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# Due Process

tion."[199]

In conclusion, the *Quirk* court found that section 375 of chapter 190 was violative of both the state and federal due process provisions. In addition to the due process violations, the court further found that the statute was violative of the state constitution provision guaranteeing that the state will collectively bargain with a union.[200] The Federal Constitution has no equivalent provision that explicitly provides for the state to collectively bargain with a union. The Federal Constitution has, however, a Contract Clause which guarantees that the state will not breach its contracts. As previously mentioned, the Second Circuit, in *Association of Surrogates and Supreme Court Reporters within the City*, applying the Contract Clause, similarly found section 375 of chapter 190 to be unconstitutional.

*NEW YORK COUNTY*

Hope v. Perales[201]
(decided April 15, 1991)

The plaintiffs challenged the constitutionality of the Prenatal Care Assistance Program (PCAP)[202] as violative of the rights of pregnant eligible women,[203] because it did not provide funds for eligible women for whom an abortion is medically necessary. The court found that "[t]he right of a pregnant woman to choose an abortion in circumstances where it is medically indicated is one component of the right of privacy rooted in the due process clause of the New York State Constitution."[204] Therefore, the court held that PCAP's exclusion of funding for medically necessary abortions was unconstitutional under the due process clause,[205] the equal protection clause[206] and sections 1 and 3 of

199. *Quirk*, 565 N.Y.S.2d at 424.
200. *Id.* at 425.
201. 150 Misc. 2d 985, 571 N.Y.S.2d 972 (Sup. Ct. New York County 1991).
202. N.Y. PUB. HEALTH LAW § 2520-2529 (McKinney 1992).
203. *Hope*, 150 Misc. 2d at 986-87, 571 N.Y.S.2d at 974.
204. *Id.* at 993-94, 571 N.Y.S.2d at 978.
205. *Id.* at 997, 571 N.Y.S.2d at 980; N.Y. CONST. art. I, § 6.

article XVII[207] of the New York State Constitution. Consequently, the court enjoined defendants from withholding such funding from eligible women.[208]

The plaintiffs included two women with incomes between 100 and 185 percent of the federal poverty line, on behalf of all pregnant women similarly situated. Plaintiffs also included several physicians, a certified nurse-midwife, two members of the clergy, family planning organizations and seven medical clinics, all of which serviced women in the PCAP income bracket, as well as advocacy organizations who represent women in this bracket. The suit was instituted against the Commissioner of the New York State Department of Social Services, and the Commissioner of the New York State Department of Health.[209]

The plaintiffs did not seek to terminate all services offered by PCAP, rather they claimed that the program "is underinclusive in its blanket exclusion of funds for all abortions without exception, [even] to preserve the life of the mother."[210] Thus, the plaintiffs sought to "expand the breadth" of the program to include financing for abortions in the case of medical necessity.[211]

The court began its analysis by reviewing the statutory scheme established on the federal level and its counterpart adopted by New York. The Prenatal Care Assistance Program was established on the federal level to authorize reimbursement for pregnancy related medical services to women with incomes

206. *Hope*, 150 Misc. 2d at 1000, 571 N.Y.S.2d at 982; N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof.")

207. *Hope*, 150 Misc. 2d at 998, 571 N.Y.S.2d at 981; N.Y. CONST. art. XVII, §§ 1, 3.

208. *Hope*, 150 Misc. 2d at 1001, 571 N.Y.S.2d at 983. The court, however, stayed the order enjoining the denial of such funding and advised that "as this is a case involving the constitutionality of a state statute, appeal may be taken directly to the Court of Appeals." *Id.* At the time this issue went to press, the court of appeals had remanded the case to the appellate division, and the case has been argued before the first department. 78 N.Y.2d 1004, 580 N.E.2d 764, 575 N.Y.S.2d 278 (1991).

209. *Hope*, 150 Misc. 2d at 987, 571 N.Y.S.2d at 974.

210. *Id.* at 989, 571 N.Y.S.2d at 975.

211. *Id.*

between 100 and 185 percent of the poverty line.[212] New York codified chapter 584 in its section 2522 of the Public Health Law, which expressly provides that "funding is only available to the extent of federal reimbursement -- which does not include funding for abortion."[213]

The court then addressed the plaintiffs' challenge to the prenatal assistance program under the due process clause of the New York State Constitution. The due process clause of the New York State Constitution, found in section 6 of article I, provides in part that: "No person shall be deprived of life, liberty or property without due process of law."[214] The court stated that:

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212. *Id.* at 990, 571 N.Y.S.2d at 975. Those with incomes below 100 percent of the poverty line are covered under other programs. *Id.*

213. *Id.* at 990, 571 N.Y.S.2d at 975-76. Section 2522 of New York Public Health Law states:

> Comprehensive prenatal care services available under the prenatal care assistance program include:
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> (a) prenatal risk assessment;
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> (b) prenatal care visits;
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> (c) laboratory services;
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> (d) health education for both parents regarding prenatal nutrition and other aspects of prenatal care, alcohol and tobacco use, substance abuse, use of medication, labor and delivery, family planning to prevent future unintended pregnancies, breast feeding, infant care and parenting;
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> (e) referral for pediatric care;
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> (f) referral for nutrition services including screening, education, counseling, follow-up and provision of services under the women, infants and children's program and the supplemental nutrition assistance program;
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> (g) mental health and related social services including screening and counseling;
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> (h) transportation services for prenatal care services;
>
> (i) labor and delivery services;
>
> (j) post-partum services including family planning services;
>
> (k) inpatient care, specialty physician and clinic services which are necessary to assure a healthy delivery and recovery;
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> (l) dental services;
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> (m) emergency room services;
>
> (n) home care; and
>
> (o) pharmaceuticals.

N.Y. PUB. HEALTH LAW § 2522 (McKinney Supp. 1992).

214. N.Y. CONST. art I, § 6.

"Historically, the New York Court of Appeals has read our State Constitution expansively, broadening the scope of individual rights and liberty accorded by the Federal Constitution, finding the basis for such rights in our state constitution."[215] The court first analyzed the statute, which deals with social and economic issues, on its face under substantive due process, and applied rational basis scrutiny. It then addressed the statute as it impacted on the fundamental right to an abortion and, here, applied strict scrutiny.

According to the court, the test applied to a challenge to a statutory scheme on substantive due process grounds is "whether there is some fair, just and reasonable connection between it and the promotion of the health, comfort, safety and welfare of society."[216] Thus, a "'regulation which is reasonable in relation to its subject and is adopted in the interest of the community is due process.'"[217] In applying this test, the court grants great deference to the decisions of the legislature. Plaintiffs, therefore, have a heavy burden in proving that a regulation is not rationally related to the police power.

Nonetheless, the court found that PCAP was not rationally related to its stated objective and held that in excluding funds for all abortions it was facially deficient.[218] The court reasoned that PCAP provides medical assistance for all services related to pregnancy and childbirth. Yet, funds are not available for abortion even if the procedure is medically necessary. This, the court concluded, is inconsistent with the regulation's stated

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215. *Hope*, 150 Misc. 2d at 993, 571 N.Y.S.2d at 978 (citing People v. Harris, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991); Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 111 S. Ct. 2261 (1991); People v. P.J. Video, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987); Rivers v. Katz, 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986); People v. Isaacson, 44 N.Y.2d 511, 378 N.E.2d 78, 406 N.Y.S.2d 714 (1978); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976)).

216. *Id.* at 994, 571 N.Y.S.2d at 978 (quoting Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 44, 378 N.Y.S.2d 1 (1975)).

217. *Id.* (quoting West Coast Hotel v. Parrish, 300 U.S. 379 (1983)).

218. *Id.*

objective -- "to combat infant mortality and promote healthier babies."[219] Hope, for example, was a carrier of sickle cell anemia, was twenty-one weeks pregnant and was informed that an abortion was medically necessary in the circumstances. Hope was ineligible for all Medicaid because her income fell above 100 percent of the federal poverty line. However, with income less than 185 percent above the poverty line, Hope fell within the PCAP guidelines and lacked the financial resources to pay for the abortion.

The court cited the case of plaintiff Hope as an illustration of the hardship Hope and other similarly situated women encounter. "Plainly, if Hope carried to term and gave birth all services available under PCAP would be available notwithstanding the danger to her health and the baby's probable affliction with sickle cell anemia."[220] The court found this result was "not 'fairly', 'justly', 'rationally' or 'reasonably' related to combating infant mortality or low birth weight."[221]

The court then addressed the fundamental right to privacy component read in the due process clause of the New York State Constitution.[222] The court stated that: "It is an eligible woman's exercise of the fundamental right to abortion which triggers PCAP'S unconstitutional restriction."[223] Although the legislature can express a preference for childbirth, its conduct of providing funds for childbirth regardless of the dangers to maternal and fetal health directly impacts on the exercise of the pregnant, eligible woman's fundamental right to choose abortion.[224]

The threshold inquiry in evaluating whether a regulation penalizes the exercise of a fundamental constitutional right is whether the regulation serves a compelling state interest and whether the regulation is narrowly tailored to achieve that purpose. Here, the

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219. *Id.*

220. *Id.* at 995, 571 N.Y.S.2d at 979.

221. *Id.*

222. *Id.* at 994, 571 N.Y.S.2d at 979 (citing Klein v. Broderick, 145 A.D.2d 145, 538 N.Y.S.2d 274 (2d Dep't), *appeal denied*, 73 N.Y.2d 705, 536 N.E.2d 627, 539 N.Y.S.2d 298 (1989)).

223. *Id.* at 995, 571 N.Y.S.2d at 979.

224. *Id.* at 996, 571 N.Y.S.2d at 980.

court found that the state had no compelling state interest or even an important state interest "when certain eligible recipients are denied assistance in spite of their medical condition."[225] The court further stated that "to condition such medical assistance on the result desired by the state and not on the medical condition of the pregnant woman effectively wrests control from the pregnant woman over her body and health."[226]

The court then addressed the plaintiffs' claim that chapter 584 violates article XVII, sections 1 and 3 of the New York State Constitution by denying aid to the class of women in medical need to terminate their pregnancies. The court pointed out that "public assistance to the needy is a matter of significant interest in this State, provision for which is expressly included in our State Constitution."[227] Section 1 requires that the state provide aid to the needy.[228] The legislature is granted great deference in defining the term "needy" and in determining the amount of aid provided. However, the Legislature cannot refuse aid to those whom it has classified as "needy."[229] Section 3 requires the state to protect and promote the health of the inhabitants of the State.[230] The court found that the program's denial of funds for medical assistance to needy women violated both clauses because it refused all aid to those in need of a medically necessary abortion. Further, it violated the state's constitutional obligation to protect and promote the health of its residents. The assertion by pregnant women in need of medically necessary abortions

225. *Id.*

226. *Id.* at 997, 571 N.Y.S.2d at 980.

227. *Id.* (citing Tucker v. Toia, 43 N.Y.2d 1, 8, 371 N.E.2d 449, 452, 400 N.Y.S.2d 728, 731 (1977)).

228. N.Y. CONST. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.").

229. *Hope*, 150 Misc. 2d at 997, 571 N.Y.S.2d at 980-81.

230. N.Y. CONST. art. XVII, § 3 ("The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.").

raises an issue of public concern, and creates an obligation upon the state to provide assistance.[231]

The last claim addressed by the court was the plaintiffs' contention that PCAP violated the state equal protection clause. The plaintiffs argued that the right to choose is a fundamental right and the state's denial of funds for the exercise of that right interferes with women's lives in a way that "does not control and alter the lives of men."[232] Once the court identified that the claim involved a regulation penalizing the exercise of a fundamental right, it then determined that such violation triggers the application of strict scrutiny or the compelling state interest test. This test requires a demonstration by the state of a compelling state interest and statutory means that are narrowly tailored to achieve that purpose.[233] Here, the court found that although "there is no constitutional obligation to pay for the medical care of the poor[], the New York State Equal Protection Clause guarantees equal participation in State benefits once such benefits are extended."[234]

The state argued that PCAP serves the state's compelling interest in promoting healthier babies and reducing the incidence of infant mortality. However, the court found that "there can be no compelling justification for that medical assistance program which in practice endangers the health and lives of eligible women for whom an abortion is medically necessary, women whom the Legislature has expressly identified as needy in regard to medical care."[235] PCAP, which in practice endangers the health and lives of women in need of medically necessary abortions, falls short of meeting the compelling state interest. Indeed, the court concluded that "balanced against the interest of

231. *Hope*, 150 Misc. 2d at 998, 571 N.Y.S.2d at 981.

232. *Id.*

233. *Id.* at 998-99, 571 N.Y.S.2d at 981 (citing Matter of Rosenstock v. Scaringe, 40 N.Y.2d 563, 564, 357 N.E.2d 347, 348, 388 N.Y.S.2d 876, 877 (1976)).

234. *Id.* at 999, 571 N.Y.S.2d at 982. The court was referring to a federal constitutional right. As discussed above, the New York State Constitution does require aid to the needy.

235. *Id.* at 999-1000, 571 N.Y.S.2d at 982.

the pregnant woman in choosing a medically necessary abortion, the State's interest is insufficient and as effectuated through PCAP, far too burdensome on the eligible woman's right, to sustain."[236]

State courts, in their determination of individual rights, may always provide for greater rights to their citizens, but may not fall below the minimum standards mandated by the United States Constitution if the right in question is one that is also protected under the Federal Constitution.

In this case the court found that the right to abortion is a fundamental right protected by the "right of privacy rooted in the due process clause of the New York State Constitution."[237]

The federal standard, when analyzing a statute pursuant to a substantive due process claim, is also rational basis scrutiny if the statute merely impacts economic and social concerns.[238] The federal courts also require a strict scrutiny analysis under both the Due Process[239] and Equal Protection[240] Clauses, when that same statute, though providing for economic and social regulation, also impacts upon a fundamental right. A state must demonstrate a compelling state interest and narrowly tailored means in order to infringe upon that fundamental right.

The United States Supreme Court encountered the issue of restrictions on abortion funding in the case of *Harris v. McRae*,[241] which involved denial of funds for abortions except when the life of the mother would be endangered by continuing the pregnancy or when the pregnancy resulted from rape or incest. Justice Stewart, writing for a 5 to 4 majority, stated that a state has no obligation to pay for those medically necessary abortions for which federal funding is unavailable under the Hyde Amendment.[242] The Court in *Harris* stated, "a woman's freedom

236. *Id.* at 1000, 571 N.Y.S.2d at 982.

237. *Id.* at 993-94, 571 N.Y.S.2d at 978.

238. *See* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

239. *See* Roe v. Wade, 410 U.S. 113 (1973).

240. *See* Zablocki v. Redhail, 434 U.S. 374 (1978).

241. 448 U.S. 297 (1980).

242. *Id.* at 308. "Since September 1976, Congress has prohibited -- either by an amendment to the annual appropriations bill for the Department of

of choice [does not] carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[243] Justice Brennan, in his dissenting opinion, pointed out that the state's refusal to fund a medically necessary abortion constitutes an intrusion upon the constitutionally protected decision to have an abortion. The state, by design and in effect, causes indigent pregnant women to bear children. Hence, this is not just an expression of the state's preference towards child-bearing but rather an active encroachment upon the fundamental right for a woman to choose whether to have an abortion.[244]

Recent United States Supreme Court decisions have eroded the federal protection for reproductive choice even further.[245] Although *Roe v. Wade*[246] has not been overruled, the basic premise of that decision, that reproductive choice is a fundamental right subject to a strict scrutiny standard of review, seems to be under scrutiny by at least some members of the Court.[247] In

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Health, Education, and Welfare or by a joint resolution -- the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain specified circumstances." *Id.* at 302 (footnote omitted). *See* Hyde Amendment, H.R.J. Res. 440, 96th Cong., 1st Sess., 93 Stat. 923, 926 (1979).

243. *Harris*, 448 U.S. at 316.

244. *Id.* at 330 (Brennan, J., dissenting). Justices Brennan, Marshall and Blackmun strongly dissented. *Id.* at 329. They interpreted the abortion funding cases as "imping[ing] on the due process right recognized in *Roe* . . . ." *Id.* at 333. The Justices, by focusing their interest on potential life, argued that the state neglected the mother's health and restricted her freedom. *Id.* at 329. Note that two of the three dissenters, Justices Brennan and Marshall, have now retired from the Supreme Court.

245. *See* Rust v. Sullivan, 111 S. Ct. 1759, 1776 (1991) (holding that "[t]he government has no constitutional duty to subsidize" abortion); Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 2976 (1990) (upholding a parental notice statute containing judicial bypass procedures); Hodgsen v. Minnesota, 110 S. Ct. 2926, 2944 (1990) (upholding a 48 hour waiting period on minors seeking abortions); Webster v. Reproductive Health Services, 492 U.S. 490, 509 (1989) (a state's refusal to fund abortions does not violate a woman's right to an abortion).

246. 410 U.S. 113 (1973).

247. *See* Eileen Kaufman, Symposium, *The Supreme Court and Local Government Law -- The 1989-90 Term*, 7 TOURO L. REV. 457, 458 (1991).

*Hope*, the trial judge, on independent state grounds, found that reproductive choice is a fundamental right under the due process clause of the New York State Constitution.[248]

In light of the Supreme Court's possible reconsideration of *Roe's* principles, other states, like New York, have addressed the issue of abortion funding. The New Jersey Supreme Court, in *Right to Choose v. Byrne*,[249] held that while there is no fundamental right to funding for an abortion, the right to choose is a fundamental right under the New Jersey State Constitution.[250] Therefore, the court found that the "challenged statute discriminate[d] between those for whom medical care is necessary for child birth and those for whom an abortion is medically necessary."[251] Similarly, the Supreme Judicial Court of Massachusetts held that the restriction on Medicaid funding for medically necessary abortions impermissibly burdens the fundamental right to privacy guaranteed under the due process clause of article 10 of the Massachusetts Declaration of Rights.[252] In *Doe v. Maher*,[253] the Superior Court of Connecticut held that a regulation that reduced Medicaid funding of abortions to those necessary to save the mother's life was in violation of the fundamental right to choose under both the due process clause[254] and equal protection clause[255] of the

248. N.Y. CONST. art. I, § 6.

249. 450 A.2d 925 (N.J. 1982).

250. *Id.* at 937.

251. *Id.*

252. Moe v. Secretary of Admin. and Fin., 417 N.E.2d 387, 402 (Mass. 1981). The plaintiffs argued that the "restriction [was] an impermissible burden on the exercise of a fundamental right secured by the guarantee of due process implicit in art. 10 of our Declaration of Rights [ ];" the court agreed. *Id.* at 397.

253. 515 A.2d 134 (Conn. Super. Ct. 1986).

254. *Id.* at 157; *see* CONN. CONST. art. 1, § 10 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.").

255. *Maher*, 515 A.2d at 162; *see* CONN. CONST. art. 1, § 20. ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or

Connecticut State Constitution.

The court omitted its discussion of the plaintiffs' claims that chapter 584 violates provisions of the New York State Constitution including the free exercise of religion clause for purposes of publication. The court concluded that PCAP was not violative of the free exercise clause.

## CIVIL COURT

### *NEW YORK COUNTY*

#### 55 Avenue C Housing Development Fund Corporation v. Serrano[256]
(published January 23, 1991)

Tenant claimed that a privately-owned cooperative's involvement with the state, constituted state action such that he was guaranteed a due process right under the New York State[257] and Federal[258] Constitutions to notice and cause of eviction before such eviction could take place. The court held, under the state constitution, that there was "meaningful State participation" with the cooperative's activities so as to constitute state action and, thus, to entitle the tenant to procedural due process of law.[259]

The cooperative brought this proceeding to evict a tenant on the ground that he was "holding over after termination of his term."[260] The tenant moved to dismiss the action because he did not receive notice for the cause of eviction.

Prior to becoming a cooperative, the building was owned and managed by the City of New York. To assist the tenants in forming a cooperative, the city funded the building's rehabilitation, gave money to the tenants to purchase the building and

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physical or mental disability.").

256. N.Y. L.J., Jan. 23, 1991, at 24 (Civ. Ct. New York County 1991).

257. N.Y. CONST. art. I, § 6.

258. U.S. CONST. amend. VI.

259. *55 Ave. C*, N.Y. L.J., Jan. 23, 1991, at 24.

260. *Id.*