

Brooklyn Law Review

Volume 60

Issue 1

SYMPOSIUM:

Ensuring (E)qual(ity) Health Care for Poor
Americans

Article 12

1-1-1994

If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan

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Recommended Citation

Julie F. Kay, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 Brook. L. Rev. 349 (1994).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol60/iss1/12>

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NOTES

IF MEN COULD GET PREGNANT: AN EQUAL PROTECTION MODEL FOR FEDERAL FUNDING OF ABORTION UNDER A NATIONAL HEALTH CARE PLAN

No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother.¹

INTRODUCTION

Sheila was 23 years old and on public assistance when she became pregnant for the second time. She had given birth to her first daughter just five months earlier and since then had spent her days taking care of her. Sheila supported herself and her daughter on the \$85 left from her monthly Aid to Families with Dependent Children ("AFDC") check of \$435, after paying \$350 toward her monthly rent. The man involved in the pregnancy provided no child support for the couple's first child. Sheila did not want another child, but she had become pregnant again despite care in using two forms of contraception, oral and injected.²

¹ Margaret H. Sanger (1913), *quoted in* THE BEACON BOOK OF QUOTATIONS BY WOMEN 31 (compiled by Rosalie Maggio, 1992) [hereinafter QUOTATIONS BY WOMEN].

² Affidavit of Kelly Lynch at 5, *Women of the State of Minnesota v. Natalie Haas-Steffen*, No. MC-93-3995 (D. Minn. filed June 23, 1993).

The injectable synthetic hormone progestin, known as Depo-Provera, provides effective contraception for several months after injection. Depo-Provera has been the subject of controversy because of the medical risks of its use, but is currently available to women in the United States. For a discussion of the political debate over the availability of Depo-Provera and its experimental use on minority women

Like many women living in poverty, Sheila did not want to carry her second pregnancy to term, but could not afford an abortion. Sheila was receiving AFDC, and most of her medical care was paid for by Medicaid, but this coverage would not fund her abortion. Although the Medicaid program was designed to meet the health care needs of low-income women like Sheila, since 1977 the Hyde Amendment has excluded nearly all federal funding of abortion.³ The Hyde Amendment has varied in content since its inception, but since June 1981 has allowed Medicaid funding of abortion only "where the life of the mother would be endangered if the fetus were carried to term."⁴ The conditions of Sheila's pregnancy—poverty, a young child to care for and no desire for another—were not considered life-threatening, so Sheila was ineligible for abortion funding.

These Hyde Amendment restrictions were upheld by the Supreme Court in *Harris v. McRae*.⁵ The Court stated that denying Medicaid funding for even medically necessary abortions is rationally related to the state's goals and, therefore, does not violate the Due Process or Equal Protection Clauses of the Constitution.⁶ In the years following *Harris*, the Court has ruled on a number of abortion restrictions, none of which has directly addressed the issue of federal funding of abortion. Ultimately, when the Court has addressed reproductive rights

and women in developing nations, see ROSALIND P. PETCHESKY, ABORTION AND WOMAN'S CHOICE 176-77 (1984), and RUTH SIDEL, WOMEN AND CHILDREN LAST 138-39 (1986).

³ See Subchapter XIX of the Social Security Act, 79 Stat. 343, codified as amended 42 U.S.C. § 1396 (1976). Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-394, § 203, 106 Stat. 1792, 1811 (1992) [hereinafter Hyde Amendment].

⁴ *Harris v. McRae*, 448 U.S. 297, 332 (1980) (Brennan, J., dissenting).

⁵ 448 U.S. 297 (1980).

⁶ *Harris*, 448 U.S. at 299. The equal protection doctrine is derived from the Fifth and Fourteenth Amendments to the Constitution. The Fifth Amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V. The Fourteenth Amendment extends equal protection guarantees to the states:

No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

issues, it has failed to scrutinize adequately the government's actions. Furthermore, the Court's analysis has failed to recognize that a lack of funding will deprive many impoverished women of access to abortion.

Sheila's case is typical. Denial of Medicaid funding curtails access to abortion for low-income women and may completely bar them from the power to choose abortion. Worse, it propels them to even more desperate "choices": facing the risk of an inexpensive illegal abortion or the danger of trying to self-abort. Other alternatives include attempting to raise funds for an abortion, going without food or other necessities, or putting one's health at risk by carrying the unwanted or unsafe pregnancy to term.⁷ When the practical effects of denying federal funding are considered, the true hardships and health risks for women like Sheila become apparent.

Part I of this Note examines the practical effects of the Hyde Amendment's denial of abortion funding, with an emphasis on how it endangers women's lives, restricts reproductive health care choices for low-income women, and disproportionately harms women from minority groups. This Note argues that restrictions on access to abortion, such as funding bans, force women to delay securing abortion services, thereby endangering their physical and mental health, and increasing the cost and hardship of abortion. Furthermore, this Note argues that when low-income women are denied abortion funding, the constitutional right to choose abortion becomes mere rhetoric.

Part II of this Note proposes an alternative interpretation of the equal protection doctrine and applies it to an analysis of abortion funding restrictions. The analysis emphasizes that the level of scrutiny that the Court has employed to decide whether legislation violates reproductive rights is inadequate. The government's goal of protecting the non-viable fetus without regard to a woman's well-being should not satisfy any equal protection standard. Therefore, Part II concludes that federal funding of abortion services is required under a modified equal protection analysis.

⁷ See *Harris v. McRae*, 448 U.S. 297, 346 (1980) (Marshall, J., dissenting). See *infra* notes 47-76 for a discussion of the results of denying abortion funding for low-income women.

Specifically, the revised form of the equal protection guarantees proposed in this Note would require the use of the highest level of scrutiny when considering legislation that affects women as a class. This analysis also de-emphasizes a showing of purposeful discrimination, instead focusing on the discriminatory effects of the challenged legislation. Using this analysis, the Court would give greater weight to the discriminatory impact of legislation that on its face does not explicitly classify people by gender. The result would be that if a statute considered facially neutral by the Court—such as the Hyde Amendment—is shown to affect women as a class and does not serve a compelling state interest, it would be struck as violative of equal protection guarantees. This analysis, based on the practical effects of denying abortion funding, would expand equal protection rights for all women.

Finally, Part III of this Note looks toward the future of abortion-funding regulations and considers the possibility of restrictions on reproductive health care within the proposed national health care plan. Legislative proposals that determine funding of reproductive health care—the new national health care plan being the most imminent example—offer an opportunity to reexamine abortion restrictions and to design legislative solutions to correct the Court's support of limited access to abortion services. A new national health care plan must include funding for a full range of reproductive health care services. To deny such funding constructs a major impediment to the right to choose an abortion and, therefore, should be challenged as violative of equal protection guarantees. An analysis of this harmful policy should begin with a look at the women who bear the brunt of a wrongful legislative decision.

I. THE EFFECT OF DENYING ABORTION FUNDING TO LOW-INCOME WOMEN

A. Medicaid Eligibility and Abortion Funding

Medicaid provides health insurance for "the poorest of poor Americans."⁸ By definition, women who receive Medicaid cannot afford to pay for their own health care. To be eligible for Medicaid, most recipients must be well below the federal poverty level.⁹ As of 1993, the Medicaid program, which was first established in 1965, had approximately 31 million enrollees.¹⁰ Depending on the final structure of the proposed national health care plan, the Clinton Administration estimates that Medicaid eventually could be phased out entirely.¹¹ Until then, the Medicaid program will continue to dictate the health care choices of Americans whose income level is low enough to make them eligible for these benefits.

A person's Medicaid eligibility is derived from his or her income eligibility for AFDC. This rate is set by each state. The national average income for AFDC eligibility is approximately 50% of the federal poverty level—under \$12,000 for a single parent family of three.¹² Thus, if a woman earns more than

⁸ *The Cost Implications of Including Abortion Coverage Under Medicaid*, ISSUES IN BRIEF (Alan Guttmacher Inst., New York, N.Y.), Oct. 1993, at 1 [hereinafter *Cost Implications*].

⁹ The Medicaid program is designed to provide "medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396 (1988 & Supp. IV 1992) (introductory paragraph).

¹⁰ *Cost Implications*, *supra* note 8, at 1. "In 1990, Medicaid covered approximately 11% of the total U.S. population . . . and 47% of those with incomes below the Federal Poverty Level." HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS: 1993 GREEN BOOK, 103d Cong., 1st Sess. 1637 (1993). Because eligibility requirements for children are less restrictive than those for adults, children from low-income families are more likely to receive coverage. *Id.*

¹¹ Under the proposed national health care plan, Medicaid would be eliminated—except for long-term care for the elderly and the disabled—and would be replaced by pooling recipients into the national plan. Dan Morgan, *Expanded Medical Safety Net Still Has Holes*, WASH. POST, Feb. 2, 1994, at A1.

¹² *Cost Implications*, *supra* note 8, at 1. For example, in Alabama a person who earns more than 17% of the federal poverty level is not eligible for Medicaid, while in California a person whose income is less than 94% of the federal poverty level is eligible for Medicaid. *Id.* at 2. Twenty-six states place eligibility at or

\$6000 a year, she and her dependents would not be eligible for AFDC nor Medicaid.¹³

Twenty-one years after it created the Medicaid program, Congress changed the statute to underscore the needs of pregnant women. Although Medicaid eligibility is generally linked to AFDC income qualifications, in 1986 Congress expanded coverage for pregnant women.¹⁴ It relaxed the eligibility requirements to include pregnant women with higher incomes and those whose family structure had made them ineligible for AFDC before they became pregnant.¹⁵ By expanding eligibility requirements, Congress has acknowledged the special needs of pregnant women. But Congressional support of pregnant, low-income women has been very selective. Even though Medicaid funding covers a full range of pregnancy testing, pre-natal care and post-birth care for pregnant women, Congress wavered on the abortion issue. Congress has denied funding for almost all women who choose abortion by amending the Medicaid appropriations each year.¹⁶

Congress first restricted Medicaid funding for women who choose abortion when it enacted the Hyde Amendment in 1977. In 1980, the Supreme Court upheld the amendment.¹⁷ By amending annual HHS appropriations bills and by joint resolution, Congress has continued a version of the Hyde Amendment every year since its introduction.¹⁸ The Hyde

below 50% of the federal poverty level. *Id.* at 1.

¹³ Medicaid is jointly funded by the federal and state governments. The federal government reimburses states for a portion of their Medicaid expenditures according to a rate established by the Department of Health and Human Services ("HHS"). Rachel B. Gold & Daniel Daley, *Public Funding of Contraceptive, Sterilization and Abortion Services, Fiscal Year 1990*, 23 FAM. PLAN. PERSP. 204, 204-05 (1991). The cost of Medicaid cannot be determined by direct congressional appropriation because spending is determined by the type and amount of care required and the number of eligible recipients. *Id.*

¹⁴ See 42 U.S.C. § 1396a(a)(10)(A)(ii)(IX) (1988 & Supp. IV 1992).

¹⁵ *Id.*; see also Gold & Daley, *supra* note 13, at 204. ("States are now required to provide Medicaid coverage to pregnant women (and their children up to age six) with incomes up to 133 percent of the federal poverty level; pregnant women (and their infants up to age one) with incomes up to 185 percent of poverty may be covered at the states' discretion.").

¹⁶ See *supra* note 3 and accompanying text.

¹⁷ *Harris v. McRae*, 448 U.S. 297, 298 (1980).

¹⁸ *Ensuring Reproductive Freedom: Proposals to the President and the 103d Congress: Removing Barriers to Reproductive Health Care*, REPRODUCTIVE FREEDOM IN FOCUS (Center for Reproductive Law & Pol'y, New York, N.Y.), 1993, at 11

Amendment contains few exceptions to the absolute ban on abortion funding, and since its inception they have varied slightly.

Earlier versions of the Hyde Amendment provided funding for abortion if a woman was pregnant as a result of rape or incest, but only if she had reported the incident to law enforcement officials within 60 days of its occurrence.¹⁹ In 1981, the reporting requirement was reduced to allow a woman only 72 hours to report the incident. In 1982, the rape-incest exception to the Hyde Amendment was eliminated entirely.²⁰ In 1993, however, the rape-incest exception was reinstated as part of a compromise solution during Congressional debate over the complete elimination of the Amendment, although the status of the reporting requirement remained uncertain.²¹

While a mandatory reporting requirement may appear to be reasonable, in practice it discourages women from seeking abortion funding. The reporting requirement itself may increase a woman's trauma.²² If a woman does know the identity of her attacker, she may not wish to reveal it for fear of repercussion or retaliation. In cases of incest, these fears are particularly prevalent. In addition, a woman may not report that she is the victim of rape or incest because she may not want to see her attacker prosecuted. Finally, a woman may not realize within a limited time period that she is pregnant as a

(The 1976 Hyde Amendment for fiscal year 1977 was enjoined by court order until 1978 and for a seven months in 1980. In 1980, the Supreme Court, in *Harris*, upheld the Hyde Amendment as constitutional.) [hereinafter *Ensuring Reproductive Freedom*]; see also ALAN GUTTMACHER INST., CHRONOLOGY OF ABORTION RESTRICTIONS ENACTED BY CONGRESS: 1970-1992 48 (1993) [hereinafter CHRONOLOGY OF ABORTION RESTRICTIONS].

¹⁹ CHRONOLOGY OF ABORTION RESTRICTIONS, *supra* note 18, at 48.

²⁰ Hyde Amendment, *supra* note 3. See Pub. L. No. 97-12, § 109, 95 Stat. 95 (1981).

²¹ Hyde Amendment, *supra* note 3. See Pub. L. No. 103-112, § 509, 107 Stat. 113 (1993). In December 1993, although the 1993 rape-incest provision of the Hyde Amendment did not contain a reporting requirement, a federal directive declared that states could not use reporting requirements or state Medicaid regulations to deny Medicaid payments for abortions in these cases. Several states, however, refuse to obey this directive and continue to deny abortion funding in cases of rape and incest. See William E. Clayton Jr., *States Must Fund Charity Abortions: New Federal Policy Takes Precedence*, HOUS. CHRON., Jan. 7, 1994, at A2; Robert Pear, *Pennsylvania Defies U.S. Abortion Rule*, N.Y. TIMES, Jan. 19, 1994, at A12.

²² See Affidavit of Dr. Jane Hodgson at 19, *Women of Minnesota v. Haas-Steffen*, No. MC-93-3995 (D. Minn. filed June 23, 1993).

result of a rape, or she may be in shock or suffering from trauma. In addition to its discouraging effects, the reporting requirement inherently distrusts women as it presumes that they are lying about rape in order to obtain abortion funding.²³

The Hyde Amendment has also varied as to whether it will allow funding for "medically necessary" abortions. An abortion is generally considered "medically necessary" only if the woman's life or health would be endangered if she were forced to carry her pregnancy to term. From 1978 to 1979, the Hyde Amendment provided Medicaid funding of abortion if carrying the pregnancy to term would put the woman at risk of "severe health damage," but subsequent revisions deleted this provision.²⁴ The current Hyde Amendment excludes funding for "medically necessary" abortions except where necessary to save the life of a pregnant woman.

The requirement that a life-threatening condition exist before funding is allowed ignores pregnant women who suffer from a wide range of hazardous and debilitating conditions—including AIDs or cancer—none of which the Hyde Amendment considers "life-threatening" *per se*.²⁵ Furthermore, it is often difficult for physicians to determine exactly when the continuation of a pregnancy would be damaging enough to threaten a woman's life.²⁶ Even if forced pregnancy

²³ Such reporting requirements are insulting to women as they "call into question the credibility of all women, and imply that women will lie about rape or incest in order to obtain Medicaid funding." *Medicaid Funding and Reporting Requirements*, FACT SHEET (National Abortion Rights Action League ("NARAL"), Washington, D.C.), 1990, at 1.

For a general analysis of the inflated assertion that women and girls lie about rape and incest, see HELEN BENEDICT, *VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES* 18 (1992) ("The tendency of women to lie about rape is vastly exaggerated in popular opinion. The FBI finds that 8 percent of reported rapes are unfounded, but other researchers put the figure at only 2 percent."). See also SUSAN ESTRICH, *REAL RAPE* (1987).

²⁴ See CHRONOLOGY OF ABORTION RESTRICTIONS, *supra* note 18, at 36-40.

²⁵ "For women with AIDS or cancer even a slight decrease in health may be life-threatening. . . . Yet an abortion in the case of a pregnant woman with AIDS would not qualify [for federal abortion funding] . . . both because it will not prevent her death (i.e., it will not cure the underlying disease) and because it is difficult to predict the extent to which continuing the pregnancy will damage her health." Affidavit of Dr. Jane Hodgson, *supra* note 22, at 29-30. See also *infra* notes 54-55 for a discussion of the possible medical dangers of pregnancy.

²⁶ "[A] physician cannot know with certainty that a particular procedure is

does not cause physical harm, the psychological effects may be devastating. Justice Stevens's dissent in *Harris* denounced the provision, noting that "[b]ecause a denial of benefits for medically necessary abortions inevitably causes serious harm to the excluded women, it is tantamount to severe punishment."²⁷ A woman's physical and mental health is so devalued that the government will not provide abortion funding unless her illness progresses to the point of being life-threatening.

In contrast to the Hyde Amendment's prohibition of funding for virtually all abortion services, the Medicaid program does cover pregnancy-related care. If a woman does decide to carry her pregnancy to term, whether by choice or due to a lack of alternatives, the federal government offers her financial support. This distinction puts excess pressure and persuasion on low-income women and has a tremendous impact on their lives and reproductive choices.²⁸ Moreover, the Hyde Amendment's "pro-motherhood" efforts to encourage low-income women to continue unwanted pregnancies contrasts sharply with state policies that deny benefit increases for women who become pregnant while on AFDC.²⁹

'necessary to prevent the death' of his or her patient; rather, a physician can only assess the risk of death. The definition . . . does not give any guidance as to how high the risk of death must be for the exception to apply, or if the risk of death has to be eliminated completely, rather than simply reduced by the abortion, in order for the exception to apply." Affidavit of Dr. Jane Hodgson, *supra* note 22, at 26.

²⁷ *Harris v. McRae*, 448 U.S. 297, 354 (Stevens, J., dissenting).

²⁸ See *infra* notes 44-71 (showing the tremendous impact of denial of abortion funding). "By singling out abortion as the only pregnancy-related procedure denied to Medicaid recipients, the Hyde Amendment has had devastating consequences for low-income women's lives." CHRONOLOGY OF ABORTION RESTRICTIONS, *supra* note 18, at 11 (citing James Trussell et al., *The Impact of Restricting Medicaid Financing for Abortion*, 12 FAM. PLAN. PERSP. 120, 120-21 (1980)).

²⁹ Many states are beginning to implement policies called "family caps" or "children's disallowances" under which families on AFDC will not have their grants increased for children conceived while the mother received welfare. See Center for Law & Social Policy ("CLASP"), *HHS Approves Wisconsin and Georgia Waivers*, in STATES UPDATE: A CLASP REPORT ON STATE WELFARE REFORM DEVELOPMENTS (Jodie Levin-Epstein ed., 1993). Such an approach to welfare, when combined with a denial of Medicaid funding of abortion, is both nonsensical and cruel. Low-income women are faced with a situation where they cannot afford abortion funding, yet if they have another child the government will not increase their AFDC payment to pay this child's expenses. Ultimately, this policy penalizes entire families and does not facilitate its goal of reducing the number of children that women on AFDC may have.

For all its inequity and negative impact on impoverished women, the Hyde Amendment went virtually unchallenged during the Reagan and Bush Administrations. Between 1980 and 1992, the federal government created a large number of federal statutes, regulations and policies—including many not specifically related to health issues—that placed restrictions on abortion funding.³⁰ Since his election, however, President Clinton has reversed some of this legislation and expanded both access to information for patients at clinics that receive federal funding and abortion services for federal employees.³¹ In addition, an increased number of women elected to Congress, combined with the election of a pro-choice president, dramatically expanded Congressional debate on the Hyde Amendment.³² Although Congress still voted to continue the Hyde Amendment, a provision for funding abortions in cases of reported rape or incest was reinstated into the bill.³³

The current version of the Hyde Amendment allows individual states to provide state funding for a full range of abortion services for low-income women. Yet, only twenty states continue, either voluntarily or under court order, to pay for abortion services for low-income women beyond those neces-

³⁰ CHRONOLOGY OF ABORTION RESTRICTIONS, *supra* note 18, at 1. For example, Congress has also enacted the Adolescent Family Life Act, 42 U.S.C. § 300 z-10(a) (1988 & Supp. IV 1992), which prohibits any discussion of abortion in sex education programs; the Helms Amendment, 22 U.S.C. § 2151b(f)(3), (f)(1) (1988 & Supp. IV 1992), 48 C.F.R. § 752.7016(b) (1992), 48 C.F.R. § 752.7004(d)(4) (1992), barring use of Foreign Assistance Act funds for abortions, and the Restrictions on Abortion Related Advocacy with Funds made available for the Legal Services Corporation Act, 42 U.S.C. § 2996f(b)(8) (1988 & Supp. IV 1992).

³¹ President Clinton has used the executive power to reverse some of the domestic and international anti-abortion policies enacted during the Reagan and Bush administrations. Domestically, he reversed the "gag rule," which mandated that counselors at federally funded family planning clinics could not mention abortion as an option for women with unwanted pregnancies. Additionally, the Clinton administration is facilitating importation of RU486, an abortifacient, and has recently signed into law federal protections for abortion clinics.

In the area of foreign policy, President Clinton lifted the "Mexico City Policy," thereby restoring funding to overseas birth control programs that offered abortion, and also rescinded a ban on military hospitals performing abortions overseas. Lynn Smith, *Bowed, But Unbroken?*, L.A. TIMES, Mar. 22, 1993, at E1.

³² See, e.g., *Planning for the Abortion Debates*, WASH. POST, Sept. 18, 1993, at A20; Karen Schneider, *House Retains Ban on Funding of Abortions for the Poor*, PHIL. INQUIRER, July 1, 1993, at A1; Karen Tumulty, *Abortion Funds Ban Retained in House Test*, L.A. TIMES, July 1, 1993, at A1.

³³ See *supra* note 21 and accompanying text.

sary to save a woman's life.³⁴ In several states, the denial of funding for abortion has been successfully challenged on state constitutional grounds.³⁵ Although a number of states have continued abortion funding for Medicaid recipients despite the Hyde Amendment, public funding for abortion has decreased dramatically since the ban on federal funding.³⁶ By 1987, only twelve percent of all abortions were paid for with public funds,

³⁴ According to the Center for Reproductive Law and Policy ("CRLP"): The least restrictive states are Arizona, California, Connecticut, Massachusetts, New York, Washington, and West Virginia. Hawaii, Oregon, and Vermont fund all medically necessary abortions. New Jersey provides abortions necessary to preserve a Medicaid recipient's life or health. North Carolina funds abortions in cases of rape, incest, severe fetal anomaly, or where the woman's health will be impaired; Maryland funds abortions where the pregnancy is the result of rape or incest, where a fetal anomaly exists, or if continued pregnancy will have serious adverse effects on the woman's physical or mental health. Wisconsin will fund abortions in cases of reported rape or incest, or if the pregnancy will have serious health consequences for a women [sic] due to a prior existing condition. Iowa and Virginia fund abortions if a severe fetal anomaly exists or where the pregnancy is the result of rape or incest. Minnesota and Wyoming fund abortions where the pregnancy is the result of reported rape or incest. Pennsylvania funds abortions where the pregnancy is the result of rape or incest or where continuing the pregnancy imposes a threat to the woman's life. Previously one of the least restrictive states, Alaska recently approved regulations that will limit state funding for abortion, but have not yet taken effect.

Ensuring Reproductive Freedom, *supra* note 18, at 12 n.35. A number of challenges to a denial of abortion funding are being brought on state constitutional grounds as of this writing. See, e.g., *Women of Minnesota v. Haas-Steffen*, No. MC-93-3995 (D. Minn. filed June 23, 1993).

³⁵ In many states, the denial of funding for abortion has been overturned by expanding equal protection guarantees through state constitutional grounds. See Carole A. Corns, *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, 390-95 (1991); see also Judy L. Popper, Note, *New Jersey Statute Prohibiting Medicaid Funding for Abortions Except Where Medically Necessary to Preserve Life of the Mother Violates the Equal Protection Clause of the New Jersey Constitution*, 56 TEMP. L.Q. 983 (1983). State constitutions may contain identical language to the federal constitution, yet be interpreted to grant greater protections to women. See Judith S. Kaye, *Celebrating Our Other Constitution*, 60 N.Y. ST. B.J. 8, 8-9, 73, 78 (1988).

³⁶ For example, during the first year that the Hyde Amendment was in effect, the number of publicly subsidized abortions dropped from approximately 295,000 to 194,000. Stanley K. Henshaw & Lynn S. Wallisch, *The Medicaid Cutoff and Abortion Services for the Poor*, 16 FAM. PLAN. PERSP. 170, 171 (1984). After the Hyde Amendment, most public funding for abortion came from the states, not the federal government. By 1990, the number of federally funded abortions was 165. Gold & Daley, *supra* note 13, at 209.

and most of this funding was provided by the states.³⁷

In addition to state medical assistance, private funding sources exist to try to meet the abortion needs of low-income women. But these resources meet just a fraction of the demand for abortion funding.³⁸ Minnesota's Pro-Choice Resources is the largest such abortion assistance fund in the United States and is supported solely by private donations. This organization distributes approximately \$10,000 per month in grants and loans to low-income women to help cover the cost of abortion services.³⁹ Like other organizations nationwide that provide funding for women in need of abortion services, Pro-Choice Resources frequently fails to fill all of the requests it receives.⁴⁰

Other private funding sources include clinics and practitioners who will lower or waive their fees for low-income women. For example, many abortion providers in the Minneapolis area will lower their fees for women who are referred to them by Pro-Choice Resources.⁴¹ Unfortunately, lowering abortion fees sometimes jeopardizes the financial stability of such clinics. As a result, these clinics must often postpone their efforts to expand services into other areas of reproductive health care, including contraceptive services and services for the prevention of sexually transmitted diseases.⁴²

Medicaid-eligible women, who by definition are living in poverty, lack the funds necessary to pay for reproductive health care, including abortion services. Because the federal government refuses to pay these costs, women are often completely denied access to abortion services or face delays that increase the health risks of abortion. Low-income women en-

³⁷ *Abortion in the United States*, FACTS IN BRIEF (Alan Guttmacher Inst., New York, N.Y.), Mar. 15, 1993, at 1. During the Reagan-Bush presidencies, in addition to the decrease in abortion funding, federal funding for contraceptive services was severely curtailed. Once inflation is factored in, federal expenditures for family planning services have fallen by almost two-thirds since 1980. Gold & Daley, *supra* note 13, at 204.

³⁸ See Affidavit of Kelly Lynch, *supra* note 2, at 18.

³⁹ Affidavit of Kelly Lynch, *supra* note 2, at 2.

⁴⁰ Affidavit of Kelly Lynch, *supra* note 2, at 3.

⁴¹ See Affidavit of Katherine G. Welsh at 3, *Women of Minnesota v. Haas-Steffen*, No. MC-93-3995 (D. Minn. filed June 23, 1993); Affidavit of Pamela Gallop, at 2, *Haas-Steffen*.

⁴² See Affidavit of Katherine G. Welsh, *supra* note 41, at 8 ("Because we feel compelled to reduce and waive fees for women on medical assistance who cannot pay for abortions, we are forced to cut costs in other areas.").

counter significant additional barriers which perpetuate a two-tiered system of health care delivery.

B. The Hardship of Delayed or Expensive Abortion

The hardships which low-income women encounter as a result of the government's refusal to provide abortion funding fall into two categories: medical risks and personal suffering. The medical risks of pregnancy are well known; the personal hardships are more difficult to quantify. Low-income women who, by definition, lack access to funds, may try a variety of desperate methods to raise the money needed for an abortion.⁴³ As public funding for abortion has decreased and private funding sources are limited, however, many pregnant, low-income women must waste vast amounts of time trying to locate organizations or individuals to provide such services. Moreover, a woman who postpones her abortion while trying to raise funds increases the danger and expense of her abortion. The cost of obtaining an abortion increases as the pregnancy progresses.

A fairly common scenario occurs where a woman who cannot afford an abortion is caught in a cycle in which she spends time trying to raise money while the costs increase and her pregnancy advances. One recent study indicated that when Medicaid-eligible women experienced delay, they had abortions two to three weeks later than other women in the same clinic.⁴⁴ This delay increases the risks associated with abortion which in turn may be exasperated by a shortage of abortion services.

Indeed, the cost of an abortion may act as a total bar to obtaining abortion services for low-income women. Several factors influence the price of an abortion, including length of pregnancy, availability of local facilities, and the type of facility and procedure used.⁴⁵ Almost all abortion providers require payment in advance. The least expensive abortion, a first-trimester, out-patient procedure, usually costs between \$200 and

⁴³ See *supra* note 7 and accompanying text.

⁴⁴ Henshaw & Wallisch, *supra* note 36, at 170 (study of the effect of ban on Medicaid funding at a clinic in St. Louis, Missouri.).

⁴⁵ NATIONAL ABORTION FED'N, *ECONOMICS OF ABORTION* (Ann T. Cook ed., 1991).

\$300.⁴⁶ Second trimester abortions range from \$350 to \$450; after the 16th week the cost goes up approximately \$100 per week, with a maximum fee usually not over \$1200.⁴⁷ The fees especially burden poorer women, since the average cost of \$250 for an early pregnancy can be a significant portion of their income. In fact, an outpatient abortion costs nearly two-thirds of the average maximum monthly AFDC payment for a family of three.⁴⁸ Raising these funds severely taxes Medicaid-eligible women.

These women must endure greater hardship because of the unanticipated expense of abortion. Since many women who receive AFDC already cannot meet the costs of daily life, the expense of \$200 or more for an abortion can be devastating. Struggling to raise abortion funds, these women skimp on necessary items for their families, skip paying rent or utility bills, pawn household goods or personal items, or use money set aside for their families' food and clothing.⁴⁹ Borrowing money from friends or partners—who are themselves often without funds—puts them further in debt.⁵⁰ The pressure of an advancing pregnancy may push them into illegal activities, such as fraudulently claiming someone else's insurance, or committing theft or prostitution, to raise funds.⁵¹ Many low-income women will jeopardize their future or security by spending their entire savings to pay for an abortion: It is "impossible to know the consequences for the women and their families if their depleted savings later became needed for emergencies."⁵² Each individual Medicaid-eligible woman is forced to make painful and sometimes tragic sacrifices to pay for an abortion.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Cost Implications*, *supra* note 8, at 2 ("This amount does not include the cost of transportation which can be considerable in areas of the country where abortion services are few and far between. In 27 states, the cost of an abortion is more than two-thirds the maximum monthly AFDC payment, and in nine states, it is higher than a family's entire monthly allotment.").

⁴⁹ See *Harris v. McRae*, 448 U.S. 297, 346 n.7 (Marshall, J., dissenting); *Henshaw & Wallisch*, *supra* note 36, at 170-71; Affidavit of Katherine R. Welsh, *supra* note 41, at 3.

⁵⁰ Affidavit of Katherine G. Welsh, *supra* note 41, at 3.

⁵¹ Affidavit of Katherine G. Welsh, *supra* note 41, at 3.

⁵² *Henshaw & Wallisch*, *supra* note 36, at 178; see also *Harris*, 448 U.S. at 346 n.7 (Marshall, J., dissenting); Affidavit of Katherine R. Welsh, *supra* note 41, at 3.

A delay in obtaining an abortion may also force a woman to carry her pregnancy to term if it causes her to postpone her abortion until it becomes too advanced to get a legal abortion. Moreover, forced pregnancy imposes undue physical and psychological burdens on women and their families. When abortion funding is unavailable or is delayed too long, some women may "in desperation, undergo unsafe illegal or self-induced abortions, or even attempt suicide."⁵³ Thus, the detrimental psychological, medical and financial effects of denying Medicaid funding for abortion services for low-income women multiply.

Abortion is often safer than carrying a pregnancy to term. Significant advances in medical technology and increased access to high quality services during the past twenty years have made abortion one of the safest medical procedures.⁵⁴ In fact, an abortion during the first trimester is considerably safer than carrying a pregnancy to term.⁵⁵ A denial of abortion funding invariably results in some delay in obtaining an abortion.⁵⁶

Moreover, since earlier abortion is safer, *any* delay in obtaining abortion services increases health risks. Research reaffirms the need for government funding and involvement in providing reproductive health care services. According to one study, when abortion is not publicly funded, 20% of Medicaid-

⁵³ Affidavit of Dr. Jane Hodgson, *supra* note 22, at 6.

⁵⁴ *Safety of Abortion*, FACT SHEET (National Abortion Fed'n, Washington, D.C.), April 1990, at 1; see also *Abortion in the United States*, *supra* note 37, at 2 ("The risk of death associated with abortion decreased more than fivefold from 1973 to 1985, with 3.4 deaths per 100,000 legal abortions in 1973 to 0.4 in 1985."); PETCHESKY, *supra* note 2, at 156-57.

⁵⁵ *Safety of Abortion*, *supra* note 54, at 1 ("According to the most recent statistics available, only 1 of 200,000 women who have legal abortions die. That is one seventh the number of women who die from childbirth . . ."); see also *Abortion in the United States*, *supra* note 37, at 2 ("The risk of death associated with childbirth is about 11 times as high as that associated with abortion."); Affidavit of Dr. Jane Hodgson, *supra* note 22, at 7-12 (If a woman experiences complications—such as hypertension, congenital heart disease or diabetes—the continuation of a pregnancy can be more risky than an abortion.); AMA Council on Scientific Affairs, *Induced Termination of Pregnancy Before and After Roe v. Wade: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3231 (1992).

⁵⁶ See Affidavit of Katherine R. Welsh, *supra* note 41, at 3 ("Many low-income women make and cancel several appointments while they try to gather the funds to pay even part of the fee. As a result, some women are delayed several weeks while they try to raise the money for the procedure.").

eligible women who would choose to have an abortion instead carry their pregnancy to term.⁵⁷ Later-term abortions simply are less safe. For example, women are sixteen times more likely to die of an abortion performed in the sixteenth week than in the eighth week of pregnancy.⁵⁸ An abortion past the thirteenth week may require a more complicated and dangerous procedure than an abortion earlier in the pregnancy.⁵⁹ It is more likely to require a hospital stay or a higher dose of anesthesia. Because pregnancy may involve more of a health risk than abortion, a woman may choose a first trimester abortion for health reasons.

Safety is not a reason for every woman to choose to abort a pregnancy rather than carry it to term. But a woman must be able to choose if she is willing to accept the health risks of continuing her pregnancy, particularly if she has pre-existing medical conditions, such as diabetes or multiple sclerosis, which would be exacerbated. The inequity is clear. By denying access to abortion funding, the government forces a low-income woman to take a health risk which her wealthier counterpart need not take, simply because she cannot afford the price of an abortion.⁶⁰

⁵⁷ *Abortion in the United States*, *supra* note 37, at 2.

⁵⁸ Janet Benshoof, *Planned Parenthood v. Casey: The Impact of the New Undue Burden Standard on Reproductive Health Care*, 269 JAMA 2249, 2254 (1993); see also *Abortion After Twelve Weeks*, FACT SHEET (National Abortion Fed'n, Washington, D.C.), Oct. 1992, at 1 ("Ideally, all abortions should be performed at 7 or 8 weeks of pregnancy when the procedure is safest."); *Abortion in the United States*, *supra* note 37, at 2 ("The risk of death associated with abortion increases with the length of pregnancy, from 1 death for every 500,000 abortions at 8 weeks or less to 1 per 30,000 at 16-20 weeks and 1 per 8,000 at 21 or more weeks.").

⁵⁹ *What Is Abortion?*, FACT SHEET (National Abortion Fed'n, Washington, D.C.), 1992, at 1 (ending the pregnancy mid-second trimester is more difficult and the procedure requires more skill of the physician).

⁶⁰ "Worse yet, the Hyde Amendment does not foist that majoritarian [anti-abortion] viewpoint with equal measure upon everyone in our Nation, rich and poor alike; rather it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality." *Harris v. McRae*, 448 U.S. 297, 332 (1980) (Brennan, J., dissenting). This distinction "seems particularly immoral when the line between the two groups is based on something as unrelated to the situation of the pregnancy or to any right of the unborn, and as frequently beyond a woman's control, as personal wealth." LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 207 (1990).

In sharp contrast, the government in effect subsidizes abortion for wealthier women by allowing tax deductions for private health insurance plans, the vast

Beyond the expense of abortion there is a severe shortage of abortion services, particularly for women requiring later abortions. Late-term or complicated abortions may require hospitalization or expensive special services that a clinic may be unable to provide. This shortage further reduces access for those women who face delays. Abortion may become unobtainable for a woman who experiences funding-related delays if her pregnancy advances beyond the category of services provided locally.

An unequal geographic concentration of abortion services in non-rural areas further restricts access to abortion, particularly for low-income women. In the United States, most abortion providers are concentrated in urban areas, while 83% of counties in the country do not have any abortion services.⁶¹ This shortage of providers means that women in rural areas often must pay large transportation costs and travel arduous distances to reach abortion services.⁶² To deliver health care services successfully to those in need, any proposed national health care system must redress both the geographic inequities of the distribution of health care and the lack of physicians specializing in the area of reproductive health care.⁶³

The denial of abortion funding does not affect women of all races equally. Bans on abortion funding affect women of color more than white women because they are more likely to be in poverty and more likely to seek an abortion. Specifically, women of color are "vastly overrepresented among the poor," with families of color more than three times as likely to live in poverty as are white families.⁶⁴ Additionally, although white women account for 65% of all abortions, women of color have

majority of which cover abortion.

⁶¹ *Abortion After Twelve Weeks*, *supra* note 58, at 2.

⁶² See, e.g., *Abortion After Twelve Weeks*, *supra* note 58, at 2 ("In several states, some women in need of abortion care must travel hundreds of miles to reach the nearest provider. Women are often delayed many days as they arrange transportation, time off work and save additional money for travel and lodging costs.")

⁶³ See *infra* notes 173-81 and accompanying text.

⁶⁴ David R. Baron, *The Racially Disparate Impact of Restrictions on the Public Funding of Abortion: An Analysis of Current Equal Protection Doctrine*, 13 B.C. THIRD WORLD J. 1, 7-8 n.22 (1993); see also Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, 11 WOMEN'S RTS. L. REP. 15 (1989).

an abortion rate more than twice the rate for white women.⁶⁵ Therefore, though women of color represent only a third of all Medicaid recipients, they are disproportionately burdened by the elimination of Medicaid funding for abortion.⁶⁶ Women of color are also more likely to die from illegal abortions, which are often sought for financial reasons or because of the poverty-induced delays mentioned above.⁶⁷ As a result of poor medical conditions or teenage pregnancy, women of color are also more likely to need very late abortions,⁶⁸ because they face more of the hardships caused by a denial of federally funded abortion services.

Ironically, the enormous personal and financial toll that the Hyde Amendment takes on all low-income women does not even reduce federal expenditures. Although "cost justifications alone are not, and should not be, a main factor in the determination of whether to fund low-income women's abortions,"⁶⁹ the fact remains that the Hyde Amendment is not cost efficient. It is estimated that for every dollar spent funding abortion for low-income women the federal government would save approximately four dollars within the following two years; funds that it would be required to spend in prenatal care, delivery and postnatal care for the mother, and newborn care, neonatal intensive care and pediatric care for the child, not to

⁶⁵ *Abortion in the United States*, *supra* note 37, at 1 (abortion rate among non-white women is 57 per 1000, compared to an abortion rate of 21 per 1000 among white women).

⁶⁶ *Ensuring Reproductive Freedom*, *supra* note 18, at 12.

⁶⁷ See *supra* notes 50-52, 57 and accompanying text; see also *Ensuring Reproductive Freedom*, *supra* note 18, at 12.

Although funding was available for part of the period between 1975 and 1979, eighty-two percent of the women who died from illegal abortions were African-American or Latina. Further, during the same period, all six of the women who died from illegal abortions sought for financial reasons were African-American or Latina.

Id.

⁶⁸ "Often poverty itself causes severe health problems. One woman on medical assistance who obtained an abortion . . . was suffering from malnutrition . . . and needed an abortion both to protect her own damaged health and because she could not afford another child." Affidavit of Katherine R. Welsh, *supra* note 41, at 6; see also Nsiah-Jefferson, *supra* note 64, at 18 ("Medical problems are also a factor in late abortions, including very late abortions. . . . Given the nature of their health problems, poor women and women of color are particularly vulnerable to such developments.").

⁶⁹ *Ensuring Reproductive Freedom*, *supra* note 18, at 13 n.43.

mention savings in AFDC, food stamps and the Women, Infants, and Children ("WIC") program.⁷⁰ While the denial of such funding exacts a heavy toll on low-income women, and also appears irrational and ineffective economically, the Court has failed to remedy the situation and has permitted the ban on abortion funding to continue.

II. A DENIAL OF MEDICAID FUNDING FOR ABORTION IS A DENIAL OF EQUAL PROTECTION

In 1980, in *Harris v. McRae*,⁷¹ the Supreme Court used a traditional equal protection analysis to uphold the Hyde Amendment.⁷² That version of the Hyde Amendment denied Medicaid funding for abortion, except in cases where a woman's life was endangered or the pregnancy was a result of a reported rape or incest. As a result, Congress has been allowed to renew a similar version of the Hyde Amendment every year since its enactment.

In general, when the Supreme Court has considered the issue of access to abortion it has largely ignored the practical effects of these restrictions and has failed to offer genuine equal protection guarantees to women. The Court has based its decisions concerning reproductive rights on the doctrine of privacy. Reproductive health rights, however, should be more heavily scrutinized to ensure equal protection guarantees.⁷³

⁷⁰ *Cost Implications*, *supra* note 8, at 4.

⁷¹ 448 U.S. 297 (1980).

⁷² *Id.* at 299. Although the Constitution does not specify "equal protection" guarantees, the Court has interpreted the Due Process Clause of the Fifth Amendment to contain "liberty or equal protection guarantees." *See, e.g., id.* at 301; *see also* *Frontiero v. Richardson*, 411 U.S. 677, 681 n.5 ("While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'") (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964), and citing *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969), and *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁷³ The Court's approach to the abortion issue has consisted of an extension of the fundamental right to privacy, established by *Griswold v. Connecticut*, 381 U.S. 479 (1965), which allowed married couples access to contraceptives. The doctrine of privacy provided the basis for the Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), but "has proven less powerful than first appearances suggested." Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 B.U. L. REV. 683, 690 (1992). Legal challenges to abortion rights have questioned whether the right to privacy itself is constitutional and argued that even if such a

The Court in *Harris* failed to properly scrutinize the legislation by refusing to adequately use equal protection doctrine to protect women's rights.

The Supreme Court's equal protection analysis mistakenly insists upon applying an intermediate level of scrutiny to all gender classifications.⁷⁴ The Court should apply a modified version of the equal protection doctrine to scrutinize more closely legislation that negatively affects women as a class—particularly in the area of reproductive health laws. The modified equal protection analysis discussed below could appropriately be applied to the question of abortion funding since these restrictions affect all women, and only women, as a class.⁷⁵

privacy right exists, abortion rights are not among them. *Id.* at 691; see also *Roe*, 410 U.S. at 171 (Rehnquist, J., dissent); *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 785 (1986) (White, J., dissenting).

Although the Court created the foundation for abortion rights under the doctrine of privacy, there has been considerable criticism of this formulation. See, e.g., Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 356 ("Many feminists criticized the Court's privacy approach, because it could not protect the most disadvantaged women from coercive anti-abortion regulations."); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985) ("Overall, the Court's *Roe* position is weakened, I believe, by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1020 (1984) ("The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is women who are oppressed when abortion is denied. . . . The rhetoric of privacy also reinforces a public/private dichotomy that is at the heart of the structures that perpetuate the powerlessness of women."); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991) ("The problem is that while the private has been a refuge for some, it has been a hellhole for others, often at the same time. In gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability.").

Much of the criticism of abortion rights decisions has proposed equal protection justifications for abortion generally, and not for funding of abortion. Most commentators who have argued specifically for abortion funding under an equal protection rubric have focused on wealth as a suspect class. This Article uses the funding issue to form a basis for the equal protection of abortion rights.

⁷⁴ See *infra* notes 76-94 and accompanying text for a discussion of the levels of scrutiny that the Court employs.

⁷⁵ Although the availability of abortion affects men in that it may influence their sexual behavior or life choices, the biological reality is that women are the ones who become pregnant. Although a man may feel a moral obligation to a sexual partner who becomes pregnant, a man can choose to literally walk away from an unintended pregnancy, while a woman faces the physical and psychological effects of pregnancy. The Supreme Court, perhaps recognizing this reality, has

This modified analysis acknowledges that women are a suspect class. Traditional equal protection analysis emphasizes the intent of the legislation more than its practical impact. In contrast, a revised equal protection analysis focuses on the practical effects of such legislation and concludes that bans on abortion funding are violative of equal protection guarantees. If the equal protection guarantee is going to offer any legitimate protection to women, the doctrine must be changed to reflect the realities of gender discrimination.

A. *Traditional Equal Protection Doctrine*

The traditional equal protection doctrine guarantees that the government will treat all similar individuals in a similar fashion.⁷⁶ Although the government may classify individuals or "draw lines" when creating and implementing certain laws, such groupings cannot be arbitrary or based upon impermissible criteria.⁷⁷ Once the court determines that a classification has been made, it applies one of three "tiers," or levels of scrutiny to test whether the classification is proper. These levels of scrutiny are: the rational relation standard, under which the legislative means must be rationally related to the legislative goal; intermediate or heightened scrutiny, under which the government must show that the legislation is closely related to an important objective; and, strict scrutiny, where the government must show a compelling reason for the legislative classification.

The Court's use of three different levels of scrutiny demonstrates that equal protection guarantees do not forbid classifications of every kind. The purpose of the equal protection analysis is to "measure the basic validity of the legislative classification."⁷⁸ Some classifications—such as, race, national origin

consistently struck down legislation that created a legal role for a man in a woman's abortion decision. See e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992); Law, *supra* note 73, at 1016 ("Abortion laws present no analytic difficulty for determining whether the classification is based on biological differences.").

⁷⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 525 (1991).

⁷⁷ *Id.* "The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1978) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976)).

⁷⁸ *Personnel Adm'r*, 442 U.S. at 272 (upholding a state law which gave pref-

or alienage—will require extraordinary justification for the legislation and the Court will strike any legislation created with the *purpose* of discriminating against such a suspect class.⁷⁹ But when a non-suspect classification is reasonably based, the court will not be concerned if a law unevenly affects a particular group.

The Court decides which level of scrutiny it will apply based upon either the status of the group that the legislation classifies or the right it affects. The Supreme Court has held that only the groupings or classifications that are "inherently suspect," specifically those based upon race,⁸⁰ alienage,⁸¹ or national origin, are entitled to strict scrutiny.⁸² Legislation that classifies individuals by race, alienage or national origin will be subject to the highest level of scrutiny; that is, the Court will be most skeptical of whether laws in this category satisfy equal protection guarantees.⁸³

erence to veterans—the vast majority of whom were male—for state civil service positions, even though the preference disadvantaged women).

⁷⁹ "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Id.* (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *McLaughlin v. Florida*, 379 U.S. 184 (1964)).

⁸⁰ *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)). The Court has at times extended strict scrutiny to classifications by alienage that treat resident aliens worse than U.S. citizens, but "the test does not seem to be enforced quite as strictly in terms of the review of these classifications." NOWAK & ROTUNDA, *supra* note 76, at 531.

⁸¹ NOWAK & ROTUNDA, *supra* note 76, at 531 (citing *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

⁸² *Frontiero*, 411 U.S. at 683 n.9 (citing *Oyama v. California*, 332 U.S. 633, 644-46 (1948); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

⁸³ *Frontiero*, 411 U.S. at 682. ("[C]lassifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.").

Additionally, the Court will apply strict scrutiny if the legislation affects a "fundamental right." According to the Court, "if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.'" *Harris v. McRae*, 448 U.S. 297, 312. Rights are identified as "fundamental" based on a substantive decision by the Court, generally unrelated to equal protection or technical standards of review. NOWAK & ROTUNDA, *supra* note 76, at 532.

This Article will focus on equal protection guarantees for abortion funding using a "suspect class" argument rather than a fundamental rights argument. Following *Roe*, the Court appeared close to calling abortion a fundamental right. In a series of decisions, the Court has moved away from its strong support of

When applying the strict scrutiny test, the Court requires the government to show that its challenged legislation is narrowly tailored to a "compelling" or "overriding" end that justifies treatment of the protected individuals as a class.⁸⁴ In practice, when the Court employs strict scrutiny the legislation has fairly little chance of surviving.⁸⁵ By contrast, when the Court employs the "lowest tier" of scrutiny⁸⁶—the rational relation test—it will not invalidate a law unless it is "patently arbitrary" and bears no rational relationship to a legitimate governmental interest.⁸⁷ Thus, if the Court applies a rational relation test, there is little chance it will invalidate the legislation.

When scrutinizing classification by gender, the Court has wavered but ultimately has resisted treating gender as a suspect class. The Court has designed a standard of review of gender classifications that falls between the strict scrutiny and rational relation standards of review. This "intermediate" standard of review of gender classifications requires the government to show "at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"⁸⁸ This intermediate standard of scrutiny is

abortion rights and allowed several, fairly strong restrictions on access to abortion.

Whether there exists a fundamental right to abortion remains debatable. See, e.g., Barbara J. Cox, *Refocusing Abortion Jurisprudence to Include the Woman: A Response to Bopp and Coleson and Webster v. Reproductive Health Services*, 1990 Utah L. Rev. 543; Elizabeth A. Schneider, *Workability of the Undue Burden Test*, 66 TEMP. L. REV. 1003 (1993); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

⁸⁴ "[A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973) (quoting and reaffirming *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)).

⁸⁵ "When expressed as a standard for judicial review, strict scrutiny is strict in theory and usually fatal in fact." Larry P. Boyd, *The Hyde Amendment: New Implications for Equal Protection Claims*, 33 BAYLOR L. REV. 295, 297 n.14 (1981) (citing Gerald Gunther, *The Supreme Court, Foreword: "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 118 (1972)).

⁸⁶ *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 742 (1982) (Powell, J., dissenting).

⁸⁷ *Frontiero*, 411 U.S. at 683.

⁸⁸ *Hogan*, 458 U.S. at 724 (citing *Wegler v. Druggist Mutual Ins. Co.*, 446 U.S.

a non-solution. Intermediate scrutiny has not provided a clear and consistent standard and has failed to adequately protect women from gender discrimination.⁸⁹

Under the Court's analysis, legislation may violate equal protection guarantees even if discriminatory classifications are not apparent on the face of the legislation. If the legislation does not explicitly classify individuals in a discriminatory manner, the Court attempts to discern whether the intent in implementing the legislation was to discriminate. Specifically, when a law is facially neutral—showing no suspect classification in its plain language—it violates equal protection guarantees only if it was enacted for a discriminatory purpose or is applied in a discriminatory manner.⁹⁰ In contrast, when legislation does plainly create a suspect classification, then proof of a disparate impact is not necessary and the Court merely determines whether the legislative classification, is appropriate.⁹¹ Since legislatures rarely, if ever, disclose an intent to classify in a suspect manner, under current equal protection doctrine it is far easier to challenge facially neutral legislation by demonstrating discriminatory administration of the law than to prove a legislative intent to discriminate.⁹²

B. Applying Strict Scrutiny to Gender Classifications

If the Court is to provide legitimate equal protection for women through the current "tiered" system, it must acknowl-

142, 150 (1980)).

⁸⁹ The intermediate level of scrutiny has been criticized for its failure to provide for a clear standard to ensure women's equality. See, e.g. George C. Hlavac, *Interpretation of the Equal Protection Clause: A Constitutional Shell Game*, 61 GEO. WASH. L. REV. 1349 (1991); Hope E. Matchan & Katheryn E. Sheffield, *Adding Constitutional Depravation to Untimely Death: South Dakota's Living Will Pregnancy Provision*, 37 S.D. L. REV. 388 (1992); William R. Engles, Comment, *The 'Substantial Relation' Question in Gender Discrimination Cases*, 52 U. CHI. L. REV. 149 (1985); .

⁹⁰ See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (impact of pregnancy discrimination legislation provides an "important starting point" for determining whether a gender-neutral statute effects women disproportionately); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1976) (upholding a facially neutral zoning board decision that perpetuated racial segregation in housing, despite the discriminatory effect).

⁹¹ NOWAK & ROTUNDA, *supra* note 76, at 543.

⁹² NOWAK & ROTUNDA, *supra* note 76, at 544.

edge first that gender is a suspect classification and second, that reproductive health legislation affects women as a class. The Court should recognize gender classifications as suspect because of a history of disparate legal treatment of women. "Suspect class" status is granted to groups that are considered part of a "discrete and insular" minority.⁹³ The Court has allowed only race, national origin and alienage into this protected category,⁹⁴ and has denied that women as a class share the characteristics of these minority groups; characteristics that would entitle them to additional legal protection.⁹⁵

Historically, women of all races have been in an inferior position to men socially, economically and legally. In the area of employment, women continue to earn less than men for comparable or identical work.⁹⁶ Women also face many forms of discrimination in the workplace, including sexual harassment, limited opportunities for advancement to upper-level positions, pregnancy discrimination, and assumptions about women with children. Although women have gained access to the workplace and other traditionally male institutions, they are still forced to conform with the "male" prototypes, while simultaneously maintaining responsibility for the "female" realm of home and family.⁹⁷ This economic discrimination has denied women the opportunity to become economically self-sufficient, thereby contributing to the "feminization of poverty" in the United States.⁹⁸

⁹³ United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

⁹⁴ See *supra* notes 80-84 and accompanying text.

⁹⁵ "The analogies between race- and sex-based discrimination are powerful. Blacks and women share a similar history of oppression; prior to the Civil War the laws defining the status of blacks and women borrowed freely from one another." Law, *supra* note 73, at 963.

⁹⁶ See, e.g., Teresa Amott & Julie Matthaei, *Comparable Worth, Incomparable Pay*, in FOR CRYING OUT LOUD: WOMEN AND POVERTY IN THE UNITED STATES 316 (Rochelle Lefkowitz & Ann Withorn eds., 1986) ("Women cannot lift themselves out of poverty by working because most women work in underpaid women's jobs.").

⁹⁷ "Exercise of significant ambition today demands a single-minded, egotistic devotion that is inconsistent with primary responsibility for the care of children." Law, *supra* note 73, at 965 n.29; see also MONA HARRINGTON, *WOMEN LAWYERS REWRITING THE RULES* (1993). "By challenging notions of equality, for example, women sought to enter the world of public citizenship. But the persistence of separate spheres of work and family divided along gender-based lines, and the tenacity of female responsibility for child rearing emerged as limitations to that world." Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 650 (1986).

⁹⁸ See SIDEL, *supra* note 2, at 14-26; FOR CRYING OUT LOUD, *supra* note 96 at

Women have historically been denied full protection by the legislative and legal systems. Until fairly recently many crimes against women—including raping or assaulting one's wife—were sanctioned by the legal system or were considered "private" or "domestic" issues in which the legal system would not interfere.⁹⁹ Women continue to exercise limited political power—despite such proclamations as "the Year of the Woman" during the 1992 elections.¹⁰⁰ Women of color have faced additional barriers to equality and, in many ways, these additional concerns have been overlooked even by the feminist movement.¹⁰¹ Although gender discrimination has been well-documented by the women's movement, the courts and legisla-

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⁹⁹ See ESTRICH, *supra* note 23, at 23-24; LINDA FAIRSTEIN, *SEXUAL VIOLENCE* (1993).

¹⁰⁰ "We remember when 1972 was the year of the woman: Shirley Chisholm ran for President, Cissy Farenthold came in second for Vice President . . . Then of course 1984 was the year of the woman when Geraldine Ferraro got on the ticket. And so were 1988 and 1990 . . . well, you get the idea. Change has been somewhere between glacial and gradual." ELLEN GOODMAN, *VALUE JUDGMENTS* 232-33 (1993). An example of women's political powerlessness, despite electoral gains in the 1992 elections, can be seen in the 1993 Congressional debates over renewal of the Hyde Amendment.

During debate, opponents of the Hyde Amendment discussed the negative impact of this legislation that would be borne by low-income women. The 1993 debate over the Hyde Amendment was more extensive than it had been since the initial enactment of the legislation in 1977. Abortion rights advocates had hoped that recent changes in the composition of the House and Senate, as well as a pro-choice president, would result in defeat of the Hyde Amendment. See, e.g., *Planning for the Abortion Debates*, *supra* note 32, at A20; Schneider, *supra* note 32, at A1; Tumulty, *supra* note 32, at A1. After a debate "punctuated by angry shouts and tears," Anna Puga, *U.S. House Keeps Ban on Funding for Abortion*, BOST. GLOBE, July 1, 1993, at 1, the House passed a version of the Hyde Amendment which denied funding for abortion, except in cases of rape or incest, or if the woman's life was endangered by the pregnancy. Hyde Amendment, *supra* note 3.

During debate over the Hyde Amendment, members of both the House and Senate recognized that the restriction on funding was tantamount to a total denial of access to abortion for low-income women. Five female Democratic members of the Senate declared that passage of the Hyde Amendment would implement a two-tiered system of abortion funding and, as Senator Carol Moseley-Braun stated, that Congress "must separate reality from fiction (and decide) whether having wealth gives some women more rights than others." Eric Pianin, *Senate Keeps Medicaid Abortion Limits*, WASH. POST, Sept. 29, 1993, at A11. Ultimately, the efforts of these newly elected Congresswomen were unsuccessful as the Hyde Amendment was renewed, although in a modified version which provided funding for pregnancies resulting from rape or incest.

¹⁰¹ For a critical analysis of the historical treatment of women of color by the feminist movement, see ANGELA Y. DAVIS, *WOMEN, RACE AND CLASS* (1983).

tures historically have resisted legal remedies, requiring hard-fought battles for even incremental changes.¹⁰²

In its 1973 decision, *Frontiero v. Richardson*,¹⁰³ the Supreme Court correctly recognized the practical reality of women's "minority" status: "It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly under-represented in this Nation's decisionmaking councils."¹⁰⁴ The *Frontiero* Court noted that gender, like race and national origin, is "an immutable characteristic determined solely by the accident of birth,"¹⁰⁵ and as a result, designated women a suspect class.

The plurality's reasoning in *Frontiero* clearly conveys that a strict scrutiny standard for gender classifications is not only possible, but is logical and desirable. Discrimination because of a person's gender, the Court noted, would violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."¹⁰⁶ Because the Court found that characterizations by gender "frequently bear[] no relation to ability to perform or contribute to society,"¹⁰⁷ it concluded that classifications based upon gender, like "classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."¹⁰⁸

Yet, three years after it annunciated this standard, the Court reverted to an intermediate scrutiny test for gender classifications and, since that time, has adhered to this inter-

¹⁰² See, e.g., KATHARINE T. BARTLETT, GENDER AND LAW (1993). For a detailed analysis of the resistance to the passage of the Equal Rights Amendment, see JANE J. MANDSBRIDGE, WHY WE LOST THE ERA (1986).

¹⁰³ 411 U.S. 677 (1973).

¹⁰⁴ *Id.* at 686 n.17. The Court stated that: "There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives." *Id.* Fortunately the political representation of women has increased since this statement was made. In 1993, there were 47 women in the House, seven women in the Senate, and two women on the Supreme Court. Despite these advances, however, it is unlikely that women will overcome their minority status in the immediate future, particularly in the political arena.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 686.

¹⁰⁷ *Id.*

¹⁰⁸ *Frontiero*, 411 U.S. at 688.

mediate, and mediocre, level of equal protection for women.¹⁰⁹ The Court has not only failed to classify gender characterizations as suspect, but also has denied that legislation concerning pregnancy and abortion affects women as a class.¹¹⁰ Worse yet, in a number of decisions since it retreated from applying strict scrutiny, the Court has used biological differences as a rationale for employing an intermediate level of scrutiny.¹¹¹ In doing so, the Court often has failed to distin-

¹⁰⁹ See *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate level of scrutiny applied to challenge of Oklahoma statute that forbid sale of beverages containing more than 3.2% alcohol to males under the age of 20 and to females under the age of 18). The Court's departure from the strict scrutiny standard was short-lived, as the Court later admitted: "As is evident from our opinions, the Court has had some difficulty in agreeing upon the proper approach and analysis in cases involving challenges to gender-based classifications." *Michael M. v. Superior Ct. of Sonoma County*, 450 U.S. 464, 468 (1981). One year later, Justice Powell felt confident enough about a lower-level scrutiny as the standard for gender classifications that he commented: "Even the Court does not argue that the appropriate standard here is 'strict scrutiny'—a standard that none of our 'sex discrimination' cases ever has adopted." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 741 n.9 (1982) (Powell, J., dissenting).

¹¹⁰ See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974).

¹¹¹ See *Michael M.*, 450 U.S. at 469 (upholding a discriminatory statutory rape law and recognizing "realistically . . . the fact that the sexes are not similarly situated"); *Geduldig*, 417 U.S. at 494 (failing to recognize pregnancy as a gender-related condition and upholding regulations discriminating against pregnant women); see also *infra* notes 113-18 and accompanying text.

The *Geduldig* court acknowledged that only women can become pregnant but stated that "it does not follow that every legislative classification concerning pregnancy is a sex-based classification." 417 U.S. at 496 n.20. To deny that such legislation does not create a class of women, however, is an "Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon." Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 45, 54 n.304 (1977).

The Court is not immune to social change. Not surprisingly, the addition of Ruth Bader Ginsburg and Sandra Day O'Connor has added to the change in tone and content of debate on such issues. The Court has been extensively criticized for its decision in *Geduldig*. It is doubtful that the Court would decide a similar case in the same manner today. "Criticizing *Geduldig* has become a cottage industry. Over two dozen law review articles have condemned both the Court's approach and the result." Law, *supra* note 73, at 983 n.107. The Court does not cite *Geduldig* often, and then only for limited propositions. *Id.* at 984 n.110.

In response to feminist arguments against the Court's decision, Congress passed the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1988), which required that pregnancy, childbirth and related medical conditions be treated the same as any other medical disability. See Law, *supra* note 73, at 984 n.112 ("After the Court extended the 'logic' of *Geduldig* to Title VII, Congress reacted swiftly to provide . . . the Pregnancy Discrimination Act (PDA) of 1978."); Schneider, *supra* note 97, at 641 ("Even though the efforts of feminist litigators to treat

guish between genuine biological differences and biological rationales constructed to justify social stereotypes that oppress women.¹¹²

Indeed, the Court generally has recognized biological differences only to the detriment of women. For example, in *Geduldig v. Aiello*,¹¹³ a pregnancy discrimination case, the Court rejected the notion of pregnancy as a gender-related condition and ruled that regulations affecting pregnant women did not affect women as a class. Seven years later, however, in *In re Michael M.*,¹¹⁴ the Court recognized the biological differences between men and women in order to justify upholding a discriminatory statutory rape law. The law allowed men to consent to sexual intercourse at a younger age than women. The Court acknowledged that women are affected by pregnancy in ways men are not.¹¹⁵ This selective acknowledgment of biological differences to achieve results which perpetuate gender stereotypes demonstrates the need for strict scrutiny.

Particularly in the area of biological differences, it is important for the Court to recognize women's "minority" status and the need for a higher level of scrutiny to guarantee equal protection to women.¹¹⁶ The Court must fully acknowledge

pregnancy as an equality issue failed in the courts, the Pregnancy Discrimination Act was passed as a result of efforts based on feminist legal argumentation to fit pregnancy into a discrimination model."). The Court has been considerably slower than members of Congress to recognize that pregnancy is irrefutably related to gender.

¹¹² Although genuine biological differences may warrant some disparate treatment, permitting laws based on social stereotypes of women merely serves to reinforce male dominance in society. See generally Law, *supra* note 73; MacKinnon, *supra* note 73.

¹¹³ 417 U.S. 484 (1974).

¹¹⁴ 450 U.S. 464 (1981).

¹¹⁵ The statutory rape law at issue in *Michael M.* applied a double standard by which teenage males under age 18 were considered mature enough to consent to sexual activity while females of the same ages were deemed incapable of giving consent. In *Michael M.*, the Court recognized that "[o]nly women may become pregnant," *id.* at 471, and that "she alone endures the medical risks of pregnancy or abortion. She suffers disproportionately the social, educational, and emotional consequences of pregnancy." *Id.* at 479. The Court was willing to acknowledge that pregnancy is a gender-specific condition in order to uphold a discriminatory statute based on stereotypes of women as sexual victims. The Court subsequently has resisted extending recognition of biological differences to regulations affecting pregnancy, contraception and abortion.

¹¹⁶ Women are at a particular disadvantage when laws discriminating on the basis of biological differences are upheld. The Court should be especially wary of

that only women become pregnant and that women bear a disproportionate burden in childbearing.¹¹⁷ Therefore, the Court must recognize that regulation of reproductive health affects *all* women as a class, regardless of whether they are seeking abortion services or abortion funding.¹¹⁸

A denial of access to abortion services for any woman serves to perpetuate gender stereotypes of women as "breeders" whose primary function is to bear and rear children. Such gender stereotypes, perpetuated by legislation regulating abor-

the impact of such laws. As Professor Sylvia Law states:

[B]ecause there are no escapees from biology, no pregnant men, or women sperm donors, a standard focusing solely on comparative equality does not provide a helpful tool for evaluating laws governing ways in which men and women categorically, biologically differ. . . . An equality doctrine that ignores the unique quality of these experiences implicitly says that women can claim equality only insofar as they are like men."

Law, *supra* note 73, at 1004-07.

¹¹⁷ "Laws restricting abortion so dramatically shape the lives of women, and only of women, that their denial of equality hardly needs a detailed elaboration. While men retain the right to sexual and reproductive autonomy, restrictions on abortion deny that autonomy to women." TRIBE, *supra* note 58, at 105. "No men are damaged in the way women are harmed by an abortion prohibition [Abortion] is, in essence, a female procedure, a procedure only women need," and abortion restrictions are created "with the clear aim of keeping women and only women from access to it." MacKinnon, *supra* note 73, at 1321-22.

Women may also bear a disproportionate responsibility in childrearing, but such differences are generally socially constructed and are not based on immutable characteristics as is the case with childbearing. Since this cultural norm has been changing, with women now composing 45% of the employed workforce, BUREAU OF LABOR STATISTICS, U.S. DEPT OF LABOR, WORKING WOMEN: A CHARTBOOK 2 (Aug. 1991), and 55% of women with children under age three are working, there has been some redistribution in child care responsibilities. *Id.* at 7. These changes are reflected in legislative initiatives, such as the Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 29 C.F.R. § 825 (1993). Because of the biological reality that women bear children, an equal protection argument can be firmly based upon biological differences, although an equivalent argument could be made based upon a cultural history of women's oppression.

¹¹⁸ "Because such laws [restricting abortion] deprive women of means to determine whether or not they will become mothers should they become pregnant, they impair the possibility of sexual pleasure for women, and aggravate the force of sexual fear." Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 371 (1992).

Furthermore, the group of women who are Medicaid-eligible is not a closed group but is open to any woman who falls into poverty. Just as almost any woman can become pregnant unexpectedly, so can almost any woman unexpectedly become reliant on Medicaid. As discussed earlier, the denial of Medicaid funding is equivalent to a total denial of abortion services for many low-income women. See *supra* notes 32-46 and accompanying text.

tion, negatively affect *all* women regardless of income level or whether they are capable of conceiving children.¹¹⁹ Restrictions on access to abortion limit women's ability to control both their biological condition and their position in society.¹²⁰ Women as a class have been excluded from the workforce because of their very capacity to become pregnant, irrespective of whether an individual woman intends to become pregnant.¹²¹ The very possibility of becoming unexpectedly pregnant affects women's capacity to enjoy sexuality and threatens their health¹²² and their ability to participate equally in all aspects of life.

Specific regulations and restrictions on abortion reinforce certain gender-based stereotypes. For instance, requiring a twenty-four hour waiting period before a woman can obtain an abortion implies that women as a group are incapable of independently making a decision without being told to "go home and sleep on it." Requiring a woman to consult with, and often

¹¹⁹ "Whether or not women have children, they are disadvantaged by social norms that limit their options because of women's enforced role in childbearing and childrearing." MacKinnon, *supra* note 73, at 1312.

Gender stereotypes of women as childbearers and childrearsers have effectively enforced the notion of women as second-class citizens. The separation of the public and private spheres has served to reinforce gender roles as:

Production (or much of it anyway) is a social activity under the control of capital, socially valued and distributed through the price of its products and for which workers are paid a wage. Reproduction (in the sense of having babies) is a private activity with no direct control by capital, no social mechanism for its recognition and co-ordination, and for which no recompense is paid to women.

Susan Himmelweit, *Abortion: Individual Choice and Social Control*, in *SEXUALITY: A READER* 98, 99 (Feminist Review ed., 1987).

¹²⁰ These social and biological dimensions to women's control over their reproductive health have been described as the two essential ideas underlying the feminist view of reproductive rights. The first is "an extension of the general principle of 'bodily self-determination,' to the notion that women must be able to control their bodies and procreative capacities." PETCHESKY, *supra* note 2, at 2. The second is a "historical and moral argument' based on the social position of women and the needs that such a position generates." *Id.*

¹²¹ "[C]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal-employment opportunities." *International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 211 (1991) (a manufacturer may not exclude fertile women from certain jobs because of its concern for the health of the fetus a woman might conceive.).

¹²² PETCHESKY, *supra* note 2, at 5. For example, the widespread use and acceptance of contraceptives that endanger women's lives have included the Dalkon Shield, the "Pill" and Depo-Provera.

to obtain the permission of her husband before obtaining an abortion—so-called “spousal notification” laws—implies that women and the fetuses they carry are the property of their husbands since actions affecting either must be subject to his notice and, implicitly, his approval. Such laws also ignore the reality of abusive marriages, often with extremely damaging consequences for women. Similarly, parental notification or parental consent laws, even those which include a judicial-bypass option, are based on the myth of the “Father-Knows-Best” model of parenting and often ignore the reality of absent or abusive parents, and an insensitive and patriarchal judiciary.

Until legislation based on gender stereotypes is eradicated, even women who are not directly subject to immediate regulation will feel its effects. Although the Court at one time considered gender classifications suspect,¹²³ it has shown a greater reluctance to recognize the social implications of abortion restrictions and their discriminatory purpose. Once the Court acknowledges that gender classifications should be granted suspect-class status, it must examine more carefully such classifications to determine if the purpose of the legislation is to discriminate against women.

C. *Application of a Revised Purposeful Requirement*

Under a traditional equal protection model, a challenge to the ban on federal funding of abortion faces two doctrinal obstacles. These obstacles are a result of earlier Supreme Court decisions that tolerated sex discrimination. First, as discussed earlier, the Court has rejected the notion that pregnancy is a sex-based characteristic;¹²⁴ and, second, the required showing of a discriminatory legislative intent is extremely difficult to surmount.¹²⁵

¹²³ See *supra* notes 104-09 and accompanying text.

¹²⁴ See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

¹²⁵ Ruth Colker, defines these obstacles well, stating:

There are two major doctrinal difficulties in trying to apply current equal protection doctrine to reproductive health issues: (1) the *Geduldig v. Aiello* holding that pregnancy is not a sex-based condition, and (2) the *Personnel Administrator v. Feeney* holding that purposeful discrimination must be established by proving that a legislature acted “because of” its

Equal protection standards should concentrate on the situation of those who are discriminated against, rather than reviewing the intentions of the discriminator. A more practical purposeful requirement would focus on the impact of the legislation at issue, not on congressional intent. A revised analysis simply would ask whether the state's interest in protecting the fetus is being promoted in a manner that directly harms the welfare of women as a class. The court could therefore "examine *what* the state is doing to women, and not simply why it does it."¹²⁶ Currently, the Court refuses to acknowledge that legislation restricting access to abortion affects women as a class, and therefore is *not* facially neutral and not subject to a showing of purposefulness. Consequently, the requirement that a purposeful intent to discriminate must be shown for a "facially neutral" statute should be revised to reflect the reality of the subtle sexism in the law.

The characteristics of abortion legislation demonstrate the need and opportunity for a revised form of equal protection analysis. The Hyde Amendment on its face applies only to that group of individuals who can become pregnant: women.¹²⁷ To illustrate this point, suppose that the legislature declared that anyone who developed testicular cancer would not be covered by Medicaid for particular treatments—those disapproved by the legislature. The denial of cancer treatment funding would not immediately impact all men, only those with cancer, or with the possibility of developing cancer. Certainly some men could minimize their chances of developing cancer through a healthy lifestyle and good luck. But since there is no totally reliable method for either staying healthy enough to avoid cancer or wealthy enough to avoid the need for Medicaid funding, this legislation would impact all men as a group. Therefore, this legislation would not be gender neutral on its face.

desire to harm women rather than "in spite of" this desire. Colker, *supra* note 73, at 357.

¹²⁶ Siegel, *supra* note 118, at 369 (emphasis added). Fears that such a standard would open a floodgate of overturned legislation could be addressed by a "constrained application of antidisubordination principles" which would be reserved for groups that historically have faced discrimination. *Id.* at 368.

¹²⁷ See *supra* notes 113-126 and accompanying text for a discussion of the Court's recognition of biological differences. Even though the Court has so far rejected pregnancy as a sex-based characteristic, the Hyde Amendment's discrimination against women is clear both on its face and in its application.

The biological reality is that, for obvious reasons, only men can develop cancer of the testes. Similarly, only women can become pregnant.

Even if the Court insists that the fact that only women become pregnant is insufficient to declare legislation facially discriminatory, the Court cannot deny that in practice such legislation primarily affects women. Without elaborate statistical surveying, it is obvious that 100% of the people directly affected by the Hyde Amendment will be women because only women have abortions. Although men may be affected secondarily by the Hyde Amendment's denial of abortion funding, this legislation is targeted solely at pregnant women.

Demonstrating that the legislation has a greater effect on a certain group of people, however, is not considered conclusive proof that the legislation violates traditional equal protection guarantees. Although statistical evidence of the effects of legislation may indicate discriminatory application of a law, the Court will rarely consider such evidence alone to be absolute proof of a violation of equal protection.¹²⁸ Instead, the Court has minimized the importance of the discriminatory impact of pregnancy legislation. The Court has noted that when the discriminatory impact is "essentially an unavoidable consequence of a legislative policy that has in itself always been deemed to be legitimate, and when . . . the statutory history and all of the available evidence affirmatively demonstrate the opposite, the inference simply fails to ripen into proof."¹²⁹ Such an argument is completely circular. The Court is using an equal protection analysis to determine whether legislation serves a purpose so legitimate that its discriminatory impact may be ignored. Thus, the Court validates legislation by saying it has a legitimate purpose when this is exactly what the Court is trying to determine by its analysis.

The Court, however, does concede that in instances where "the statistical proof is overwhelming, it may be sufficient to establish a *prima facie* case."¹³⁰ The effects of regulation of

¹²⁸ NOWAK & ROTUNDA, *supra* note 76, at 544 ("Throughout its decisions in cases concerning the existence of classifications, the Court has held that statistical proof is usually relevant but rarely determinative.").

¹²⁹ *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 n.25 (1978).

¹³⁰ NOWAK & ROTUNDA, *supra* note 76, at 545; *see also* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking a facially neutral law which prohibited operating a

pregnancy and abortion are almost exclusively felt by women. Thus, even if the Court denies that pregnancy and abortion are themselves gender-related conditions, it cannot deny that the primary effects of legislation regulating pregnancy are overwhelmingly experienced by women.

Even if it acknowledges the discriminatory effects of challenged legislation, the Court may still require a showing of a "discriminatory purpose."¹³¹ Yet, the traditional equal protection analysis of discriminatory purpose does not consider the gender stereotypes that influence some Congressional decisions denying abortion funding. The Court's distinction that legislation must be passed "because of" rather than "in spite of" a discriminatory purpose is tenuous.¹³² Determining congressional intent in reproductive health law is an arduous task, particularly since legislative history is largely indiscernible and often contains barely visible, but significant, gender stereotypes about women and motherhood. The danger exists that gender stereotypes are so ingrained that legislators do not recognize that such assumptions form the basis of a policy. For instance, a legislature may consider compelled pregnancy a "reasonable" way to preserve fetal life but this belief may be based on archaic or stereotypic assumptions about women and pregnancy.¹³³ The traditional purposeful analysis is misguided in its heavy reliance on legislative intent, which may be impossible to determine and once determined can contain subtle gender stereotypes harmful to women.¹³⁴

laundry without a permit except in a brick or stone building when, in practice, the state denied permits to all Chinese applicants).

¹³¹ "[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Personnel Adm'r*, 442 U.S. at 272.

¹³² For a strong argument in favor of replacing the "perpetrator perspective" with the doctrine of "antisubjugation" in equal protection doctrine, see Baron, *supra* note 64, at 56-60. Baron makes a strong race-based argument against denial of abortion funding. A considerable number of commentators addressing a revision of equal protection analysis have advocated an "antisubordination principle." See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1988); Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Catherine A. MacKinnon, *supra* note 73; Siegel, *supra* note 118. This Note discusses those analyses which are more directed towards reproductive health issues.

¹³³ Siegel, *supra* note 118, at 363.

¹³⁴ Yet even under the Court's own stringent purposefulness test, the Hyde Amendment can be shown to have a discriminatory purpose. In addition to statis-

In addition, legislation that restricts access to abortion is unique in that it is directed at women as a class, has the dramatic effect of forced pregnancy, and historically has significantly oppressed women. Although the inevitable outcome of the Hyde Amendment is to restrict or deny abortion access for women, the traditional equal protection analysis does not consider this demonstrative of congressional intent. The Court has rejected the inevitable outcome of legislation as conclusive proof of intentional discrimination by Congress.¹³⁵ It has required a showing that the legislative body has "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an

tical evidence of the adverse effects of the Hyde Amendment, the legislative history of the Hyde Amendment shows Congress's discriminatory purpose. The 1993 Congressional debate over the Hyde Amendment demonstrates that Congress intended to discriminate against women by denying them access to reproductive health care. Statements made during a heated and well-publicized congressional debate underscore that Congress was well aware that the Hyde Amendment, though neutral on its face, would impact women, not men. Opponents of the Hyde Amendment argued that it discriminated on the basis of race and gender. House members articulated that abortion funding is "an issue of discrimination and fairness." Puga, *supra* note 100, at 1.

Not all members of Congress agreed on exactly *how* the legislation would affect women. What is important to a showing of "purposefulness" is that members of Congress acknowledged that the legislation *would* classify individuals. Even Hyde Amendment supporters recognized that the legislation had disparately affected people according to their gender and race. Representative Henry Hyde claimed that providing abortion funding would say to black women: "You can't have a job. You can't have an education. You can't have a decent place to live, so here's what we'll do: We'll give you a free abortion." Schneider, *supra* note 33, at A1. Representative Hyde's comments imply that rather than provide low-income women with more access to necessities, his solution would be to further deprive them of benefits, such as reproductive health care.

Even if members of Congress failed to consciously recognize that this classification would negatively affect women, sexist attitudes nonetheless "play an important role in the enactment of abortion regulation." Siegel, *supra* note 118, at 362. A legislator's genuine concern for the welfare of the fetus often is based upon archaic or stereotypical assumptions about women, which biases their deliberations and prioritizes fetal life-saving even if it requires forced pregnancy. *Id.* The abortion debate pits women's rights against fetal rights. Thus, because society is unable to engage in this moral debate with a full notion of women's equality it may be unable to "balance" the rights of women and the unborn as if it were a disinterested bystander to a conflict thrust upon women by nature." *Id.* at 379.

¹³⁵ "Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of [the law in question], a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof." *Personnel Adm'rs*, 442 U.S. 256, 279 n.25.

identifiable group."¹³⁶

Yet, if the purpose of equal protection is to guarantee equal protection for all individuals, then the intent of those legislators enacting the law should be less important than the law's impact. Traditional equal protection doctrine focuses on "the judgment and justifications of the state actors deploying public power, rather than the impact of a particular exercise of power on the citizens subject to it."¹³⁷ Because gender discrimination often is very subtle, and may be based on a combination of biological facts and sexual stereotyping, searching for "purposeful" discrimination frequently will be futile.¹³⁸ If equal protection guarantees exist to facilitate a truly equal society, then scrutiny must focus on the impact of laws that oppress women.

A revised equal protection model, which considers gender as a suspect class and de-emphasizes the discriminatory legislative intent requirement, offers greater protection from legislation that oppress women. The Court should concentrate not on whether a legislative goal to classify by gender is substantially related to important governmental ends, but instead should ask: "Has the challenged action harmed women in ways that enforce, perpetuate, or aggravate their subordinate social status?"¹³⁹ This revised analysis would focus on the practical effects of the challenged legislation rather than the relatively minor and uncertain question of whether legislators were aware of these effects when they passed the legislation. Such a standard would enable a more substantial challenge to gender discrimination, while maintaining the substance of the traditional equal protection analysis.

Under traditional equal protection analysis, once the Court determines that the legislation enforces harmful gender stereotypes, the burden shifts to the state. The Court should develop an equal protection standard under which a law could discriminate on the basis of gender *only* if a compelling state interest

¹³⁶ *Id.* at 297.

¹³⁷ Siegel, *supra* note 118, at 368.

¹³⁸ "Classifications based upon gender, not unlike those based upon race, have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Adm'r*, 442 U.S. at 273 (citing *Caan v. Mohammed*, 441 U.S. 380, 398 (Stewart, J., dissenting)); see also Law, *supra* note 73, at 973-87.

¹³⁹ Siegel, *supra* note 118, at 369 n.425.

was shown. Such a standard would allow courts to require a non-discriminatory alternative when a law negatively affected women. Additionally, at the point of determining whether a state interest was in fact compelling, the Court again would consider the "broader substantive concerns of sex equality, including the oppression of women and the constraints of traditional sex roles."¹⁴⁰

Under this revised approach to equal protection, the Court would be required to perform a more comprehensive analysis, balancing the legislative goals against the burdens the law, in practice, places on women as a class. A law would be upheld only if it had "no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom,"¹⁴¹ or if the government had a compelling interest in what the law sought to regulate. Such a standard of scrutiny for sex-based classifications places the burden on the state to justify the law and ensures that important governmental reasons exist to justify disparate treatment of men and women.¹⁴²

D. Application of a New Model of Equal Protection Guarantees

The proposed revised standard would effectively strike abortion restrictions such as the Hyde Amendment. Under this standard, the Court would be required to reconsider whether the state's interest in the fetus is compelling enough to encourage forced pregnancy through a denial of abortion funding. Unlike the Court's deferential rational relation standard applied to the Hyde Amendment in *Harris v. McRae*,¹⁴³ a revised standard of equal protection genuinely would consider the gender inequality perpetuated by a denial of access to abortion through funding bans. An application of the revised standard to the facts in *Harris* demonstrates how this standard is useful for genuinely facilitating equal protection for women.

In 1980, when abortion rights, as defined by *Roe v.*

¹⁴⁰ Law, *supra* note 73, at 1011.

¹⁴¹ Law, *supra* note 73, at 1008-09.

¹⁴² Law, *supra* note 73, at 1008.

¹⁴³ 448 U.S. 297 (1980).

Wade,¹⁴⁴ were at their strongest, the Supreme Court in *Harris* upheld the Hyde Amendment and declared that the federal government was not required to provide abortion funding. The Court's analysis did not consider gender a suspect class. Instead, *Harris* applied a traditional equal protection analysis, rejected the notion that the Hyde Amendment burdened a "fundamental right" to abortion access,¹⁴⁵ and declined to consider economic classifications suspect.¹⁴⁶ Accordingly, the

¹⁴⁴ 410 U.S. 113 (1973).

¹⁴⁵ *Harris*, 448 U.S. at 312-18. "We address first the appellees argument that the Hyde Amendment, by restricting the availability of certain medically necessary abortion under Medicaid, impinges on the 'liberty' protected by the Due Process Clause as recognized in *Roe v. Wade* . . . and its progeny." *Id.* at 312.

In holding that the legislation did not impinge upon a fundamental right to abortion, the Court reasoned that although an indigent woman may have less access to abortion, this was a result not of any government actions but of "her own indigency." *Id.* at 316. The Court found that the Hyde Amendment gave an indigent woman "at least the same range of choice" in deciding whether to obtain an abortion as she would have if the government had chosen to not provide any health care. *Id.* at 317. By calling a woman's restricted access to abortion a "product . . . of her indigency," *id.* at 316, the Court fell into using the old stereotype of the "undeserving poor" who should be grateful to receive any health care at all.

The dominant ideology in the United States generally, and in the Court particularly, has been reluctance to acknowledge any entitlement to basic needs such as food, clothing and shelter. The notion of individual rights has focused more on entitlement to political rights, and the right to be free from government interference, than entitlement to any basic necessities. *See, e.g., Karst, supra* note 111, at 62 (describing the need for an expanded principle of human rights and a "principle of equal citizenship [which] . . . call[s] for judicial intervention when economic inequalities make it impossible for a person to have 'a fully human existence' and the political branches of government turn a blind eye"). Popular support for a national health care plan may indicate that entitlement to basic human needs is becoming more accepted—perhaps as a result of larger segments of the population being threatened with the loss of such basic necessities.

¹⁴⁶ *Harris*, 448 U.S. at 323 ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification."). The Court has consistently denied that wealth is a suspect class. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

In addition to their equal protection claims, appellees challenged the constitutionality of the Hyde Amendment based on the Establishment Clause of the First Amendment, which prohibits any "law respecting an establishment of religion," and the Free Exercise Clause of the First Amendment, which provides the right to freedom of religion. *Harris*, 448 U.S. at 311. The Court rejected the Establishment Clause argument because it was "convinced that the fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause." *Id.* at 319-20. The Court dismissed a Free Exercise Clause argument because it ruled that appellees lacked proper standing to raise such a challenge. *Id.* at 320.

Court upheld the Hyde Amendment on the ground that the legislation's means were "rationally related" to its purported goal.¹⁴⁷

¹⁴⁷ Whenever it is applied to abortion restrictions, the rational relation standard has failed to protect women because it does not require a compelling reason for legislation that negatively affects women as a group. The Court's decision in *Harris*, finding that abortion funding was rationally related to the legislative goal of protecting the fetus, was far too deferential to the legislature.

The Court should use a higher level of scrutiny when considering legislation that affects women as dramatically as does a denial of abortion funding. Basing equal protection on economic position results in a denial of rights to low-income people. Low-income women should not be denied the equal protection benefits available to wealthier women since such vital rights should not be "for sale." "The denial to some women of the right to choose to terminate a pregnancy, while others can exercise that right freely . . . seems particularly immoral when the line between the two groups is based on something as unrelated to the situation of the pregnancy or to any right of the unborn, and as frequently beyond a woman's control, as personal wealth." *TRIBE*, *supra* note 60, at 207.

When low-income women are forced to bear unwanted children because they lack abortion funding, their low-income status is perpetuated. The additional expense and responsibility of a child may make it impossible for a woman to raise herself above the poverty level.

Additionally, the disparate racial and gender impact of the denial of abortion funding calls for a greater justification of the legislation than the mere rational-relation test. Justice Marshall found the rational-relation standard inappropriate because the race, wealth and gender implications of the Hyde Amendment were in opposition to equal protection guarantees:

The fact that the Hyde Amendment falls exclusively on financially destitute women suggests "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

Harris, 448 U.S. at 344 (Marshall, J., dissenting) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

The application of a strict scrutiny test for gender discrimination offers a more appropriate standard for measuring the constitutionality of abortion restrictions. Unlike the rational relation test, strict scrutiny requires the government to employ the *least* burdensome method of reaching its legitimate legislative goal.

The rational relation standard is more appropriately applied in cases concerning economic rights. *See, e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117 (1978) (upholding a state law regulating the pricing practices of petroleum producers and refiners, and limiting their ownership of retail gas stations); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978) (upholding a state law charging non-residents more than state residents for hunting licenses).

Justice Marshall, in his *Harris* dissent, asserted that the rational-relation test was unsuitable when applied to the issue of abortion funding. He stated: "I do not believe that legislation that imposes a crushing burden on indigent women can be treated with the same deference given to legislation distinguishing among business interests." *Harris*, 448 U.S. at 342 (Marshall, J., dissenting). Many commentators have argued that the rational relation test is inappropriate for legislation affecting human rights. *See, e.g., Roy G. Spece, Jr., A Purposive Analysis of Constitutional*

The first step in applying either the traditional or revised equal protection analysis is to scrutinize the governmental interest. The only governmental interest discussed in *Harris* was a "legitimate interest in protecting the potential life of the fetus."¹⁴⁸ But this interest was not legitimate. First, the government's asserted interest in protecting the fetus was *not* the true purpose of the legislation. Second, if the legislation was designed to protect the "potential life of the fetus" this is *not* a legitimate state interest—let alone a compelling one—under the Court's established abortion-rights law. Finally, even if the state does have a legitimate interest in protecting a fetus, the denial of funding does not provide even a rational means—and certainly not a narrowly tailored means—of reaching this goal.

The Hyde Amendment's purported goal of protecting the fetus is suspect. More likely, the goal of the Hyde Amendment is simply to decrease the number of abortions indirectly by denying funding to women who may have no alternative but to carry a pregnancy to term.¹⁴⁹ Anti-abortion legislation has been most successful when it has focused on low-income women whose financial pressures make them the most vulnerable to restricted abortion access. Justice Ruth Bader Ginsburg has recognized that the "hostile reaction to *Roe* has trained largely on" the low-income woman who "lacks resources to finance privately implementation of her personal choice to terminate her pregnancy."¹⁵⁰ For example, during the Reagan and Bush Administrations, a range of funding restrictions deliberately asserted anti-abortion policies on domestic and international recipients of reproductive health care funds.¹⁵¹ Several of

Standards of Judicial Review and a Practical Assessment of the Constitutionality of Regulating Recombinant DNA Research, 51 S. CAL. L. REV. 1281 (1978).

¹⁴⁸ *Harris*, 448 U.S. at 324.

¹⁴⁹ Henry Hyde himself, while debating the original enactment of the bill, admitted: "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill." Baron, *supra* note 64, at 13 (citing 123 CONG. REC. H6083 (daily ed. June 17, 1977) (statement of Rep. Henry J. Hyde)).

¹⁵⁰ Bader Ginsburg, *supra* note 73, at 383.

¹⁵¹ Domestic legislation denying abortion funding included: the "gag rule" preventing federally funded family planning counselors from mentioning abortion as an option, 42 C.F.R. § 59.8-59.10 (1992); appropriations for the District of Columbia, Pub. L. No. 102-382, § 114 (1992); the Civilian Health and Medical Program

these restrictions have since been repealed by the Clinton Administration.¹⁵²

Furthermore, even if the government's goal genuinely is to protect fetal life, this is unconstitutional. Although the Court has wavered in its support of abortion rights, at no point has the Court proclaimed that the state has the kind of general interest in the potential life of the fetus that the *Harris* majority relied on for finding a legitimate state interest.¹⁵³ The government may not legitimately have an interest in a pre-viable fetus.¹⁵⁴

Finally, if the government's goal were deemed sufficiently compelling, this goal could be achieved by methods far less burdensome than forced pregnancy. Restrictions in funding are

of the Uniformed Services, which provides health care for military dependents and retirees, 32 C.F.R. § 199.4(2) (1992); health care for federal prison inmates, 28 C.F.R. § 551.23(b) (1992); and for federal government employees, Pub. L. No. 102-393 (1992). See *Ensuring Reproductive Freedom*, *supra* note 18, at 14-17.

International policies restricting abortion access focused on contraception programs, but also had an impact on a number of other policy areas not directly related to women's reproductive health care. *Id.* at 42. These policies banned abortion information, counseling and referral services for recipients grants from the Agency for International Development—the "Mexico City" policy—and other agencies, including the United Nations Fund for Population Activities, the Support for Eastern European Democracy Program and Congressional Assistance to Romania, and the Agriculture and Trade Development Assistance Act of 1954. *Ensuring Reproductive Freedom*, *supra* note 18, at 46-61.

¹⁵² President Clinton repealed the Title X "gag rule," the "Mexico City Policy," the ban on abortions at military hospitals, lifted the moratorium on funding for fetal tissue research, and ordered the import ban on RU486 to be reconsidered. *Ensuring Reproductive Freedom*, *supra* note 18, at 1.

¹⁵³ Even if the government did have a legitimate interest in the fetus from the moment of conception, protecting fetal rights by denying abortion funding and coercing low-income women into carrying a pregnancy to term is an unusually cruel way to reach this goal. As Justice Brennan recognized in *Harris*: "As a means of preventing abortions, [the Hyde Amendment] is concededly rational—brutally so." *Harris*, 448 U.S. at 330 n.4 (Brennan, J., dissenting).

The rational relation standard is inappropriate when addressing issues that are so coercive and so close to fundamental or constitutional rights. Abortion funding is the "one health care service absolutely required for the exercise of a woman's decisional autonomy as protected by *Roe*." Robin M. Collin & Robert W. Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181, n.125 (1991).

¹⁵⁴ In *Roe v. Wade*, the Court devised a trimester system which allowed the state an interest in the potential life of the fetus only *after* the point of viability; generally considered to be in the third trimester. 410 U.S. 113 (1973). Although the Court in *Casey* essentially abolished the trimester framework, the Court did preserve its general guidelines by limiting the state's interest in early pregnancy.

a cruel and inappropriate means of inflicting an anti-abortion agenda on low-income women. If the government is genuinely concerned about protecting the fetuses of low-income women, it could do so through far more rational and humane legislation. The government could protect unwanted fetuses by deterring unplanned pregnancies or by concentrating its efforts on programs that foster the best pre-natal care. More positive measures to prevent unwanted pregnancies could include providing low-cost or free contraceptives and sex education. This approach of "refocusing the [public health] system toward prevention" has been advocated by members of the Clinton Administration.¹⁵⁵

In addition, the government should focus on methods of decreasing the number of women who choose abortion out of economic necessity. To discourage abortion without coercing women to carry the pregnancy to term, the government must address the underlying social inequalities which influence a woman's decision not to carry her pregnancy to term. This approach would involve addressing social factors that restrict a woman's ability to support a child. For example, gender discrimination accounts for unequal wages, yet with equal pay a single woman might be able to afford to carry a pregnancy to term and support a child from her salary alone. Social inadequacies, such as an absence of quality, affordable child care, often force women to choose between earning an income and having children.

The current abortion debate, which pits a woman against her fetus, does not emphasize the need for a broad range of policies to advance women's rights and to discourage unwanted pregnancy. Advocates should concentrate on encouraging the government to protect fetal life by developing policies that recognize reproductive health care as part of a broader need for women's equality.

¹⁵⁵ Surgeon General Joycelyn Elders, M.D., notes that preventative reproductive health care measures are also economical: "for every \$1 spent on prenatal care, at least \$3.38 is saved . . . [and] for every dollar spent on public family planning, more than \$4 in public funds for health and social services are saved." Joycelyn Elders, *The Future of Public Health*, 269 JAMA 2293, 2293 (1993).

E. *The Supreme Court's Resistance to Expanding Equal Protection Guarantees for Women*

Unfortunately, the Supreme Court has a long history of failing to fully recognize women's rights, particularly in the area of reproductive rights. One drawback to a revised equal protection standard that relies on judicial discretion is that the Court may fail to recognize when legislation perpetuates harmful stereotypes about women. Although the Supreme Court has made some progress in its understanding of the need for greater protection of women's rights in some areas of law—such as in sexual harassment cases¹⁵⁶—the Court seems particularly slow to ensure women's full reproductive rights.

Since *Roe v. Wade*, a series of Supreme Court decisions have gradually restricted access to abortion by allowing the state to have an interest in the pre-viable fetus. Two of the Court's more recent decisions, *Webster v. Reproductive Health Services*,¹⁵⁷ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁵⁸ are most relevant to the abortion funding issue and the debate over women's reproductive health care in general. Although neither case directly addressed the issue of federal abortion funding, both *Webster* and *Casey* further narrowed abortion access for low-income women by upholding abortion restrictions.¹⁵⁹ Both decisions demonstrate the

¹⁵⁶ See, e.g., *Harris v. Forklift Sys.*, 114 S. Ct. 367 (1993).

¹⁵⁷ 492 U.S. 490 (1989). The Court has decided a number of other abortion rights cases in this time period. See, e.g., *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (invalidating state statutes that required women to view anti-abortion literature and physicians to determine fetal viability and to preserve the fetus in post-viability abortions); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (requiring a state to show a "compelling" interest for abortion regulations during the first trimester).

The Court's more recent decisions do not directly address abortion funding but may have had an indirect affect by restricting abortion generally. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld Health and Human Resources regulations that prohibited federally funded family planning clinics from counseling or referring clients to abortion services, even upon the client's request for such information. Although the *Rust* decision directly considered a federal funding restriction, the case was decided on First Amendment free speech grounds rather than abortion rights. See, e.g., Note, *The Policy Against Federal Funding For Abortions Extends Into the Realm of Free Speech After Rust v. Sullivan*, 19 PEPP. L. REV. 637 (1992).

¹⁵⁸ 112 S. Ct. 2791 (1992).

¹⁵⁹ In *Webster*, the Court addressed several questions concerning abortion access,

Court's weakening commitment to reproductive rights. Yet neither decision grants the government the right to assert an unlimited interest in a first-trimester fetus.

The application of *Casey's* "undue burden" standard to abortion restrictions implies that the Court is willing to accept some obstacles to abortion access. Yet the *Casey* decision did not clearly delineate a standard for determining which abortion restrictions would place an undue burden on women choosing abortion. As a result, lower courts face considerable confusion as they try to address the issue of what constitutes an "undue burden."¹⁶⁰ Advocates challenging abortion restric-

including whether public hospitals had to provide abortion services at all. 492 U.S. at 509. The *Webster* Court upheld a Missouri law prohibiting the use of public hospitals or publicly employed physicians to provide abortion services. The Court analogized the issue of providing abortion services via public hospitals to the abortion funding issue and reasoned that since the state did not provide funding for abortion services, women denied access to abortion at public hospitals would not be any more disadvantaged by being forced to use a private practitioner. *Id.* The Court stated that:

Just as Congress' refusal to fund abortions in *McRae* left 'an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all,' Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not to operate any public hospitals at all.

Id.

The Court in *Casey* did not directly address the issue of abortion funding, but considered generally restrictions on access to abortion. In *Casey*, the Court rejected *Roe's* trimester framework and allowed the government to assert an interest in the fetus before the third trimester of a woman's pregnancy. The *Casey* Court developed an "undue burden" test. This test permitted states to impose restrictions on abortion before viability, as long as these restrictions did not constitute an "undue burden" on women. *Casey*, 112 S. Ct. at 2820. Applying the undue burden test, *Casey* declared that Pennsylvania's requirements of informed consent, 24-hour waiting periods, parental consent and record-keeping and reporting requirements did not impose undue burdens on women seeking abortions. *Id.* at 2822-25. The Court, however, did strike as overly burdensome the state's requirement that a married woman notify her spouse before obtaining an abortion. *Id.* at 2830.

¹⁶⁰ "Casey is a splintered opinion, confusing abortion law Abortion law becomes even more unclear because the joint opinion explicitly rejects *Roe's* trimester framework and strict scrutiny standard while claiming to adhere to *Roe's* essential holding." Schneider, *supra* note 83, at 1003; see also Patricia J. Williams, *Courtspeak: When is a Fundamental Right Not a Fundamental Right?*, in CENTER FOR CONSTITUTIONAL RIGHTS, REFLECTIONS AFTER CASEY 25, 27 (Dorothy M. Zellner & Nancy Scerbo eds., 1993).

The undue burden standard had not been applied to abortion rights cases before *Casey* and was more suggestive of an economic inquiry than privacy rights.

tions under *Casey* must explore the factual impact of such restrictions in an effort to show how these restrictions burden women.¹⁶¹ Although it has generally failed to recognize the economic realities faced by low-income women with unwanted pregnancies, the Court is beginning to acknowledge the enormous impact of reproductive health laws on women's equality.¹⁶²

Ultimately, the Court has failed to recognize that any restriction on access to abortion will act as a total bar for some women. For a woman who lives in a rural area where a doctor performs abortions only one day a week, a 24-hour waiting period may turn into a one-week delay. A one-week delay could make her pregnancy too advanced for a legal abortion. Furthermore, what may not be an undue burden for an upper- or middle-income woman, may be a total bar to abortion access for low-income women or teenagers. A woman forced to stay overnight in a hotel or travel home and return during a 24-hour waiting period may find the additional cost too high to afford an abortion and be forced to carry an unwanted pregnancy to term.

Given the Court's previous disregard of the burdens faced by low-income women trying to obtain abortion services, it is unlikely that the Court will consider additional expenses alone

[O]ddly enough, *undue burden* is a term borrowed—as far as anyone can tell, since O'Connor did not say what she meant by the term—from business regulation. It's used to protest regulations that "unduly burden" the profitable management of businesses. . . . Furthermore, *undue burden* has a decidedly pecuniary base as its standard; traditionally, cases implying this term have been referring to something that unduly taxes or that leaves a disproportionate penalty.

Williams, *supra*, at 27.

¹⁶¹ *An Analysis of Planned Parenthood v. Casey*, REPRODUCTIVE FREEDOM IN FOCUS (Center for Reproductive Law & Pol'y, New York, NY), 1993, at 6 ("[L]itigators will need to present extensive facts to prove that a statute creates an 'undue burden.' As a result, courts will have broad discretion to decide whether a challenged restriction is invalid.").

¹⁶² "More surprisingly at the time, the joint opinion of the breakaway Reagan/Bush justices even acknowledged the impact of feminism. . . . Citing Rosalind Petchesky, one of feminism's finest theorists on this subject, the opinion also recognized abortion as a crucial aspect of women's equality, noting that women's ability to 'participate equally in economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.'" Rhonda Copelon, *From Rhetoric to Reality: The Challenge of Casey*, in REFLECTIONS AFTER CASEY, *supra* note 160, at 9, 10-11.

as constituting an undue burden. If the Court is unwilling to recognize or elaborate on the extreme hardship of such restrictions as a 24-hour waiting period or parental consent, it is unlikely to find that a complete denial of abortion funding places an undue burden upon low-income women. Although the Court has maintained some limits on the state's interest in the fetus, thereby recognizing the detrimental effects the restrictions have on individual women, its most recent reproductive rights decisions do not appear to offer any support for abortion funding for low-income women. Yet, the changing composition of the Supreme Court indicates that in the future it may recognize the discriminatory impact of a challenged law.

In addition, the Court appears affected by an increased societal awareness of how sexism affects women's lives. The Court itself has not been insulated from such concerns. During the confirmation hearing of Justice Clarence Thomas, the country focused its attention on the issue of sexual harassment and, since that time, the Court has ruled on this issue with increased awareness of the impact of sexual harassment on women.

The Court's recent opinions reflect a growing awareness of women's rights, particularly in the workplace. For example, in *Harris v. Forklift Systems, Inc.*,¹⁶³ the Court evolved in its Title VII analysis of a sex discrimination case, stating that a "discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."¹⁶⁴ Nonetheless, the Court did not go as far as the standard proposed by Justice Ruth Bader Ginsburg, who noted that the "critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁶⁵

¹⁶³ 114 S. Ct. 367 (1993).

¹⁶⁴ *Id.* at 371.

¹⁶⁵ *Id.* at 372. (Bader Ginsburg, J., concurring). The Court also recently acknowledged "what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B. v.*

Despite its progress in the area of employment discrimination against women, the Court has been slow to combat gender discrimination in the area of reproductive health law. The majority of the justices are not committed to women's rights and, indeed, those selected by then-Presidents Reagan and Bush were chosen in part because of their anti-abortion viewpoints.¹⁶⁶ The law traditionally has not been receptive to women's equality, particularly because it has excluded women and their experiences of pregnancy and childbearing.¹⁶⁷ Although the Court may be making some progress in the realm of gender equality, and will undoubtedly expand its recognition of women's interests with the addition of Justice Ginsburg's perspective, it cannot be relied upon to enact the type of sweeping equal protection reform needed to facilitate women's equality in society.

Instead of merely relying on the Court's slowly evolving recognition of gender discrimination, the legislature must recognize equal protection guarantees in those areas in which such protection has been weak—for example, with laws governing reproduction. The state's interest in the fetus is not "compelling" if proper emphasis is given to the amendment's negative effects on women and the possibility of less-burdensome alternatives. But until women's interests are valued, the detrimental effects of oppressive legislation will continue to be ignored.

The proposed national health care plan offers not only an

Alabama, 114 S. Ct. 1419, 1422 (1994). Although the Court gave greater recognition to gender discrimination than it had in any of its earlier decisions—for instance, acknowledging similarities between gender and racial prejudices—it declined to apply a strict level of scrutiny to gender classifications. Furthermore, the "backlash" resulting from the Court's steps towards full recognition of gender discrimination can be seen in Justice Scalia's scathingly sarcastic dissent. He attempts to cling to the past by facetiously commenting: "Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes . . . and how sternly we disapprove the male chauvinist attitudes of our predecessors. *Id.* at 1436 (Scalia, J., dissenting).

¹⁶⁶ "Unlike their predecessors, Presidents Reagan and Bush, who selected at least sixty percent of the nation's sitting federal judges, applied a specific anti-abortion 'litmus test' for all federal court appointees." *Ensuring Reproductive Freedom*, *supra* note 18, at 31.

¹⁶⁷ "[T]he interest, perceptions and experiences that have shaped the law have not included those of women. The social conception of pregnancy that has formed the basis for its legal treatment has not been from the point of view of the pregnant woman, but rather from the point of view of the observing outsider, gendered male." MacKinnon, *supra* note 73, at 1309.

opportunity, but an obligation to reconsider abortion funding in the broader context of gender discrimination. Since the Court has been slow to grant women's rights, a legislative solution may be a more effective—and more appropriate—method of facilitating social equality for women.

III. NATIONAL HEALTH CARE AND THE FUTURE OF ABORTION FUNDING

A. *"Health is not simply the absence of sickness."*¹⁶⁸

Debate over the proposed national health care plan will inevitably include discussion of abortion services and funding. The combination of a dramatic reorganization of health care and the polarization of the abortion debate offers an occasion for Congress to reconsider the issue of abortion funding. The national health care plan presents an chance to secure full reproductive health care and to "redress serious biases in the existing system that prejudice true freedom of choice in child-bearing."¹⁶⁹ Any proposed federal health care plan should include coverage of abortion services.

In the legislature and on the grass-roots level, advocates may take advantage of the increased attention on health care to restructure the abortion issue so as to include low-income women. The proponents of access to abortion services must eradicate the financial barriers that prevent equal access to abortion for low-income women. These barriers include funding bans, physician shortages and the costs related to abortion. Expanding the content and the context of the abortion debate can make abortion part of a broader agenda for greater reproductive rights—and an essential element of gender equality for all women.

The focus of the debate should be on the continuum of factors that restrict access to abortion for all women and, in effect, deny low-income women the right to choose abortion. To facilitate genuine reproductive freedom, Congress should reject

¹⁶⁸ Hannah Green, *quoted in* QUOTATIONS BY WOMEN, *supra* note 1, at 147.

¹⁶⁹ JEANNIE I. ROSOFF, HEALTH CARE REFORM: A UNIQUE OPPORTUNITY TO PROVIDE BALANCE AND EQUITY TO THE PROVISION OF REPRODUCTIVE HEALTH SERVICES 3 (1993).

the current form of the abortion debate which positions women in opposition to fetuses. A model for providing reproductive health care must include a range of preventative services to reduce unwanted pregnancy and sexually transmitted diseases. Such care must also include pre-natal care or abortion services, and should facilitate conditions that allow a woman to make a genuine choice.

The costs associated with obtaining abortion services create just as difficult an obstacle for low-income women as the costs of the abortion service itself. These costs include transportation, access to a telephone, child care provisions and missed hours at work.¹⁷⁰ Any national health care plan that hopes to provide all Americans with genuine health care must not only abolish obstacles to services for those living in poverty, but must take affirmative steps to ensure the availability of reproductive health services.

Financial inequity is one such obstacle. Women in poverty are at a great disadvantage when abortion services are less available. Not surprisingly, women who can afford to travel greater distances or pay for private care have greater access to abortion. The Court must recognize this when it considers whether restrictions place an undue burden on access to abortion and should reject the idea that it is permissible to use government funding to coerce recipients into choosing a particular type of care.

So too, a national health care system should reject abortion restrictions such as those in *Webster*, which reduce the number of providers and public hospital services. The need is great for hospital services for abortion, particularly in rural areas. Low-income women use public hospitals more than wealthier women, in part because of discrimination in health care.¹⁷¹ The Court's decision in *Webster* allowing individual

¹⁷⁰ See Vernellia R. Randall, Address at *Ensuring (E)qual(ity) Health Care for Poor Americans* (Dec. 3, 1993) (symposium sponsored by the Edward V. Sparer Public Interest Law Fellowship Program and the *Brooklyn Law Review*) (discussing how barriers of economics, infrastructure, class, race, culture and communication result in the failure of "universal coverage" to result in health care coverage for low-income Americans) [hereinafter Randall Address]; see also Vernellia R. Randall, *Does Clinton's Health Care Reform Proposal Ensure (E)qual(ity) of Health Care for Ethnic Americans and the Poor?*, 60 BROOK. L. REV. 167 (1994).

¹⁷¹ Randall Address, *supra* note 170 (discussing health care providers' biases against treating low-income patients and the race bias in health care which results

hospitals to refuse to provide women with these services creates even more barricades to health-care access for low-income women.

A hospital's decision not to provide abortion services has a broad negative effect on women's health care. Reproductive health services are often the only way for a hospital to make initial contact with women who may need general health care but would not otherwise approach a hospital. Furthermore, it is inappropriate to allow a hospital to make a decision as to whether women in the community will have access to abortion services. Any individual physician who is personally opposed to abortion could be excused from performing them—for instance, through a "conscience clause" provision. But to place such a decision in the hands of an individual hospital further deprives women of decision-making power about their own reproductive health care and impedes the exercise of a constitutional right. Therefore, the proposed national health care plan should facilitate patient care without allowing a patchwork delivery of services based upon hospital politics.

A national system of health care delivery should diminish the power of individual hospitals to determine what services would be available to women. If the government is responsible for the provision of health care services, individual hospitals would not be able to mandate that they will not make abortion services available. While individual doctors may opt out of providing abortion services, a hospital itself could be required to provide a full range of reproductive health care services.

The types of abortion regulation upheld in the *Webster* decision contribute to the shortage of abortion providers, an issue of vital importance to accessing abortion, particularly for low-income women. As a result of anti-abortion pressures, the number of physicians willing and able to provide abortion services has decreased dramatically.¹⁷² This shortage is not simply due to physicians' career choices, but is a result of sev-

in the situation where "the color of a person's skin affects the aggressiveness of care received"); see also, Morgan, *supra* note 11, at A1 (discussing practitioners reluctance to treat Medicaid patients because of the "stigma that Medicaid coverage still has for many as a 'poor person's program' that many physicians have shied from").

¹⁷² See Lauran Neergaard, *Community Pressure Has Made Rural Abortions Few and Far Between*, L.A. TIMES, June 28, 1992, at A24.

eral policy decisions within the medical profession. Many medical schools no longer require nor even offer their students training in abortion procedures.¹⁷³ Many students now attending medical school grew up in a post-*Roe* era and, as a result, assume that access to legal abortion will always exist. In addition, because of the current state of the abortion debate, young doctors decline to become abortion providers. In a profession which is so revered by society, many people are unwilling to commit to an area of health care that has become so stigmatized.¹⁷⁴

Finally, with the increase in violence and harassment against abortion providers and clinic staff, many physicians are no longer willing to remain in a profession in which they are subject to such "pro-life" behavior.¹⁷⁵ The national health care plan must acknowledge this shortage of abortion providers and the resulting denial of reproductive health care choices for women. The plan should seek to remedy the shortage by offering incentives to encourage physicians to provide abortion services. To ensure women's access to abortion, the government must also work to protect the rights of physicians against threats and harassment by abortion opponents.¹⁷⁶

As the *Webster* decision shows, the Supreme Court cannot

¹⁷³ A University of California-Davis survey revealed that in 1991, only 12% of obstetrics-gynecology programs in the United States offered routine, first-trimester abortion training, and 31% offered none. Darlene Gavron Stevens, *Abortion Doctors Lying Low*, CHI. TRIB., Sept. 2, 1993, at 1. This rate has sharply declined since 1985, when 23% offered routine abortion training. *Id.*

¹⁷⁴ These observations are taken in part from a series of conversations with Dr. Jane Hodgson, July 1993, whose insight and commitment to women's reproductive health care are exemplary.

¹⁷⁵ See Stevens, *supra* note 173, at 1.

¹⁷⁶ Incidents of violence against abortion clinics have increased dramatically since 1980. Examples of this violence include attacks on reproductive health care clinics by firebombing, arson, and butyric acid—a toxic substance dangerous to skin and respiratory systems. See *Suspected Arson and Clinical Attacks at Women's Health Clinics*, REPRODUCTIVE FREEDOM NEWS (Center for Reproductive Law & Pol'y, New York, NY), Sept. 24, 1993, at 7. These attacks are aimed at clinic staff, patients and facilities.

The Freedom of Access to Clinic Entrances Act, recently enacted by Congress, allows peaceable protests against abortion clinics but prohibits protestors' actions—such as parking cars and chaining themselves to block clinic entrances—to obstruct clinic entrances. States have also used "stalker" laws to prosecute abortion protestors who harass abortion providers and their families. State trespassing laws also have been used to remove protestors from the private property of clinics and staff members.

be relied upon to ensure that medical providers do not abandon the provision of abortion services. The Court's reasoning in *Webster* and *Casey* indicates that it will not consider cases on the basis of the impact its rulings will have on women's equality. *Webster* echoed the Court's stated belief in *Harris* that the government does not owe women access to health care and, therefore, if a woman lacks health care services it is the fault of her own poverty and cannot be blamed on the government. The Court's rationale fails once the government begins providing health care on a national basis. If all Americans are covered by a single form of health care—regardless of what plan this coverage ultimately follows—it will be more difficult to treat low-income people's health care needs differently. Under a single system of health care, the stigma of Medicaid will no longer facilitate a distinct two-tiered system of health care services.

Even if the Court expands its *Harris* rationale—that since the government is not required to provide any health care services it may choose which ones it will provide—this opinion is unlikely to be acceptable to most Americans. Although Americans may expect recipients of public assistance to be satisfied no matter how minimal the services provided are, once the government begins to provide a service for the entire nation, expectations will increase dramatically. Once the government becomes involved in the provision of all health care services, it is unlikely that individuals will accept harsh limitations on the types of services provided. Furthermore, since ninety percent of all private health care insurance currently provides abortion coverage, women will have an expectation of continued coverage.¹⁷⁷ If the government is presenting a plan

¹⁷⁷ Ellen Goodman, *Two Tiers for Women?*, BOSTON GLOBE, Sept. 30, 1993, at 15 ("Remember all those pro-choice voters? Remember the ones with health insurance? They didn't send this administration to Washington to see their own choices diminished.").

Even if the government decided to abolish the existing inequality in Medicaid's delivery of health care services, there is a greater likelihood that it will expand health care provisions to bring greater equality rather than reducing the amount of services provided. "While it is theoretically possible for a legislature to respond to a holding that a classification violates equality norms by abolishing the program or denying benefits equally to all, this is often politically unrealistic." Rachel N. Pine & Sylvia A. Law, *Envisioning A Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 2, 420 n.48

which accepts responsibility for providing all health care services, then it cannot single out a particular necessary procedure and deny women coverage nor create a separate private market for this service.

B. *The Future of the Abortion Debate*

Abortion remains one of the most politically polarized issues in America today. Nonetheless, the orchestrators of a national health care system must not be allowed to sacrifice women's health care to politics. Provisions that block access to abortion negatively and unnecessarily affect women's health. By delaying the abortion procedure for non-medical reasons, they endanger women's health and needlessly increase the cost of the procedure. The current Supreme Court does not consider itself the proper governmental branch to enact widesweeping social change. Therefore, activists must concentrate their advocacy efforts on the legislative level. Legislative initiatives, such as the proposed national health care system, demand a broadening of the reproductive health debate into a larger agenda for gender equality.

In the debate over reproductive rights, the pro-choice movement must concentrate on equality rights generally, and not become locked into a narrow debate over abortion rights. If the debate over abortion access is going to result in greater gender equality, it must concentrate on a wider range of social and economic barriers that prevent women from gaining access to not only abortion, but to fully equal status in society. Thus far, by responding to the anti-abortion movement, women's rights advocates have been "put in the position of having to fight for something they need rather than want."¹⁷⁸ By framing abortion rights as part of a larger agenda of women's reproductive health care, women's rights advocates can broaden its appeal to avoid championing a discourse about abortion that has been accused of "flatten[ing] the sadness and complexity of the issue" and becoming "caught up in a pitched battle against pro-life language that [is] even more one dimen-

(1992).

¹⁷⁸ Frances Olsen, Comment, *Unraveling Compromise*, 103 HARV. L. REV. 105, 123 (1989).

sional.”¹⁷⁹ The abortion funding issue presents an opportunity for women’s rights advocates to address the reproductive health care needs of all women, not just those who can privately afford access to abortion.

If the government wants to influence women’s reproductive choices, it should do so by offering incentives rather than through coercive funding measures. If the government’s goal is to prevent abortion by encouraging a woman to carry a pregnancy to term, it must do so by the least intrusive means. For example, rather than restricting access to abortion, the government should provide both pre-natal care and financial assistance after birth so that a low-income woman is not forced to choose abortion simply because she believes she cannot support a child. Additionally, states should avoid policies such as those which encourage abortion through denial of increases in AFDC benefits if a recipient has additional children.

The denial of federal funding of abortion poignantly demonstrates that the needs of large groups of women—particularly low-income and women of color—have been overlooked in the abortion debate. Within the framework of the current abortion debate, even if the right to abortion is won, the more pressing issues of *access* to abortion and reducing the need for abortion are not adequately addressed.

The debate over health care reform raises the question of how to guarantee genuinely equal access to quality health care for everyone in the United States.¹⁸⁰ Regardless of the form it takes, a national health care system must have two crucial components: genuine access and genuine choice. Genuine access to health care services involves far more than simply providing health insurance. Genuine choice in the type of care one receives requires patient autonomy. The issues surrounding federal funding of abortion services demonstrate that health care issues do not exist in isolation. A successful national health care plan cannot ignore the social conditions that contribute to poor health.

The conditions of poverty often prevent low-income people

¹⁷⁹ NAOMI WOLF, *FIRE WITH FIRE* 129 (1993).

¹⁸⁰ The debate over whether undocumented workers and “illegal aliens” should be eligible for coverage under the new health care system shows the complexity of the health care debate as it relates to other areas of American policies, such as immigration.

from gaining genuine access to health care even when, theoretically, they have health insurance. For instance, as discussed earlier, "out of pocket" expenses—such as high insurance deductibles, transportation and child care costs—often are unmanageable for families in poverty. Language and cultural differences between health care providers and low-income patients also often act as barriers to health care. In addition, physician shortages in areas of rural or urban poverty severely limit health care access for low-income people.

Genuine access to quality health care requires patients having information and independent control to determine their own health care choices. Genuine choice also must be informed, but not by forced exposure to anti-abortion rhetoric, harassment or other interference. A genuine choice about abortion includes the resources and the right to make such a decision without interference by the government or other political organizations. This choice includes a woman being able to independently make her decision without being forced to go through an obstacle course of abortion restrictions as her pregnancy advances. The national health care plan presents an occasion to provide reproductive health care for all women as a vital step toward gender equality.

CONCLUSION

The issue of funding for abortion services is central to gender equality for all women. The denial of funding for abortion excludes some women from obtaining abortion services and perpetuates gender stereotypes about all women. Because abortion restrictions affect all women as a class, challenges to such laws provide the Court with a chance to expand equal protection guarantees. The Court should seize the opportunity to facilitate gender equality by modifying equal protection doctrine. The Court should declare gender to be a suspect class and should examine legislation that classifies by gender to determine its practical impact, not the legislators' intentions in passing the law.

Since the Court has been so reluctant to increase women's equality, particularly in the area of reproductive rights, the legislative branch must move to create greater equality. The proposed national health care plan offers a chance to create

greater gender equality by providing women with a full range of reproductive health care services and choices. Women's reproductive health care is an essential element of gender equality and, therefore, the government should focus its efforts on facilitating, not impeding, women's access to such vital services.

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¹⁸¹ The author wishes to thank Kathryn Kolbert, Simon Heller, and especially Professor Elizabeth Schneider of Brooklyn Law School, for their assistance with this Note.

