CENTER FOR REPRODUCTIVE RIGHTS

Healthcare Reform in Hyde Amendment's Shadow

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The debate over abortion coverage within the larger healthcare reform dialogue has been painfully narrow for those of us who believe that as a matter of equality, due process, and sound public health policy, abortion should be treated like other medical procedures. From early on when the so-called Capps Amendment, with the support of pro-choice members of the House, was added to the original bill, the best that abortion rights supporters could hope for was that plans within the exchange would voluntarily cover abortion, so long as federal funds were not used and were strictly segregated. Coverage of abortion within the public option would be left to the discretion of the administration. With the adoption of the Stupak Amendment by the House, the situation is now even worse – abortion coverage can only be offered through a separate rider, and cannot be included in the public option, thus making it unlikely that women will be able to obtain abortion coverage at all, even with their own money. The current Senate bill contains language similar to the Capps compromise, but the Senate will also consider further restrictions on abortion coverage.

The current debate over insurance coverage for abortion focuses on how best to reflect the so-called status quo that federal money will not be used to fund abortions. That status quo is the direct result of the Supreme Court's misguided decision in *Harris v. McRae*, 448 U.S. 297 (1980). In *Harris*, five members of the Court upheld the Hyde Amendment, an appropriations limitation passed annually by Congress, which limits federal funding of abortions to procedures necessary to save the woman's life or to terminate a pregnancy resulting from rape or incest. That limitation stands in stark contrast to the far broader "medically necessary" standard applicable to *all other* health services provided under the federal Medicaid program. The *Harris* majority upheld the funding limit against a due process challenge on the grounds that the ban "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy," 448 U.S. at 315, and constitutes a valid expression of government preference for childbirth over abortion. According to the majority opinion, "the Hyde Amendment leaves 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 healthcare costs at all." Id. at 317.

As Justice Brennan argued forcefully in dissent, the majority failed to recognize the coercive effect of the Hyde Amendment:

> *For what the [majority] fails to appreciate is that it is not simply the woman's indigency that interferes with her freedom of choice, but the combination of her own poverty and the Government's unequal subsidization of abortion and childbirth. . . . The fundamental flaw in the [majority's] due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.*

McRae, 448 U.S. at 333 (Brennan, J., dissenting). By providing a pregnant woman with the medical services she needs if she decides to carry to term, but denying her the medical services she needs if she decides to terminate her pregnancy, the government uses the "selective bestowal of governmental favors" to inhibit the woman's exercise

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of her constitutional rights. Id. at 334 (Brennan, J., dissenting).

Not surprisingly, the *Harris* decision has been the subject of much eloquent criticism. For example, Harvard Law Professor Laurence Tribe has pointed out that the skewed funding scheme upheld by *Harris* may well be viewed as a "deliberate, 'active' choice by government to discourage exercise of" women's right to abortion. Laurence H. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence, 99 Harv. L. Rev. 330, 331 (1985). Emory Law Professor Michael J. Perry has written that "the wrongness of [the *Harris* decision] is beyond debate, . . . radically inconsistent with what the Court itself deems to be binding constitutional doctrine . . . [and] inconsistent with *Roe v. Wade*." Michael J. Perry Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on *Harris v. McRae*, 32 Stan. L. Rev. 1113 (1980).

Moreover, courts in 13 states have rejected the reasoning of *Harris*, holding that the government must maintain neutrality in the funding of constitutional rights, and striking down similar Medicaid funding bans under their state constitutions.[1]

As the debate moves forward, Congress should recognize that the limits imposed by the Stupak Amendment go far beyond the status quo that Congress need not cover medically necessary abortions in the Medicaid program. In addition, Congress should reject attempts to expand the harmful reach of *Harris*, and move towards a day when all women, including those reliant on the federal government for healthcare, have access to the abortion services they need.

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[1] *See Planned Parenthood v. Perdue*, No. 3AN 98-7004 CI, slip op. (Alaska Super. Ct. Mar. 16, 1999); *Simat Corp. v. Arizona Healthcare Cost Containment System Admin.*, No. CV1999014614, slip op. (Ariz. Super. Ct. May 23, 2000); *Committee to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *Roe v. Harris*, No. 96977, slip op. (Idaho Dist. Ct. Feb. 1, 1994); Doe v. Wright, No. 91 Ch. 1958, slip op. (Ill. Cir. Ct. Dec. 2, 1994); *Moe v. Secretary of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Women of Minnesota v. Gomez*, 542 N.W. 2d 17 (Minn. 1995); *Jeannette R. v. Ellery*, No. BDV-94-811, slip op. (Mont. Dist. Ct. May 22, 1995); Right to *Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Planned Parenthood Ass'n v. Department of Human Resources*, 663 P.2d 1247 (Or. Ct. App. 1983), *aff'd on other grounds*, 687 P.2d 785 (Or. 1984); *Doe v. Celani*, No. S81-84CnC, slip op. (Vt. Super. Ct. May 26, 1986); *Panepinto*, 446 S.E.2d 658.