Brooklyn Law Review

Volume 61 | Issue 4 Article 8

4-1-1995

COMMENT: *Hope v. Perales:* Abortion Rights Under the New York State Constitution

Kelley P. Swift

COMMENT

HOPE V. PERALES: ABORTION RIGHTS UNDER THE NEW YORK STATE CONSTITUTION

INTRODUCTION

Although the public had anticipated that *Hope v. Perales*[1] would be a landmark decision testing the scope of abortion rights under the state constitution,[2] the case that was supposed to be the most widely and intensely disputed decision on the New York Court of Appeals' calendar fell short of expectations. Both sides of the abortion issue had touted the case as a "defining moment in the abortion debate."[3] Pro-choicers had extolled that *Hope* was "the most important affirmation of reproductive choice since the repeal in 1970 of New York's criminal law against abortion," the year in which both the New York Supreme Court and Appellate Division declared that the New York State Constitution, independently from the United States Constitution, protects a woman's freedom of choice.[4] Federal constitutional protection of women's constitutional right to reproductive choice had been eroding with virtually every privacy case decided by the United States Supreme Court since *Roe v. Wade*.[5] Young and poor women who are

---

[1] 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994).

[2] Gary Spencer, *Abortion Before Court of Appeals*, N.Y.L.J., Jan. 1, 1994 at 2.

[3] Gary Spencer, *Court of Appeals Weighs Requiring Funds for Abortion*, N.Y.L.J., Mar. 18, 1994 at 52.

[4] Donna Lieberman & Catherine Weiss, *New York Forum about Justice: New York's Constitution Protects its Own*, NEWSDAY, April 25, 1991, at 22.

[5] 410 U.S. 113, 153 (1973) (right to privacy under federal Constitution includes a woman's right to terminate her pregnancy). For a discussion of the Supreme Court's erosion of abortion rights, see infra notes 255-268 and accompanying

most vulnerable have felt the impact of this erosion most acutely.[6] Regardless of the erosion at the federal level, New York's lower courts have continued to affirm and expand the state constitutional right to abortion. In *Hope v. Perales*, the New York Supreme Court and the Appellate Division assured state protection for this right by holding that the New York State Constitution precludes the Pre-Natal Care and Assistance Program (PCAP),[7] which funds prenatal and childbirth services for low-income women, from excluding medically necessary abortions from its coverage.[8]

Hope's potential remained unrealized when the New York Court of Appeals held that PCAP's exclusion of medically necessary abortions did not violate either the Due Process or the Equal Protection clauses of the state constitution.[9] The court reasoned that the legislature's decision to fund only one course of conduct did not infringe upon poor women's due process right to abortion because this funding choice did not prohibit women from obtaining abortions.[10] The court rejected the plaintiffs' argument that funding childbirth and not abortion violated an obligation under the due process clause for the state not to influence the exercise of a fundamental right.[11] The court found that there was no evidence that eligible women were induced by PCAP to continue their pregnancies and therefore relinquish their right of choice.[12] The court therefore found that PCAP's selective funding in favor of childbirth did not constitute an impermissible burden on this right.[13]

For the same reason, the court also rejected the argument that the funding scheme violated the Equal Protection clause.[14] The court simply stated that plaintiffs' equal protec-

---

text.

[6] *See infra* notes 262-269 and accompanying text.

[7] Prenatal Care Act of 1989, Ch. 584, 1989 N.Y. LAWS 1224 (*codified in* N.Y. PUB. HEALTH LAW §§ 2521, 2522, 2529, (McKinney 1989) (effective Jan. 1, 1990)); *see* notes 18-44 and accompanying text.

[8] Hope v. Perales, 189 A.D.2d 287, 298, 595 N.Y.S.2d 948, 954, (1st Dep't 1993), *rev'd*, 83 N.Y.2d 563, 63 N.E.2d 183, 611 N.Y.S.2d 811 (1994).

[9] Hope v. Perales, 83 N.Y.2d 563, 577, 634 N.E.2d 183, 188, 611 N.Y.S.2d 811, 816 (1994).

[10] *Id.*

[11] *Id.* at 575, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

[12] *Id.* at 576, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

[13] *Id.*at 575, 634 N.E.2d at 187, 611 N.Y.S.2d 815.

[14] *Hope*, 83 N.Y.2d. at 576 n.6, 634 N.E.2d at 187 n.6, 611 N.Y.S.2d at 815

tion clause challenge was at the core of their due process clause challenge and that both fail for much of the same reasons.[15] The court therefore found that the plaintiffs failed to prove PCAP even indirectly infringes upon the reproductive right of choice and upheld the program as rationally related to a legitimate state interest.[16]

The most intriguing aspect about *Hope* is not the court's ruling—that the state constitution permits the legislature to fund, for example, a "one step at a time" pre-natal program to help infants without having to fund medically necessary abortions.[17] Rather, *Hope* is remarkable in that the court of appeals successfully ducked the important legal issues the case presented. First, the court remained silent as to whether abortion was a fundamental right under the state constitution, thereby avoiding two controversial issues: abortion rights and state constitutional expansion beyond federal interpretation. Second, the court failed to answer whether the government must remain neutral in the area of reproductive health care. As a result, the court managed to write a cautious decision with a narrowly limited holding that did not establish any new principle of law. This Comment will argue that although the court did not properly decide *Hope*, the case may not have presented the best context to define the scope of abortion rights under the state constitution. Because abortion funding cases implicate unpopular notions of public assistance and controversial questions as to whether the government should use tax dollars of citizens who morally oppose abortion, *Hope* may not have been the most appropriate case to test the state constitutional waters.

Part I of this Comment will present background information on the Pre-natal Care Assistance Act (PCAP). Then, Part II will outline the facts of *Hope*, as well as discuss each court's decision and reasoning. In Part III, this Comment will analyze the court of appeals' decision in light of the evidence that was submitted at trial. Part III will also argue that the court skewed the evidence in its statement of the record. Part IV will

---

n.6.

[15] *Id.*

[16] *Id.* at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

[17] *See* Williamson v. Lee Optical, Co., 348 U.S. 483 (1955).

conclude that although the decision was improperly decided, the case may not have been the best context to decide abortion rights issues for both political and social reasons. This Comment also proposes ways in which the pro-choice movement still might use *Hope* to its advantage.

I. THE PRE-NATAL CARE ASSISTANCE PROGRAM

The now $100 million program, which services 25,000 pregnant women,[18] was created to assist women with incomes slightly above the Medicaid eligibility standard and to provide the "often extraordinary medical care necessary to maintain a healthy pregnancy."[19] With the aid of federal funding, New York State hoped to promote the health of infants and mothers and to decrease infant mortality.[20] PCAP achieves this goal by ensuring adequate prenatal care to pregnant women who, though not indigent, are deemed less likely to spend available resources to obtain good prenatal care.[21]

Congress first established PCAP on the federal level to give reimbursements to states providing prenatal and related care to needy pregnant women whose household incomes exceeded Medicaid eligibility standards.[22] Federal PCAP is not Medicaid and the program serves a different population.[23] In 1986 Congress amended the federal Medicaid[24] statute to

---

[18] Gregg Birnbaum, *Pro-choicers Livid as State Court Limits Tax-Funded Abortions*, N.Y. POST, May 6, 1994, at 10.

[19] *Hope*, 189 A.D.2d at 305, 595 N.Y.S.2d at 959 (Murphy, P.J., dissenting).

[20] *Hope*, 83 N.Y.2d. at 573, 634 N.E.2d at 185, 611 N.Y.S.2d at 813. New York's infant mortality and low birthweight rates are higher than the national average. *Hope*, 189 A.D.2d at 290, 595 N.Y.S.2d at 949-50.

[21] *Id.* (quoting Mem. of State Exec. Dept., 1989 McKinney's Session Laws of N.Y., at 2218).

[22] *Hope*, 83 N.Y.2d at 572, 634 N.E.2d at 184-85, 611 N.Y.S.2d at 813.

[23] *Hope*, 189 A.D.2d at 293, 595 N.Y.S.2d at 951.

[24] In 1965, Congress created Medicaid, a federal-state cost sharing program in which states are reimbursed for expenditures for a wide range of medical services for qualified individuals. The program serves approximately 31 million enrollees whose combined incomes and resources are deemed by law to be insufficient to meet the cost of necessary medical care. *The Cost Implications of Including Abortion Coverage under Medicaid*, ISSUES IN BRIEF (The Alan Guttmacher Institute, New York, N.Y.), Oct. 1993, at 1 (hereinafter *"Cost Implications"*); *see also*, Beal v. Doe, 432 U.S. 438, 444 (1977). A state choosing to participate in Medicaid can elect to provide medical services to either the "categorically needy"—those who get financial aid from specific federal aid programs, 42 U.S.C. § 1396(a)(19)(A) (West

create an optional category of Medicaid-eligible persons composed of pregnant women and infants with family incomes at or below 100% of the federal poverty line.[25] Under the 1987 amendment to the federal Medicaid statute, Medicaid coverage of pregnancy-related services became mandatory.[26] The amendment required each state to extend eligibility to women up to 133% of the poverty line, but states can opt to extend benefits to women whose income is 185% of poverty line, without regard to other resources these women may have.[27] Unlike Medicaid, which provides reimbursement for all medically necessary care rendered to qualified individuals, PCAP only reimburses expenditures authorized by statute.[28]

In 1987, the New York State Legislature enacted the pilot

Supp. 1993), or the "medically needy"—those who do not qualify for federal programs but who lack adequate resources for medical care. 42 U.S.C. §1396(a)(10)(C) (West Supp. 1993). The national average of income eligibility for those receiving Medicaid is 50% of the federal poverty line, or $5,945 a year. *Cost Implications, supra* at 1. Once a state participates in the voluntary program, it must comply with both federal statutes and regulations. Weaver v. Regan 886 F.2d 194, 197 (8th Cir. 1989) (citing Alexander v. Choate, 469 U.S. 287, 289 n.1 (1985)). Medicaid now includes funding only for abortions that are the result of rape or incest or are necessary to save the mother's life. 42 U.S.C. § 1396 (1994). Notwithstanding this restriction, states are entirely free, at their own option and expense, to offer additional services, including abortions. Harris v. McRae, 448 U.S. 297, 311 n.16 (1980) ("A participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable.").

[25] Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9401, 100 Stat. 1874, 2050-52 (1986).

[26] Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 4101, 101 Stat. 1330, 1330-1400 (1987), 42 U.S.C. § 1396a(a)(10)(A)(i)(1994). Federal law sets out mandatory and optional categories of services funded under Medicaid. 42 U.S.C. §§ 1396(a)(4)(10), 1396(d)(a) (Supp. V. 1993). States may not receive federal funding if they adopt standards and income-eligibility levels more restrictive than "mandatory" federal standards. 42 U.S.C. § 1396(c) (Supp. V. 1993). A state will still receive federal funds if it provides optional services, but coverage of these services is not necessary to obtain federal reimbursement. 42 U.S.C. § 1396(a)(4)(10), 1396(d)(a) (Supp. V. 1993).

[27] *Hope*, 83 N.Y.2d at 572, 634 N.E.2d at 185, 611 N.Y.S.2d at 813. The option of extending mandatory coverage up to 133% of the poverty line exists only for states that had not already extended coverage above 133% as of December 19, 1989. 42 U.S.C. § 1396a(1)(2)(A)(ii)(II), (iv)(I) (1994). In fact, for states like New York that opted before December 1989 to extend these services to women up to 185% of the poverty line, coverage for this class of beneficiaries must be maintained at this level. 42 U.S.C. § 1396a(1)(2)(A)(iv) (1994).

[28] Hope v. Perales, 150 Misc.2d 985, 990, 571 N.Y.S.2d 972, 975 (Sup. Ct. N.Y. County 1991).

PCAP.[29] This pilot program, funded solely out of the State treasury and without federal reimbursement, authorized grants to qualified medical providers for the provision of prenatal care to women with family incomes at or below 185% of federal poverty line. The program was restrictive both geographically, because it did not cover all areas of the state, and substantively, because it excluded delivery, labor, abortion and postpartum services.[30]

New York replaced the pilot program in 1989[31] to participate in the federal PCAP program and to take advantage of designated federal funds.[32] The new program also authorized the Commissioner of Health to provide grants of State funds to prenatal care service providers.[33] Several changes were made in 1989. First, PCAP became a state-wide entitlement program for women and infants.[34] Second, the program became funded and administered through the state Medicaid program.[35]

New York's PCAP now offers the maximum coverage allowed under federal reimbursement standards and includes women with incomes at or below 100% to 185% of the federal poverty line.[36] Thus, a single pregnant women with an annual income between $9,840 and $18,204 is eligible.[37] PCAP imme-

---

[29] Prenatal Care Act of 1987, ch. 822, 1987 N.Y. LAWS 1542 (*codified in* N.Y. PUB. HEALTH LAW § 2520 et seq.) (McKinney 1987)) (hereinafter "Prenatal Care Act of 1987").

[30] Complaint, Appendix 59, at 82, Hope v. Perales, 189 A.D.2d 287, 595 N.Y.S.2d 948 (1st Dep't 1993) (No. 90-21073), *rev'd*, 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994) (hereinafter "Appendix").

[31] Act of July 19, 1989, ch. 584, 1989 N.Y. Laws 1224 (codified at N.Y. PUB. HEALTH LAW §§ 2521 et seq. (McKinney Supp. 1993) (hereinafter "Act of July 19, 1989").

[32] *Hope*, 150 Misc.2d at 988, 571 N.Y.S.2d at 975.

[33] Prenatal Care Act of 1987, ch. 822, *supra* note 29.

[34] *Hope*, 83 N.Y.2d at 572, 634 N.E.2d at 185, 611 N.Y.S.2d at 813.

[35] *See* Act of July 19, 1989, *supra* note 31; N.Y. SOC. SERV. LAW § 366(4)(n), (o); *Hope*, 83 N.Y.2d at 572 n.2, 634 N.E.2d at 185 n.2, 611 N.Y.S.2d at 813 n.2.

[36] *Hope*, 185 Misc.2d at 986, 571 N.Y.S.2d at 973. The state's decision to enact PCAP was based on studies that documented the correlation between infant mortality and neurological abnormalities on the one hand, and low birthweight and premature births on the other. These conditions are ameliorated by proper care throughout the pregnancy. *Hope*, 83 N.Y.2d at 573, 634 N.E.2d at 185, 611 N.Y.S.2d at 814 (citations omitted).

[37] *Id.* at 572, 634 N.E.2d at 185, 611 N.Y.S.2d at 813; N.Y. PUB. HEALTH LAW § 2520 et seq. (McKinney Supp. 1993).

diately presumes a woman's eligibility upon a preliminary showing that her household income falls within this income range.[38] Unlike Medicaid, this program does not require that she first exhaust her resources.[39]

PCAP does not fund medically necessary abortions even though it covers a long and extensive list of pregnancy-related services.[40] Nor does the state fund abortions necessary to save the mother's life, even though these are reimbursable under the federal program.[41] Largely as a result of legislative compromise and opposition from anti-choice legislators, PCAP is the only health care program in the state which specifically denies abortions to its clients.[42] The state justifies this exclusion by explaining that eligible women can fund their own

---

[38] N.Y. PUB. HEALTH LAW § 2521[3], N.Y. SOC. SERV. LAW § 366[4](o)(2) (McKinney 1992)..

[39] N.Y. SOC. SERV. LAW § 366a[2] (McKinney 1992). A Medicaid recipient must, upon verification, show exhaustion of resources before his or her application is approved. The discrepancy between the two programs' requirements is due to the exigencies attendant upon prenatal care. *Hope*, 83 N.Y.2d at 573, 634 N.E.2d at 185, 611 N.Y.S.2d at 813.

[40] These services include: prenatal risk assessment, prenatal care visits, laboratory services, parental health education, referrals for pediatric care and nutritional services, mental health and related social services, transportation to and from appointments, labor and delivery, post-pregnancy services such as family planning, in-patient care, dental services, emergency room services, home care and pharmaceuticals. N.Y. PUB. HEALTH LAW § 2522(1)(a)-(o) (McKinney 1993); *Hope*, 83 N.Y.2d at 572, 634 N.E.2d at 185, 611 N.Y.S.2d at 813.

[41] Complaint, Appendix, *supra* note 30, at 83. The New York State Supreme Court stated that a woman is not entitled to funds under PCAP for an abortion even if necessary to save her life. *Hope*, 150 Misc. 2d. at 990, 571 N.Y.S.2d at 976. The program also fails to fund abortions resulting from rape or incest.

[42] James Dao, *Lawyer Takes Abortion-Rights Case to Top Albany Court*, N.Y. TIMES, Mar. 17, 1994, at B5; Maureen Fan, *Abortion Rule Upheld in N.Y.*, NEWSDAY, May 6, 1994, at A6. *See also* Philip Gates, *Fight over Abortion Stalls Prenatal Care*, N.Y. TIMES, May 17, 1989, at B3. For three consecutive years, a dispute between the Republican-controlled Senate and Democrat-controlled Assembly over abortion funding blocked the expansion of PCAP. "The Democrat Assembly refuse[d] to consider bills that would change th[e] traditions [of Medicaid funding for abortions]. The Republican Senate, though, will not discuss legislation that does not exclude Medicaid-funding abortions for newly-eligible." *Id.*; *see also* Philip Gates, *Albany Pace on Prenatal Care Excludes Abortions*, N.Y. TIMES, June 30, 1989 at B2. Initially, "[t]he Assembly . . . had refused to approve the program unless the state agreed to pay for abortions for the newly-eligible women." Finally, a three-year deadlock ended when the Assembly passed the legislation excluding abortion coverage. Assembly Speaker Mel Miller explained the Assembly's change in position: "[A]lthough most of my conference would favor that abortions be paid for under this program, . . . they feel the program is so important that it must be approved." *Id.*

abortions.[43] Moreover, these women are still able to receive all of the other covered pregnancy and post-pregnancy services up to sixty days after their pregnancies have been terminated, regardless of how they ended their pregnancies.[44]

II. *HOPE V. PERALES, CLAIMS AND DEFENSES*

A. *Facts*

"Hope" was a 19 year-old pregnant woman who worked forty-four hours a week while attending college at night.[45] She had qualified for PCAP because her salary was below 185% of the federal poverty line.[46] After Hope tested positive for pregnancy, her doctor informed her that because she is a carrier of sickle cell anemia,[47] an abortion would be medically necessary

---

[43] The New York Court of Appeals based its holding on this assumption. *Hope*, 83 N.Y.2d at 577, 611 N.Y.S.2d at 816, 634 N.E.2d at 188.

[44] *Hope*, 83 N.Y.2d at 572, 634 N.E.2d at 185, 611 N.Y.S.2d at 813; *see* N.Y. PUB. HEALTH LAW § 2521(3) and N.Y. SOC. SERV. LAW § 365-a(5)(b). New York continues to include funding for abortions in its Medicaid program even though the United States Supreme Court ruled that exclusion is not unconstitutional. *See, e.g., In re* City of New York v. Wyman, 66 Misc.2d 402, 321 N.Y.S.2d 695 (Sup.Ct. N.Y. County), *rev'd*, 37 A.D.2d 700, 322 N.Y.S.2d 957 (1st Dep't 1971), *rev'd*, 30 N.Y.2d 537, 330 N.Y.S.2d 385, 281 (1972), and *infra* notes 247-253 and accompanying text.

[45] *Hope*, 150 Misc. 2d at 994, 571 N.Y.S.2d at 978. Another plaintiff, Jane Moe, also was income eligible but was not pregnant. She carried a fatal genetic defect that would compel her to have an abortion if she became pregnant. *Hope*, 83 N.Y.2d at 574, 634 N.E.2d at 186, 611 N.Y.S.2d at 814.

[46] *Hope*, 150 Misc. 2d at 994, 517 N.Y.S.2d at 979. Ironically, had Hope quit her job or taken one that paid less money, she then would have been entitled to receive funding for an abortion under Medicaid. Transcript of Proceedings before Honorable Edward J. Greenfield, Appendix, *supra* note 30, at 307-08.

[47] *Hope*, 150 Misc. 2d at 987, 571 N.Y.S.2d at 974. Sickle cell anemia is an inherited, chronic, and usually fatal anemia that is marked by crescent-shaped red blood cells. THE AMERICAN HERITAGE DICTIONARY 1676 (3d ed. 1992) The disease is characterized by episodic pain in the joints, fever, leg ulcers, and jaundice and is caused by a recessive gene. *Id.* It occurs almost exclusively in black people of Africa or African descent. *Id.* Allan Rosenfield, M.D., Professor of Obstetrics-Gynecology and Public Health and head of the Population and Family Health division at Columbia University School of Public Health, testified that pregnancy accelerates the clinical course of sickle cell anemia and causes more frequent medical crises in women who suffer from this disease. Affidavit of Allan Rosenfield, Appendix 164, *supra* note 30, at 171. For example, women infected with sickle cell anemia experience more frequent and more severe infections such as pneumonia, congestive heart failure, and pulmonary complications such as embolus. *Id.* Additionally, Dr. Allan stated that pre-eclampsia is seen in as many as one-third of preg-

to protect her health. Hope could not afford to pay the $900 abortion fee on her salary of $230 a week.[48] Hope then left school so that she could work more and save money for the abortion.[49] Unfortunately, four weeks later, twenty-one weeks into her pregnancy, the cost of the abortion increased to $1000-$1500.[50] Despite saving for four weeks and borrowing from friends, Hope still did not have the resources to pay for an abortion—even though her doctor advised her that the procedure would be necessary to preserve her health.[51]

Hope and Jane Moe,[52] on behalf of all income eligible women who might require a medically necessary abortion, along with physicians and various health care organizations, commenced a class action for declaratory and injunctive relief challenging the constitutionality of the PCAP.[53] The plaintiffs claimed that PCAP was facially unconstitutional and violated the Due Process clause[54] of the state constitution. They argued that since the right of reproductive choice was fundamental under the Due Process clause's right to privacy, any infringement upon this right was subject to strict scrutiny.[55] The plaintiffs demonstrated that PCAP burdened the fundamental right to reproductive choice by coercing women into childbirth.[56] The plaintiffs explained that the program is discriminatory because it only funds one of two courses of conduct

---

nant women who suffer from the disease. *Id.* Finally, perinatal mortality and spontaneous abortion are also common in women carrying this trait. *Id.*

[48] *Hope*, 83 N.Y.2d at 574, 634 N.E.2d at 186, 611 N.Y.S.2d at 814. Hope testified that her monthly expenditures included: $267 for rent; $270 for food; $80-100 for her share of the utilities (phone bill only because her parents pay gas and electric in exchange); $38 for car insurance; and $68 for gas. Affidavit of Jane Hope, Appendix 97, *supra* note 30, at 98 (hereinafter "Hope Aff.").

[49] *Hope*, 150 Misc. 2d at 994, 571 N.Y.S.2d at 978.

[50] *Id.* An abortion in New York costs between $200 and $3,500 depending on the facility and the stage in pregnancy. *Id.*

[51] *Id.* at 994, 571 N.Y.S.2d at 978-79.

[52] Jane Moe was not pregnant at the time but would have required an abortion if she became pregnant because she is a carrier of the fatal chromosomal abnormality, Trisomy 13. *See infra* notes 147-53 and accompanying text.

[53] *Hope*, 83 N.Y.2d at 573, 634 N.E.2d at 185-86, 611 N.Y.S.2d at 813-14.

[54] N.Y. CONST. art. I, § 6, "no person shall be deprived of life, liberty, or property without due process of the law."

[55] Brief for Plaintiffs-Respondents at 49, Hope v. Perales, 83 N.Y.2d, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994) (No. 23) (hereinafter "Plaintiffs' Brief").

[56] *Hope*, 150 Misc. 2d at 995, 571 N.Y.S.2d at 979.

possible in pregnancy.[57] This selective funding scheme, plaintiffs argued, effectively takes the decision away from women and therefore improperly interferes with their right to choose.[58] Since the state conditions funding on the result it desires—childbirth—this impermissibly pressures low income women into carrying to term and leaves women without any real choice regarding their pregnancy. The state's discriminatory funding scheme therefore infringed upon a constitutional right and was subject to the highest level of review under the constitution.

The plaintiffs argued that the defendants failed to prove that the program withstood strict scrutiny analysis for two reasons.[59] First, they contended that the defendant's failed to put forth a compelling state interest because the state's interest in childbirth cannot override a woman's fundamental right to choose.[60] Second, they argued that the program bears no relation to the goal of ensuring the delivery of healthy babies by those women who carry to term.[61]

Additionally, the plaintiffs asserted that PCAP violated the Equal Protection clause[62] because the conduct-oriented program does not meet the clause's guarantee that state benefits will be extended equally.[63] The Equal Protection clause guarantees equal participation in a state benefit once the benefit is extended.[64] Here, the state intruded upon a fundamental right by refusing to extend the benefit of state funding simply because some women choose to exercise a fundamental right.

---

[57] *Hope*, 83 N.Y.2d at 575-76, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

[58] *Hope*, 150 Misc. 2d at 997, 571 N.Y.S.2d at 980.

[59] Plaintiffs' Brief, *supra* note 55, at 48.

[60] *Id.*

[61] *Id.* at 50.

[62] N.Y. CONST. art. I, § 11. "No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or [any] agency or subdivision of the state." *Hope*, 150 Misc. 2d at 998, 571 N.Y.S.2d at 981. Plaintiffs also argued that the program violates the freedom of religion clause, Article I, § 3, Aid to Needy, N.Y. CONST. art. 17, § 1, Health of Inhabitants, N.Y. CONST. art. 17, § 3. Although the Supreme Court of New York ruled in favor of the plaintiffs on the Aid to Needy claim, *Hope*, 150 Misc. 2d at 997, 571 N.Y.S.2d at 980, the appellate division rejected both challenges. *Hope*, 189 A.D.2d at 298, 595 N.Y.S.2d at 954. These challenges will not be discussed in this Comment.

[63] Affirmation of Robert M. Levy, Appendix 51, *supra* note 30, at 54; Plaintiffs' Brief, *supra* note 55, at 54.

[64] *Hope*, 150 Misc. 2d at 999, 571 N.Y.S.2d at 982.

Plaintiffs asserted this distinction triggered the "strict scrutiny" standard of review because the program's funding scheme burdened a fundamental right.[65] As in due process, strict scrutiny applies when a law has a discriminatory impact upon a fundamental right.[66] The plaintiffs argued that PCAP discriminated between those for whom medical care is necessary for childbirth and those for whom an abortion is medically necessary.[67] The state failed to meet this stringent standard because New York lacked a compelling interest to justify the distinction between these women.[68] The program thus violated equal protection.[69]

The plaintiffs sued both the Commissioners of the New York State Department of Social Services and the Department of Health—the directors of the agencies responsible for administering the PCAP and promulgating the relevant guidelines.[70] The defendants' position was that the legislature's decision to enhance access to prenatal care did not impair the ability of women, whatever their income level, to procure abortions.[71] Therefore, because the program did not affect a woman's right to choose abortion, the program was constitutional.[72]

Specifically, the defendants argued that the state had expanded PCAP to remedy a special, significant problem—the detrimental effects on infants' health caused by a lack of prenatal care.[73] New York State argued that it had a strong interest in providing access to prenatal and obstetrics care to women who are too poor to get these services. The defendants further asserted that PCAP's funding scheme, which provided pregnancy-related and childbirth expenses but not abortion, also was narrowly tailored, because this scheme achieved its

---

[65] A statute that burdens a fundamental right or discriminates against a suspect class must be struck down unless it satisfies the strict scrutiny standard of review. Under this test, the restriction must be narrowly tailored to serve a compelling interest. *In re* Rosenstock v. Scaringe, 40 N.Y.2d 563, 357 N.E.2d 347, 388 N.Y.S.2d 876 (1976).

[66] *Hope*, 150 Misc. 2d at 999, 571 N.Y.S.2d at 981.

[67] Plaintiffs' Brief, *supra* note 55, at 56.

[68] Plaintiff's Brief, *supra* note 55, at 56.

[69] Plaintiff's Brief, *supra* note 55, at 56.

[70] *Hope*, 150 Misc. 2d at 987, 571 N.Y.S.2d at 974.

[71] *Hope*, 189 A.D.2d at 295, 595 N.Y.S.2d at 953.

[72] *Id.* at 291, 595 N.Y.S.2d at 950.

[73] *Id.*

ends of promoting the health of newborns.[74] Funding birth and not abortion, according to the defendants, did not discriminate against nor deprive women of their right to choose because women could still afford to have an abortion.[75] The defendants relied on the legislative presumption that the women who receive PCAP and therefore are above the poverty line would have the resources to enable them to afford an abortion.[76] PCAP, in their view, was merely a "one step at a time" approach to ameliorating infant mortality rates.[77] Thus, the defense concluded that the legislature's decision to finance medical services that aimed to improve the health of infants did not infringe upon nor even meaningfully relate to a woman's right to abortion.[78]

B. *The Courts' Decisions*

1. The Supreme Court of New York

The Supreme Court of New York held for the plaintiffs and ruled that PCAP violated the Due Process and Equal Protection clauses of the state constitution because its selective, conduct-oriented financing scheme interfered with a woman's fundamental right to abortion.[79] As the court wrote, a "woman's decision to bear a child transforms her body, risks her health and changes her life . . . [thus] [h]er right to make this decision free from government interference lies at the heart of the right to privacy secured by the Due Process clause in the New York State Constitution."[80]

The Supreme Court found that PCAP interferes with this

---

[74] *Hope*, 150 Misc. 2d at 989, 571 N.Y.S.2d at 975.

[75] *Hope*, 189 A.D.2d 295, 595 N.Y.S.2d at 952-53.

[76] *Hope*, 150 Misc. 2d at 989-90, 571 N.Y.S.2d at 975.

[77] *Id.* at 989, 571 N.Y.S.2d at 975.

[78] *Hope*, 189 A.D.2d at 291, 595 N.Y.S.2d at 950.

[79] *Hope*, 150 Misc. 2d at 995, 999, 571 N.Y.S.2d at 979, 982. The supreme court held that abortion is protected as a fundamental right under the state constitution. *Id.* at 995, 571 N.Y.S.2d at 979. The court stated, "It is an eligible woman's exercise of the fundamental right to abortion which triggers PCAP's unconstitutional restriction." *Id. See also In re* Klein, 145 A.D.2d 145, 538 N.Y.S.2d 274 (2d Dep't), *appeal denied,* 73 N.Y.2d 705, 736 N.E.2d 627, 539 N.Y.S.2d 298 (1989) (court implicitly held abortion is fundamental right).

[80] Spencer, *supra* note 2, at 2.

fundamental right by impermissibly pressuring PCAP-eligible poor women toward childbirth.[81] As noted, although PCAP provided medical assistance for all services related to pregnancy and childbirth—including prenatal risk assessment and laboratory services to detect fetal abnormalities—it did and does not fund abortion. The court stated that a medical assistance program that conditions assistance on the state-preferred choice of childbirth "effectively precludes an eligible woman from any real choice in the fundamental decision 'to bear or beget a child.'"[82] Therefore, PCAP violated the Due Process clause of the state constitution.

The court also held that PCAP's abridgment of a fundamental right[83] failed even the lowest level of scrutiny under the court's equal protection analysis.[84] Because PCAP ignored the effects on maternal health and the probability of grave infant defects that would result if women could not receive abortions, the court held that PCAP was not rationally related to the state's goal of promoting infant and maternal health. The court recognized that there is no constitutional requirement for a state to accord equal treatment to both abortion and childbirth,[85] but found it "inconsistent and even irreconcilable

---

[81] *Hope*, 150 Misc. 2d at 995, 571 N.Y.S.2d at 979.

[82] *Id.* at 995-96, 571 N.Y.S.2d at 979 (quoting Cary v. Population Servs. Int'l, 431 U.S. 678, 687 (1977)).

[83] *See id.* at 994, 571 N.Y.S.2d at 978 ("The right of a pregnant woman to choose abortion in circumstances where it is medically indicated is one component of the right to privacy . . . ."). *See also id.* at 995, 571 N.Y.S.2d at 979 ("It is an eligible woman's exercise of the fundamental right to abortion which triggers PCAP's unconstitutional restriction.").

[84] There are two levels of review when a statute is challenged on nonprocedural grounds as violating due process and three levels under equal protection analysis. Strict scrutiny, which applies to fundamental rights and suspect classifications, requires that the statute be narrowly tailored to promote a compelling state interest. Golden v. Clark, 76 N.Y.2d 618, 623, 564 N.E.2d 611, 613-14, 563 N.Y.S.2d 1, 3-4 (1990). If a fundamental right is not infringed, then the inquiry is whether there is some reasonable relation between the statute and a legitimate state interest. West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937); Montgomery v. Daniels, 38 N.Y.2d 41, 54, 340 N.E.2d 444, 451, 378 N.Y.S.2d 1, 11 (1975). Under equal protection analysis, certain classifications, such as gender and illegitimacy, are reviewed under a third level of review—the intermediate level of scrutiny. City of Cleburne Texas v. Cleburne Living Ctr., 473 U.S. 432 (1985). In *Hope*, because PCAP could not even satisfy the lowest level of scrutiny, the trial court did not analyze it under the higher level.

[85] *Hope*, 150 Misc. 2d at 996, 571 N.Y.S.2d at 980 (quoting Maher v. Roe, 432 U.S. 464, 470 (1977)).

to find that a State-sponsored aid program providing prenatal services furthers, at best, a 'compelling' or at least, an 'important', State interest when certain eligible recipients are denied assistance in spite of their medical condition."[86]

The court concluded that the program was not designed to ensure that eligible women received the most appropriate medical assistance and therefore failed the second prong of due process and equal protection analysis. On the contrary, the program ignored the risks to a mother's health and the probability of grave fetal defects by excluding medically necessary abortions. This policy left at-risk women with no alternative but to give birth despite medically diagnosed dangers.[87] Thus, the program actually based assistance on conduct, and not medical need as the state asserted. If Hope gave birth, the state would have funded all of the expenses; if she elected to have an abortion to protect her own health, the state would have refused to assist her even though it was a medically necessary procedure. Because its very design disregarded the danger to both mother and baby, PCAP was facially deficient since it could not fulfill its stated objective of enhancing maternal and fetal health.[88] PCAP does not withstand the lowest level of scrutiny under the due process and equal protection clauses. The result, that both the mother and the baby would be sick, was not "fairly, justly, rationally or reasonably related to combating infant mortality or low birth weight."[89] Moreover, these medical conditions would lead to more costly treatment for both mother and child.[90] The court therefore concluded that there was no justification for the funding scheme's infringement upon the exercise of an eligible woman's fundamental right to choose abortion.[91]

---

[86] *Id.*

[87] *Id.* at 990, 571 N.Y.S.2d at 976.

[88] *Id.* at 994-95, 571 N.Y.S.2d at 978.

[89] *Id.* at 995, 571 N.Y.S.2d at 979.

[90] Hope testified that she "[could not] afford to raise a baby on [her] own" and if the baby was afflicted with sickle cell anemia, she "[could not] care for a sick baby all alone." Hope Aff., *supra* note 48, at 99.

[91] *Hope*, 150 Misc. 2d at 996-97, 571 N.Y.S.2d at 980.

2. The Appellate Division of New York

In a 4-1 ruling, the New York Appellate Division affirmed the lower court ruling and agreed that PCAP infringed upon a woman's right to reproductive freedom, a part of the fundamental right to privacy protected by the state's Due Process clause.[92] The court agreed with the trial court's invalidation of PCAP because it also found that PCAP unconstitutionally discriminated against

> women's right to reproductive freedom, which is part of the fundamental right to privacy protected by the Due Process Clause . . . of the New York State Constitution [and held that] the right of a pregnant woman to choose abortion in circumstances where it is medically indicated is one component of the right of privacy.[93]

The Appellate Division agreed with the Supreme Court that the scheme was unconstitutional because it "unconditionally bases assistance on conduct rather than need."[94] This discrepancy impermissibly steered women toward childbirth by paying for all the expenses incurred in childbirth and none of those associated with abortion.[95] The effect of a policy which only funds childbirth is "certain[ ] to pressure women in the direction of giving birth"[96] and "has the effect of forcing needy women to give birth even when this is not medically indicated and is detrimental to their physical and mental well-being."[97] The court rejected the defendant's argument, finding it "extremely facile" to claim that PCAP-eligible women still could procure an abortion when poor women frequently lack the

---

[92] *Hope*, 189 A.D.2d at 297, 595 N.Y.S.2d at 954 ("the Due Process Clause of the State Constitution . . . encompasses the right to reproductive choice which is an integral part of the right to privacy and bodily autonomy"). The dissent also recognized that, "[i]ndeed, it may even be conceded, as the plaintiffs argue, that the protections afforded in the subject area by the State Constitution exceed those of the Federal Constitution: that the right of reproductive choice is fundamental under the State Constitution . . . ." *Id.* at 298-99, 595 N.Y.S.2d at 955 (Murphy, J., dissenting).

[93] *Id.* at 292, 595 N.Y.S.2d at 950.

[94] *Id.* at 292, 595 N.Y.S.2d at 951.

[95] *Id.*

[96] *Id.* at 293-94, 595 N.Y.S.2d at 951.

[97] *Hope*, 189 A.D.2d at 295, 595 N.Y.S.2d at 953.

means to pay for the procedure on their own.[98] PCAP thus conflicted with the "requirement that government actions must be constitutionally neutral in affecting the exercise of fundamental rights."[99] For this reason, the appellate division concluded that the "only logical explanation for the discriminatory funding scheme implemented by the Legislature when it adopted PCAP . . . was that a majority of that body was endeavoring to avoid the political pitfalls accompanying anything even remotely connected to the subject of abortion."[100]

3. The New York Court of Appeals

In a surprising decision, the New York Court of Appeals reversed the lower courts' rulings and held that the plaintiffs had failed to establish that PCAP even indirectly infringed upon their right to reproductive choice.[101] The court claimed no evidence indicated that women are "coerced, pressured, steered or induced by PCAP to carry pregnancies to term,"[102] and therefore plaintiffs failed to show a burden on a fundamental right. The court, contrary to the two lower courts, accepted the defendant's claim that PCAP is rationally related to its goal of ameliorating infant mortality and morbidity rates by providing prenatal care to low-income women.[103] Consequently, the court upheld PCAP under both the Due Process and Equal Protection clauses.[104]

The court of appeals placed great emphasis on its perceived distinction between Medicaid-eligible women and PCAP-eligible women. Indeed, this differentiation provided the basis of its reasoning. The court acknowledged that New York had a long-standing commitment to fund abortions for poor women under the Medicaid program because for these women, abor-

---

[98] *Id.* at 295, 595 N.Y.S.2d at 953.

[99] *Id.* at 296, 595 N.Y.S.2d at 953; *see also Hope*, 150 Misc. 2d at 995, 571 N.Y.S.2d at 979 (while the legislature can express a preference for childbirth over abortion and allocate resources accordingly, it cannot "transgress constitutional principles to achieve this result").

[100] *Hope*, 189 A.D.2d at 297, 595 N.Y.S.2d at 954.

[101] *Hope*, 83 N.Y.2d at 576, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

[102] *Id.*

[103] *Id.* at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

[104] *Id.* at 577, 634 N.E.2d at 187, 611 N.Y.S.2d at 814.

tion would arguably be foreclosed by a lack of resources.[105] The court found no evidence on the record that rebutted the legislature's presumption that a woman who is slightly above the Medicaid line has the financial means to exercise her fundamental right to choice.[106] The court justified its reliance on this presumption by pointing out that PCAP-eligible women do not ordinarily receive state assistance. Because these women presumably could still afford an abortion from their own resources, the court concluded PCAP's scheme of only funding childbirth did not impose any direct burden on abortion, nor did it make abortion any less accessible or less affordable for these women.[107] Based on this reasoning, the court rejected the argument that merely subsidizing certain prenatal services while excluding others itself constituted coercion. It found no other evidence that this lack of subsidization influenced PCAP women to carry to term.[108] According to the court, the program actually made abortion even more affordable because of the free testing and sixty-day postpartum care.[109] PCAP was therefore constitutional under both the Due Process and Equal Protection Clauses.

III. THE MISSTATEMENT OF THE RECORD: HOW THE COURT AVOIDED IMPORTANT ISSUES

The New York Court of Appeals appears to have intentionally misconstrued the trial transcript in order to avoid addressing crucial legal issues presented in *Hope*. The court's opinion betrayed two assumptions that were inconsistent with the record to reach its conclusion. First, it relied upon the legislature's presumption that PCAP-eligible women can afford abortions on their own despite an abundance of evidence submitted by plaintiffs contradicting this premise.[110] Second, the court limited the scope of PCAP's objectives solely to combatting the state's "unacceptably high rate of low birthweight and infant mortality."[111] The court ignored evidence indicating

---

[105] *Id.* at 575, 634 N.E.2d at 187, 611 N.Y.S.2d at 814.
[106] *Hope*, 83 N.Y.2d at 576, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.
[107] *Id.* at 575, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.
[108] *Id.* at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.
[109] *Id.* at 575, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.
[110] *Id.* *See infra* notes 115-159 and accompanying text.
[111] *Hope*, 83 N.Y.2d at 573, 634 N.E.2d at 185, 611 N.Y.S.2d at 813. *See infra*

that the legislature enacted PCAP to prevent maternal as well as infant mortality and morbidity. Because of its selective reading of the record, the court was able to reach the conclusion that PCAP's funding of prenatal care is rationally related to a legitimate state objective.[112] By claiming that PCAP was not a general medical program and by distinguishing PCAP-eligible women from Medicaid-eligible women, the court limited the scope of the program. Thus, it avoided having to answer the "Medicaid question"—whether the state constitution affords greater protection than the federal constitution in terms of abortion rights—and having to take into account what was in the best medical interest for these women.[113]

A. *PCAP-Eligible Women's Difficulty In Affording Abortions On Their Own*

The New York Court of Appeals distinguished women in PCAP's income category from Medicaid-eligible women whose "option to choose an abortion is arguably foreclosed by her lack of resources."[114] The court inaccurately stated that the legislative presumption that PCAP-eligible women are able to afford an abortion on their own was "not rebutted on the record before [it]."[115] Based on this initial conclusion, the court reasoned that "[t]here is no evidence that eligible women are coerced, pressured, steered or induced by PCAP to carry their pregnancies to term."[116]

The court reached this conclusion notwithstanding the fact that the plaintiffs submitted numerous affidavits establishing

---

notes 160-171 and accompanying text.

[112] *Id.* at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

[113] Because the New York legislature continuously has funded abortion in its general Medicaid plan, the court of appeals has never been confronted with the issue as to whether the state constitution mandates the inclusion of abortion in a general medical plan. *See Hope*, 150 Misc. 2d at 992, 571 N.Y.S.2d at 977. This Comment argues that the court of appeals avoided this issue when it distinguished Medicaid-eligible from PCAP-eligible women. In both situations, however, women often cannot afford to pay for an abortion. *See infra* notes 115-159 and accompanying text.

[114] *Hope*, 83 N.Y.2d at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

[115] *Id.* at 575, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

[116] *Id.* at 576, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

that PCAP-eligible women often cannot afford to pay independently for abortions.[117] The trial court recognized this showing when it rejected the defendants' contention that PCAP-eligible women were able to afford an abortion. Both the evidence submitted at trial, and the fact that the legislature enacted PCAP precisely to cover these women whom it believed needed financial assistance with prenatal and post-natal expenses, supports the lower court's finding of fact.[118]

The plaintiffs submitted numerous expert affidavits to the trial court that documented the hardship and significant challenge PCAP women encounter when attempting to save for an abortion in the absence of government assistance. William H. Scarbrough, Ph.D.,[119] a poverty expert, and Stanley K. Henshaw, Ph.D.,[120] one of the country's leading statisticians

---

[117] *See infra* notes 119-133, 137-159 and accompanying text. If the court had accepted the testimony that PCAP-eligible women cannot afford to pay for an abortion, it would have been confronted with the argument accepted by the lower courts that the funding scheme discriminates against women for whom abortion is medically necessary, but who cannot afford one, and in favor of women who seek medical care for childbirth. *Hope*, 150 Misc.2d at 996-97, 571 N.Y.S.2d at 980. *See* Right to Choose v. Bryne, 450 A.2d 925, 934 (N.J. 1982). The argument accepted by the supreme court and appellate division was that medical care is required by virtue of pregnancy. To condition medical assistance on the result desired by the state and not on the medical necessity of the pregnant woman effectively wrests control over her body and health from her and takes the choice away from her. The state simply cannot wield its enormous economic power to influence a woman to choose birth, particularly when it could be fatal to her. *Hope*, 150 Misc. 2d at 997, 571 N.Y.S.2d at 980.

[118] *See infra* notes 119-160. *See also Hope*, 189 A.D.2d at 296-97, 595 N.Y.S.2d at 953. *See also* Governor's Memorandum on Approval of Ch. 584, N.Y. Laws (July 19, 1989) *reprinted in* [1989] N.Y. Laws Gm-60 (McKinney) ("Approximately 28,000 women and 40,000 infants, who would not otherwise receive appropriate medical care, now will have access to necessary care.").

[119] Dr. Scarbrough is Associate Director for Research at the National Center for Children in Poverty, a research institute affiliated with the School of Public Health at Columbia University. He also worked as a senior analyst in the United States General Accounting Office where he was responsible for planning, implementing and monitoring national studies of public assistance programs, and for developing federal statistical policy. Affidavit of William H. Scarbrough, Appendix, *supra* note 30, at 191 (hereinafter "Scarbrough Aff.").

[120] Deputy Director of Research for the Alan Guttmacher Institute ("AGI") in New York City, an independent, nonprofit corporation involved in research, policy analysis and public education in reproductive health care. AGI statistics have been accepted by the Census Bureau as the most complete statistics on abortion in the United States and are published each year in the *Statistical Abstract of the United States*. Affidavit of Stanley K. Henshaw, Appendix 133, *supra* note 30, at 133 (hereinafter "Henshaw Aff.").

in reproductive health care, both testified that the statutory exclusion irreparably harms pregnant women in the PCAP income category who need an abortion but cannot afford to pay independently for medical care.[121] Dr. Scarbrough found that these women, many of whom were minority and teenaged mothers when they had given birth to their first child, often could not provide basic necessities for their families.[122] In recognition of their plight, the federal government had extended various entitlement programs to these families, such as food stamps and federal housing subsidies, because those women "could not otherwise afford the subsidized goods and services."[123] Therefore, in Dr. Scarbrough's opinion, PCAP-eligible women are poor, "insofar as poverty means the inability to afford the basic necessities of life, such as medical treatment."[124]

Dr. Henshaw also testified that women often have a difficult time saving for an abortion, which sometimes represents 30 weeks of their earnings.[125] In New York, women eligible under PCAP earn between $499 and $921 a month,[126] or on the average, $1,500 a month for a family of three.[127] After paying 40% to rent and utility bills (higher in the Northeast than the national average), 25% to childcare, (again, 20% more expensive in the Northeast) and 20% to federal, state, and local taxes, the woman heading a family of three would be left

---

[121] Scarbrough Aff., *supra* note 119, at 193. *See generally* Appendix, *supra* note 30, at 192-98. *See also* Henshaw Aff., *supra* note 120, at 135.

[122] Scarbrough Aff., *supra* note 119, at 193. Because Dr. Scarbrough did not know of any state studies of this income range, his conclusions were based on national demographics of families with incomes between 100% and 185% of the federal poverty line.

[123] Scarbrough Aff., *supra* note 119, at 194. Families with gross incomes up to 130% of the poverty line qualify for food stamps, 7 C.F.R. § 273.9 (1988), and families with incomes up to 80% of the median family income (an income slightly higher than 100% of the federal poverty line) are eligible for federal housing subsidies. Scarbrough Aff., *supra* note 119, at 194 (citing P.A. Leonard, C.N. Dolbear, & E.B. Lazere, *A Place to Call Home: The Crisis in Housing for the Poor,* Washington, D.C., Center on Budget and Policy Priorities (1989)).

[124] Scarbrough Aff., *supra* note 119, at 198.

[125] Henshaw Aff., *supra* note 120, at 139.

[126] Brief Amicus Curiae of the City of New York at 11, Hope v. Perales, 150 Misc. 2d 985, 571 N.Y.S.2d 972 (Sup. Ct. N.Y. County 1991) (No. 21073/90) (hereinafter "City Brief").

[127] Scarbrough Aff., *supra* note 119, at 195.

with approximately 10%—or $150—per month.[128] The remaining money must cover the essentials of every day life—food, clothing, and transportation. Many of these women, who are "only a few steps away from homelessness and poverty,"[129] do not have savings or private health insurance.[130]

An abortion in New York State, excluding the expenses of child care, loss of salary, transportation and other less tangible expenditures, costs between $200 and $3,500 depending on the stage in pregnancy and type of facility.[131] In some cases, this cost can equal from two-thirds to over one hundred percent of the woman's total public assistance payments.[132] For a single woman whose income is between one hundred and one hundred eighty-five percent of the federal poverty line, the cost represents between one to thirty weeks' earnings.[133]

Women who do manage to scrape together the money for an abortion must divert funds from living necessities. This leads to severe hardship. Medicaid recipients, for example, have reported that to meet the cost of an abortion, they had to use money earmarked for other family essentials like children's expenses, food, bill payments, and transportation, clothing and

---

[128] Scarbrough Aff., *supra* note 119, at 195-96.

[129] City Brief, *supra* note 126, at 11.

[130] Scarbrough Aff., *supra* note 119, at 196 (approximately 43% of all families in the 100-185% federal poverty level have no private medical insurance).

[131] Appendix, *supra* note 30, at 197; *Cost Implications*, *supra* note 24, at 2 (average cost of early, outpatient abortion is $250).

[132] *See* City Brief, *supra* note 126, at 11; *Cost Implications*, *supra* note 24, at 2. The average monthly maximum in AFDC payments to a family of three in 27 states is estimated to be $250. Moreover, in nine states, the cost of an early term abortion is higher than families' entire monthly payments. *Cost Implications*, *supra* note 24, at 2.

[133] Henshaw Aff., *supra* note 120, at 139. *See also* Affidavit of Josephine Rose, Appendix, *supra* note 30, at 286-90. Dr. Henshaw testified that the exclusion of abortion from PCAP harms women who cannot afford but require an abortion. Henshaw Aff., *supra* note 120, at 287. For women who do not live near a city that provides subsidized abortions, the cost of transportation and overnight stay may preclude women altogether from obtaining a necessary abortion. A PCAP-eligible woman in Auburn, New York, for example, would have to pay between $30.90 and $100.70 for transportation to Buffalo, Rochester, or New York City; the cost of the second trimester abortion in a city costs $350-$1,000; a sonogram which may be required to determine the duration of the pregnancy costs between $50-$225.00. Thus, the total cost often exceeds one month's salary. Furthermore, if the woman has a medical problem necessitating hospital supervision for an abortion, the cost is even higher. Some women have continued their pregnancies because they cannot afford these costs. Henshaw Aff., *supra* note 120, at 288-89.

utility bills.[134] Others may resort to even more drastic measures, such as forging insurance claims or even stealing the money.[135] Thus, these women lack basic Medicaid coverage, which includes abortion services. Women often face problems in finding a facility that will perform the procedure. More and more doctors and hospitals are not willing to perform abortions.[136] Women in more remote areas of the state simply do not have access to abortion facilities. Nor do they have adequate access to a public facility in New York City,[137] that

---

[134] Stanley K. Henshaw & Lynn S. Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor,* 16 FAM. PLAN. PERSP., 170, 178-79 (July/Aug. 1984). *See also* Janice Steinschneider, *State Constitutions: The New Battlefield for Abortion Rights,* 10 HARV. WOMEN'S L.J. 284, 286 n.10 (1987).

[135] Women's Health Servs., Inc. v. Maher, 482 F. Supp. 725, 731 n.9 (D. Conn.) (1980). Of the 63% that did obtain funds for abortions in this case, many did so only with some sacrifice of not paying rent or utility bills, pawning household goods, diverting food and clothing money, journeying to another state to obtain lower rates, or fraudulently using a relative's insurance policy. In a few cases, some patients were desperate enough to steal money to fund their abortions. *Id.*

[136] There has been a significant decline in the number of doctors who are willing to perform the procedure. In part, the decreasing number of doctors is due to tactics by anti-abortion extremists who picket doctors' homes, make death threats, and put doctors' photographs and addresses on wanted posters. Tessa Souter, *Stop Tactics,* THE GUARDIAN, May 9, 1994, at T010. Abortion clinics throughout the country have been the target of arson, bombing, vandalism and abusive picketing leading to the passage of the Freedom of Access to Clinic Entrance Act. *Id.* These tactics have been successful. The number of abortion providers in rural states has decreased by 51% since 1977 and by 6% in urban areas. *Id.* More astonishing is that a staggering 83% of all United State counties do not have a single abortion provider. *Id.*

[137] The Executive Vice President of Planned Parenthood of New York City ("PPNYC"), testified that PPNYC patients who cannot afford to pay for an abortion but are able to obtain an abortion at a municipal hospital are forced to wait approximately four to five weeks. Affidavit of Joan S. Coombs, Appendix 236, *supra* note 15, at 243. This delay is in contrast to the one- to two-day delay for Medicaid-eligible women. *Id.* at 239. *See also* Affidavit of Vicki Alexander, M.D., Appendix, *supra* note 30, at 221. Dr. Alexander, Medical Director of Community Family Planning Council ("CFPC"), and former staff physician at Maternal—Infant Care-Family Planning Projects, testified that women in the

> 100-185% income category . . . often cannot be served [at private abortion facilities] because they cannot pay the fee. The price of the abortion at these clinics range from $235-$1,000 depending on the duration of the pregnancy. Few patients in the 100-185% income category can raise even the lowest of these sums in the short time available before the price beings to climb as the pregnancy advances.

Id. at 224.

Dr. E. Hakin Elahi, Director of Ambulatory Care and Assistant Professor at the Department of Obstetrics and Gynecology at the School of Medicine of the State University of New York at Stony Brook, and Medical Director of PPNYC,

subsidizes abortions for PCAP-eligible women, because many women cannot afford the transportation costs. Moreover, women who are able to get to a New York City hospital that performs abortions for PCAP-eligible women for free or at a reduced cost often face a delay of 3-4 weeks and each week's delay increases the health risks of the procedure and the trauma associated therewith.[138] Due to severe overcrowding, inflexible schedules and bureaucratic procedural requirements, many women who would have obtained a first trimester abortion were forced to delay the procedure sometimes up to five weeks.[139] Too often, these women have no other option but to carry through with an unwanted birth because they simply cannot save for an abortion.

Statewide physicians and health care providers who work with this constituency on a daily basis testified before the New York Court of Appeals that many women have such a difficulty

---

testified that based on "extensive clinical experience, personal knowledge and study of relevant literature and statistical data recognized as reliable in the medical profession," his professional opinion was that PCAP irreparably harms "low-income women who need a pregnancy terminated but cannot afford to pay independently for medical care." Affidavit of E. Hakin Elahi, M.D., Appendix 246, *supra* note 30, at 246-47. Many women cannot afford an abortion and therefore delay the procedure in order to obtain money to pay the cost, which is $3,500 at Stony Brook including physician's fees, a sonogram, anesthesia, and hospital expenses. *Id.* at 247.

Louise Crawley, Director of Erie Medical Center in Buffalo, New York and former resident nurse in Obstetrics and Gynecology at Buffalo General Hospital, testified that "many [PCAP-eligible] patients have such severe financial constraints," they postpone the procedure in order to raise money, yet know this increases the cost and complications of the abortion. Affidavit of Louise Crawley, Appendix 262, *supra* note 30, at 262, 266. Some women who cannot afford the procedure or the transportation cost to New York City to obtain a subsidized abortion end up "carrying dangerous pregnancies to term and suffering the attendant consequences to their health." *Id.* at 268.

Sharon Collier, counseling supervisor at the Erie Medical Center, described four cases in which PCAP-eligible women were forced to either delay the abortion to obtain the funds or were forced to carry to term. Affidavit of Sharon Collier, Appendix 270, *supra* note 30, at 274-77. Patricia Romeo, Coordinator and Counselor at the Patchogue Center of Planned Parenthood Suffolk County, Inc., testified that 20-25% of their non-Medicaid patients, nearly all of whom were in the 100-185% income category, reported serious financial limitations that may delay or prevent them from obtaining an abortion. *Id.* at 278, 281. She described two typical examples: one in which an income-eligible woman, because of lack of funding, was forced to delay a first trimester abortion until the second trimester; the other in which the woman was forced to carry to term because she could not afford a second trimester abortion. *Id.* at 284.

[138] Affidavit of Ana O. Dumois, Appendix 207, *supra* note 30, at 211.

[139] Henshaw Aff., *supra* note 120, at 138.

obtaining funds for an abortion that they either must delay the procedure or are "forced to continue the pregnancy."[140] PCAP-eligible women often must postpone having an abortion while they try to raise money. This delay poses two serious problems: later procedures are more expensive, thereby requiring women to raise even more money than needed for a first trimester abortion;[141] and delaying an abortion greatly increases the risk of complications and risks associated with the procedure and is "wholly inconsistent with sound medical practice."[142] A second trimester abortion performed at sixteen to twenty weeks carries *nineteen times* greater risk of death than an abortion performed at eight weeks.[143] Other women who are unable to save the money and cannot get subsidized abortions

---

[140] Henshaw Aff., *supra* note 120, at 140 (the exclusion of abortion from PCAP will force many women in this income category to "delay . . . into the second trimester of pregnancy and others will be deterred from obtaining necessary abortions"); *see also* Affidavit of Irwin H. Kaiser, M.D., Appendix 147, *supra* note 30, at 148. A medical doctor and professor emeritus in the Department of Obstetrics and Gynecology at the Albert Einstein College of Medicine of Yeshiva University, Kaiser testified that the "statutory exclusion causes irreparable and severe harm in that it operates to delay and in some cases, to prevent the women in the affected income category from obtaining timely, safe abortions." *Id.* at 148. One reason is that amniocentesis, the most reliable prenatal diagnostic test, is ideally performed for this purpose after the 15th week, with test results obtained between the 19th and the 21st weeks. *Id.* at 149-50. For many low-income women who learn later in pregnancy of a genetic abnormality that may cause deformity or death of the infant, the program's exclusion of abortion leaves many "no real alternative but to continue the pregnancy irrespective of the medical, physical, or emotional consequences." *Id.* at 151. Therefore, although responsible medicine mandates that these women obtain an abortion, PCAP's scheme "effectively precludes most low-income women from obtaining abortions." *Id.* at 154.

Dr. Ana Dumois, CEO of Community Family Planning Council ("CFPC"), a nonprofit agency providing comprehensive reproductive health care to the five boroughs of New York City through funding received from the New York City Human Resources Department, the State Department of Health, United Way, and private resources, testified that PCAP irreparably harms women in this income range because they "often cannot raise the money to pay for abortions in private, free-standing clinics in New York City." Affidavit of Ana O. Dumois, Appendix 207, *supra* note 30, at 210. The price range for abortions is $235-$1,000, which represents between one-half of a week's to four weeks' earnings. *Id.* Moreover, these amounts are "usually unavailable for medical care because the family's income is almost entirely absorbed by other necessities such as food and shelter." *Id.*

[141] Henshaw & Wallisch, *supra* note 134, at 170-71.

[142] Moe v. Secretary of Admin. and Fin., 417 N.E.2d 387, 393 (Mass. 1981).

[143] Henshaw Aff., *supra* note 120, at 138. Moreover, the tendency of teenagers to obtain abortions later in pregnancy has the largest single effect on morbidity and mortality for abortion in this population. *Id.* (citations omitted).

"are forced to continue pregnancies."[144] The exclusion of abortion from PCAP therefore forces some women to "carry unwanted and medically risky pregnancies to term."[145]

In addition to the expert testimony, Hope and other individual women submitted affidavits to the court of appeals detailing personal accounts of financial inability to pay for an abortion.[146] Jane Moe, for example, testified that in November 1988, she had been forced to continue one pregnancy because of a lack of money.[147] Although she had earned slightly above the Medicaid line, her income of $1050 a month had been insufficient to allow her to save for an abortion that would have cost $300.[148] At the end of each month, only $100-250 a month had remained for food, transportation, and clothing, and she had not had medical insurance.[149] After her last pregnancy, she had given birth to twins.[150] One of her twins was born with trisomyl 13, a fatal chromosomal abnormality, and had died within months.[151] If Jane Moe were to become pregnant again, the most effective test to determine whether the fetus would be afflicted with the chromosomal defect would not be available until late in the second trimester. At that stage in the pregnancy, it would be extremely difficult, if not impossible for her to afford an abortion that would cost approximately $1,000.[152]

---

[144] Henshaw Aff., *supra* note 120, at 138-40. (The exclusion of abortion from PCAP will force many women to "delay . . . into the second trimester of pregnancy and others will be deterred from obtaining necessary abortions.").

[145] *Id. See also* Affidavit of Irwin H. Kaiser, M.D., Appendix, *supra* note 30, at 147-54.

[146] *See* Hope Aff., *supra* note 44, at 99 ("The clinic . . . that will do an abortion at my stage of pregnancy charges $1500. . . . The one . . . that Planned Parenthood referred me to charges $1000. I can't afford either amount."). *See also* Affidavit of Jane Moe, Appendix 101, *supra* note 30, at 106 ("I could never afford to pay for a later second-trimester procedure on my own.") (hereinafter "Moe Aff.").

[147] Moe Aff., *supra* note 147, at 103.

[148] Moe Aff., *supra* note 147, at 102-03.

[149] Moe Aff., *supra* note 147, at 102.

[150] Moe Aff., *supra* note 147, at 103.

[151] Moe Aff., *supra* note 147. The baby was born with a severe cleft palate, no skull bone from the forehead to the back of the neck thus leaving the tissue exposed, extra fingers and toes, and with virtually no immune system. Because the baby could not eat, she slowly starved to death. Moe Aff., *supra* note 147, at 104-05.

[152] Moe Aff., *supra* note 147, at 106. *See also* Affidavit of Jane Slate, Appendix 678, *supra* note 30. Her after-tax income was $248 a week. After paying $200 in rent, $160 a month for food, $215 for child care, $160 for diapers and formula for

Furthermore, the legislature's enactment of PCAP reflects a recognition that many PCAP women have an extremely difficult time affording any pregnancy-related services.[153] By definition, the legislature selects these women because they can not afford or do not receive adequate medical services.[154] Several references in the legislative debate demonstrate that members were aware of the dire financial status of women eligible for PCAP.[155]

Equally important, the evidence submitted at trial had convinced the two lower courts that women in the PCAP income category could not afford abortions. The trial court found as a factual determination[156] that women were manipulated impermissibly by PCAP's funding scheme because they could not pay independently for an abortion.[157] Likewise, the appel-

---

her child, $50 for subway transportation, she was left with $281 a month for clothing, shoes, and medical care for the baby and herself. After finding out that she was pregnant, she saved $50 a week for four weeks to cover the cost of a $400 abortion. At this point, the cost increased to $750 because of the pregnancy's advanced stage. She then borrowed $350 but had no idea how she would ever pay this money back. Affidavit of Jane Slate, Appendix, *supra* note 30, at 678-79.

[153] *See Hope*, 150 Misc. 2d at 1000, 571 N.Y.S.2d at 982 ("women whom the Legislature has expressly identified as needy in regard to medical care"). *See also infra* notes 133-134.

[154] *Hope*, 150 Misc. 2d at 998, 571 N.Y.S.2d at 981 ("The effect of Chapter 584 [the chapter enacting PCAP] is to deny medical assistance to *needy women* . . . .") (emphasis added).

[155] New York State Assembly Debate at 9 (June 30, 1989) ("I hope this is only the beginning and that . . . women in this category receive the full range of benefits, they desperately need them.") (statement of Assemblyperson Marshall); *id.* at 10 ("[T]his is a bill that . . . expands prenatal care for those women in the category where they desperately need it. They are not poor enough to be eligible for Medicaid and they are not earning enough to afford good, adequate medical care.") (statement of Assemblyperson Mayersohn); New York State Senate Debate at 5398 (1980) (This bill will avert "human suffering among so many poor women that were deprived of the medical services that they needed.") (statement of Senator Mendez); *id.* at 5403 ("This bill . . . represents an effort to meet the objective of expanded prenatal care for New York's needy women.") (statement of Senator Tully).

[156] The appellate standard of review for a factual determination is narrow in scope, and the court of appeals "is without power to review findings of fact if such findings are supported by evidence in the record." Humphrey v. State, 60 N.Y.2d 742, 743, 457 N.E.2d 767, 768, 469 N.Y.S.2d 661, 662 (1983); Le Roux v. State, 307 N.Y. 397, 405, 121 N.E.2d 386, 390 (1954) (stating that the "finding of fact was not reversed by the Appellate Division and, accordingly, being supported by substantial evidence of record, it is conclusive in this Court."); N.Y. CIV. PRAC. L. & R. 5501(b) (McKinney 1978); N.Y. APPELLATE PRACTICE, § 4.13 (Thomas Newman ed. 1983).

[157] *Hope*, 150 Misc. 2d at 995, 571 N.Y.S.2d at 979; Memorandum Decision,

late division held that "[t]he fact is that women who cannot afford to pay for an abortion, even if one is medically necessary, have no choice."[158] Even the defendants did not dispute this argument and in fact acknowledged that PCAP-eligible women "may face difficulty paying for an abortion."[159]

B. *The Goals and Scope of PCAP*

The court of appeals limited PCAP's scope by determining that the program merely aims to improve the health of babies. This determination contradicted evidence submitted at trial that showed that the legislature was concerned also with women's health. If the court had recognized that the program reflects an interest in preserving *maternal* health and lives, it likely would have invalidated PCAP under the rational relation test.[160] A program that refuses funding for a procedure necessary to save a woman's life fails to advance one of its primary goals: reducing maternal morbidity.

Appendix 16, *supra* note 30, at 34:

> Plaintiffs have proffered several affidavits documenting the hardships women in the affected income category like Hope and others similarly situated encounter in attempting to save for an abortion. Often such women are either forced to postpone the procedure increasing not only the medical risk to themselves, but also the cost of the abortion, or to forego the procedure altogether, jeopardizing their own health. Defendants do not dispute these facts; indeed they acknowledge that women in the plaintiff class "may face difficulty paying for an abortion." Now that the Legislature has singled these women out, their desperation should not be ignored.

[158] *Hope*, 189 A.D.2d at 296, 595 N.Y.S.2d at 953. ("Having acknowledged that pregnant women with family incomes between 100 and 185 percent of the poverty level are 'needy' and require help in obtaining pregnancy-related services, the legislature violated Article XVII, § 1, as well as Article XVII, § 3 . . . .").

[159] *Hope*, 150 Misc. 2d 995, 571 N.Y.S.2d at 979.

[160] The rational-relation test is the lowest form of scrutiny under both the Due Process and Equal Protection Clauses. The test requires that the statute at issue bear some "fair, just and reasonable connection" between the goal of the law and the means to achieve it. Montgomery v. Daniels, 38 N.Y.2d 41, 54, 340 N.E.2d 444, 451, 378 N.Y.S.2d 1, 11 (1975). *See also* Alevy v. Downstate Med. Ctr., 39 N.Y.2d 326, 332-33, 348 N.E.2d 537, 542-43, 384 N.Y.S.2d 82, 87-88 (1976) (traditional analysis of equal protection is two-tiered: rational relation and strict scrutiny). In this case, the New York Supreme Court found that PCAP failed even the lowest level of scrutiny because PCAP's denial of funding in a situation where the mother and baby are afflicted with sickle cell anemia is not "'fairly', 'justly', 'rationally', or 'reasonably' related to combating infant mortality or low birth weight." *Hope*, 150 Misc. 2d at 995, 571 N.Y.S.2d at 979.

The plaintiffs submitted substantial evidence indicating that PCAP's goals were to improve maternal as well as infant health.[161] First, PCAP provides a wide range of services that do much more than merely reduce infant mortality; several services improve the health of the income-eligible mother. Dental care, mental health counseling, family planning and clinical aftercare do nothing directly to promote the health of the infant but do, however, directly improve the health of the mother.[162] Similarly, the postpartum coverage directly benefits the mother's and not the infant's health.[163]

One of PCAP's three major components requires all PCAP providers "to offer a full range of services, including . . . health education, care coordination, psychosocial assessment, . . . postpartum services, nutrition services, HIV counseling and testing services and quality assurance."[164] After the birth, the

---

[161] *See infra* notes 162-171.

[162] Some services, such as family planning, pharmaceuticals and laboratory fees cost less than abortion; this rebuts the defense that the legislature excluded the less expensive abortion procedure while subsidizing other services that are more costly. Plaintiffs' Brief, *supra* note 55, at 46; *see* N.Y. PUB. HEALTH LAW § 2522 ((1)(c) (laboratory services), (j) (family planning services), (o) (pharmaceuticals) (McKinney Supp. 1993)).

[163] Senate 6397, 1989-1990 Regular Sessions, June 28, 1989, Appendix 400, *supra* note 30, at 401. (Ch. 584), Sec. 1, part 1: pregnant women continue to be eligible for assistance for sixty days after their pregnancy is ended. Section 2 includes (h) post-partum services and (j) post-partum services including family planning services and (l) dental services. *See also* Assembly 6343 1989-1990 Regular Sessions, March 15, 1989, Appendix 395, *supra* note 30, at 397 (competing bill with S. 6397 which would have provided under section four that the pregnant woman and her children would receive the full range of services available under Medicaid).

[164] Prenatal Care Assistance Program, Appendix 413, *supra* note 30, at 425. *See also* New York State Department of Health PCAP Comprehensive Provider Program Agreement, Appendix 567, *supra* note 30, at 582-83. Development of Care Plan and Coordination of Care included that care be coordinated to "(v) provide to or refer the pregnant woman for needed services including: . . . (b) dental services; (c) mental health and related social services; . . . (e) home care; . . . (vi) provide for the pregnant woman special tests and services as may be recommended or required by the STATE when necessary to protect *maternal and/or fetal health*[,] . . . counseling and education based on test results." *See also id.* at 584, 586, Sec. G, Health Education, which includes, *inter alia*, "(15) family planning;" *id.* at 586, Sec. H, Psychosocial Assessment, which includes, "1) screening for social, economic, psychological and emotional problems; and 2) referral, as appropriate to the *needs of the woman* or fetus, to the local Department of Social Services, community mental health resources, support groups, or social/psychological specialists;" *id.* at 586, 588, Sec. I, Prenatal Diagnostic and Treatment Services, "(vii) postpartum counseling, evaluation and referral to professional care and services, as

mother receives services that include "identifying any medical, psychosocial, nutritional, alcohol treatment and drug treatment needs of the *mother or infant* that are not being met," referring the mother to resources available to meet these needs, assessing family planning needs, and providing preconception counseling.[165]

Secondly, PCAP's annual report lists "reduc[ing] preventable infant and *maternal mortality and morbidity* in New York State," under its objectives and goals.[166] The Governor's Memorandum in Support of Chapter 584 also explains that the bill added "other services . . . necessary to the birth of a healthy baby and a healthy recovery by the mother."[167] Governor Mario Cuomo lauded PCAP's expansion which he believed would "contribute to the improved health and well-being of the citizens of New York."[168] Furthermore, the legislative history also indicates that the state designed the program for maternal well-being as well as infants'.[169] The Memorandum for Senate Bill 5339 initially proposed by Senator Michael J. Tully[170] described the purpose of PCAP to "expand Medicaid eligibility for pregnant women, to receive pregnancy related services . . . ."[171] The plain language of "pregnancy related

---

required, to include preconception counseling as appropriate;" *id.* at 589-90, Sec. J, HIV Services, "1) routinely provide the pregnant woman with HIV counseling and education; 2) routinely offer the pregnant woman confidential HIV testing; and 3) provide the HIV-positive woman and her newborn infant the following services or make the necessary referrals for these services: (i) management of HIV disease; (ii) psychosocial support; and (iii) case management to assist in coordination of necessary medical, social and addictive services." (emphasis added in all). *See also* Stipulation and Order, Dec. 14, 1990, Appendix 691, *supra* note 30, at 692 (If a woman terminates her pregnancy by an abortion, she is still entitled to all of the above services offered to a woman who carries to term.)

[165] N.Y.S. Department of Health Prenatal Care Assistance Program Comprehensive Provider Agreement, Appendix 567, *supra* note 30, at 593, Sec. M, Postpartum Services, (1); *see generally id.*, (1)-(6).

[166] Prenatal Care Assistance Programs, 1989 Annual Report, Appendix 413, *supra* note 30, at 424 (emphasis added).

[167] Governor's Program Bill 1989—Memorandum, Appendix 388, *supra* note 30.

[168] Governor's Program Bill 1989—Memorandum at 389 ("In addition, women and their babies will be guaranteed a more comprehensive service package of services.").

[169] *See infra* note 155.

[170] Senator Tully's bill, N.Y. S.6397, later passed the legislature, thus enacting PCAP.

[171] Memorandum of Senator Michael J. Tully, Jr., Appendix 393, *supra* note 30, at 393.

services" inherently includes abortion because in every pregnancy there are two potential courses of action—childbirth and abortion.[172] Therefore, if the legislature wanted to limit PCAP to only those expenses incurred with childbirth, it easily could have qualified this clause.

IV. How and Why the Court of Appeals Did Not Answer Whether Abortion Is a Fundamental Right

The New York Court of Appeals seems to have ignored completely the evidence that PCAP's intended goals include improving maternal as well infant health. To avoid the appearance of violating the principle of stare decisis,[173] the court simply refused to address a crucial issue in *Hope*—whether abortion was a fundamental right under the state constitution. In the context of New York's jurisprudence, its traditional protection of abortion rights and individual liberties, and the lower courts' affirmation of abortion as a fundamental right, the court of appeals may have been obligated to interpret New York's constitution more broadly than the Federal Constitution.[174] Because several members of the court may not have been ready to reach this conclusion, the court apparently compromised to avoid the issue altogether.

---

[172] Harris v. McRae, 448 U.S. 297, 333 (1980) (Brennan, J., dissenting).

[173] Stare decisis is defined as "to stand by that which was decided; rule by which common law courts 'are slow to interfere with principles announced in the former decisions and often uphold them even though they would decide otherwise were the question a new one.'" BARRON'S LAW DICTIONARY 461 (3d ed. 1991) (quoting Oklahoma County v. Queen City Lodge I.O.O.F., 156 P.2d 340, 345 (Okla. 1945)). The doctrine is particularly applicable in the field of constitutional law. *Id.* (citing St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936)).

[174] *See infra* notes 201-219 and accompanying text. PCAP satisfies federal constitutional standards, which do not require states to fund medically necessary abortion for women who meet the Medicaid guidelines. The guildelines' income standard is below PCAP's eligibility standard. *Hope*, 83 N.Y.2d at 574, 634 N.E.2d at 186, 611 N.Y.S.2d at 814. *See* Harris v. McRae, 448 U.S. 297, 316 (1980); Maher v. Roe, 432 U.S. 464, 469 (1977) ("The Constitution imposes no obligation on the [government] to pay the pregnancy-related medical expenses of indigent women . . ."). States, however, may freely interpret their constitutions more broadly than the United States Supreme Court interprets the federal counterpart. Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980) (citations omitted). Therefore, states are free to include medically necessary abortions in their Medicaid plans although the federal government will not reimburse these costs. *Harris*, 448 U.S. at 311, n. 16. *See infra* notes, 264-269.

If the court had declared that abortion was a fundamental right under the state constitution, the court would likely have invalidated PCAP under the strict scrutiny standard.[175] To withstand an attack on either due process or equal protection grounds under strict scrutiny, a statute must be narrowly tailored to promote a compelling state interest.[176] In the abortion context, the plaintiffs, relying on the Supreme Court's decision in *Roe v. Wade*, asserted that abortion is a fundamental right under the right to privacy founded in the due process clause. The due process clause prevents states not only from barring a fundamental right, but it also prevents state interference with this right to such an extent that it is the equivalent of denying the right. The state here was affirmatively blocking a poor woman from obtaining an abortion that she could not afford; in practical terms, this policy has the same effect in discouraging her exercise of a fundamental right that an outright denial or criminal sanctions would have had.[177] While the state has an important interest in promoting childbirth, this interest cannot outweigh the "superior interest in the life and health of the mother."[178] PCAP's balance fails the test; by excluding a procedure that is necessary to preserve the mother's health, and sometimes her life, in favor of childbirth, the program inappropriately subordinates the mother's interest. Furthermore, the program must be narrowly tailored to serve this interest under strict scrutiny analysis. The supreme court, however, found that PCAP failed the lowest level of scrutiny because it was not even rationally related to its stated goal of promoting infant health.[179]

---

[175] *See supra* note 65. Strict scrutiny is applied when a state burdens a fundamental right.

[176] *See supra* note 65. *See also* Rivers v. Katz, 67 N.Y.2d 485, 496, 495 N.E.2d 337, 343, 504 N.Y.S.2d 74, 80 (1986) (due process).

[177] *Hope*, 150 Misc. 2d at 996, 571 N.Y.S.2d at 980.

[178] Moe v. Secretary of Admin. & Finance, 417 N.E.2d 387 (Mass. 1981); Committee to Defend Reproductive Rights v. Meyers, 625 P.2d 779, 796 (Cal. 1981) ("we . . . conclude that the asserted state's interest in protecting a nonviable fetus is subordinate to the woman's right of privacy."). *See also* Planned Parenthood v. Casey, 505 U.S. 833, 837 (1992) (a state may "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.") (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973)).

[179] *Hope*, 150 Misc. 2d at 1000, 571 N.Y.S.2d at 982 ("Indeed, balanced against the interest of the pregnant woman in choosing a medically necessary abortion,

First, the court of appeals never addressed whether abortion is a fundamental right under the state constitution.[180] The *Hope* decision was the first since 1972 where the New York Court of Appeals had been given the opportunity to make an independent declaration affirming reproductive rights for women under the state constitution. If the court had found abortion to be a fundamental right, it would have had to apply strict scrutiny analysis for both the due process and equal protection claims since PCAP would therefore be interfering with a fundamental right. Because the state has no compelling interest until viability, PCAP could not have withstood the first prong of strict scrutiny.

Instead, the court avoided this issue, notwithstanding the fact that PCAP's constitutionality hinged upon a determination of whether or not abortion is a fundamental right under the state Constitution.[181] The court sidestepped the question by ambiguously stating that the defendants did not contest that "[t]he fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right."[182] The court also held that there was no need to analyze PCAP's funding scheme under any test other than the rational relation test—the lowest level of scrutiny for due process and equal protection challenges—because no burden on a right exist-

---

the State's interest [of reducing low birthweight and infant mortality] is insufficient, and . . . far too burdensome on the eligible woman's right, to sustain [the statute].").

[180] The court did, however, state that "it is undisputed by defendants that the fundamental right to reproductive choice, inherent in the due process liberty guaranteed by [the] State Constitution, is at least as extensive as the Federal constitutional right." *Hope*, 83 N.Y.2d at 575, 634 N.E.2d at 186, 611 N.Y.S.2d at 814.

[181] Spencer, *supra* note 3, at 52. Chief Judge Kaye asked New York Civil Liberties Union attorney Catherine Weiss, who represented the plaintiffs, if the court's "recognition of a fundamental right to reproductive choice under the State Constitution [was] essential" to the case. *Id.* Ms. Weiss answered that the court must recognize the right before it determined whether it was burdened by PCAP. *Id.*

[182] *Hope*, 83 N.Y.2d at 575, 634 N.E.2d at 186, 611 N.Y.S.2d at 814. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (federal constitutional right to privacy is broad enough to encompass right to abortion). *But see infra* note 258. Many criticize *Casey* and question if abortion is still a fundamental right because the Court will no longer apply strict scrutiny, the traditional analysis for a fundamental right; rather, the plurality opinion adopted an "undue burden" standard of review.

ed.[183] In avoiding this question, the court also evaded another inextricably intertwined issue—whether the New York Constitution affords greater protection of reproductive choice than the Federal Constitution. As a result, the court defined neither the independence nor the scope of any state constitutional guarantee.

Next, the court refused to answer whether the government has an obligation to remain neutral regarding reproductive health care and not prefer childbirth over abortion. The Supreme Court has held that the federal government does not have to remain neutral on this issue and has thus permitted states under the federal constitution to provide benefits to women who carry to term while denying those benefits to women who have an abortion.[184] Many state courts, however, have interpreted their state constitutions as requiring the government to remain neutral when extending benefits and therefore forbid the state from exercising its financial power to influence women's decisions.[185]

The court of appeals explicitly acknowledged this evasion when it said that the "government obligation to stand neutral [is] an issue we need not and do not reach in this case . . . ."[186] The court dismissed this issue by concluding that PCAP women, who are only slightly above the Medicaid line, are distinguishable from Medicaid-eligible women whose "option to choose an abortion is arguably foreclosed by her lack of resources."[187] The court held that this "legislative premise [is] not rebutted on the record before us."[188] By avoiding these two questions, the court concluded that there was no "evidence that eligible women are coerced, pressured, steered or induced by PCAP to carry pregnancies to term."[189]

---

[183] *Hope*, 83 N.Y.2d at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

[184] Maher v. Roe, 432 U.S. 464, 474 (1977) (state can make "a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds").

[185] *See infra* notes 301-321 and accompanying text.

[186] *Hope*, 83 N.Y.2d at 576, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

[187] *Id.* at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

[188] *Id.* at 575, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

[189] *Id.* at 576, 634 N.E.2d at 187, 611 N.Y.S.2d at 815.

A. *New York Jurisprudence*

1. Federalism

In order to determine the extent to which state courts, under their own constitutions, can expand protections of reproductive freedom beyond the federal guarantee, one must first analyze the role of a state court in the context of our federalist system. An understanding of the United States Supreme Court and its relationship to the state courts as independent interpreters of their constitutions begins with the notion that the original states, including New York State, preceded the formation of the federal government and Federal Constitution.[190] Each of the 50 states is an independent sovereign with its own state constitution that exists separately and independently from the United States Constitution.[191]

Although the Federal Constitution has emerged as the primary source of fundamental rights,[192] distinguished jurists and scholars have encouraged state courts to look to their own constitutions to supplement individual rights and fundamental liberties.[193] Unlike the United States Constitution, which grants enumerated powers to the federal government, state constitutions are separate sources of both individual freedoms and restrictions on the exercise of power by the Legislature.[194] The United States Supreme Court has long proclaimed that state constitutions may provide more expansive protection of individual liberties than the Federal Constitution.[195] Although states cannot circumscribe rights guaran-

---

[190] Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982) (quoting People v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975)).

[191] *See* Kimberly A. Chaput, *Abortion Rights Under State Constitutions: Fighting the Abortion War in the State Courts*, 70 OR. L. REV. 593, 606 (1991).

[192] Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1326, 1328 (1982) (hereinafter "*Developments in the Law*").

[193] *Right to Choose*, 450 A.2d at 931. *See also* William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[194] *Right to Choose*, 450 A.2d at 931 (citations omitted). *See Developments in the Law, supra* note 192, at 1326-28.

[195] Oregon v. Kennedy, 456 U.S 667 (1982) (Brennan, J., concurring); Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980); Oregon v. Haas, 420 U.S. 714, 719 (1975); Cooper v. California, 386 U.S. 58, 62 (1967).

teed by the Federal Constitution, they are entirely free to interpret their own law to supplement or expand them.[196]

A state may consider many factors when determining whether its own constitution affords greater protection to individual liberties and rights than the Federal Constitution guarantees. Courts often turn to the state constitution when the language in the state provision differs from the Federal Constitution and supports a broader interpretation of individual rights under state law,[197] although states also analyze their constitutional provisions differently than the United States Supreme Court interprets an identical, corresponding federal provision.[198] Another factor is whether the history of the text reveals a state intention to broaden the right.[199] The court also may expand protection under state law when the very purpose of a provision serves to affirm certain rights rather than merely restrain the sovereign power of the State.[200]

---

[196] People v. P.J. Video, Inc., 68 N.Y.2d. 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986), *cert. denied*, 479 U.S. 1091 (1987); Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982) ("Although the State Constitution may encompass a smaller universe than the federal Constitution, [the] constellation of rights may be more complete."). *See, e.g., Pruneyard Shopping Ctr.*, 447 U.S. at 81; *Cooper*, 386 U.S. at 62. *See also* 1 RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 1.6[a]; Brennan, *supra* note 194.

[197] *P.J. Video*, 68 N.Y.2d at 302, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

[198] Doe v. Department of Social Serv., 487 N.W.2d 166, 187 (Mich. 1992) (Mallet, J., dissenting); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982). A state court can use three different approaches when analyzing the state constitution. First, the court can utilize the "lock-step approach," which entails the state looking at the United States Constitution when interpreting a parallel state constitutional provision. *See* David M. Skover, *Address: State Constitutional Law Interpretation: Out of "Lock Step" and Beyond "Retroactive" Decisionmaking*, 51 MONT. L. REV. 243, 245-46, 254 (1990); William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986). Second, the court could choose the "reactive posture method" in which a state generally follows federal precedent but expands certain rights under its own constitution in isolated cases. *Id.* Third, the "beyond the reactive approach" allows the state court to undertake a separate and independent state constitutional analysis before engaging in a federal constitutional analysis. *Id.*

[199] *P.J. Video*, 68 N.Y.2d at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

[200] *Id.* at 303, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

2. New York State's Constitution is Historically Broader than the Federal Constitution

Although recently a split in the New York Court of Appeals[201] has occurred, the court frequently construes the scope of rights and liberties under the state constitution more liberally than under the Federal Constitution.[202] In particular, the court has expanded state constitutional protection for privacy rights at times when the United States Supreme Court interprets the federal counterpart more cautiously.[203] Indeed, the court of appeals is more likely to find a haven for these rights under the state constitution at times when the Supreme Court has restricted the same right under the Federal Constitution.[204] Consequently, the New York State Constitution is a primary source of civil liberties to New Yorkers.[205] New York

---

[201] *See infra* notes 332-345.

[202] People v. P.J. Video, Inc., 68 N.Y.2d 296, 303, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912 (1986), *cert. denied*, 479 U.S. 1091 (1987).

[203] *See infra* notes 205, 212-219 and accompanying text.

[204] *See infra* notes 205-234.

[205] *Hope*, 150 Misc. 2d at 993, 571 N.Y.S.2d at 978; People v. Scott, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (due process rights of criminal defendant expanded); People v. Vilardi, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990) (rejected federal rule regarding prosecutor's failure to disclose exculpatory evidence); *P.J. Video*, 68 N.Y.2d at 303-04, 501 N.E.2d at 560-61, 508 N.Y.S.2d at 912 (state constitution requires more exacting standard for issuance of search warrants authorizing the seizure of obscene material than federal Constitution); Rivers v. Katz, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986) (right of involuntarily committed mental patient to refuse antipsychotic medication); People v. Hollman, 79 N.Y.2d 218, 590 N.E.2d 204, 581 N.Y.S.2d 619 (1986); Bellanca v. State Liquor Auth., 54 N.Y.2d 228, 429 N.E.2d 765, 445 N.Y.S.2d 87 (1981), *cert. denied*, 456 U.S. 1006 (1982) (blanket ban on topless dancing); Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978) (statutory provisions for foreclosure of garageman's possessory lien); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978) (due process limits on police conduct); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976) (right to counsel); Bryn v. New York City Health and Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973) (upheld statute decriminalizing first and second trimester abortions before federal courts did so); People v. Barber, 289 N.Y. 378, 46 N.E.2d 329 (1943); *cf.* United States v. Bagley, 473 U.S. 667 (1983); *In re* Fosmire v. Nicoleau, 75 N.Y.2d 218, 551 N.E.2d 77, 551 N.Y.S.2d 876 (1990) (patients' constitutional right to refuse life-saving blood transfusion); Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991) (rejected federal free press standard and granted broader protection under state constitution); People v. Torres, 74 N.Y.2d 224, 543 N.E.2d

has an enduring commitment to an independent and expansive construction of the state constitution and "clearly has not hesitated to diverge from the more restrictive constitutional law interpretative tract pursued by the United States Supreme Court, especially in recent years."[206] In declining to be bound by the Court's more limited interpretation of the Federal Constitution, the court of appeals repeatedly has rejected applying the federal interpretation to the New York State's Constitution.[207] Accordingly, the court endeavors to find a basis in New York's constitution when necessary to protect individual freedoms.[208]

The New York State Constitution's Equal Protection clause, for example, offers broader protection than the federal parallel by its language.[209] The drafters of the clause were determined to provide broader rights under the state provision than those afforded under the Fourteenth Amendment.[210] While the Fourteenth Amendment only applies to state action, the drafters expanded protections by including individual ac-

---

61, 544 N.Y.S.2d 796 (1989) (rejected Supreme Court's ruling in Michigan v. Long, 463 U.S. 1032 (1985), which allowed police to search car's passenger compartment in stop and frisk). *See generally* Pete Galie, *State Constitutional Guarantees and Protections of Defendants' Rights: The Case of New York 1960-1978*, 28 BUFF. L. REV. 157 (1979). The very nature of the New York Constitution and state law concern over fundamental fairness protects individual rights against encroachments that pass muster under the federal Constitution. *Sharrock*, 45 N.Y.2d at 160-61, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44 (quoting Taylor v. Porter, 4 Hill 140, 146 (1843)).

[206] *Hope*, 189 A.D.2d at 295, 595 N.Y.S.2d at 952.

[207] *Id.* at 294, 595 N.Y.S.2d at 952.

[208] People v. P.J. Video, Inc., 68 N.Y.2d 296, 303, 501 N.E.2d 556, 561, 508 N.Y.S.2d 907, 912 (1986), *cert. denied*, 479 U.S. 1091 (1987). According to the *P.J. Video* court, "Under established principles of federalism . . . States also have sovereign powers. . . . Although State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them." *Id.* at 302, 501 N.E.2d at 559-60, 508 N.Y.S.2d at 911.

[209] *Compare* N.Y. CONST. art. 1, § 11 ("No person shall, because of race, color, creed, or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state of [any] agency or subdivision of the state.") *with* U.S. CONST. AMEND. XIV, § 1 ("[n]or shall any State . . . deny any person within its jurisdiction the equal protections of the laws.").

[210] New York State Constitutional Convention Committee, PROBLEMS RELATING TO THE BILL OF RIGHTS AND GENERAL WELFARE, Vol. VI at 221, 223, 227 (1930). *See also* Edward R. Alexander, *The Right to Privacy and the New York State Constitution: An Analytical Framework*, 8 TOURO. L. REV. 725 (1992).

tion as well as state action.[211]

Another comparison can be made between the Federal Constitution's Due Process Clause, which mandates that no "*state* [shall] deprive any person of life, liberty or property, without due process of law,"[212] and New York's Due Process clause which requires that "no person shall be deprived of life, liberty, or property without due process of the law."[213] New York's Due Process clause,[214] enacted before the federal counterpart, differs from the Fourteenth Amendment because it does not explicitly require state action before an individual may find refuge in its protection. The unique interpretation of this flexible language, based on the historical difference between the federal and state clauses, demonstrates that they were adopted to combat entirely different evils. The Fourteenth Amendment was a watershed attempt to extend national privileges and immunities and furnish minimum standards protecting individuals against the potential abuses of a monolithic government.[215] In contrast, the New York State Constitution is an affirmative safeguard of individual rights.[216] The New York State Due Process clause achieves this goal by protecting liberties from attacks by both individuals and the state.[217] Indeed, the "function of the comparable provisions of the State Constitution, if they are not to be considered purely redundant, is to supplement those rights [under the federal constitution] to meet the needs and expectations of the particular State."[218]

---

[211] *Id.*

[212] U.S. CONST. AMEND. XIV, § 1 (emphasis added). *See also* U.S. CONST. AMEND. V, ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ").

[213] *Id.*

[214] N.Y. CONST. Art. 1, § 6 ("no person shall be deprived of life, liberty, or property without due process of the law"). This clause does not eliminate the necessity of state involvement in the challenged activity; however, "the absence of any State action language simply provides a basis to apply a more flexible State involvement requirement than is currently being imposed by the Supreme Court with respect to the Federal provision." Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152, 160, 379 N.E.2d 1169, 1174, 408 N.Y.S.2d 39, 44 (1978).

[215] *Sharrock,* 45 N.Y.2d at 160, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44 (quoting Philip B. Kurland, *The Privileges and Immunities Clause: "Its Hour Come Round at Last"?,* 1972 WASH. U. L. Q. 405). *See also* Brennan, *supra* note 194, at 501.

[216] *Sharrock,* 45 N.Y.2d at 160, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44.

[217] *Id.* at 160-61, 379 N.E.2d at 1174, 408 N.Y.S.2d at 44 (quoting Taylor v. Porter, 4 Hill 140, 146 (1843)).

[218] People *ex rel.* Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557, 503 N.E.2d

As a result, on innumerable occasions, the New York State courts have construed the state constitution to bestow greater rights and liberties than those afforded under the Federal Constitution.[219]

3. New York is a Leader in Abortion Rights

Another area where New York has expanded protection of liberties from government intrusion is in the area of reproduc-

---

492, 494-95, 510 N.Y.S.2d 844, 846-47 (1986).

[219] *Sharrock*, 45 N.Y.2d at 159, 379 N.E.2d at 1173, 408 N.Y.S.2d at 44 (1978) (expansion of state liberties "finds its genesis specifically in the unique language of the due process clause of the New York State Constitution as well as the long history of due process afforded the citizens of this State."); *id.* at 160, 379 N.E.2d at 1173, 408 N.Y.S.2d at 44 (New York's due process clause has "long safeguarded any threat to individual liberty irrespective of from what quarter that peril arose"). *See* Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 317, 319, 94 N.E. 431, 448, 449 (1911); Wynehamer v. People, 13 N.Y. 378, 405 (1856). *See also* Immuno A.G. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991) (first amendment protection under the New York State Constitution despite the United States Supreme Court ruling that first amendment rights were not indicated); People v. Harris, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1990) (defendant's station-house confession suppressed under state constitutional prohibition of illegal searches and seizures even though United States Supreme Court upheld its admission in 495 U.S. 14, 21 (1990)).

See also Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 339, 412 (1987) (New York has a "long tradition of reading the parallel clauses independently and affording broader protection . . . under the State Constitution"); Vito J. Titone, *State Constitution Interpretation: The Search for an Anchor in a Rough Sea*, 61 ST. JOHN'S L. REV. 431, 466 (1986) (the "history of solicitude for a particular right has been used by the New York courts as a foundation for fashioning a body of state constitutional law that is substantially more protective than is the federal Constitution. Indeed, in New York, our traditions, which include judicial concern for the right of privacy and personal liberty, make up a vital part of our judges' psyches . . . ."). One example of this broader protection is that the court of appeals has interpreted the state constitution to require further protection of criminal rights beyond those afforded in the Federal Constitution. People v. P.J. Video, 68 N.Y.2d 296, 309, 501 N.E.2d 556, 564, 508 N.Y.S.2d 907, 916 (1986) (state constitution imposed a more exacting standard for the issuance of a search warrant authorizing the seizure of allegedly obscene material than the Federal Constitution required, even though the applicable language of both constitutions was identical.). *See also* People v. Bigelow, 66 N.Y.2d 417, 426-27, 488 N.E.2d 451, 457, 497 N.Y.S.2d 630, 636-37 (1985) (court rejected good faith exception to warrant clause under state constitution despite the fact that the United States Supreme Court upheld the exception under the federal constitution in United States v. Leon, 468 U.S. 897 (1984) and Massachusetts v. Sheppard, 468 U.S. 981 (1984)).

tive freedom.[220] New York historically has been a leader in protecting women's right to choose.[221] New York courts repeatedly have construed broader protections for abortion under the state constitution than those deemed available under the Federal Constitution. In this respect, New York State has served as a model for other states to follow in this area.[222] This phenomenon has proven particularly true when no relief under federal law is available.[223]

In 1828, New York enacted legislation to permit abortions necessary to save a mother's life.[224] The New York statute became a model for subsequent state legislation across the country; other states developed similar statutes.[225] Then in 1970, three years before *Roe v. Wade*, New York amended its law and repealed previously existing criminal sanctions for first and second trimester abortions.[226] This repeal made New York one of the first two states[227] to legalize abortion under

---

[220] *See infra* notes 222-254 and accompanying text for examples.

[221] *See infra* notes 222-254 and accompanying text for examples.

[222] *Hope*, 189 A.D.2d at 294, 595 N.Y.S.2d at 952. *See also* Luke Bierman, *When Less Is More: Changes to the New York Court of Appeals' Civil Jurisdiction*, 12 PACE L. REV. 61, 62 (1992) (the "New York Court of Appeals' decisions have long been considered influential on a national scale") (relying on John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 401-03 (1977)).

[223] *See* Harris v. McRae, 448 U.S. 297 (1980); People v. Scott, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992); People v. Vilardi, 76 N.Y.2d 67, 555 N.E.2d 915, 556 N.Y.S.2d 518 (1990); *In re* Patchogue-Medford Cong. of Teachers v. Board of Educ., 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987); People v. Class, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986); O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 523 N.E.2d 277, 528 N.Y.S.2d 1 (1988); People *ex rel.* Arcara v. Cloud Books, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986); Bryn v. New York City Health and Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972); People v. Barber, 289 N.Y. 378, 46 N.E.2d 329 (1943).

[224] James P. O'Hair, *A Brief History of Abortion in the United States*, 262 JAMA 1875 (1989).

[225] *Id.* (citation omitted). Furthermore, New York enacted legislation in 1928 that served as a model for early anti-abortion statutes which prohibited both pre- and post-quickening abortions, both of which were punishable under the criminal laws. Bonnie L. Hertberg, *Resolving the Abortion Debate: Compromise Legislation, an Analysis of the Abortion Policies of the United States, France and Germany*, 16 SUFFOLK TRANSNAT'L L.J. 513, 515 n.22 (1993). The 1928 statute excluded from criminal punishment an abortion which was necessary to preserve the life of the mother or which was recommended by two physicians. *Id.*

[226] N.Y. PENAL LAW § 125.05[3] (McKinney 1992); *Hope*, 150 Misc. 2d at 991, 517 N.Y.S.2d at 976.

[227] Hawaii was the first state, but New York immediately followed and within

the circumstances delineated by the American Law Institute guidelines.[228] In decriminalizing abortion, the legislature recognized that the state had no right to interfere with the most personal and important decision a woman could make regarding her body and her life. Repeal of criminal sanctions became the "cornerstone principle of what has come to be recognized as a woman's constitutional right to abortion,"[229] improved abortion conditions, and decreased maternal deaths from illegal abortions.[230]

Because of this history, New York traditionally has been a haven for women seeking reproductive freedom, particularly when the right was wavering on the federal level.[231] Very few states had passed pro-abortion legislation in 1970; those that did, such as New York, attracted many nonresidents seeking abortions.[232] By the time that *Roe v. Wade* had secured this right on the federal level,[233] sixty percent of New York's abortions involved women from out of state.[234] Again, when *Planned Parenthood v. Casey*[235] threatened to abolish abortion on the federal level, state officials prepared New York State for an onslaught of women seeking protection under the state laws.[236] Since then, out-of-state women still comprise

---

months enacted the New York State Abortion Law Reform. O'Hair, *supra* note 225, at 3.

[228] In 1962, the American Law Institute promulgated section 203.3 of the Model Penal Codel which described circumstances under which abortion should not be punished. Specifically, the Code excluded from criminal prohibition abortions which were performed when the pregnancy would impair the mental or physical health of the mother, when the child was at risk of being born with grave physical or mental defects, or when the pregnancy resulted from rape, incest or other felonious intercourse. Hertberg, *supra* note 226, at 516. Between 1967 and 1973, nineteen states amended their restrictive abortion laws, many of which were modeled after the Model Penal Code. Julia Walsh, *Reproductive Rights and the Human Genome Project*, 4 J. CAL. REV. L. & WOMEN'S STUD. 145, 158 (1994). New York went further and repealed its criminal abortion statute for abortions performed early in pregnancies. *Id.*

[229] *Hope*, 150 Misc. 2d at 991, 571 N.Y.S.2d at 976.

[230] O'Hair, *supra* note 225, at 3.

[231] *See infra* notes 255-268.

[232] *O'Hair*, *supra* note 225, at 3.

[233] *See supra* note 5.

[234] John Riley, *The Abortion Ruling, The Outlook for N.Y.*, NEWSDAY, June 30, 1992, at 87.

[235] 505 U.S. 833 (1992). In this case, the lower court upheld Pennsylvania's extremely restrictive abortion regulations including parental and spousal consent requirements, a mandatory waiting period, and informed consent provisions.

[236] *Id.* In 1992, because of the federal cutback on abortion rights, New York

5% of the 150,000 abortions performed in New York.[237]

New York also continuously has struck down restrictions on abortion under state law that have survived under the Federal Constitution.[238] For the past seventeen years, over twenty-five bills proposing parental notification for minors seeking abortions have failed in New York.[239] New York also has resisted informed consent and biased counseling laws.[240] Nor

---

State health regulators reviewed their rules to prepare for a possible influx of women from out of state seeking abortions. Surrounding states were likely to pass restrictions of the sort the Supreme Court approved in Pennsylvania. "It may mean we'll see a return to the time when NY was a haven for women looking for legal abortions," said Peter Slocum, Dept. of Health Spokesman. *Riley, supra* note 234.

[237] Riley, *supra* note 234.

[238] *See infra* notes 256-268.

[239] S.3225/A.5581, 1993-94 Session (requires parental notice prior to performance of an abortion on unemancipated minor with waiver in limited circumstances) and S.3224/A.5580 (requires parental consent of unemancipated minor unless judge issues order of consent, or delay may result in death or grave physical danger, or good faith reliance by physician that minor is eighteen or older). Neither reached a floor vote. *See also* N.Y. PUB. HEALTH LAW § 17 (McKinney 1990 & Supp. 1993) (prohibits the release of minor's pertinent medical records to parents or guardians). *Compare* Hodgson v. Minnesota, 497 U.S. 417, 453-55 (1990) (Stevens, J., concurring) (parental notification requirement with judicial bypass before minor could obtain abortion constitutional) *with* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 506-07 (1990) (upholding notice to one parent or judicial authorization before minor could obtain abortion). Parental consent provisions require that young women, usually under the age of 18, obtain one parent's "informed consent" before she can have an abortion. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding one parent's consent with judicial bypass before abortion could be performed); Bellotti v. Baird, 443 U.S. 622 (1979) (upholding statute requiring parental consent before abortion performed on minor as long as alternative procedure provided). Likewise, a parental notification requirement demands that the young woman "notify" one parent. *See Akron Center*, 497 U.S. at 506-07. In both cases, a young woman can only avoid the requirement through a judicial bypass procedure where she presents her case before a judge and obtains a court order allowing the abortion. *Id.* The problem with these requirements is that young women are deterred from seeking reproductive medical care if they are required to inform their parents. In this case, the provision does nothing to help young women and only restricts access to abortion. Janet Benshoof, Planned Parenthood v. Casey: *The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, May 5, 1993, *available in* LEXIS, News File, JAMA library, at *12-13.

[240] "Informed consent" and "biased counseling" provisions allegedly ensure that the woman's choice to terminate her pregnancy is an informed decision. Their methods and requirements, however, are "biased" because they clearly act as a discouragement to abortion. The Supreme Court upheld one such provision in Planned Parenthood v. Casey, 505 U.S. 833 (1992). Chief Justice Rehnquist acknowledged that "the information might . . . persuade some women to forgo abor-

has the state permitted a mandatory delay policy.[241] New York's resistance to these restrictions reflects the recognition that such a policy serves no effective goal and would only exacerbate the plight of poor women.[242] Many women would have

---

tions [but this] does not lead to the conclusion that the Constitution forbids [it]." 505 U.S. at 968 (1992) (Rehnquist, C.J., concurring in part and dissenting in part). The provision upheld in *Casey* requires the attending doctor to outline the abortion procedure, inform the woman of the fetus's probable gestational age, and advise the woman of possible health risks associated with abortion and carrying the pregnancy to term. *Id.* at 882-84. The doctor also must give the woman state-sponsored material that includes pictures of the fetus at two-week gestational intervals, lists alternatives to abortion, and informs her of the availability of public assistance programs to help her pay for prenatal and neonatal care. *Id.* at 907. The woman then must wait 24 hours after the information is given to her even if the abortion is medically necessary. Benshoof, *supra* note 239, at *11. *See* N.Y. PUB. HEALTH LAW §§ 4161, 4163 (McKinney 1993) (protects anonymity of women who obtain abortions by omitting identifying information on fetal death certificates and provides penalties for release of identifying information). *But see* S.3295/.5590 (1993-94 Session) (enacts woman's right to know act providing for informed consent of woman prior to abortion) (stuck in Committee). *See also* N.Y. JUD. LAW § 4 (McKinney 1983) (permits courts to exercise discretion to close courtrooms in abortion cases); N.Y. GEN. BUS. LAW § 394-e (McKinney 1984) (provides penalties for release of reports of referrals for abortion services except to agencies authorized by statute).

[241] Mandatory delay provisions require that women wait a certain amount of time after an initial consultation before they are able to obtain an abortion. In *Casey*, the plurality upheld such a provision, explaining that it ensures the decision is informed and protects the state's interest in potential life by discouraging abortion. 505 U.S. at 885-87. However, as Justice Stevens noted, "The State cannot further its interests by simply wearing down the ability of the pregnant woman to exercise her constitutional right." *Casey*, 505 U.S. at 918 (Stevens, J., concurring in part and dissenting in part).

Furthermore, "there is no evidence that the mandated delay benefits women or that it is necessary to enable the physician to convey any relevant information to the patient." *Id.* Justice Blackmun agreed with Justice Stevens that the provision was unconstitutional because the delay requirement "rests either on outmoded or unacceptable assumptions about the decisionmaking capacity of women or the belief that the decision to terminate the pregnancy is presumptively wrong . . . [and this requirement will] only influence the woman's decision in improper ways." *Id.* at 937-38 (Blackmun, J., dissenting in part and concurring in part). These provisions therefore effectively only serve to curtail women's access to abortion services. Benshoof, *supra* note 239 at 12, 13.

[242] *Casey*, 505 U.S. at 937-38 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun explained that the mandatory delay policy impermissibly influences a woman's decision and operates as a substantial obstacle to a woman's choice to undergo an abortion. *Id.* For example, delaying the procedure could increase health risks. *Id.* at 937. Women also face financial constraints because the policy requires two separate visits to the abortion provider which increases travel time and financial costs, such as transportation fees, time off from work, babysitter fees, etc., particularly for women who live in rural areas. *Id.*

to take time off from work to travel to the facility several times.[243] These delays could jeopardize women's health and increase the cost of the procedure as the pregnancy advances into later stages.[244] In fact, the only restriction New York has imposed on abortion is that a licensed physician must perform the procedure.[245]

New York's long-standing commitment to abortion rights also is demonstrated by its policy of funding abortions for poor women since 1978.[246] Even after the passage of the Hyde Amendment,[247] which prohibits Medicaid Funding of abortions except in cases of rape, incest, or threat to the life or health of the woman, New York continued to afford greater protection to women's right to reproductive freedom than the

---

Furthermore, the delay requires a woman to subject herself twice to harassment and abuse by clinic protestors. *Id.*

[243] *Id.*

[244] *See supra* notes 137-145 and accompanying text (testimony that delays in abortion procedure increases risk of complications and cost of procedure). *See also* Henshaw & Wallisch, *supra* note 134, at 171 (quoting C. Tietze, *Induced Abortion: A World Review* (5th ed. 1983) (risk of death increases by almost 30% each week of gestation over eight weeks, and risk of major complications increases 20% each additional week past the eighth week)).

[245] Riley, *supra* note 234, at 87.

[246] *See Hope*, 150 Misc. 2d at 992, 571 N.Y.S.2d at 977.

[247] Pub. L. No. 94-439 § 209, 90 Stat. 1434 (1976). In 1976, Congress amended the Labor-Health, Education and Welfare (HEW) Appropriations Act by adopting a rider which limited abortion funding to cases where the mother's life was endangered if the fetus was carried to term. (Pub. L. No. 94-439 § 209, 90 Stat. 1434 (1976); *see* Roe v. Casey, 623 F.2d 829, 833 n.10 (3d Cir. 1980). It was named the "Hyde Amendment" after Congressman Henry J. Hyde (R-Ill.), who proposed an initial amendment to prevent funds from being used to "pay for abortions or to promote or encourage abortions." 122 CONG. REC. 20,410 (1976).

A subsequent version of the amendment expanded funding to include victims of rape and incest and situations in which carrying the pregnancy to term would result in "severe and long-lasting physical health damage to the mother." Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977). In 1980, Congress once again deleted the "physical health damage" exception. Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979). A Medicaid-eligible woman challenged the restriction and the Supreme Court upheld the exclusion of abortions that were not necessary to save the mother's life. *See* Harris v. McRae, 448 U.S. 297 (1980). President Clinton signed into law a version of the Hyde Amendment that provides federal Medicaid funds for a larger range of abortions, but still excludes medically necessary abortions. *See* Department of Labor, Health and Human Services and Education and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-112, § 509, 107 Stat. 1002, 1115 (1993) (provides that no funds "appropriated under this Act shall be expended for any abortion except when . . . necessary to save the life of the mother or (when) the pregnancy is the result of an act of rape or incest").

federal government by including Medicaid funding for abortions for all women whose income was at or below one hundred percent of federal poverty line.[248] As one of only thirteen states that pay for abortions with state money, New York consistently includes all medically necessary abortions in the state Medicaid program in spite of the Supreme Court ruling that the exclusion is not unconstitutional.[249] In In re *New York City v. Wyman*,[250] the court of appeals upheld the State Commissioner of Social Services' directive that allowed Medicaid reimbursements for medically necessary abortions.[251] The court viewed this legislation as a means "to afford indigents the opportunity to obtain abortions in situations where otherwise only the well-to-do would be able to obtain competent medical intervention and reform would thus 'reduce discrimination against the poor.'"[252] Medicaid funding of abortions demonstrates New York's commitment to the right to choose as well as the reality that the federal government does not protect its citizens' rights in the same manner as the state constitution.

Finally, New York City goes one step further by providing free abortions to PCAP-eligible women at its own expense. The city authorized the New York City Health and Hospital Corporation to execute this policy because it realized that, after subtracting basic expenses such as rent, food, and transportation, eligible women who make between $99 to $921 a month are "not free to save" for an abortion that costs between $235 and $1,000.[253]

---

[248] N.Y. SOC. SERV. LAW, § 365-a[2], [5][b]. *See also In re* City of New York v. Wyman, 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972); Donovan v. Cuomo, 126 A.D.2d 305, 513 N.Y.S.2d 878 (3d Dep't 1987). *See also Hope*, 150 Misc. 2d at 992, 571 N.Y.S.2d at 977; *Hope*, 83 N.Y.2d at 575, 634 N.E.2d at 184, 611 N.Y.S.2d at 814.

[249] N.Y. SOC. SERV. LAW § 365-9[2], [5][b], 18 N.Y.C.R.R. 505.2(e); *Hope*, 83 N.Y.2d at 572, 645 N.E.2d at 185, 611 N.Y.S.2d at 813. *Cf.* Harris v. McRae, 448 U.S. 297 (1980).

[250] 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972).

[251] *Id.* at 538, 281 N.E.2d at 181, 330 N.Y.S.2d at 386.

[252] *Id.* at 540, 281 N.E.2d at 182, 330 N.Y.S.2d at 388.

[253] *Hope*, 150 Misc. 2d at 992-93, 571 N.Y.S.2d at 977.

4. New York's Stare Decisis and Abortion Rights

Abortion rights are precisely the type of issue over which state courts depart from federal interpretation because of inadequate protection of those rights under the United States Constitution. When state and federal provisions are similarly worded and the federal provision is "underenforced," many argue that this situation presents the best context for a state to turn to its own constitution and interpret it more broadly than the United States Supreme Court has the Federal Constitution.[254]

The United States Supreme Court increasingly has restricted abortions rights since *Roe v. Wade*.[255] As recently as 1993, the Supreme Court announced a new standard of review for the constitutional evaluation of abortion restrictions in *Planned Parenthood v. Casey*. [256]In *Casey*, the majority rejected the strict scrutiny standard utilized in *Roe*[257] and held

---

[254] Lawrence Sager, *Foreword: State Constitutions and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985).

[255] 410 U.S. 113 (1973). *See* Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990); Planned Parenthood Assoc. v. Ashcroft, 462 U.S. 476 (1983); H.L. v. Matheson, 450 U.S. 398 (1981) (state may, in most situations, insist that parents receive notification of their minor daughter's abortion); Belotti v. Baird, 443 U.S. 622 (1979) (requirement of parental consultation and consent, or court approval prior to permitting unmarried minors to undergo abortion; states may require minor to convince judge either that she is mature enough to make the abortion decision herself, or that terminating the pregnancy is in her best interest).

Likewise, although *Roe* held that the state's interest in protecting the fetus is not superior to the mother's interest in her health and life, the Supreme Court has upheld restrictions that appear to be contrary to *Roe*. *See* Colautti v. Franklin, 439 U.S. 379 (1979) (requirement that physician determine fetal viability prior to performing abortion; imposing criminal and civil sanctions for failure to exercise care to save fetal life); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, (1976) (requirement of parental consent prior to an abortion; prohibition of saline abortion after first trimester; imposing civil and criminal sanctions for failure to exercise care to save fetal life) (overruled by *Casey*); Doe v. Bolton, 410 U.S. 179 (1973) (limiting those hospitals in which abortions could be performed; requiring prior hospital committee approval and concurrence of three doctors that abortion is necessary). Furthermore, informed consent, mandatory waiting periods and required physician testing restrict access to abortion, both financially and physically. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding informed consent, mandatory waiting period).

[256] 505 U.S. 833 (1992).

[257] 410 U.S. at 155 (state cannot interfere with woman's choice in first trimester because abortion is fundamental right under the right to privacy).

that an abortion regulation will be upheld as long as it does not "unduly burden" a woman's choice.[258] Under this new standard, however, it is highly questionable whether abortion remains a fundamental right, warranting the same strong protections such as the right to free speech and the right to vote.[259] Indeed, the undue burden standard indicates that the Supreme Court is backing away from protecting women's constitutional right to abortion.[260]

---

[258] "Only where the state regulation imposes an undue burden on a woman's ability to make [the decision whether or not to continue her pregnancy] does the power of the State reach into the heart of the [protected] liberty." *Casey*, 505 U.S. at 874. An "undue burden" test is not the highest level of scrutiny and is indeed a drastic departure from the more rigorous standard of review announced in *Roe* which prohibited restrictions upon abortion unless they were narrowly drawn to serve a compelling state interest. *Roe*, 410 U.S. at 155. As a result, in the first and second trimesters, the mother's interest in her health outweighs any state interest in the fetus. *Id.* at 163. During the first two trimesters, the state can only regulate the abortion procedure as it reasonably relates to maternal health. *Id.* Therefore the state's interest in the potential life does not become compelling until the third trimester and the point of viability—where the fetus presumably has the capacity to have meaningful life outside the mother's womb. *Id.* Furthermore, *Roe* held that although the state could proscribe abortions after viability, it still could not prohibit the procedure when it was necessary to "preserve the life or health of the mother." *Id.* In *Casey*, the Court recognized that *Roe* forbade any regulation of abortion "designed to advance [the state's interest in the potential life] before viability." *Casey*, 505 U.S. at 876. The plurality, however, explicitly overruled this principle when it held that the government can attempt to influence a woman's decision on behalf of the fetus before viability. *Id.* The Court reasoned that the state had a strong interest in the fetus throughout the pregnancy; consequently, the government was permitted to enact regulations at any point during the pregnancy as long as they are reasonably related to promoting childbirth over abortion. *Id.* at 883. The Court rejected the strict scrutiny level of review to analyze such a regulation and merely requires that the regulation not place a "substantial obstacle" or impose an "undue burden" on the woman's exercise of her liberty. *Id.* at 874.

[259] Sen. Labor Comm., The Freedom of Choice Act of 1992, S. RES. 321, 102d Cong., 2nd Sess. 10 (1992) (arguing that the "undue burden standard" is a major departure from *Roe* and abortion is no longer a fundamental right); *see also* Kathryn Kolbert & David H. Gans, *Responding to* Planned Parenthood v. Casey: *Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151, 1154 (1993). *But see Casey*, 505 U.S. at 924 (Blackmun, J., concurring in part and dissenting in part) (Casey reaffirmed the central and essential holding in Roe).

[260] *See, e.g.*, Benshoof, *supra* note 239 at *7 ("The Court's new, less rigorous standard of review adopted in *Casey* will permit states to impose laws . . . that will hinder women from obtaining reproductive health care . . . . "); Kolbert & Gans, *supra* note 260, at 1153 ("Despite the strong language in *Casey*, the Court actually backed away from affording women the highest level of constitutional protection for the abortion choice.").

Furthermore, the Supreme Court consistently has upheld public funding restrictions for abortions. Women's right to reproductive freedom on the federal level has been diminished because the exclusion of funding for many women restricts their access to abortion.[261] In 1980, for example, a five member majority upheld the Hyde Amendment[262] that prohibited federal reimbursement for abortions under the Medicaid program except when necessary to save the mother's life.[263] The Court ruled that states were not required to fund medically necessary abortions that the federal government would not reimburse.[264] The Court reasoned that although the government may not place obstacles in the path of a woman's freedom of choice, it was not required to remove previously existing obstacles, such as indigency.[265] In validating the statute, the Court rejected plaintiffs' challenges under the Constitution's Due Process[266] and Equal Protection[267] clauses and held that the restriction did not impinge upon the due process liber-

---

[261] *See* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding prohibition on the use of public facilities and employees in the scope of employment, prohibited public funding for abortion counseling, and permitted viability testing prior to performing abortions); Williams v. Zbarez, 448 U.S. 358 (1980) (upholding under equal protection clause a state statute prohibiting state medical assistance for all abortions except those necessary to save the mother's life); Maher v. Roe, 432 U.S. 464, 478 (1977) (upholding the exclusion of purely elective, nontherapeutic abortions from Medicaid coverage because indigency is not a suspect class and bore rational relation to State's legitimate interest in encouraging childbirth); Beal v. Doe, 432 U.S. 438 (1977) (as a matter of statutory construction, states could refuse to fund nontherapeutic abortions under states' medical programs for needy persons).

[262] *See supra* note 247.

[263] Harris v. McRae, 448 U.S. 297 (1980). *See* Soc. Sec. Act, Title XIX, 79 Stat. 343, *as amended*, 42 U.S.C. § 1396 (1988 & Supp. III 1991).

[264] *Harris*, 448 U.S. at 311.

[265] *Id.* at 316-17. The Court based it decision on the same reasoning it used in *Maher v. Roe*. Although Congress has opted to subsidize medically necessary services generally, but not medically necessary abortions, the fact remains that this funding scheme leaves the indigent woman with the same range of choices she would have if the legislature decided not to subsidize health care costs at all. *Id.* at 317. "It simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316. Again using the rational-relation test, the Court found that refusing to fund abortions except when necessary to save the life of the mother bore a rational relationship to the state's "legitimate interest in protecting the potential life of the fetus." *Id.* at 324.

[266] *Id.* at 318, 319-20; U.S. CONST. amend. I.; U.S. CONST. amend. V.

[267] *Harris*, 448 U.S. at 322-23; U.S. CONST. amend. V.

ty recognized in *Roe v. Wade*.[268]

In light of the insufficient protection of abortion rights under the Federal Constitution, combined with New York's precedent of favoring broad protection for abortion rights, the New York Court of Appeals in *Hope* would have had a difficult time justifying a holding that the state is not required to fund abortions for poor women. It is within precisely this context that women would expect New York's constitution to supplement the federal right and offer more expansive protection

---

[268] Four members of the Court vigorously dissented and attacked the opinion on several points. One particular contention was that because Congress had denied Medicaid funds for medically necessary abortions, the Hyde Amendment was not supported by a sufficiently compelling state interest to justify its restriction on the exercise of a fundamental right to choose abortion. The Court based its conclusion on *Roe v. Wade*'s holding that the state's interest in the fetus could never outweigh the mother's interest in her health before the third trimester. *See Roe*, 410 U.S. at 155 (after the second trimester, state's interest in fetus is compelling). Justice Stevens explained that the Court's earlier decision in *Roe v. Wade* prevented the state from denying a woman who needs an abortion for medical reasons medical benefits to which she would otherwise be entitled, solely to further an interest in the fetus. *Harris*, 448 U.S. at 352. According to *Roe*, after the second trimester, the state's interest in the fetus is compelling thereby permitting the state to prohibit abortions. 410 U.S. at 163. This right, however, is not absolute; *Roe* explicitly held that the state can only prohibit abortions during the third trimester "as long as it is not necessary to preserve the mother's life or health." *Id.* The *Harris* dissenters therefore reasoned that by denying women money to pay for an abortion to preserve their health, the state violated *Roe* because the state was preferring its own interest in the fetus at the expense of the mother's interest in her health. *Harris*, 448 U.S. at 352. For an analysis of Harris and a discussion of abortion-funding cases generally, *see* Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to the Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981).

For criticisms on Supreme Court funding decisions, *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 1346-47 (2d ed. 1988); Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113, 1113-28 (1980); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1500-01 (1989). As a result of their decisions, the number of federally funded abortions plummeted from 294,600 in 1977 to 267 in 1992, with federal expenditures, in actual dollars, falling from $89 million to $332,000. With the federal government abandoning these women, the responsibility for providing subsidized abortion services fell to the states. In 1992, the states reported spending a total of nearly $80 million of their own revenues to pay for 202,355 abortions to indigent women. Almost all of these 200,000 abortions (99.9 percent) were performed in the 13 states that continue to fund most medically necessary abortions. For states that continue to use state Medicaid funds for abortions, *see infra* note 309. *See also* Daniel Daley & Rachel B. Gold, *Public Funding for Contraceptive, Sterilizations, and Abortion Services, Fiscal Year 1992*, 25 FAM. PLAN. PERSP. 244 (1993).

under state law for the right to choose.[269] It therefore appears that the court purposely failed to address this issue rather than handing down a decision that was inconsistent with innumerable cases decided upon state constitutional grounds.[270]

The court of appeals' earlier decisions clearly illustrate that state constitutional rights have been guaranteed consistently, even when the United States Supreme Court fails to protect these liberties under the Federal Constitution. It is precisely this scenario, where the federal right to privacy has grown tenuous in the wake of *Casey*,[271] *Harris*,[272] and *Webster*,[273] that the New York Court of Appeals traditionally has expanded coverage under the state constitution beyond that afforded under the Federal Constitution. The court could not declare explicitly that abortion was not a fundamental right under the state constitution without violating stare decisis.[274] As noted, New York jurisprudence warrants a more expansive protection for abortion as a fundamental right under the state constitution.[275] Directly overturning or ignoring precedent seriously undermines the court's integrity.[276] In recognition of this fact, the lower courts found that PCAP's funding scheme —the only assistance plan in the state that does not fund abortion—was inconsistent with New York's long, liberal history of aiding needy residents, and therefore was contrary to New York's constitutional right to due process.

Moreover, if the court had rejected the principle that abortion was a fundamental right under the New York State Con-

---

[269] *Hope*, 189 A.D.2d at 295, 595 N.Y.S.2d at 952 ("The Court of Appeals, which clearly has not hesitated to diverge from the more restrictive constitutional law interpretive track pursued by the United States Supreme Court . . . has an enduring commitment to an independent and expansive construction of the state constitution.").

[270] *Hope*, 189 A.D.2d 287, 595 N.Y.S.2d 948.

[271] 505 U.S. 833 (1992).

[272] 448 U.S. 297 (1980).

[273] 492 U.S. 490 (1989).

[274] *See supra* note 173.

[275] *Hope*, 150 Misc.2d at 991-92, 571 N.Y.S.2d at 976-77.

[276] *See, e.g., Casey*, 505 U.S. at 867 ("to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subject the court's legitimacy beyond any serious question"); *see also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) (recognizing that no judicial system could do society's work if it "eyed each issue afresh" in every case that raised it).

stitution, this decision would have been irreconcilable with other decisions that would seem to imply generous state protection for women's reproductive freedom.[277] The court of appeals expansively had interpreted the state constitution to safeguard rights that are particularly personal and intimate in nature.[278] As early as 1914, New York's highest court recognized that each person "of adult years and sound mind has a right to determine what shall be done with his own body . . . ."[279] The state constitutional right to privacy is "the broad, general right to make decisions concerning oneself and to conduct oneself in accordance with those decisions free of governmental restraint or interference."[280] Inherent in this right to privacy is the right of an individual to make personal decisions on extremely private issues concerning contraception, procreation, marriage, and abortion without government interference.[281] Additionally, in *Rivers v. Katz*,[282] the court of appeals held that the state constitution recognizes that patients

---

[277] *See infra* notes 279-284 and accompanying text.

[278] *See* Cooper v. Morin, 49 N.Y.2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979) (right to personal contact visits, as distinguished from conjugal visits, for pretrial detainees was recognized under state constitution), *cert. denied*, 446 U.S. 984 (1980); *see also supra* notes 202-219 and accompanying text.

[279] Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

[280] *In re* Coughlin v. Doe, 71 N.Y.2d 48, 52, 518 N.E.2d 536, 539, 523 N.Y.S.2d 782, 785 (1987). *See also* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) ("the right to be let alone—the most comprehensive of rights and the right most valued by civilized men").

[281] The New York Court of Appeals has recognized that the listed rights are fundamental under the constitutional right to privacy. Doe v. Coughlin, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.S.2d 782 (1987); People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980). *See* Turner v. Safley, 482 U.S. 78 (1987) (extending fundamental right to marry to prison inmates and striking down a virtual flat ban on marriage); Zablocki v. Redhail, 434 U.S. 374 (1978) (establishing constitutional right to marry in the course of striking down a state law allowing parents with court-imposed child-support obligations to remarry only if obligations were met and children were not likely to go on public assistance); Roe v. Wade, 410 U.S. 113 (1973) (right to abortion included in fundamental right to privacy); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating law that banned distribution of contraceptives to unmarried persons); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating law against interracial marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (state cannot penalize married couple's use of contraceptives); Skinner v. Oklahoma, 316 U.S. 535 (1942) (state cannot sterilize repeated larcenists while imprisoning repeated embezzlers because there is a fundamental right to procreate).

[282] 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986).

have a fundamental liberty interest to determine their own medical treatment and may refuse medicine even if such refusal endangers their lives.[283] The court held that the individual must have the final say in these matters "in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires."[284]

In numerous cases, New York courts have expanded this state right to privacy and implicitly have held that abortion is a fundamental right.[285] The court in In re *Klein,* for example, held that the state has "no compelling interest in the protection of the fetus prior to viability" since the mother's right to choose abortion under her constitutional right to privacy "is paramount at that stage."[286] In that case, the court permitted a husband to sign informed consent forms to authorize an abortion for his comatose pregnant wife.[287] The plaintiffs,

---

[283] *Id.* at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 (right to refuse medical treatment is fundamental and coexists with patients' liberty interest guaranteed by the due process clause); Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990).

[284] *Rivers,* 67 N.Y.2d at 493, 495 N.E.2d at 341, 504 N.Y.S.2d at 78 (upholding fundamental right of bodily autonomy and permitting involuntarily committed mental patients to refuse anti-psychotic medicine, even if such medication was necessary to save life).

[285] *In re* Klein, 145 A.D.2d 145, 147, 538 N.Y.S.2d 274, 275 (2d Dep't 1989), *appeal denied,* 73 N.Y.2d 705, 536 N.E.2d 627, 539 N.Y.S.2d 298 (1989). In this case, the appellate division upheld the lower court's decision to appoint the husband of a comatose pregnant woman to be her guardian and sign an informed consent abortion authorization form. In doing so, the court rejected an application made by complete strangers who intervened solely to prevent the pregnancy's termination. The court denied the application to appoint the strangers as guardians of the fetus because the fetus, which was under 24 weeks old and therefore not yet viable, was not a "legally recognized 'person' for the purposes of proceedings such as these." *Id.* at 147, 538 N.Y.S.2d at 275 (quoting Roe v. Wade, 410 U.S. 113 (1973)).

Furthermore, the court held that the state has "no compelling interest in the protection of the fetus prior to viability since the mother's constitutional right to privacy, which includes the right to terminate her pregnancy, is paramount at that stage." *Id. See also* Bryn v. New York City Health and Hosps. Corp., 31 N.Y.2d 194, 386 N.E.2d 887, 335 N.Y.S.2d 390 (1972) (upholding New York's 1970 statute decriminalizing first and second trimester abortions and refused to recognize the legal personality of fetus), *appeal dismissed,* 410 U.S. 949 (1973). *See also* N.Y. PENAL LAW 125.05(3) (McKinney 1987).

[286] *In re* Klein, 145 A.D.2d at 147, 538 N.Y.S.2d at 275. The court did not distinguish between federal and state privacy rights.

[287] *Id.* at 146, 538 N.Y.S.2d at 275.

who had no relation to the mother or fetus, sought to be appointed guardian of both the pregnant woman and her fetus to prevent the husband from terminating the pregnancy.[288] The Second Department rejected the argument that the fetus was a person and ruled that the "mother's constitutional right to privacy . . . includes the right to terminate her pregnancy . . . ."[289] Furthermore, the court's requirement of a compelling state interest demonstrates that it applied strict scrutiny analysis. Strict scrutiny does not apply unless a fundamental right is implicated. The court therefore implicitly acknowledged that the right to choose abortion is a fundamental right.

Likewise, in *Steinhoff v. Steinhoff*, the court prohibited a husband from forbidding his wife from obtaining or any hospital from performing an abortion on his wife.[290] These cases demonstrate that New York courts favor protecting reproductive freedom from interference by others and from interference by the court itself. In accordance with this tradition, it is not surprising that both the New York Supreme Court and Appellate Division have held that the right of a pregnant woman to choose an abortion in circumstances where it is medically necessary is one component of the right of privacy rooted in the Due Process clause[291] of the New York State Constitution.[292] Indeed, Attorney General Robert Abrams, representing the defendants in the *Hope v. Perales'* appeal, conceded that there is a state constitutional right to abortion.[293]

---

[288] *Id.*

[289] *Id.* at 147, 538 N.Y.S.2d at 275.

[290] 140 Misc. 2d 397, 531 N.Y.S.2d 78 (Sup. Ct. Nassau County 1988); *see also In re* Mary P., 111 Misc. 2d 532, 444 N.Y.S.2d 545 (Fam. Ct. Queens County 1981) (mother of pregnant teenager cannot force her daughter to have an abortion or otherwise interfere with the decision to carry to term).

[291] *See supra* notes 212-219 (defining the scope of privacy under due process); *see also* Roe v. Wade, 410 U.S. 113, 153 (1973) ("[t]his right to privacy, whether it be found in the Fourteenth Amendment's concept of personal liberty is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *id.* at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision . . . ").

[292] *Hope*, 150 Misc.2d at 994, 571 N.Y.S.2d at 978. *See, e.g., In re* Klein, 145 A.D.2d 145, 538 N.Y.S.2d 274 (2d Dep't 1989), *appeal denied*, 73 N.Y.2d 705, 536 N.E.2d 627, 539 N.Y.S.2d 298 (1989); N.Y. CONST. art. 1, § 6; Marni Brown, Comment, Hope v. Perales: *Expanding Medically Necessary Abortion Rights of Pregnant Indigent Women Under New York and Nebraska State Constitutional Due Process Clauses*, 72 NEB. L. REV. 586, 605 n.114 (1993).

[293] Riley, *supra* note 234, at 87.

The court of appeals itself has continued to protect other individual rights beyond that afforded by the United States Supreme Court. New York has extended the right to privacy in areas where the Supreme Court has refused. For example, the court continues to cite as good law[294] a decision that struck down a penal statute that had criminalized all forms of sodomy,[295] even though the Supreme Court later upheld a similar statute in *Bowers v. Hardwick*.[296] In *People v. Onofre*, the court of appeals held that banning all forms of sodomy violated the Federal Constitution because such a ban was overbroad.[297] The court reasoned that the right of adults to engage in consensual sex of all types included consensual sodomy.[298] It found that there was no rational basis for exclud-

---

[294] *See, e.g.*, People v. Scott, 79 N.Y.2d 474, 489, 593 N.E.2d 1328, 1337, 583 N.Y.S.2d 920, 929 (1992) (citing People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980)); *id.* at 487, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927 (the right to be left alone is "a core principle reflected in our cases vindicating a broader privacy right in areas other than search and seizure."); *id.* at 488, 593 N.E.2d at 1337 583 N.Y.S.2d at 929 (acknowledging "New York's tradition of tolerance of the unconventional and of what may appear bizarre or even offensive."); Coughlin v. *In re* Doe, 71 N.Y.2d 48, 52, 518 N.E.2d 536, 639, 523 N.Y.S.2d 782, 785 (1987) ("The right to privacy, in constitutional terms, involves freedom of choice, the broad, general right to make decisions concerning oneself and to conduct oneself in accordance with those decisions free of governmental restraint or interference."), *cert. denied*, 488 U.S. 879 (1988); People v. Hollman, 68 N.Y.2d 202, 210, 500 N.E.2d 297, 302-03, 507 N.Y.S.2d 977, 982-83 (1986) (distinguishing public and private morality).

[295] People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 938-39, 434 N.Y.S.2d 947, 949 (1980). The statute was also invalid on equal protection grounds because it only applied to unmarried persons. *Id.* at 491-92, 415 N.E.2d at 942-43, 434 N.Y.S.2d at 953. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7 at 18-20 (as to fundamental rights in general), §18.30 [a] (2d ed. 1992) (as to the right to engage in sexual acts). New York courts also have continued to protect the right of pretrial detainees to have contact visits under the state constitution even though the Supreme Court later ruled that this right is not guaranteed by the federal Constitution. *Cf.* Cooper v. Morin, 49 N.Y. 2d 69, 399 N.E.2d 1188, 424 N.Y.S.2d 168 (1979), *cert. denied*, 446 U.S. 984 (1980); Block v. Rutherford, 468 U.S. 576 (1984).

[296] 478 U.S. 186 (1986). The defendant in *Onofre* also was a male who was convicted of committing a sexually deviant act with another male in his home. *Onofre*, 51 N.Y.2d at 983, 415 N.E.2d at 937-38, 434 N.Y.S.2d at 948.

[297] *Id.* at 490, 415 N.E.2d at 941-42, 434 N.Y.S.2d at 952 ("Personal feelings of distaste for [consensual sodomy] and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution . . . ").

[298] *Id.* at 490-91, 415 N.E.2d at 942, 434 N.Y.S.2d at 952.

ing protection for decisions "to seek sexual gratification from what at least once was commonly regarded as 'deviant' conduct, so long as the decisions are voluntarily made by adults in a noncommercial, private setting."[299] After *Onofre*, the United States Supreme Court refused to expand the Constitution to include a right to homosexual sodomy and distinguished this conduct from the constitutional right to abortion as articulated in *Roe*.[300] In *Bowers*, the Supreme Court rejected the same argument that the court of appeals had upheld in *Onofre*—that due process prohibits government proscription of private sexual conduct between consenting adults. Despite *Bowers* the Court of Appeals continues to rely on *Onofre* as broadening the right to privacy to include certain private actions, such as consensual adult sodomy, that are simply beyond the government's reach. If New York's jurisprudence is broad enough to protect homosexual conduct, in spite of a contrary federal decision, the court of appeals would have had a difficult time concluding that the state does not offer extended protection for abortion rights. In the context of federal erosion of this right, it indeed may have been irreconcilable for the court to reject expanded abortion rights in *Hope,* yet continue to recognize some constitutional right to consensual sodomy.

B. *Jurisprudence In Similarly Situated States*

The New York Court of Appeals would have faced another obstacle had it determined that abortion was not a fundamental right: such a decision would have "bucked the trend" of several similarly situated states that have upheld funding for

---

[299] *Id.* at 488, 415 N.E.2d at 940-41, 434 N.Y.S.2d at 951.

[300] In Bowers v. Hardwick, 478 U.S. 189, 190-91 (1986), the court stated,

> [W]e think it evident that none of the rights announced in [Griswold v. Connecticut (contraception), Eisenstadt v. Baird (contraception), Roe v. Wade (abortion), and Loving v. Virginia (marriage)] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . . Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscriptions is unsupportable.

abortions under an expanded state constitutional right.[301] Against the backdrop of the federal erosion of abortion rights, state constitutions have grown even more important in the fight for women's reproductive freedom and have become the real battleground for women when challenging abortion restrictions.[302] If the court of appeals did not expand protection for abortion in New York, which has always been a leader in abortion rights, the court risked handing down a decision that was inconsistent not only with its own but with other states' jurisprudence as well.[303]

Throughout the country women have been turning to their state legislatures and state courts in seeking protection for their right to reproductive freedom. Although the number of states that offer expanded constitutional protection for abortion funding beyond the federal level remains a minority, the percentage is growing.[304] A substantial number of states have enacted laws guaranteeing women the right to abortion;[305] both Florida and California have enacted constitutional provisions declaring abortion to be a protected, fundamental state right.[306]

After the United States Supreme Court ruling in *Harris v. McRae* that states are not required to fund medically necessary abortions under Medicaid, thirteen states have continued to provide coverage through state funds for poor women despite the federal government's refusal to reimburse these costs.[307]

---

[301] *See infra* notes 305-321 and accompanying text.

[302] Kolbert & Gans, *supra* note 259, at 1148. One reason for the Court's erosion is the appointment of conservative Justices by the Bush and Reagan administrations including Antonin Scalia, Sandra Day O'Connor, Anthony Kennedy, and the elevation of William Rehnquist to Chief Justice—all of whom expressed dissatisfaction with *Roe*—and Clarence Thomas. Clinton's appointees, however, have changed the make-up of the Court. Justices Ruth Bader Ginsberg and Stephen Breyer both are pro-choice. *See*, Kimberley A. Chaput, *Abortion Rights Under State Constitutions*, 70 OR. L. REV. 593, n.6 (1991).

[303] *See infra* notes 305-321 and accompanying text.

[304] *See infra* notes 305-321 and accompanying text.

[305] These states include Connecticut, Kansas (contains provisions, however, requiring parental notification, informed consent, and 8-hour waiting period), Maryland (pending ballot referendum), Nevada, and Washington. Riley, *supra* note 235, at 87 (citing The Alan Guttmacher Institute, National Abortion Rights Action League, The Center for Reproductive Law and Policy).

[306] *Riley, supra* note 235.

[307] These states include: Alaska, California, Connecticut, Hawaii, Massachusetts; New Jersey, New York, North Carolina, Oregon, Vermont, Washington and West

Eight states, including New Jersey and Connecticut, extend Medicaid funding for abortions through their expanded prenatal programs.[308] These states have expanded interpretation of their own constitutions to protect poor women's right to abortion beyond those afforded under the federal Constitution.[309] Several of these states have upheld funding for medically necessary abortions under the state due process clause.[310] In *Committee to Defend Reproductive Rights v. Myers*,[311] California's highest court agreed that the state was

---

Virginia. *See* National Abortion Rights Action League Foundation, *Who Decides? A State-By-State Review of Abortion Rights* 162-65 (1991). Another six states—Iowa, Minnesota, Pennsylvania, Virginia, Wisconsin, and Wyoming—funded abortions in the case of rape or incest even before they were mandated to do so by Clinton's 1993 Executive Order to the Hyde Amendment. Little Rock Fam. Plan. Serv., P.A. v. Dalton, 860 F. Supp. 609, 617 n.4 (E.D. Ark. 1994).

[308] Philip Cates, *Albany Pact on Prenatal Care Excludes Abortions*, N.Y. TIMES, June 30, 1989, at B2.

[309] This expansion is generally accomplished through the state due process and/or equal protection clauses. *See*, Planned Parenthood Ass'n, Inc. v. Department of Human Resources of State of Oregon, 663 P.2d 1247 (Or. Ct. App. 1983) (denial of state medical assistance funding for medically necessary abortions violated the privileges and immunities clause of the Oregon Constitution), *aff'd on statutory grounds*, 687 P.2d 785 (Or. 1984). Also, many claims unsuccessfully attack the restrictions under the State's freedom of religion clause. *See also* Ellen Relkin & Sudi Solomon, 9 WOMEN'S RTS. L. REP. 27, 59-66 (1986).

Two of the states that upheld the funding restrictions for abortions construed their state constitutions consistent with the federal constitution. *But cee* Doe v. Department of Soc. Servs. of Michigan, 487 N.W.2d 166 (Mich. 1992). In this case, the Michigan Supreme Court upheld § 109A of the Social Welfare Act as constitutional, although it prohibited use of public funds to pay for abortion unless necessary to save the mother's life. *Id.* at 169. Interestingly, from 1976 to 1987, Michigan used its own money to pay for abortions and then in 1987 passed a referendum limiting that practice. *Id.; see also*, Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985) (no state or federal funds for abortion because state policy favors childbirth except when life of mother endangered, or she's victim of rape, incest, upheld); Kolbert & Gans, *supra* note 259, at 1162 n.70 (citing Doe v. Department of Soc. Servs., 487 N.W.2d 166, 174) (Mich. 1992) (state court, in upholding funding restriction, construed its constitution "consistent with the Federal Constitution, declining a broader, more independent interpretation."); IDAHO CODE § 56-209c (1982 Cum. Supp.); N.J. STAT. ANN. § 30:4D-6.1 (West 1981).

[310] *See* Kindley v. Governor of Maryland, 426 A.2d 908 (Md. 1981) (upholding a statute authorizing funding for medically necessary abortions because excluding women who require this medical procedure would constitute an impermissible burden on their right to choose); Women's Health Ctr. of W. Va. v. Panepinto, 446 S.E.2d 658 (W.Va. 1993); Doe v. Celani, No. S81-84CnC, slip op. (Vt. Super. Ct. Chitteneden County 1986) (denial of funding for medically necessary abortions violates state constitution common benefit and safety clauses), *cited in* Kolbert & Gans, *supra* note 259, at 1161 n.69.

[311] 625 P.2d 779 (Cal. 1981).

not required to fund medical care for the poor.[312] Once the state decided to do so, however, the court found that it could not selectively grant these benefits based on criteria that had nothing to do with need.[313] In *Myers*, the state could not exclude certain recipients solely because they had sought to exercise their constitutional right to abortion.[314] The court reasoned that requiring recipients to give birth in order to receive Medicaid benefits was unconstitutional because this criterion was unrelated entirely to whether these women were in fact needy.[315]

States also have used their state equal protection clauses to broaden abortion rights beyond the scope afforded under the Federal Constitution with regard to abortion funding.[316] In *Doe v. Maher*,[317] Connecticut invalidated its restrictive abortion-funding statute, basing its decision on its Due Process clause, Equal Protection clause, and Equal Rights Amendment.[318] The Connecticut statute limited state funding of

---

[312] *Id.* at 784 ("the state has no constitutional obligation to provide medical care to the poor").

[313] *Id.* at 798 ("Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion."); *id* at 786 ("California courts have repeatedly rejected the argument that because the state is not obligated to provide a general benefit, it may confer such a benefit on a selective basis which excludes certain recipients solely because they seek to exercise a constitutional right.").

[314] *Id.* at 786.

[315] *Id.*

[316] *See* Mat-Su Coalition for Choice v. Valley Hosp. Ass'n, No. 3PA-92-1207 (Alaska Super. Ct., 3d Dist. Feb. 9, 1993) (preliminarily enjoining community hospital's ban on abortion services under the Alaska Constitution's privacy guarantee), cited in Kolbert & Gans, *supra* note 259, at 1161 n.62; Dodge v. Department of Soc. Servs., 657 P.2d 969 (Colo. Ct. App. 1982); *In re* T.W., 551 So.2d 1186, 1191-92 (Fla. 1989) (parental consent statute violates explicit state constitutional right to privacy); Moe v. Secretary of Admin. & Fin., 417 N.E.2d 387, 400 (Mass. 1981) (The State Declaration of Rights affords greater degree of protection to the right of abortion than does the federal Constitution as interpreted by *Harris v. McRae*); North Carolina v. Stam, 267 S.E.2d 335, 342 (establishing an abortion fund to "ensure that low income women have a meaningful opportunity to exercise their constitutional choice to terminate their pregnancies"), *modified by* 275 N.E.2d 439 (N.C. 1980); Right to Choose v. Byrne, 450 A.2d 925, 934 (N.J. 1982) (New Jersey Constitution is broader than United States Constitution. Thus, the right to choose is fundamental for *all* women and state cannot discriminate between indigent women who require funding for medically necessary abortions from those that require funding for childbirth).

[317] 515 A.2d 134 (Conn. Sup. Ct. 1986).

[318] CONN. CONST. art. I, § 1, 20.

Medicaid abortions to situations where the mother's life was endangered. The court found the statute to be unconstitutional because it infringed upon a woman's right to privacy under state law[319] which included the right to seek an abortion and to preserve one's health.[320] The court concluded that the statute violated these principles because the scheme denied funding for necessary medical expenses for indigent women while paying for all necessary medical costs incurred by indigent men.[321]

C. *Why The New York Court of Appeals Avoided The Constitutional Questions*

1. Courts' Reluctance To Decide Constitutional Questions

One reason why at least a few members of the court of appeals may have been disinclined to expand the state constitutional right to abortion is that courts generally hesitate to interpret constitutions and do so in as few cases as possible.[322] The United States Supreme Court has employed a variety of devices to avoid answering difficult constitutional law questions, a desirable result in many instances.[323] Unlike the legislative and executive departments, the Court is not a representative branch of the public. It therefore cautiously proceeds to avoid the appearance that its decision was merely a surrender to political pressure. This type of politically motivated decision compromises the Court's integrity by making it indistinguishable from the other two branches although the federal judiciary is supposed to be removed from the political are-

---

[319] *Maher*, 515 A.2d at 157.

[320] *Id.* at 150 ("Surely, the state constitutional right to privacy includes a woman's guaranty of freedom of procreative choice."); *id.* at 151 ("these . . . fundamental rights of privacy—the right to secure an abortion").

[321] *Id.* at 159.

[322] *See infra* notes 323-331 and accompanying text.

[323] The Supreme Court's adherence to stare decisis and its reluctance to overrule a principle is another possible reason why the Court is averse to addressing a constitutional issue. In *Casey*, Justice O'Connor pointed out that the Court's integrity could be questioned if the Court overruled a rule absent a compelling reason demonstrating it was not a surrender to political pressure or in response to a change in the composition of the Court. *Casey*, 505 U.S. at 867.

na.[324] Overruling a particularly controversial precedent without the most compelling reason, for example, flies in the face of stare decisis and seriously threatens the Court's legitimacy.

In contrast, by taking a more modest approach to a case and not deciding a constitutional question, courts give the legislature room to act and amend. Once a constitutional question is decided, discussion ends; the public can no longer petition the legislature because, as a practical matter, legislative debate on the matter is forestalled. On the federal level, for example, amending the Constitution is an excruciatingly difficult task.[325] Indeed, Congress has only accomplished this on five occasions after it disagreed with a Supreme Court ruling.[326] On the other hand, striking down a law on statutory grounds more readily permits the legislature to make the necessary changes. It also gives the public time to accept new principles through a natural political process of consensus-building. When a state court charges ahead constitutionally before society is ready, the state may face backlash.[327] It

---

[324] *Id. See also* Mitchell v. W.T. Grant, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

[325] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-6, 65 (2d ed. 1988).

[326] *Id.* at 65 n.10 and U.S. CONST. amend. XI (limited jurisdiction of federal courts); *contra* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (prior broad interpretation to hear suits brought against states without states' consent); *id.* amend. XIV, § 1 (nullifying decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), that Americans of African decent, whether slave or free, could not be deemed citizens of United States); *id.* amend. XVI (nullifying decision in Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895), holding federal income tax unconstitutional unless apportioned); *id.* amend. XXVI (nullifying decision in Oregon v. Mitchell, 400 U.S. 112 (1970), that Congress was without power to set voting age in state elections; the amendment set the age at eighteen). *See also id.* amend. XIX (reversing decision in Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), that women may be denied the right to vote). Unlike the above amendments, the 19th, ratified in 1920, was not widely perceived as a reaction to a specific court case.

[327] *See, e.g.*, cases of noncompliance following Brown v. Board of Education decision: Green v. County Sch. Bd., 391 U.S. 430 (1968) ("freedom of choice" plan held inadequate compliance with desegregation requirements and 10-year delay intolerable); Cooper v. Aaron, 358 U.S. 1 (1958) (Supreme Court's reaffirmation of *Brown* after official resistance in Little Rock, Arkansas in which the Governor called in the National Guard to block integration of Little Rock's Central High School); Davidson M. Douglas, *The Rhetoric of Moderation: Desegregating the South During the Decade after* Brown, 89 NW. L. REV. 92 (1994). *See also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1st ed. 1976); Michael J. Klarman, Brown,

therefore may be best to let certain issues go naturally through the political process before the judicial branch intervenes.

In *Ashwander v. Tennessee Valley Authority*,[328] Justice Brandeis set forth a sketch of how the Supreme Court avoids constitutional questions.[329] The Court "refuses unnecessarily to anticipate constitutional questions, formulates rules only as

---

Racial Change & the Civil Rights Movement, 80 VA. L. REV. 7, 13 (1994) (discussion of governor's decision to call in National Guard). Justice Felix Frankfurter wanted to prevent a premature vote on school desegregation because in 1952 the Court was not yet united. He feared that a divided opinion and clashing opinions might have "reduced the Court's standing and ignited a racial warfare in the South." *Id.* at 600. Moreover, he was convinced that any desegregation process that the Court would order must not be "a drastic one, instant and universal; it would probably have to allow the South to make the adjustment." *Id.*

More recently, the Supreme Court of Hawaii's decision requiring the state to prove a compelling governmental interest in order to justify the denial of marriage licenses to homosexual couples also demonstrates this point. Although state laws on homosexual relations have moved from prohibition to tolerance over the past three decades, the gay marriage issue remains controversial and has been dividing the country. Melanie Kirkpatick, *Rule of Law: Gay Marriage: Who Should Decide?*, WALL ST. J., Mar. 13, 1996, at A15. New York has taken some steps towards recognizing homosexual rights. For example, New York recognizes gay couples as a family for the purpose of rent-controlled housing. Braschi v. Stahl Assoc. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). The court of appeals also has permitted an unmarried partner of a child's biological mother to become the second parent to the child by adoption. Jacob v. Dana, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995). New York's reluctance to go any farther, however, is demonstrated by the fact that in *Jacob v. Dana*, the court had the opportunity "to signal that it was ready to clarify that the denial of a marriage license to a same-sex couple was unconstitutional" but the court "has not yet reached that point." *City Gets Cold Feet over Gay Marriage/Officials Say Timing Isn't Right*, SAN FRANCISCO CHRON., 1995 WL 5309488, Dec. 4, 1995.

[328] 297 U.S. 288 (1936).

[329] *Id.* at 346-48 (Brandeis, J., concurring).

> The Court developed . . . a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are [in part] [1.] The Court will not pass upon the constitutionality of legislation in a friendly, non-adversarial proceeding . . . because to decide such questions "is legitimate only in the last resort" . . . [2.] The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it." . . . [3.] The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." . . . [4.] The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . [7.] "When the validity of an act of the Congress is drawn in question, and even if serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

broad as necessary for the case at hand, prefers decisions on non-constitutional grounds, and construes statutes where possible to avoid constitutional problems."[330] These devices are based on a principle that courts "do not review issues, especially constitutional issues, until they have to."[331]

2. The New York Court of Appeals' Reluctance to Broaden the State Constitution: The *Scott* and *Keta* Cases

The vigorous dissenting opinions in both *People v. Keta*,[332] and *People v. Scott*[333] indicate that at least some members of the court of appeals would not have been prepared to expand New York State constitutional coverage for abortion rights beyond those afforded by the Federal Constitution.[334]

---

[330] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring); TRIBE, *supra* note 268 at 72, n.1; *see also* Harris v. McRae, 448 U.S. 297, 306-07 (1980) ("It is well settled that if a case may be decided on either statutory or constitutional grounds, this Court, for sound jurisprudential reasons will inquire first into the statutory question. This practice reflects the deeply rooted doctrine 'that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'") (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)); Kremens v. Bartley, 431 U.S. 119, 133-34 & n.15 (1977) (relying on discretionary consideration to refuse review of "important constitutional issues," despite the "availability of thoroughly prepared attorneys to argue both sides . . . and of numerous amici curiae ready to assist in the decisional process, all of them 'stand[ing] like greyhounds in the slips, straining upon the start'"); Ashwander v. Tennessee Valley Auth. 297 U.S. 288, 346-48 (1936).

[331] *Joint Anti-Facist Refugee Comm.*, 341 U.S. at 154-55. Justice O'Connor's concurrence in Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), echoed this principle when she advised that a federal court should await a definitive construction by the state court rather than precipitously indulge in a facial challenge to the constitutional validity of a state statute. *Id.* at 507.

[332] 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (striking down under Art. I., § 12 of state constitution warrantless administrative search of automobile dismantling business even if used to determine whether businesses dealing with stolen automobile parts).

[333] 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (forbidding warrantless searches of open fields with posted "No Trespassing" signs or other means indicating unmistakably private property).

[334] Eve Cary & Mary R. Falk, People v. Scott & People v. Keta: *Democracy Begins in Conversation,* 58 BROOK. L. REV. 1279, 1323 (1993) ("[T]he New York Court of Appeals [has] been 'uncommonly divided' for at least the past five years over state constitutional law cases, particularly those in which they have been called upon to interpret a provision of the New York State Constitution more broadly than the United States Supreme Court has already interpreted an analogous federal provision.") (quoting *Scott*, 79 N.Y.2d at 503, 593 N.E.2d. at 1346, 583

The dissenting opinions in these two cases primarily opposed the lack of methodology the majority used when it rejected an interpretation of the Federal Constitution offered by the United States Supreme Court.[335]

In *Scott*, the New York Court of Appeals rejected the Supreme Court's interpretation of the Fourth Amendment in *New York v. Berger*[336] that permitted an administrative search similar to the one in *Scott*. Instead, the court struck down a state statute authorizing this type of search under the state constitution.[337] The court of appeals again rejected the federal interpretation of the Fourth Amendment in *Keta* when it refused to apply the "open fields" doctrine,[338] despite its validation under *Oliver v. United States*.[339] The rationale for both rejections of the United States Supreme Court's rulings was based upon the principle that the New York Constitution and New York's search and seizure jurisprudence offer more expansive protection of individual rights—and particularly the right of privacy—than that afforded under federal law.[340]

The dissenters in *Scott* and *Keta* vehemently objected to the expansion of the New York State Constitution by the majority.[341] They criticized the majority for ignoring prece-

---

N.Y.S.2d at 938) (Kaye, C.J., concurring). Compare Bellacosa's harsh criticism of the "New Federalism," *id.* at 1297, with Chief Judge Judith Kaye as one of the most committed adherents to the "New Judicial Federalism" movement which emphasizes independent state constitutional analysis especially in areas in of individual rights. *Id.* at 1323 n.24. *See also* Kaye, *supra* note 220.

[335] Cary & Falk, *supra* note 334 at 1280.

[336] 482 U.S. 691 (1987).

[337] *See* N.Y. CONST. art. I, § 12.

[338] In *Oliver v. United States*, the Supreme Court created a bright line rule that the Fourth Amendment's protection of "persons, houses, papers, and effects" simply does not extend to areas outside the "curtilage" of the home—those areas that are not in the immediate proximity of the home. 466 U.S. 170, 179 (1984). In *Oliver*, the Court upheld a warrantless search on private property because the search was conducted in "open fields" and therefore was outside of the curtilage of the home. *Id.* at 181. In contrast, the New York Court of Appeals rejected the open fields doctrine in *People v. Scott* because New York State "citizens are entitled to more protection." 79 N.Y.2d at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927. In *Scott*, the court of appeals invalidated a warrantless search that was similar to the one upheld in *Oliver*. *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

[339] 466 U.S. 170 (1984).

[340] *Scott*, 79 N.Y.2d at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927; *Keta*, 79 N.Y.2d at 496, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934 (Titone, J., concurring).

[341] *Scott*, 79 N.Y.2d at 517, 593 N.E.2d at 1355, 583 N.Y.S.2d at 947 (Bellacosa, J., dissenting) ("The Court today points to no history or tradition of this State . . .

dent and failing to apply a non-interpretative approach to determine whether New York should in fact depart from federal precedent.[342] A non-interpretative analysis includes examination of pre-existing state statutory or common law defining the scope of individual rights, the history and tradition of the state, the right identified in the state constitution as being peculiar in state or local concern, and distinctive attitudes of its citizenry towards the specific right.[343] The dissenters argued that in the absence of a textual difference between the state and federal constitution or a "unique character of the particular state that distinguishes it from the rest of the nation," the court is not justified in departing from the federal interpretation of the parallel provision,[344] particularly because both the government and public need uniformity in federal and state constitutional law.[345]

States should be cautious before distinguishing themselves from the nation because such action erodes the perception of a united nation.[346] By making this type of radical decision, state courts also may undermine the judicial process, because

---

warranting extra New York privacy protections . . . .").

[342] *Id.* at 510, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943 (Bellacosa, J., dissenting); *see also, id.* at 506, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting) ("The Court's declaration of independence from the Supreme Law of the Land and from this Court's own recent noninterpretative constitutional analysis and definitive guidance propels the Court across a jurisprudential Rubicon into a kind of Articles of Confederation time warp. The "movement" has been dubbed the 'New Federalism.'").

[343] *Scott*, 79 N.Y.2d at 509, 593 N.E.2d at 1350, 583 N.Y.S.2d at 942. *See also* Cary & Falk, *supra* note 334 at 1328 and compare the differences between noninterpretative analysis and interpretative analysis which include difference in the texts and history of the two constitutions.

[344] Cary & Falk, *supra* note 334 at 1321. *See also* California referendum, Proposition 8, which requires state courts to give the same meaning to a provision in the California Constitution as is given to the parallel provision in the United States Constitution. Constitution of the State of California, Article I, § 28(b), Proposition 8, "Victims' Bill of Rights," adopted by public referendum, June 8, 1982.

[345] *Scott*, 79 N.Y.2d at 510, 593 N.E.2d at 1350, 583 N.Y.S.2d at 942 (Bellacosa, J., dissenting).

[346] James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 827 (1992) ("It can thus be dangerous for the people of a state to say too vehemently and too often, 'We are fundamentally different from the rest of the nation.' To talk in that way may be to contribute to the conditions making it difficult for the state to consider itself, and to remain, a part of the nation. This danger may well account at least in part for state courts' reluctance to make too much of constitutional differences.").

the public believes that the court has usurped the legislative function.[347] Incoherent or inconsistent constitutional law doctrines may emerge. Justice Handler of the New Jersey Supreme Court explained the concerns associated with breaking with federal precedent in *State v. Hunt*.[348] Although state courts can and have interpreted state constitutions more broadly, there is a "danger, however, in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere."[349] Justice Handler argued that federalism requires a certain degree of cooperation, and that national judicial history has closely wed federal and state constitutional doctrine.[350] A state that continuously interprets its own constitution independently, insensitive to federal law and without explaining criteria to invoke additional state protection, may cause an "erosion or dilution of constitutional doctrine."[351]

3. Abortion Funding: Not the Best Case for Defining Abortion Rights

Abortion funding is a perfect example of an issue in which state courts are reluctant to depart from federal jurisprudence because abortion funding is an extremely controversial topic. More people support the general notion that a woman has a right to choose abortion rather than the idea that their tax dollars should be spent to pay for abortions.[352] Abortion funding is controversial because numerous ethical, moral, and polit-

---

[347] George Deukmejian & Clifford K. Thompson, Jr., *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 999-1006 (1979).

[348] 450 A.2d 952 (N.J. 1982) (rejecting United States Supreme Court conclusion in Smith v. Maryland, 442 U.S. 735 (1979), that telephone billing records were not entitled to 4th Amendment protection).

[349] *Id.* at 963 (Handler, J., concurring).

[350] *Id.* at 964 (Handler, J., concurring).

[351] *Id.* at 963-64. *Cf. id.* at 960, Justice Parshman's concurrence in which he argues that an independent state analysis, "strengthens the safeguards of fundamental liberties."

[352] Indeed, some taxpayers who morally oppose abortion, for example, object to the use of their tax dollars to fund these procedures. Carole A. Corns, Note, *The Impact of Public Abortion Funding Decisions on Indigent Women: A Proposal to Reform State Statutory and Constitutional Abortion Funding Provisions*, 24 U. MICH. J. L. REF. 371, 373 n.20 (1991) (citation omitted).

ical issues are tied to it. Anti-choice groups, for example, have found abortion funding to be a politically vulnerable target and one of the best ways to reduce the number of abortions short of overturning *Roe v. Wade*.[353] Abortion funding cases are "weak" in terms of gathering support for reproductive rights because of the variety of intertwined, sensitive issues. These factors include the "backlash against the omnipresence of big federal government, the resentment toward welfare recipients, and the concern that society has grown morally lax on issues related to family and sex."[354] Some may view government's refusal to fund abortions as a limitation on "big government."[355] Opposition to public funding of abortions also stems from the view that this benefit is simply another handout to welfare recipients.[356] Funding abortions for poor women is an extremely unpopular notion particularly during this time when both the public and legislators constantly are attacking welfare.[357] Furthermore, individuals that morally oppose abortion do not want their tax-dollars being spent in this manner.[358]

In this political climate, it is easy for a politician to appease many sides—by being tough on welfare and refusing to fund abortions while at the same time taking a middle ground on abortion and maintaining a "pro-choice" position.[359] Essentially an anti-funding position is a quid pro quo for a pro-choice stance.[360] Legislators who favor abortion restrictions and the prohibition of abortion funding still can pacify the increasingly influential political right. Meanwhile, the same legislators can reaffirm their commitment to pro-choice groups by steadfastly

---

[353] LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 15 (1990).

[354] *Id.*

[355] President Jimmy Carter, for example, demonstrated that he was a Democrat who understood the limits of the role of "Big Government when he replied to the *Maher v. Roe* ruling, "there are many things in life that are not fair, that wealthy people can afford and poor people can't. But I don't believe that the Federal Government should take action to try to make these opportunities exactly equal . . . " *Id.* at 154 (quoting "Transcript on the President's News Conference on Domestic and Foreign Affairs," N.Y. TIMES, July 13, 1977, at A10).

[356] Id. at 378-80.

[357] *Id.* at 157.

[358] *See supra* note 352; *see also, e.g.,* arguments against subsidizing the Vietnam War.

[359] TRIBE, *supra* note 353 at 153.

[360] TRIBE, *supra* note 353, at 157.

declaring they are "pro-choice". Many people define "pro-choice" merely as a belief that abortion should not be unconstitutional.[361] Therefore, if legislators adopt the basic position that the government should not illegalize abortion, they then can label themselves "pro-choice".

4. Avoiding the "Medicaid Question"

By distinguishing PCAP-eligible women from Medicaid-eligible women, the court of appeals successfully avoided having to answer whether the state constitution requires Medicaid funding for abortions.[362] New York thus far has avoided this question because the state legislature has included funding for medically necessary abortions under the state Medicaid program.[363] The Medicaid question is complex and involves extremely sensitive political and public policy questions.[364] Therefore, by distinguishing PCAP-eligible from Medicaid-eligible women, the court was able to avoid this controversial question and continue to defer to the legislature.

---

[361] This definition, however, misses the mark for many pro-choice supporters. While this limited definition was satisfactory before abortion was legalized, it no longer is the case for many pro-choice groups. If a woman cannot afford to pay for an abortion or if she must get parental consent before the state will allow her to have the procedure, she effectively loses control over her choice whether or not to have an abortion. The dissenting opinions in *Harris* and the lower courts' opinions in *Hope v. Perales*, *supra* notes 79-100, 268 and accompanying text, demonstrate that these restrictions serve as affirmative blocks to abortion. For this reason, many abortion rights groups have redefined "pro-choice" as including opposition to parental consent requirements and in favor of Medicaid funding for abortions:

> NARAL has dubbed as "great pretenders" candidates who use pro-choice rhetoric to 'mask' their pro-life positions [such as] Rep. Michael Huffington (R) . . . noting his vote against federal funding . . . NARAL also accused [then] State Senator George Pataki (R) of running a campaign of deception" to "hoodwink" NY voters into believing he is pro-choice—despite what the group claims is a nine-year pro-life abortion record in the state Legislature [citing] his votes against [Medicaid] funding and for notification and a 24-[hour] wait period.

Abortion Politics: More on Gag Rule, Great Pretenders, 6 AMER. POL. NETWORK ABOR. REP., Oct. 17, 1994, *available in* WESTLAW, Allnews library (*New York Post* reporter "notes that the NARAL 'pretenders' bill themselves as pro-choice but clash on issues like funding and parental consent.") *Id.*

[362] *See supra* note 113 for an explanation of the "Medicaid question."

[363] N.Y. SOC. SERVS. LAW § 365-a[2], [5][b], 18 N.Y.C.R.R. 505.2(e). *See also*, Hope v. Perales, 83 N.Y.2d 563, 571-572, 634 N.E.2d 183, 184-85, 611 N.Y.S.2d 811, 812 (1994).

[364] *See supra* notes 352-361.

5. The Political Compromise

One can speculate that this decision was a compromise—by misinterpreting the record and ignoring numerous affidavits, the court did not have to answer these difficult questions. On the one hand, it did not have to rule abortion was *not* a fundamental right. On other hand, it limited the holding in the case solely to the facts presented. The result was that the court avoided two of the most important questions in *Hope*—whether the court should expand protection of abortion under the state constitution beyond federal protection and whether the court should declare abortion a fundamental state right.[365]

Many pro-choice advocates would argue that this "waffling" only serves to hurt women, and that the court should have decided one way or another.[366] In their view, if the court had flatly declared abortion is not a fundamental right, women could have turned to the legislature and concentrated their efforts on this level.[367] They could have demanded that the leg-

---

[365] *See* Cary & Falk, *supra* note 334 at 1334, n.289 (Chief Judge Kaye's 'fuzzy' concurrence in *Scott* and *Keta*, which is devoted to defending the majority against the dissent, is an example of "her well-known talent as a peacemaker and consensus builder rather than her capacity for critical legal thinking.").

[366] *See* Birnbaum, *supra* note 18, at 10 (*Hope* is a "decision that sparked outrage from abortion-rights supporters"); Maureen Fan, *Abortion Rule Upheld in NY*, N.Y. NEWSDAY, May 6, 1994, at A6 (Donna Lieberman, director of the Reproductive Rights Project of the New York Civil Liberties Union and attorney for the plaintiffs stated that *Hope*, "represents a missed opportunity for the Court of Appeals to have recognized a fundamental right broader than the federal right and to remove abortion from the state legislative agenda, to remove it as a chip that can be haggled over and bargained away whenever the state needs to expand health-care services."). Pro-lifers, on the other hand, welcomed the decision. Birnbaum, *supra* note 18, at 10 ("Abortion opponents praised the unanimous opinion . . . calling it a 'welcome Mother's Day gift.'").

[367] An example of pro-choicers galvanizing in the wake of an erosion in reproductive rights is the March of Women's Lives on April 5, 1992 in which one-half million abortion-rights advocates marched in Washington, D.C. to show their strength while *Planned Parenthood v. Casey* was pending in the Supreme Court. It was the biggest pro-choice march and one of the largest political events in the city's history. Diane Mason, *NOW Hopes Washington Protest March Will Inspire Activism*, ST. PETERSBURG TIMES, April 3, 1992 at 2A ("Women's movement leaders called the *Webster* ruling a 'watershed' event, saying it would galvanize the public in support of women."); Christine Spolar, *Abortion-Rights Rally Draws Half a Million Marchers*, WASH. POST, April 6, 1992 at A1 (the 1992 elections "energized both sides of the abortion issue"). Furthermore, the 1992 march focused on the fact that if the Supreme Court overruled *Roe v. Wade* in *Casey*, the supporters

islature enact a constitutional amendment to the state constitution, similar to the federal Freedom of Choice Act (FOCA).[368] At the very least, groups could have pressured the legislature into amending PCAP to include abortion funding. More people may have been motivated to act if a strong decision had threatened their rights, just as pro-choicers rallied on the federal level when *Casey* came down.[369] Instead, faced with an uncertain outcome, women may not foresee the potential danger and therefore, will not be sufficiently alarmed to actively protest and lobby the legislature for its support.

However, perhaps *Hope* is not as harmful to the pro-choice movement as many would believe.[370] The court of appeals carefully and explicitly limited its holding in *Hope*. At least now, advocates can wait for a better context to decide these questions. *Hope* is extremely narrow and avoids answering the "Medicaid question."[371] Because *Hope* simply reflects the reality that the legislature has the power to address problems "one step at a time,"[372] it will be easily distinguishable from future abortion rights cases. It also is important to remember that courts are extremely reluctant to overturn precedent.[373]

---

were going to concentrate efforts on the Freedom of Choice Act which would write abortion into law and the Reproductive Health Equity Act, which restored Medicaid funding for abortions. *Id.*

[368] *See* H.R. 25 and S. 25, 103d Cong., Reg. Sess. 1993-94 (reaffirming *Roe v. Wade* and stating that its purpose is to limit states' power to restrict the freedom of a woman to terminate her pregnancy).

[369] *See supra* note 367.

[370] *See supra* note 372-386 and accompanying text.

[371] *See supra* note 113.

[372] *See*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (Supreme Court adopts a "hands-off" approach towards regulations of business under the due process clause and allows the legislature to address these problems one step at a time).

[373] *See supra* note 323. *See also* Planned Parenthood v. Casey, 505 U.S. at 853-67, in which the Supreme Court thoroughly analyzed its decision to uphold the underpinnings of *Roe v. Wade*. The Court explained that there is an "obligation to follow precedent . . . [W]e recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . Indeed, the very concept of the rule of law . . . requires such continuity over time that a respect for precedent is, by definition, indispensable." *Id.* at 853. The Court then declared that a decision to overrule "should rest on some special reason over and above the belief that a prior case was wrongly decided." *Id.* at 864. *See also* Mitchell v. W.T. Grant, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting) ("A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political

Therefore, if the legislature were to fail to provide Medicaid funding for abortions, for example, *Hope* will not be an obstacle for a case that involves the rights of the "poorest of the poor."[374]

Furthermore, a more advantageous context would be one that avoids altogether the unpopular concept of abortion funding. A more effective vehicle to define abortion rights would be a case challenging a provision that harshly restricted access to abortions, such as a mandatory delay provision or an onerous informed consent requirement. Pro-choice advocates may find a warmer reception from the judiciary and the public for this type of case, because it sidesteps welfare-related issues. Substantial evidence indicates that a mandatory delay provision may preclude New York women from having an abortion because women in rural areas who do not live near abortion centers could not afford, financially and otherwise, to make repeated trips to a city clinic.[375] For these reasons, the United States Supreme Court previously has recognized the possibility that certain mandatory delay policies may constitute an undue burden on women's right to choose.[376]

In addition to this case not being the best forum for settling the abortion rights issue, perhaps a unanimous court, or at least one that is divided, should be established before hand-

---

branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which is our abiding mission to serve.").

[374] Doe v. Maher, 515 A.2d 134, 141 (Conn. Super. Ct. 1986) (describing Medicaid-eligible women who have significantly more medical problems than the general population as a result of their existence under poverty conditions [and therefore] are likely to encounter significantly more medical problems as a result of their pregnancies . . . for which a medically necessary abortion may be indicated").

[375] *See supra* notes 137-139, 140.

[376] *See Casey*, 505 U.S. at 885-87 (plurality opinion). The Court recognized that "[i]n theory, at least, the [24-hour] waiting period is a reasonable measure," but suggested that there may be times when a mandatory delay would constitute an undue burden. The Court, for example, recognized that this policy will increase women's exposure to harassment and hostility outside clinics by anti-abortion protesters. Additionally, the Court acknowledged that "those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'" *Id.* (citing lower court's finding). *But see* Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1982) where the Court struck down a parallel provision under the strict scrutiny standard. *See also* Thornburgh v. American Coll. of Obst. & Gyn., 476 U.S. 747 (1986) (invalidating informed-consent provision under strict scrutiny standard).

ing down such an historic decision as the one posed in *Hope*.[377] In *Brown v. Board of Education*, for example, Justice Frankfurter was adamant about presenting a "united front" when the Supreme Court handed down its historic decision which struck down school segregation laws.[378] A closely divided court does not have the same power when establishing a fundamental right as does a declaration by a firmly united court. The perception of a court's unity is almost as important as the decision is itself.[379]

---

[377] Although no abortion decision on the federal level was decided by a unanimous Court, many cases which were less splintered provide greater clarity and precedential value. By the end of the Court's dealings with abortion cases, the Court was so divided that the decisions resembled more of a patchwork than any consistent jurisprudence. In turn, with less consistency, the Court was able to overturn earlier decisions with less trouble.

Roe v. Wade, for example, was decided by a seven to two majority vote. Similarly, early abortion cases at least had a majority vote. In contrast, in the Court's last decision, *Planned Parenthood v. Casey*, Justices Kennedy, Souter and O'Connor joined in the plurality decision which articulated the undue-burden test. Every other member of the Court merely concurred in part and dissented in part with the plurality decision resulting in four additional opinions. The adverse effect of this splintering, which developed over two decades, is evidenced by the Court's inconsistent decisions regarding different types of abortion restrictions. The Court's gradual acceptance of restrictions severely hampers women's right to choose.

In *Planned Parenthood v. Danforth*, the majority struck down a spousal and parental consent requirement. 428 U.S. 52 (1976) (parental-consent requirement struck down by *Casey*). In *Akron v. Akron Center for Reproductive Health*, the majority applied strict scrutiny and stuck down a 24-hour waiting period. 460 U.S. 416 (1983) (overruled by *Casey*). The Court became more splintered in *Thornburgh v. American College of Obstetrics and Gynecology*, but a five member majority was still successful in rejecting informed consent and reporting regulations. 476 U.S. 747 (187) (overruled by *Casey*).

[378] Philip Elman & Norman Silver, *The Solicitor General's Office: Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 822-23 (1987)

> Frankfurter wanted the Court to deal with the issue [of overruling *Plessy v. Ferguson*] openly, directly, wisely, courageously, and more than anything else, unanimously. He did not want the segregation issue to be decided by a fractured Court, as it then was. . . . He wanted the Court to stand before the country on this issue united and speaking in a single voice. He felt that whatever it did had to go out to the country with an appearance of unity, so that the Court as an institution would best be able to withstand the attacks that inevitably were going to be made on it.

Id. at 823 (Justice "Jackson's view was that whatever the Court did, it should do as a united Court; and what he wanted to do was erase *Plessy v. Ferguson* . . ."). Frankfurter believed that the only result that would "stand both the Court and the country in good stead [was] a unanimous opinion." KLUGER, *supra* note 327, at 599.

[379] KLUGER, *supra* note 327, at 600 (In the desegregation cases, Frankfurter was

Pro-choice advocates may best serve their cause by not dwelling on *Hope*. Rather, they should use *Hope's* limitations to their advantage. Pro-choicers should not view *Hope* as a lost opportunity for the court to declare abortion a fundamental right, or as a step away from state constitutional protection for abortion funding. Instead, pro-choice groups should limit the scope of *Hope* as they were once forced to do with *Casey*. For example, in future litigation they can continue to use the plethora of New York case law that clearly demonstrates a state expansion of privacy rights.[380] Additionally, these groups can take advantage of the court of appeals' ambiguous language that "the fundamental right of reproductive choice, inherent in the due process liberty rights guaranteed by [the] State Constitution, is *at least as extensive* as the Federal constitutional right."[381] This ambiguity leaves open the possibility of arguing that the scope of state abortion rights are more extensive than those protected under the federal Constitution.

Finally, if the "Medicaid question" does indeed arise—if conservative legislators are successful in eliminating abortion funding from Medicaid—then *Hope* may be a useful tool. The court clearly distinguished Medicaid-eligible women from PCAP-eligible women in *Hope*.[382] Additional support for retaining abortion funding for Medicaid recipients may be found in the State of New York's amicus brief in support of the plaintiffs' in *Harris v. McRae*.[383] The Attorney General, on behalf of the State, argued that the Hyde Amendment's exclusion of abortions under the federal Medicaid statute will "profound-

---

"convinced that *how* the Court presented its ruling would be no less important than the substantive content of the opinion."). *See also In re* Murchison, 349 U.S. 133, 136 (1955) ("'Justice must satisfy the appearance of justice.'") (citations omitted); Offutt v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"); David Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 790 (1993) ("[T]he appearance of justice will affect public perception of the system's legitimacy. A system consistently seen as unjust will eventually lose the allegiance of its citizens. If people perceive the courts as less than fair decision makers, the moral force courts depend on to ensure complacence with decisions they make diminishes").

[380] *See supra* notes 202-219.

[381] Hope v. Perales, 83 N.Y.2d 563, 575, 634 N.E.2d 183,186, 611 N.Y.S.2d 811, 814 (1994).

[382] *Id.* at 577, 634 N.E.2d at 188, 611 N.Y.S.2d at 816.

[383] 448 U.S. 297 (1980).

ly affect the liberty interest guaranteed to poor pregnant women by the United States Constitution and New York State law."[384] The brief further argued that the Hyde Amendments posed, "an undue burden on the fundamental right of women to choose to terminate a pregnancy."[385] If the State itself supported these constitutional arguments for federal reimbursement of abortions, it would appear entirely inconsistent for its own state courts to reject these points if the funding was threatened under the state's program. Moreover, the court of appeals conceded that an indigent woman's option to exercise her fundamental right is "arguably foreclosed."[386] By not following federal precedent, and not dismissing constitutional claims, the court left the door open for potential state constitutional challenges to any statute eliminating Medicaid funding for abortions. For these reasons, the court's compromise may actually prove to be beneficial to abortion rights in the long run.

CONCLUSION

The New York Court of Appeals failed to answer whether abortion rights are protected independently and beyond the scope of the federal constitution. Rather than viewing *Hope* as

---

[384] Brief Amicus Curiae of the Attorney General of the State of New York in Support of the Plaintiffs-Appellees, Harris v. McRae, No. 79-1268 (October Term 1979), Appendix 662, *supra* note 30, at 663.

[385] *Id.* at 671. *See also id.* at 669 ("[T]his case is not primarily a matter of the *funding* of medically necessary abortions; it is rather a matter of their availability . . . because the Hyde Amendments would have the result (which their proponents clearly intended) of effectively prohibiting poor woman (sic) from having medically necessary abortions, they are unconstitutional.") *See also id.* at 673 ("By excluding the majority of medically necessary abortions from the certifiable categories, the Hyde Amendments compel Medicaid-eligible women to resort to 'alternatives' ranging from illegal abortion to mental derangement . . . [and] this legislation erects an 'absolute obstacle to a woman's decision'" to terminate her pregnancy as protected by the constitution.) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71, n.11 (1976)). The enactments therefore "brutally coerce poor women to bear children . . . ." *Id.* (quoting Beal v. Doe, 432 U.S. 438, 456 (1977) (Marshall, J., dissenting)).

[386] *Hope*, 83 N.Y.2d at 577, 634 N.E. 2d at 188, 611 N.Y.S.2d at 816. ("The case before us is significantly different. Unlike an indigent woman, whose option to choose an abortion is arguably foreclosed by her lack of resources, the PCAP-eligible woman . . . presumptively has the financial means to exercise her fundamental right of choice.").

an obstacle to reproductive freedom, the pro-choice movement can limit the adverse effect of the decision and even try to use it to their advantage. First, pro-choice organizations can limit *Hope* to its extremely narrow holding. If the question of Medicaid funding for abortion arises, the challengers can rely on *Hope* as explicitly distinguishing between PCAP-eligible and Medicaid-eligible women.[387] Secondly, because the court reserved the option to expand the state constitution for abortion rights, women can wait for a stronger case to define the scope of such liberties.[388] Lastly, women should continue to pressure the legislature to amend PCAP, emphasizing the evidence that indicates that women in the PCAP program cannot afford abortions. By limiting the scope and applicability of *Hope*, pro-choice advocates can move beyond this narrow decision and view it as another tool along the path towards expanding the scope of abortion rights in New York State.

Kelley P. Swift

[387] *Id.*

[388] *See supra* notes 352-365.