CONSTITUTIONAL LAW—SUPREME COURT UPHOLDS VALIDITY OF HYDE AMENDMENT. STATES NEED NOT FUND ALL ABORTIONS UNDER MEDICAID—HARRIS V. MCRAE, 100 S. CT. 2671 (1980).

INTRODUCTION

In Harris v. McRae, the United States Supreme Court held that the Hyde Amendment, which limits the breadth of funded "medically necessary" abortions to pregnancies which endanger life or result from rape or incest, is a valid exercise of Congress' legislative power. In addition to stating that the Hyde Amendment relieved the states of the duty of fully funding abortions which the federal government did not fund, the Court found that this change to the Medicaid program does not infringe on the plaintiffs' first or fifth amendment guarantees, including those estab-

1. 100 S. Ct. 2671 (1980).
   Notwithstanding any other provision of this joint resolution except section 102, none of the funds provided by this joint resolution shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service;
   Nor are any payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.
   Id. The 1980 version is broader than the 1977 fiscal year version, which provides:
   None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.
Labor, Health, Educ., and Welfare Act, Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976). However, the 1980 version is narrower than the 1978-79 version and reads:
   None of the provided for funds in this Act ["paragraph" in 1977 version] shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.
   Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the termination of an ectopic pregnancy.
3. 100 S. Ct. at 2693.
4. Id. at 2684-85.
5. Id. at 2689-91.
6. Id. at 2685-88, 2690-91.
lished by *Roe v. Wade*\(^7\) and its progeny.\(^8\)

This article will examine the constitutional guarantees as interpreted by the Court in the area of abortion and the valid power of the government to use its influence in promoting its interests in childbirth. The *McRae* decision will be analyzed with prime emphasis on first and fifth amendment problems.

**FACTS AND HOLDING**

In 1976, the Hyde Amendment was challenged as being violative of the first and fifth amendments of the United States Constitution\(^9\) by plaintiffs, McRae, who was a Medicaid recipient in her first trimester of pregnancy, several physicians, and others.\(^10\) The district court certified the case as a class action on behalf of all pregnant or potentially pregnant women in New York who were eligible for Medicaid and wished to terminate their pregnancies within their first two trimesters.\(^11\)

The district court held that the Hyde Amendment had altered the Medicaid program\(^12\) and relieved the states from funding medi-
cally necessary abortions.\(^{13}\) It found the Hyde Amendment valid under the establishment clause of the first amendment,\(^{14}\) but invalid under the free exercise clause of the first amendment\(^{15}\) and the due process clause of the fifth amendment.\(^{16}\)

On appeal, the Supreme Court agreed that the Amendment relieved participating states from the obligation of funding any medically necessary abortions not reimbursed under the Hyde Amendment.\(^{17}\) The Court also concurred with the lower court that the Hyde Amendment did not violate the first amendment's establishment clause,\(^{18}\) but it found that all the plaintiffs lacked proper standing to raise a free exercise challenge.\(^{19}\) With respect to the fifth amendment, the Court found no infringement on a woman's rights or liberty as protected by the due process clause because the government placed no obstacle before a woman which hindered her exercise of choice.\(^{20}\) It was noted by the Court that, although a woman's freedom of choice must be protected, nothing in the Constitution requires funding of that freedom.\(^{21}\) The Court also held that even though the impact of the Hyde Amendment falls on the indigent, no equal protection infringement existed, be-

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13. 100 S. Ct. at 2682.
14. \textit{Id.}
15. \textit{Id.}
16. \textit{Id.}
17. \textit{Id.} at 2683-85.
18. \textit{Id.} at 2689.
19. \textit{Id.} at 2690.
20. \textit{Id.} at 2685-89.
21. \textit{Id.} at 2688-89.
cause poverty is not a recognized suspect classification calling for the Court's strict scrutiny. Thus, finding strict scrutiny not appropriate, the Court reduced its analysis to requiring that the Hyde Amendment be rationally related to a legitimate governmental interest which was found to be the government's desire to protect the life of the fetus and its mother.

BACKGROUND

RIGHT TO ABORTIONS

A woman's right to decide to have an abortion was first recognized in 1973 by the Supreme Court in Roe v. Wade. The Wade Court decided that the fundamental right of personal privacy encompassed a woman's right to decide to have an abortion. As with any fundamental right, state-imposed restrictions on access

22. Id. at 2690-91.
23. Id. at 2692-93.
24. Id. The dissenting views were vigorous (Blackmun, Brennan, Marshall, and Stevens, J.J., dissenting).
26. Roe v. Wade, 410 U.S. 113, 152-54 (1973). The Court offers a case history of the establishment of the fundamental right of privacy. Although not explicitly mentioned in the Constitution, the right of privacy does exist under the Constitution. The roots of the right to privacy are found in the first, fourth, fifth and ninth amendments, the penumbras of the Bill of Rights, and the fourteenth amendment. Id.
to that right triggers strict scrutiny. Consequently, any regulation restricting access to abortion must serve compelling state interests and be narrowly drawn. However, the Court stated that the right to decide to have an abortion is not absolute. As the pregnancy progresses, a point is reached at which the state's interests in the mother and the fetus became compelling and regulation or proscription by the state is permissible. Specifically, in the first trimester of pregnancy, the state's interest in either the life of the fetus or the health of the mother was found to be slight. Thus, the Court recognized no legitimate state interests compelling enough to warrant deprivation of the woman's fundamental right. At this point, the Court stated that any abortion decision must be free of interference by the state. During the second trimester but before "viability" of the fetus, the Court found the state to have an interest only in the health of the mother. This interest becomes compelling and allows the state to require second trimester abortions be performed in hospitals or other licensed facilities by qualified or specially licensed personnel. In the third trimester, once the fetus becomes viable, the Court recognized two separate and distinct governmental interests—the health of the mother and the protection of the fetus' potential life. At this stage, the state is allowed to proscribe abortions unless they are necessary for the life or health of the mother.

In Doe v. Bolton, a companion case to Wade, the Court expanded upon Wade by stating that states may not attempt to circumvent a woman's right to abortion by making abortions unreasonably difficult to obtain through requirements of elaborate

27. Id. at 155.
28. Id. at 156. This follows since the fundamental right identified in Wade is the right to personal privacy which encompasses the right to decide to have an abortion.
29. Id. at 163.
30. Id.
31. Id.
32. Id.
33. Id. at 163-64.
34. Id.
35. 410 U.S. 179 (1973). The Bolton decision effectively prohibits a state from processing an abortion patient in a manner more burdensome than for other patients. Bolton struck down Georgia statutory procedural requirements that an abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals, that the procedure be approved by the hospital staff abortion committee, and that the performing physician’s judgment be confirmed by independent examinations of the patient by two other licensed physicians. Additionally, a requirement that a woman must be a bona fide resident of Georgia before she could have an abortion in that state was struck down. Id. at 201.
procedural barriers. The Court's clarification was later restated in Planned Parenthood of Central Missouri v. Danforth, where the Court found that the abortion right was impermissibly burdened by state statutes which required spousal or parental consent, or medical procedures not widely available. Any consent requirement was found to be an invalid delegation of a veto power over another's constitutional rights. However, state regulations which minimally burdened the woman's exercise of her rights were upheld in Danforth. The Court allowed regulations which required recordkeeping and the patient's consent because they were useful to the state and did not constitute any interference with the abortion decision or the physician-patient relationship.

In spite of the Court's emphatic stand that a woman's right to decide to have an abortion was fundamental, thereby allowing state interference only when the state's interests become compelling, new questions arose with respect to whether states participating in the federal Medicaid program could withhold assistance for nontherapeutic abortions. In Bolton, Chief Justice Burger, in his concurrence, stated that the Court had not created an affirmative right to "abortions on demand." This statement did not provide clear direction to the states. Some courts and commentators argued that the Constitution supported the idea that minimal access for the poor to exercise their constitutional rights must be provided; thus, requiring states participating in Medicaid to fund nontherapeutic abortions for the poor. Other states excluded nontherapeutic abortions although the Medicaid program required funding for all necessary medical treatment for the poor.

After Wade, laws were passed by some states which were designed to restrict access to abortions by more strictly regulating the state's existing Medicaid programs. In most cases, elective abortions were not funded under these statutes, while therapeutic

36. Id. at 215-21 (Douglas, J., concurring); Abortion Implications, supra note 12, at 240.
38. Id. at 67-78.
39. Id. at 74.
40. Id. at 79-80.
42. 410 U.S. 179, 189, 208 (1973).
44. Id. at 122; Comment, Abortion on Demand in a Post-Wade Context: Must the State Pay the Bills? 41 FORDHAM L. Rev. 921, 929-32 (1973).
46. Id. at 123.
abortions received funding only after special certification such as prior authorization by the state's welfare department or the concurrence of two physicians. When faced with the validity of these statutes, most federal courts decided that no distinction could be made between the different medical treatments necessitated by pregnancy under any Medicaid scheme. The rationale for the decisions invalidating these statutes was generally based on violations of equal protection including the discriminatory effects resulting to the welfare patient, because of the patient's poverty. Having found a fundamental right at issue and any restriction of that right, such as denial of funding, the courts applied the strict scrutiny test. Generally, the fundamental rights prevailed over the states' interests in restricting abortions absent any showing of a compelling interest by the state.

Funding Abortions

The Supreme Court also faced funding questions during its 1976 term. In three cases, the Court surprisingly upheld state regulations denying funding for all nontherapeutic abortions. In Beal v. Doe, a Pennsylvania statute requiring a physician to certify that the abortion was medically necessary before funding would be available was found to be in accord with the federal Medicaid program. The Court ruled in Poelker v. Doe that the government

49. Id.
50. Id.
51. Id.
52. Beal v. Doe, 432 U.S. 438, 447 (1977); Maher v. Roe, 432 U.S. 464, 479 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977) (per curiam) (these were the only cases dealing with this specific question during the 1976 term). See also Abortion and Medicaid, supra note 43, at 124-25, which described this trio of cases as being a surprising and severe setback to the trend of cases favoring unhindered abortion access.
54. Id. at 447. In Beal, the Supreme Court dealt with the question of whether Title XIX of the Social Security Act required the funding of nontherapeutic abortions as a condition of participation in the Medicaid program established by the Act. In that case, the Court reviewed a Third Circuit decision holding that Pennsylvania's refusal to reimburse the costs of lawful nontherapeutic abortions per-
may refuse to provide abortions in public facilities.\textsuperscript{56} In \textit{Maher v. Roe},\textsuperscript{57} the Court held that, in order to discourage abortions, states may refuse to fund an elective abortion while funding childbirth.\textsuperscript{58} The Court indicated that government is free to express the moral prerogatives of the community by declining to support an activity that the community believes to be immoral.\textsuperscript{59} Specifically, in \textit{Maher}, the Court found that the right to an abortion for a woman implied no limitation on a state's authority to make a value judgment favoring childbirth over abortion and to implement that judgment by allocating public funds.\textsuperscript{60} The Court also emphasized the
"strong and legitimate [state] interest in encouraging normal childbirth."61 The Court found that even though the laws effectively excluded only indigent women from obtaining an abortion, no suspect class had been created because financial need alone does not identify such a class.62 Therefore, the classification did not require strict scrutiny of the legislation.

The *Maher* Court stated that its decision "signaled no retreat from *Wade* or the cases applying it"63 because the right articulated in *Wade* was the right protecting a woman from "unduly burdensome" interference with her freedom to decide to terminate her pregnancy.64 The Court stated that these state regulations placed no obstacles in the pregnant woman's path to an abortion because the denial of Medicaid funds did not create a restriction to abortions that was not already there.65 The only barrier existing was indigency and that, the Court says, existed prior to any regulation.66

Before *Maher*, courts had employed a strict scrutiny analysis whenever they examined challenges to state-imposed abortion funding restrictions. However, even though an identical issue was before the court in *Maher*, the Court lowered its standard of analysis to favor the government. The Court surprisingly gave the issue of the infringement of the fundamental right little consideration by not using strict scrutiny and saying the interference was not enough.67 Thus, in *Maher*, the Court, having found a legitimate state interest in withholding funds from abortion, no creation of a suspect class by the discrimination in the statute, and no absolute right to governmental funds to ensure the enjoyment of a fundamental right, used the less exacting test of rationality,68 and the Connecticut legislation was found to be valid.69 However, the *Maher* court left open the question whether it would strictly scrutinize a denial of funds for medically necessary abortions.

Strict scrutiny may also be used when the government desires to encourage a particular manner of exercise of a right and discourage another manner of exercising that right.70 The test

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61. *Id.* at 478.
62. *Id.* at 471.
63. *Id.* at 475.
64. *Id.* at 473. The Court implies that the funding limitations are not only not "unduly burdensome" but are not the imposition of a burden at all. *Id.* at 474.
65. *Id.* at 474.
66. *Id.*
67. *Id.*
68. *Id.* at 469-78.
69. *Id.* at 480-81.
designed to determine the appropriateness of strict scrutiny of any
government program involves the determination of whether the
program encourages action or interferes with "choice." The for-
mer is permissible; the latter proscribed. To avoid strict scrutiny,
the choice disfavored by the state must still be a viable alternative,
and the exercise of the disfavored alternative must not be bur-
dened or interfered with by the imposition of a penalty.

Strict scrutiny may likewise be appropriate when an indigent
is denied enjoyment of a common benefit. In Griffin v. Illinois,
Douglas v. California and other decisions, the Court invali-
dated legislation which denied certain benefits to a class discrimi-
nated against because of wealth. In San Antonio School District
v. Rodriguez, the Court distinguished between the cases where
strict judicial scrutiny must be utilized and where not. The Court
reiterated its well-established principle that wealth discrimination
alone is not enough to invoke strict scrutiny. However, wealth
discrimination inflicted on a fairly definable poverty group with the
result of absolute deprivation of benefits because of a lack of per-
sonal resources will cause the Court to use its strict scrutiny analy-
sis.

The guarantee of equal protection is a right to be free from
"invidious discrimination in statutory classifications and other
governmental activity." However, where any classification in a
statute does not impinge on a fundamental right or liberty or is not
suspect under the traditional "two-tiered" approach, it must be
found valid unless the classification is not based on grounds rele-
vant to a legitimate governmental objective. This is the rationality
test.

71. Id.
72. Id.
74. 351 U.S. 12 (1956) (invalidated state laws preventing an indigent criminal
defendant from obtaining a transcript for use at trial and during appeal).
75. 372 U.S. 353 (1963) (indigent defendant has right to court-appointed counsel
on direct appeal and lack of resources should not deprive one of a right).
77. See notes 73-75 and accompanying text supra.
78. 411 U.S. 1 (1972).
79. Id. at 20-29.
80. Id. at 29.
81. Id. at 19-20.
82. Harris v. McRae, 100 S. Ct. 2671, 2691 (1980).
THE STATUTORY ISSUE

The plaintiffs challenged the Hyde Amendment on statutory grounds contending that it was inapplicable to the states. The statutory question was whether Title XIX required a state which participated in Medicaid to continue funding the broad class of medically necessary abortions after the Amendment which only required federal reimbursement of a more limited class. If the Court found the question to be answered in the affirmative, the participating states would find themselves independently financing the greater share of medically necessary abortions.

The entire Court found that the Medicaid program created by Title XIX was a system of "cooperative federalism" in which Congress did not intend "to require a participating state to assume the full costs of providing any health services in its Medicaid plan." In fact, the Court noted that Congress' purpose was to provide federal financial assistance for all legitimate state expenditures under the approved Medicaid plan. The Court pointed out that it follows that Title XIX does not require a participating state to include in its plan any services for which a subsequent Congress has withheld federal funding. Thus, the Court held that the State does not have to fund any abortions for which funding is unavailable under the Hyde Amendment.

FIRST AMENDMENT CONSIDERATIONS

The establishment clause of the first amendment was found not violated by the Hyde Amendment. In order to be valid under the establishment clause, the statute must meet three requirements: It must have a secular legislative purpose; its primary ef-

84. 100 S. Ct. at 2683.
85. See note 12 supra.
86. Id.
87. Id. The opinion states that without federal funding and with the retention of a funding obligation, the participating state would be left shouldering the entire cost of abortions not encompassed by the Hyde Amendment.
88. Id.
89. Id. at 2684. The Court was in line with lower court decisions. Hodgson v. Bd. of County Comm'rs, 614 F.2d 601, 613 (8th Cir. 1980); Preterm, Inc. v. Dukakis, 591 F.2d 121, 132 (1st Cir. 1979); Zbaraz v. Quern, 596 F.2d 196, 200 (7th Cir. 1979).
90. 100 S. Ct. at 2684-85.
91. Id. at 2685.
92. Id. at 2689.
fect must neither advance nor inhibit religion; and, it must not foster excessive governmental entanglement in religion. 95

The first requirement is a low-threshold test requiring only that the purpose be arguably secular. 96 The mere fact that the beliefs of a particular religion coincide with the legislative action is not, alone, sufficient to sustain an establishment clause attack. 97 The congressional debates evidence that the foremost reason for the Hyde Amendment is to stop abortion because it is the killing of human beings. 98 There is no clear revelation that these beliefs are based on religious doctrine rather than biological ideas or personal beliefs. 99

The second requirement of the test that the statute neither advance nor inhibit religion appears also to have been met. The law, to survive constitutional review, must be "remote, indirect and incidental" to the exercise of a particular religion. 100 Since the Hyde Amendment limits the financing of abortions but does not lend

95. Id.; Abortion and Medicaid, supra note 43, at 152.
. . . [T]he essential question [is] the humanity of the unborn . . . . What is it that is being aborted? Is it a chicken? Is it a tumor? Is it animal? Is it vegetable? Is it mineral? Is it a bad tooth to be pulled out, or is it a diseased appendix to be cut out and thrown away? No; it is a human being . . . . 
. . . [A]bortion does not merely "terminate a pregnancy" . . . . It is the calculated killing of an innocent, inconvenient human being.
. . . That is a human life; that is not a potential human life; it is a human life with potential. Id. at 19700-01. Throughout the legislative history of the Hyde Amendment, the sponsor, Congressman Hyde, and his supporters expressed the desire of the government in discouraging abortions in terms of protecting the unborn, innocent human beings from being killed. Id. at 19701. This belief that a fetus is a human being with rights which need protection is the overt governmental interest behind the Hyde Amendment. 122 CONG. REC. 20410, 26785 (1976). Congressman Hyde openly offers the "clear statement of legislative intent" as being the prevention of "the use of federal funds to pay for abortions except to save the life of the mother." Id. at 30897. The purpose is clearly to discourage the alternative of abortion in pregnancy. Id.

99. The motivation behind the Hyde Amendment appears to be one of general moral disagreement with abortion as opposed to any religious connection. The only overt biblical or religious reference is to that of "Herod's biblical slaughter" which is used by Congressman Hyde in depicting abortion. 122 CONG. REC. 26785 (1976). See also Address by Congressman Hyde, at Georgetown Univ. (Oct. 1979), reprinted in GEO. UNT. RTL JOURNAL. Congressman Hyde's legislative views that human life begins upon conception are based on his biological beliefs and are not apparently attempting to further any religious belief or doctrine. 122 CONG. REC. 20410 (1976).

100. L. Tribe, supra note 96, at 840.
financial support to any religious institution,\textsuperscript{101} there is no clear direct influence by government, and the law withstands attack.

The third part of this test which requires no excessive governmental entanglement in religion seems to be fulfilled here. Although the Hyde Amendment has been criticized because its legislative proceedings appeared influenced by the Catholic church,\textsuperscript{102} the degree of government entanglement seems slim.\textsuperscript{103} The degree is estimated by evaluating the character and purpose of the religious institution to be benefited, the nature of the aid, and the resulting relationship between the government and the religious body.\textsuperscript{104} The legislative history shows no tangible benefits or aid to religious institutions.\textsuperscript{105} In fact, some religious organizations were opposed to the Hyde Amendment.\textsuperscript{106} The inescapable involvement and interest of religious groups in fetal life does not necessarily render the subject inappropriate for the legislative spectrum.\textsuperscript{107} Such a view would give too little weight to religious groups and their freedoms to "express their convictions in the political process."\textsuperscript{108} Without more, the establishment clause does not appear to have been violated.

The assertion by the plaintiffs that the Hyde Amendment violates the free exercise clause of the first amendment was dismissed because the Court decided that none of the plaintiffs had proper standing for such a challenge.\textsuperscript{109} The certified class of similarly situated indigent women on whose behalf plaintiffs were suing lacked standing because no one in the class alleged that they were compelled because of religious beliefs to seek an abortion.

\textsuperscript{101} See note 2 \textit{supra} for the reading of the different versions of the Hyde Amendment.

\textsuperscript{102} \textit{Abortion \& Medicaid, supra} note 43, at 154. The brief points out that Catholic lobbyists made available to Congress anti-abortion literature and that the Catholic doctrine served as a basis for the abortion funding exceptions hearings in committee. \textit{Id. See also} Plaintiff-Intervenors' Affidavit at 92-100, McRae v. Califano, — F. Supp. —, — (1979) (the decision is not yet reported).

\textsuperscript{103} \textit{Id.} The points brought out in Plaintiffs' brief does not prove that any committee asked the church for advice or even used any advice given. \textit{Id.}

\textsuperscript{104} J. NOWAK, R. ROTUNDA, \& J. YOUNG, CONSTITUTIONAL LAW 851 (1977).

\textsuperscript{105} See notes 98-99 and accompanying text \textit{supra}.

\textsuperscript{106} \textit{See, e.g.,} Plaintiff-Intervenors' Affidavit at 130-133, McRae v. Califano (Intervenor was the Women's Division of the Board of Global Ministries of the United Methodist Church, the policy-making body of United Methodist Women). The United Methodist Church's "Resolution on Responsible Parenthood" expresses that each couple has the duty to control conception according to circumstances and mature Christian judgment. Because the Hyde Amendment limits an indigent woman's exercise of her religious choice to have an abortion, the Women's Division opposes this Amendment.

\textsuperscript{107} L. Tribe, \textit{supra} note 96, at 928.

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} 100 S. Ct. at 2689-90.
and were denied this because of the Hyde Amendment. The officers of the Women's Division lacked standing because none pleaded that she was pregnant or eligible for Medicaid, and, therefore, had no personal stake in the outcome of the challenge to the free exercise clause. The Court also found that the Women's Division itself lacked standing to represent the interests of its individual members. This finding was in spite of the fact that its membership included pregnant, Medicaid-eligible women who would have chosen abortions in accordance with their religious beliefs. The majority of the Court relied on established law to dismiss the officers' and the indigent women's claims but may have resorted to inapplicable precedent to dismiss the challenge of the Women's Division.

It was established in Abington School District v. Schempp that in a free exercise case, the injured must show "the coercive effect of the enactment as it operates against him in the practice of his religion." The Court interpreted this passage to mean that the free exercise claim ordinarily requires individual participation in litigation which may preclude an organization from making a representative free exercise challenge. However, Schempp stated only what is required when an individual brings such a challenge. It neither expressed nor implied that an organization may be limited in bringing such class action because the Court would rather entertain individual challenges. In Schempp, the issue did not even involve an organization. Even if the Court had ignored this seemingly inapplicable statement from Schempp, the pleading of the Women's Division may have harmed their bid at gaining the standing to raise this challenge. The Women's Division stated that rather than being of a unified view on the issue of abor-

110. Id. at 2690.
111. See note 10 supra.
112. Id.
113. Id.
114. Id.
117. Id. at 223.
118. 100 S. Ct. at 2690.
119. 374 U.S. 203, 223 (1963). The Court uses the term "individual" in stating what one must show in order to successfully bring a free exercise challenge. No language is used stating that individual persons should or ordinarily do bring such action. Nothing is stated to ban or limit organizations from bringing such a challenge as representing an affected. The language used could apply to a single organization as well as a single person. Id.
120. Id.
tions, its membership was of a diversity of beliefs and views. Keying on this statement, the Court stated that in order to maintain representative standing challenges, neither the claims asserted nor the relief requested must make the individual participation of each injured party necessary for resolution of the case. Thus, as a result of the Division's concession as to variant views in its membership, the Court held that the participation of the individuals was necessary to proper understanding and resolution of the claim. By employing this analysis, the Court effectively disposed of all the free exercise claims.

**FIFTH AMENDMENT CONSIDERATIONS**

**McRae-Which Level of Analysis?**

The fundamental right of privacy, or "liberty" is implicitly guaranteed by the Constitution. Furthermore, this privacy right encompasses a woman's right to decide to have an abortion. In *Maher*, the Court recognized that women must be protected from "unduly burdensome" interference with their freedom to decide whether to terminate their pregnancy.

The Court in *McRae* used the judicial tools developed in *Maher* to decide that the denial of funding of most therapeutic or medically necessary abortions infringed on no liberties or fundamental rights. The Court stated that government could encourage activity, such as childbirth over abortion, and do so with public funds as long as it did not impose its will by force of law. The Hyde Amendment did not impose government will because, although the funding would have to come from private sources, indigent women who desire an abortion could still have an abortion. Echoing *Maher*, the Court found the barrier to the exercise of the women's right was not the Hyde Amendment but indigency which was in existence before the legislation. The Court went on to state that Congress does not have to provide the funds to citizens to enable them to enjoy their constitutional rights and

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121. 100 S. Ct. at 2690.
122. *Id.*
123. *Id.*
124. *Id.*
126. See note 26 and accompanying text *supra*.
128. 100 S. Ct. at 2687-88.
129. *Id.* at 2687.
130. *Id.* at 2688.
131. *Id.*
132. *Id.* at 2688-89.
that indigent women are in no worse position constitutionally than if Medicaid had never funded abortions at all. This reasoning seems logical; however, certain problems exist as demonstrated by the dissents.

Justice Brennan argued the government had overstepped its limits and had impermissibly imposed its will in *McRae*. He indicated that *Wade* and its progeny stand for the proposition that the state is under an affirmative obligation to ensure access to abortions for all those who may desire them. The government must not use its enormous power and influence to burden a pregnant woman's decision to have an abortion. Since many poor women will be compelled to carry their pregnancy to term because needed funding has been denied, the Hyde Amendment is clearly a burden on one's right to make a choice and a clear imposition of government's will against abortion. Justice Brennan indicated that the discriminatory distribution of benefits can discourage the exercise of fundamental liberties in the same way as criminal sanctions and certain regulations which have been invalidated. He argued that the government wrongly believed that as long as it is "not obligated to provide . . . certain benefits or privileges, it may condition the grant of such benefits on the recipient's relinquishment of his constitutional rights."

It would seem clear that whenever government impermissibly burdens the exercise of the right to abortion that a violation of due process has occurred. It seems hardly arguable that funding childbirth while not funding most abortions is an impermissible imposition of government's will rather than a valid encouragement of an action. In fact, the Court has often invalidated similar schemes denying funds to burden the exercise of a protected choice. The *McRae* situation may be such a scheme.

After considering liberty, the Court addressed itself to the equal protection challenge. Revised by the Hyde Amendment, Medicaid would be invalid if it encouraged one action, childbirth, but interfered with the other choice, a medically necessary abor-

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133. *Id.* at 2688.
134. *Id.* at 2705-06.
135. *Id.* at 2702.
136. *Id.*
137. *Id.* at 2704.
138. *Id.*
139. *Id.*
tion for health reasons, by imposing a penalty.\textsuperscript{142} Strict scrutiny would be invoked in such a situation.\textsuperscript{143} Abortion is still a viable alternative to an indigent pregnant woman provided she meets the \textit{Wade} trimester requirements; but, questions arise as to whether, in some instances, she is not penalized by choosing a medically necessary abortion. If the denial of federal funding for abortions under Medicaid serves only the purpose of discouraging the constitutionally protected abortion decision and not of encouraging childbirth, also a protected choice, the distinction between a funding restriction and a penalty is slim, if existent at all.\textsuperscript{144} It is difficult to understand how a penalty is not imposed when giving a pregnant indigent woman, who faces long term health damage from carrying a fetus to term, the alternatives of funded childbirth or personally financed abortion.

Although the Court answered this problem in \textit{Maher} by arguing that a penalty exists only if the government withdraws more than the monetary cost of exercising the disfavored alternatives,\textsuperscript{145} the Court may have dismissed the issue too superficially. If a pregnant woman not qualifying for an abortion under the Hyde Amendment requires some medical treatment for a serious health problem which cannot be administered while she is pregnant, she will have to pay for the abortion as a condition precedent to receiving the necessary treatment under Medicaid. However, if she cannot finance the abortion, she effectively will have been denied the treatment for the problem which necessitated the abortion decision initially and also may face the severe personal costs of long-lasting health problems by childbirth.\textsuperscript{146} This situation could lead to much more than the mere dollar cost of exercising the abortion right.

However, classifying the Hyde Amendment as a penalty may have little effect because of the Court's treatment of abortion. Ordinarily, the Court seems to hold that if the government cannot forbid a choice then it also cannot penalize that choice financially.\textsuperscript{147} However, this reasoning has not been followed regarding abortion.\textsuperscript{148} The government is allowed to use financial incentives or disincentives although it cannot directly forbid the

\textsuperscript{142} See notes 70-72 and accompanying text \textit{supra}.
\textsuperscript{143} \textit{Id}.
\textsuperscript{144} See \textit{Abortion and Medicaid, supra} note 43, at 129.
\textsuperscript{146} \textit{Abortion & Medicaid, supra} note 43, at 140.
\textsuperscript{148} \textit{Id}.
abortion choice. The government can use "carrots where sticks are forbidden." Further, it must be considered whether the statute creates the identifiable poverty class deprived of benefits, as was described in Rodriguez. Such a class, if found, should cause the court to closely scrutinize the legislation. The indigent, the discriminated class in McRae, is easily definable. The class is defined as that determined by established standards in a federal Medicaid program to be the categorically or medically needy whose income is deemed by the program to be insufficient to cover medical care. The class can be even more narrowly defined as being Medicaid recipients who are not pregnant as a result of rape or incest and whose lives are not endangered from pregnancy. Under the present statutory scheme, indigent, pregnant women who desire the benefits of free medical treatment, but in the form of abortion which does not qualify under the Hyde Amendment, are absolutely deprived of the benefit of an abortion as a result of their lack of resources. It seems that since the class in McRae was definable and deprived, strict judicial scrutiny should have been invoked.

In his dissent, Justice Marshall found another ground for invoking a closer scrutiny. A heightened scrutiny has always been designed for the protection of groups with disabilities or subject to unequal treatment and "political powerlessness" in the political process because of their poverty. The McRae poor, pregnant women who found themselves medically in need of an abortion but placed outside the funding limits by the Hyde Amendment are such a group.

An intermediate level of scrutiny would be available under Justice Marshall's "sliding scale" approach—a "middle-tier" analysis. Under this analysis, the legislative purpose apparently will not be assumed to exist, as it generally is under the rationality re-

149. Id. at 309.
150. Id.
151. See notes 78-81 and accompanying text supra.
152. See note 12 supra.
153. This more narrow class formulation can be accomplished by extracting the language of the Hyde Amendment itself (1980 version, note 2 supra).
154. See note 2 supra (indigent women who once qualified for an abortion under Medicaid but do not now because of the Hyde Amendment, may only be able to have an abortion by funding from private sources).
155. 100 S. Ct. at 2708.
156. Id.
Although the particular rights at stake or classifications necessary to invoke this scrutiny are not clear, it is evident that gender classifications have triggered this intermediate level scrutiny. There may be sex-based discrimination in McRae.

If a pregnant woman has a serious but operable condition such as kidney failure, which, if treated, will cause the fetus to die, and she elects to have the abortion followed by the necessary operation for her health, Medicaid with the Hyde Amendment would not fully fund her treatment even though she could probably not carry a child to term without serious difficulty. A man with the same kidney problem would have not only the operation but also any preliminary problems funded. A pregnant woman however would have to pay for the preliminary abortion since the pregnancy is not life-threatening and is not the result of rape or incest. In essence, the consequence could be that of leaving indigent sick women without treatment because of the medical fortuity that their illness could not be treated unless the pregnancy were terminated.

Using the intermediate level scrutiny, the legislative purpose of the Hyde Amendment would have been more closely examined and might have failed the examination since the objective of discouraging abortions at the expense of women might have been difficult to justify.

If strict or intermediate scrutiny is not appropriate, then the rationality test must be used. However, two important questions must be raised regarding the Court's determination of a legitimate governmental interest in the light of Wade. At the outset of this discussion, it is important to note that the Wade Court spent much time and energy developing the respective interests of a woman and the government in each trimester of her pregnancy. However, in McRae the Court when speaking of the government's interest, did not take the time or apparently think it important to acknowledge the distinction between the levels of interests during the separate trimesters.

158. Abortion & Medicaid, supra note 43, at 143.
162. 410 U.S. 113, 156-166 (1973) (the Court spends the majority of the case establishing the historical and biological aspects of fetal development to justify its separate and distinct trimester law regarding the mother's health and interest of the government).
163. 100 S. Ct. 2671 (1980) (the interest of the government in justifying the rationality test is seen as that interest in the life of the fetus). Id. at 2692. See also notes 98-99 supra.
The first question is whether the Hyde Amendment is rationally related to a legitimate governmental interest—the protection of the life of the fetus.\textsuperscript{164} The government's legitimate interest in the fetus was found in \textit{Wade}.\textsuperscript{165} However, the interest was nearly non-existent in the first trimester—so small that no state interference in a woman's abortion decision was found to be valid.\textsuperscript{166} The government's interest gains legitimacy as the pregnancy term progresses.\textsuperscript{167} The McRae Court, however, seems to be basing its decision on the strong interest that the government has in the third trimester, ignoring the fact that many Medicaid recipients will be in their first or second trimesters when they seek abortions. The question is whether the Court was stating that the government has the same legitimate interest in the first or second trimester, that it clearly has in the third. Therefore it must further be asked whether the government's interest is sufficient under the rationality test to validate the Hyde Amendment. If so, it seems that the Court has partially overruled the \textit{Wade} trimester distinctions.

The second question is whether the Court ignored \textit{Wade}'s recognition of a woman's prevailing interest in her health. Justice Stevens noted that \textit{Wade} specifically held that the government does have an interest in the life of the fetus, but cannot protect that interest in any trimester when, according to medical judgment, an abortion is medically necessary for the preservation of the mother's health.\textsuperscript{168} \textit{Wade}'s proscription seemingly should prohibit any legitimate government interest from justifying the Hyde Amendment not only when an abortion falls under the rape, incest or life endangerment guidelines but any time the abortion is medically necessary for the mother's health.

Another interesting equal protection argument by Justice Stevens was that when government provides a special pool of benefits for a class of persons as in the case of Medicaid, eligible individuals for those benefits are entitled to equal access to that pool.\textsuperscript{169} Justice Stevens says that equal access to Medicaid is based on two neutral statutory criteria, financial and medical need.\textsuperscript{170} He distinguished \textit{McRae} from \textit{Maher} by saying that the plaintiffs in \textit{Maher} did not satisfy these criteria because there was no medical

\begin{itemize}
\item \textsuperscript{164} See notes 98-99 and accompanying text \textit{supra}.
\item \textsuperscript{165} 410 U.S. 113, 163-64 (1973).
\item \textsuperscript{166} \textit{Id.} at 163-66.
\item \textsuperscript{167} \textit{Id.}
\item \textsuperscript{168} 100 S. Ct. at 2713.
\item \textsuperscript{169} \textit{Id.} at 2712-13.
\item \textsuperscript{170} \textit{Id.} at 2712.
\end{itemize}
need involving nontherapeutic abortions. Justice Stevens said that in McRae, however, the plaintiffs met both criteria and were faced with two constitutionally-protected alternatives—abortion or childbirth. Nontherapeutic medicine need not be funded from the pool of benefits, but therapeutic medicine must be and those benefits distributed equally. Therefore any denial of benefits for medically necessary abortions is "tantamount to severe punishment." The government objective then of punishing women who seek an abortion is contrary to Wade and not legitimate. Therefore, the rationality test cannot be met because the government objective is not legitimate.

CONCLUSION

In McRae, the Supreme Court, in a five-to-four decision, found that the Hyde Amendment, which limits the funding of abortion under Medicaid, is constitutional. The Hyde Amendment was found valid under the first and fifth amendments. As proposed, had the Court strictly scrutinized the Hyde Amendment or more closely examined the interests of the government in justifying it, perhaps the Court would have found the Hyde Amendment invalid. Since, however, the Court found no constitutional violations, the question arises as to whether the court is eroding the right of women to choose abortion as first decided in Wade. In the future,
if the Court takes a more conservative trend away from abortion, *Wade* might be overruled.

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