscript{103} As a result of this interpretation of Title XIX, the dissenters considered HEW's construction of the Act to be "patently inconsistent with the controlling statute."\textsuperscript{104} Finally, the justices feared the practical effect of the majority's construction of Title XIX would be disastrous. Pregnant indigents, faced with the option of either carrying their pregnancies full term and having Medicaid pay the bill, or having an elective abor-
tion paid out of their personal resources, would invariably choose the former. As a consequence, these indigents would be forced to bear children that they otherwise would not have borne.¹⁰⁵

In *Beal*, the Court narrowly construed the Medicaid regulation. It was reluctant to find a congressional mandate in the absence of any express or implied indication that Congress intended that elective abortions be included in Medicaid services. The *Beal* decision strengthened the policy of cooperative federalism and was consistent with prior judicial decisions that upheld a wide grant of discretion to the states in administering joint federal-state programs.¹⁰⁶ The ultimate decision whether elective abortions should be funded with public monies was left to publicly-elected legislatures which, in the Court's view, are the best judges of controversial socio-economic policy questions.¹⁰⁷ With the resolution of the statutory issue in *Beal*, the way was cleared for determination of the constitutional question presented by Connecticut's refusal to fund elective abortions under its Medicaid program in *Maher v. Roe*.¹⁰⁸

**Maher v. Roe: Factual Background**

In *Maher*, appellees challenged a Connecticut welfare regulation, similar to the Pennsylvania regulation in *Beal*, which limited Medicaid funding of first trimester abortions to those that were medically necessary.¹⁰⁹ Appellees were denied abortion funding because they were unable to obtain a physician's certificate of medical necessity. The appellees argued that the regulation was inconsistent with Title XIX and violative of their fourteenth amendment due process and equal protection rights. They contended that childbirth and abortion should be treated equally under the Medicaid program. Thus, the state provision represented an unconstitutional policy prefer-

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¹⁰⁵. *Id.* at 2376.
¹⁰⁶. *See note 47 supra.*
¹⁰⁷. 97 S. Ct. at 2372-73 n.15, 2385-86, 2392.
¹⁰⁹. The Department makes payment for abortion services under the Medical Assistance (Title XIX) Program when the following conditions are met: 1. In the opinion of the attending physician the abortion is medically necessary. The term "Medically Necessary" includes psychiatric necessity. 2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy . . . . 3. The written request for the abortion is submitted by the patient, and in the case of a minor, from [sic] the parent or guardian. 4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services.

ence in that it funded the costs of childbirth, but excluded the costs of abortion.\textsuperscript{110}

The trial court found the regulation to be inconsistent with the requirements of Title XIX,\textsuperscript{111} but that judgment was reversed on appeal.\textsuperscript{112} On remand for consideration of the constitutional issue, the district court was unable to find an independent constitutional right to a state-subsidized abortion. Nonetheless, the court declared the Connecticut regulation violative of the equal protection clause of the fourteenth amendment.\textsuperscript{113} The court premised its finding upon its interpretation of \textit{Wade} and \textit{Bolton} that "abortion and childbirth . . . are simply two alternate medical methods of dealing with pregnancy."\textsuperscript{114} Thus, if the state chose to pay for childbirth expenses under Medicaid, it could not, consistent with \textit{Wade}, \textit{Bolton}, and the fourteenth amendment, refuse to fund abortions. Moreover, relying on the penalty analysis promulgated in \textit{Shapiro v. Thompson}\textsuperscript{115} and \textit{Memorial Hospital v. Maricopa County},\textsuperscript{116} the lower court concluded that the Connecticut regulation penalized the exercise of the indigent woman's right to decide to terminate her pregnancy in that it "weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion . . . [and] thus infringes upon a fundamental interest."\textsuperscript{117}

\textbf{Supreme Court Opinion}

In considering the constitutionality of the Connecticut regulation, the Supreme Court first had to decide which equal protection standard would be applied. The fourteenth amendment's equal protection clause forbids a state from invidiously discriminating between two similarly situated groups of individuals. Under the traditional two-tiered equal protection analysis,\textsuperscript{118} if a classification infringes

\begin{footnotesize}
\begin{enumerate}
\setcounter{footnote}{109}
\item Id. at 2380.
\item Roe v. Norton, 522 F.2d 928 (2d Cir. 1975).
\item Id. at 663 n.3. See also note 98 supra and accompanying text.
\item 394 U.S. 618 (1969). See notes 128-33 infra and accompanying text.
\item 415 U.S. 250 (1974). See notes 128-33 infra and accompanying text.
\item 408 F. Supp. at 663-64.
\end{enumerate}
\end{footnotesize}
upon a "fundamental right" or involves a "suspect classification," the classification will be subject to strict judicial scrutiny. Unless a compelling state interest justifies the disparate treatment, the classification will be constitutionally impermissible. Alternatively, where no fundamental right or subject classification is involved, the classification will be upheld, despite its discriminatory effect, provided it is rationally related to a legitimate state purpose.

Applying the two-tiered analysis, the Court determined that the Connecticut regulation did not discriminate against a suspect class. This determination accords with the Court's consistent refusal to formally declare suspect any classification based solely on wealth. However, there are cases where a state has been forced to remove financial obstacles in order to make a fundamental right more accessible for indigents. In the criminal context, Griffin v. Illinois held that a state could not impose court and transcript fees which would effectively bar an indigent's access to his/her fundamental right to a criminal appeal. In the civil area, however, the Court is reluctant to abolish economic barriers for indigents. An exception is Boddie v. Connecticut, where the Court found that indigents cannot be precluded from divorce by inability to pay filing fees. Subsequent decisions narrowly construed the Boddie rationale. Thus, the Court will only eliminate financial obstacles where the government monopolizes the services involved and creates the financial barriers sought to be abolished. In Maher, the abortion services and the obstacles in question were neither monopolized nor


121. See authorities cited in note 118 supra.

122. 97 S. Ct. at 2381.


created by the state. The financial barrier is created by the physician demanding payment for his/her services. Therefore, *Maher* is distinguishable from prior cases where financial barriers have been removed so that indigents could more easily exercise a fundamental right.

The *Maher* Court also rejected the appellees’ contention that the Connecticut regulation penalized the exercise of a woman’s right to decide whether or not to terminate her pregnancy.\(^{128}\) The penalty analysis was first applied in *Shapiro v. Thompson*,\(^ {129}\) and later in *Memorial Hospital v. Maricopa County*,\(^ {130}\) to invalidate state statutes which established durational residency requirements as a prerequisite for the receipt of welfare benefits.\(^ {131}\) In both cases, the Court held that the statutes in question penalized the exercise of an individual’s fundamental right to travel interstate by denying them the “basic necessities of life.”\(^ {132}\) *Shapiro* and *Maricopa* are, however, distinguishable from and inapplicable to the facts in *Maher*. First, unlike the statutes in *Shapiro* and *Maricopa*, the Connecticut regulation does not deny any basic necessity of life to indigent women who obtain an elective abortion. Furthermore, as noted by the *Maher* Court, “*Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers.”\(^ {133}\) Likewise, Connecticut does not penalize the right of a woman to decide whether or not to obtain an abortion by refusing to pay for an elective abortion.

The Court next determined that the regulation did not impinge upon a fundamental right.\(^ {134}\) In order to justify this decision, the Court clarified the scope of the woman’s right involved and the regulation’s effect upon it. The Court noted that a woman’s freedom to decide to obtain an abortion is protected from “unduly burdensome” state interference.\(^ {135}\) Examples of such interference are the criminal abortion statute in *Roe v. Wade*,\(^ {136}\) and the spousal consent requirement in *Planned Parenthood Association of Missouri v. Danforth*,\(^ {137}\) which created absolute obstacles to a woman’s abortion

\(^ {128}\) 97 S. Ct. at 2383 n.8.
\(^ {130}\) 415 U.S. 250 (1974).
\(^ {131}\) In *Shapiro*, the benefits in question were basic welfare benefits, whereas in *Maricopa County*, the benefits involved non-emergency medical care.
\(^ {132}\) 394 U.S. at 627; 415 U.S. at 269.
\(^ {133}\) 97 S. Ct. at 2383 n.8.
\(^ {134}\) Id.
\(^ {135}\) Id. at 2382.
\(^ {136}\) 410 U.S. 113 (1973). *See also* notes 13-21 *supra* and accompanying text.
\(^ {137}\) 428 U.S. 52 (1976). *See also* notes 26-32 *supra* and accompanying text. In his dissent in *Maher*, Justice Brennan contended that in *Danforth*, the spousal consent requirement that
decision, and the state prohibitions on the sale and distribution of contraceptives in *Carey v. Population Services International*, which, though not an absolute interference, was nonetheless found to be constitutionally impermissible.

Distinguishing the effect of the Connecticut regulation upon the woman’s right to decide whether or not to obtain an abortion, the Court stated that the right “implies no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.” Thus, a state regulation may encourage a woman to carry her pregnancy to term, and still not create an unduly burdensome interference with her abortion decision. Any obstacles a poor woman may have in obtaining an abortion are pre-existent and not the result of the state’s action. The woman is still free to use private means, if available, to procure an abortion.

In this respect, the *Maher* decision is consistent with prior decisions inferring that there is a distinction “between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.” For example, in *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, state laws which prohibited, respectively, the teaching of a foreign language in public schools and the sending of children to private schools were found to be impermissible restrictions on fundamental interests protected by the fourteenth amendment. However, neither case held that a state was prohibited from making a policy choice which encouraged a preferred course of action. Consequently, it is constitutionally permissible for a state to create school curricula which provide for the instruction of one language and not another, for a state to fund public and not private education, or, as the

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138. 97 S. Ct. at 2381. See also note 15 supra and accompanying text.
139. 97 S. Ct. at 2382.
140. Id. at 2382-83.
141. Id. Mr. Justice Blackmun, in his dissent in *Beal*, found the Court’s belief that a penniless pregnant woman may go elsewhere to procure an abortion reminiscent of “Let them eat cake.” Id. at 2399.
142. Id. at 2383.
143. 268 U.S. 510 (1925).
144. 262 U.S. 390 (1923).
145. The fundamental right involved in *Meyer* and *Pierce* was the right of a parent to raise and educate his/her child as he/she sees fit.
Maher Court reasoned, for a state to pay the costs of childbirth but not the costs of abortions.

As a result of the Court's determination that the Connecticut regulation did not discriminate against a suspect class or infringe upon a fundamental right, strict scrutiny was not required and no compelling state interest was necessary to justify the classification. Instead, the mere "rational basis" standard was applicable and the regulation would be constitutional if it promoted a legitimate state interest. This less rigorous standard was easily met, since the Court found the regulation furthered the state's "strong and legitimate interest in encouraging normal childbirth." Thus, the Connecticut regulation withstood the equal protection challenge.

Justice Brennan's dissent, joined by Justices Blackmun and Marshall, viewed the majority's decision as an erosion of Wade and Bolton. The dissenters believed that the practical effect of the financial pressure created by the state regulation would coerce pregnant indigent women into bearing unwanted children, thereby inhibiting their exercise of the abortion decision.

The traditional bifurcated equal protection analysis was rejected by Justice Marshall in his dissent in Beal v. Doe. The alternate test recommended by Marshall involves balancing three factors: "the importance of the governmental benefits denied, the character of the class, and the asserted state interests." In Justice Marshall's opinion, the application of this standard to the state welfare regulations in Beal and Maher, and the public hospital policy in

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146. 97 S. Ct. at 2385. In a footnote reference, the Court indicated that "[i]n addition to the direct interest in protecting the fetus, a State may have legitimate demographic concerns about its rate of population growth . . . [which] in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth." Id. at 2385 n.11.

147. The Court also upheld Connecticut's requirements of prior written request by the pregnant woman and prior authorization for the abortion by the Department of Social Services. It cited Danforth in support of its decision on the former requirement and justified its determination concerning the latter requirement on the grounds that it is reasonable for a state to require a showing of medical necessity for an abortion and not for other medical procedures because only an abortion involves the termination of a potential human life. 97 S. Ct. at 2386.

148. Id. at 2387.

149. Id. at 2396.

Non-Therapeutic Abortions

Poelker, would lead to their invalidation for three reasons: (1) the Medicaid benefits denied are of the utmost importance and have far-reaching effects upon the lives of the recipients; (2) the regulation disparately affects the poor and the non-white; and (3) there is no state interest sufficient to overcome the combined effects of the first two factors upon the constitutional rights involved.

In contrast to the Supreme Court, every other federal court which has considered the constitutionality of a classification that prohibited Medicaid funding for elective abortions while paying for childbirth expenses, found such a classification violative of the equal protection clause of the fourteenth amendment. Furthermore, almost every court reaching this conclusion applied a strict scrutiny /compelling state interest analysis to arrive at its decision.

Clearly, if the Maher Court had found that strict scrutiny analysis was appropriate, there could be no compelling state interest during the first or second trimester of pregnancy which would justify the disparate effect of this funding regulation upon the rights of pregnant indigents. Wade emphatically declared that during the first trimester of pregnancy there exists no compelling state interest which justifies a state's interference with a woman's abortion decision. During the second trimester, when a state may regulate the abortion decision to protect the maternal health, no compelling state interest could be sustained because during this period an elective abortion is safer to maternal health than childbirth.

151. 97 S. Ct. at 2398.
152. Id. at 2396-98.
155. 410 U.S. at 103.
156. During the 13th through 15th week of pregnancy, the mortality rate for abortions was
more, during the second trimester of pregnancy there is no economic justification for the regulation because the costs of an elective abortion at this time are much less than the costs of childbirth.\(^157\) Therefore, only during the third trimester would the state’s interest in the life of the fetus become sufficiently compelling to overcome the impact of the restrictive regulation upon the woman’s fundamental right.\(^158\)

**Poelker v. Doe**

In *Poelker v. Doe*,\(^159\) the Supreme Court considered St. Louis’ policy of prohibiting publicly financed hospitals from providing services for elective abortions while furnishing hospital services for childbirth. The city policy was derived from the combination of a policy directive issued by the mayor of St. Louis forbidding the performance of elective abortions, and a staffing practice at the public hospital whereby the physicians and medical students in the obstetrics—gynecology department were recruited from a Jesuit-run medical school opposed to abortion.\(^160\) Because the issue in *Poelker* was constitutionality identical to that in *Maher v. Roe*,\(^161\) the Court relied on the reasons announced in *Maher* to support its finding that the St. Louis scheme was constitutionally permissible as a justifiable expression of a policy preference for childbirth.\(^162\)

Predictably, Justices Brennan, Marshall and Blackmun found the city’s policy to be an unconstitutional interference with a

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\(^{157}\) See note 87 supra.


\(^{159}\) 97 S. Ct. 2391 (1977) (per curiam).

\(^{160}\) *Id.* at 2392.

\(^{161}\) 97 S. Ct. 2376 (1977).

\(^{162}\) 97 S. Ct. at 2392-93.
Non-Therapeutic Abortions

woman's abortion decision.\textsuperscript{163} The policy was thought to create a substantial and insurmountable barrier, which coerces an indigent woman into having children she might not otherwise bear.\textsuperscript{164}

The \textit{Poelker} decision may have a far-reaching impact upon the availability and accessibility of elective abortions throughout the United States. As noted by the dissenters, "during 1975 and the first quarter of 1976 only about 18\% of all public hospitals in the country provided abortion services, and in 10 States there were no public hospitals providing such services."\textsuperscript{165} In light of these statistics, if more public hospitals that presently provide elective abortion services adopt restrictive policies similar to the one in \textit{Poelker}, the result could be especially devastating to the pregnant indigent seeking an abortion. The non-indigent woman seeking an elective abortion may be inconvenienced by the costs of traveling to another area or going to a private hospital to obtain her abortion; for an indigent woman these costs may be prohibitive.

Furthermore, if an abortion-restrictive policy is adopted in public hospitals which have physicians on their staffs willing to perform elective abortions, unless these physicians are also associated with private facilities that provide abortion services, this action will reduce the number of physicians available to perform abortions. The availability and accessibility of more free private clinics which provide abortion services will help to offset \textit{Poelker}'s adverse impact upon the pregnant indigent seeking an elective abortion. However, in areas where no such clinics exist, or in cases where an abortion performed in a non-hospital setting will create risks to the woman's health, the prohibitive abortion policy of the local hospital may make it impossible for the pregnant indigent to obtain the medically safe abortion she desires.

**POST—Beal Developments**

The decisions in \textit{Beal}, \textit{Maher}, and \textit{Poelker} reflect the Burger Court's policy of deferring to the legislature for the resolution of controversial socio-economic issues. Although the abortion trilogy is harsh and unsympathetic toward the plight of pregnant indigents, the holdings are legally justifiable. The Court simply delegated to the legislature the final task of determining whether public funds should subsidize elective abortions for the poor. The legislative re-

\begin{itemize}
\item \textsuperscript{163} Id. at 2393.
\item \textsuperscript{164} Id. at 2394.
\item \textsuperscript{165} Sullivan, Tietze, & Dryfoos, \textit{Legal Abortion in the United States, 1975-1976}, 9 FAMILY PLANNING PERSPECTIVES 116, 121, 128 (1977); 97 S. Ct. at 2393 n.1. (Brennan, J., dissenting).
\end{itemize}
response to Beal and Maher indicates that the federal and state legislatures favor reducing, rather than increasing, the allocation of public monies for non-therapeutic abortions.

After Wade and Bolton, strong political pressure was applied to legislators to vote for more restrictive abortion funding legislation.\textsuperscript{166} Thus, the legislative response to Beal and Maher was immediate and extensive. Shortly after the decisions were announced, the United States Senate voted to prohibit the use of fiscal 1978 funds for all abortions except those where the life of the mother is endangered, and in the cases of rape, incest or medical necessity.\textsuperscript{167} Similarly, the Illinois legislature passed a bill that would amend the Illinois Public Aid Code to exclude abortions from authorized medical assistance unless a physician determined that an abortion was necessary to preserve the life of the mother.\textsuperscript{168} To date, more than twenty state legislatures have voted to eliminate public funding of non-therapeutic abortions.\textsuperscript{169}

If the Senate’s resolution is adopted, there will be no federal funds for elective abortions in fiscal 1978. States, however, may still opt to pay for elective abortions under their Medicaid programs. The major difference will be that the entire cost of the elective abortion will be borne by the state itself. Unfortunately, as previously noted, many of the states which originally provided Medicaid funding for elective abortions have, since the decisions in Beal and Maher, voted to cut off further funding for such procedures. Nevertheless, there may be a procedure which pro-abortion forces can use to assure partial funding. The exception depends upon the definition of the term “medical necessity” used in the various federal and state bills. If a bill does not limit medically necessary abortions to those resulting from certain specified occurrences, but instead leaves this decision to the total discretion of the attending physician, then more types of abortion will come within the definition of the term. For

\begin{itemize}
  \item \textsuperscript{166} See note 93 supra and accompanying text.
  \item \textsuperscript{167} S. Res. 605, 123 Cong. Rec. 11050 (daily ed. June 29, 1977).
  \item \textsuperscript{168} H.B. 333 Daily Legislative Report (CCH) Rpt. No. 99.77 June 27, 1977. The bill was subsequently vetoed by Illinois Governor James Thompson. However, the Illinois Senate resoundingly overruled the veto.
  \item \textsuperscript{169} A survey conducted by Planned Parenthood Federation of America disclosed that since the Supreme Court’s decisions in Beal and Maher, more than twenty states have eliminated public funding of elective abortions for indigent women. These states will still pay for abortions necessary to save the woman’s life. The states that have taken this action include: Alabama, Arkansas, Delaware, District of Columbia, Georgia, Louisiana, Maine, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Vermont. Missouri and Indiana did not pay for elective abortions even before the Supreme Court decision. Kansas has not paid for abortions since May, 1977. Chicago Daily Law Bulletin, Aug. 16, 1977, at 1., col. 3.
\end{itemize}
example, an abortion could be medically necessary because of the patient’s emotional condition.

CONCLUSION

If the cancellation of state and federal funds for elective abortions becomes widespread, there will be a far-reaching impact on American society. If a state elects to encourage its valid interest in childbirth and restricts Medicaid funding for elective abortions, more indigent women may be forced either to seek “back alley” abortions, or to carry their pregnancies to term. In 1974, the Department of Health, Education and Welfare estimated that if federal funds for elective abortions were eliminated, an estimated 125 to 250 women would die from self-induced abortions. Additionally, self-induced abortions could lead to serious medical complications in as many as 25,000 cases. Moreover, for those women who are forced to bear unwanted children, emotional and psychological effects upon the mother and child are inevitable.

Adverse economic implications are also likely to result from a state’s decision not to fund elective abortions. As more indigent women’s pregnancies culminate in birth, expenses for the care of the mother and child will lead to higher welfare budgets and larger welfare rolls. Furthermore, the taxpayer will be affected by restrictive abortion legislation through corresponding taxes to offset increased welfare costs.

Thousands of indigent women will be affected by legislation that prohibits the use of public funds for elective abortions. Minority women, however, will be disproportionately affected by such legislation since “[b]lacks and other non white groups are heavily overrepresented among both abortion patients and medicaid recipients.” It has been said that a society is judged by the way it treats its minority members. American society will be subject to such judgment in the near future, when, and if, restrictive abortion legislation is passed by Congress and the states.

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171. Id. at 10794-95.
172. Id. at 10794. According to an estimate compiled by the Department of HEW in 1974, if federal funding of elective abortions were eliminated, the additional costs to the government in the form of expenses for medical care and public assistance for first year after birth of the child would be between $450-565 million.
173. 97 S. Ct. at 2397 n.3, (Marshall, J., dissenting).