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THE END OF THE NORTH CAROLINA ABORTION FUND

Paul Stam*

I. INTRODUCTION

In *Rosie J. v. N.C. Department of Human Resources*, the North Carolina Supreme Court held that there was no state constitutional right to state funded abortions. The opinion of the court was straightforward. Effective July 1, 1995, the North Carolina General Assembly had restricted eligibility for payment from the state abortion fund to cases where the pregnancy resulted from "cases of rape or incest, or to terminate pregnancies that, in the written opinion of one doctor licensed to practice medicine in North Carolina, endanger the life of the mother".  

The plaintiffs in the case, which included the pseudonymous plaintiff, "Rosie J.,” an abortion clinic, Raleigh Women’s Health Organization, and a doctor who performs abortions, John Marks, claimed that abortions financed by the state were guaranteed in four sections of the North Carolina Constitution including under the "life, liberty” clause, the “law of the land” clause, the “equal protection” clause, and the clause creating a public welfare board.

Judge Henry Hight dismissed the complaint in Durham County Superior Court on February 19, 1996 for failure to state a claim. The North Carolina Supreme Court granted discretionary

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5. *Id.*
review prior to determination in the Court of Appeals.\textsuperscript{7} Justice John Webb, writing for six of the seven justices, first held that there was no constitutional right to have the state pay for medical care.\textsuperscript{8} The court had recently found a state constitutional right to a sound and basic education.\textsuperscript{9} However, that decision was based on explicit textual provisions within the North Carolina Constitution, therefore it was not analogous to the debate surrounding state financed abortions. The North Carolina Supreme Court held that, because indigent women are not a suspect class and the encouragement of childbirth is a legitimate governmental objective, the state may encourage childbirth by refusing to fund abortions.\textsuperscript{10} Although the North Carolina Supreme Court did not rely on any federal court cases, it noted that its decision was consistent with a long line of decisions of the United State Supreme Court, including \textit{Harris v. McRae}\textsuperscript{11} and \textit{Maher v. Roe}.\textsuperscript{12}

In her dissent, Justice Parker wrote that under the equal protection clause of the North Carolina Constitution,\textsuperscript{13} the state's policy of refusing to fund "medically necessary" abortions for Medicaid eligible women, while funding all other medically necessary treatments incident to pregnancy, impermissibly interfered with a pregnant woman's right to choose abortion without unduly burdensome governmental interference.\textsuperscript{14}

In \textit{Rosie J.}, the North Carolina Supreme Court brought to full circle a twenty-year odyssey in North Carolina law. In 1967, North Carolina became the second state in the nation to remove meaningful restrictions on abortions performed by doctors.\textsuperscript{15} In 1977, Congress adopted the Hyde Amendment, severely limiting federal funding of Medicaid abortions.\textsuperscript{16} In 1978, North Carolina became the only state in the South to begin a fund for payment of

\begin{itemize}
\item \textsuperscript{8} 347 N.C. at 251, 491 S.E.2d at 537.
\item \textsuperscript{9} Leandro v. North Carolina, 346 NC 336, 488 S.E.2d 249 (1997).
\item \textsuperscript{10} \textit{Rosie J.}, 347 N.C. at 251, 491 S.E.2d at 537.
\item \textsuperscript{11} 448 U.S. 297 (1980).
\item \textsuperscript{12} 432 U.S. 464 (1977).
\item \textsuperscript{13} N.C. Const. Art. I, § 19 (1970).
\item \textsuperscript{14} Rosie J., 347 N.C. at 252, 491 S.E.2d at 538 (Parker, J., dissenting).
\item \textsuperscript{15} Act of May 9, 1967, ch. 367, 1967 N.C. Sess. Laws 394.
\item \textsuperscript{16} 112 Stat. 2681-385, Public Law 105-277, Section 508 and 509, Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act, October 21, 1998 is the current version.
\end{itemize}
elective abortion. This fund for all practical purposes, ended in 1995.\textsuperscript{18}

The plaintiffs in \textit{Rosie J.} were unable to find any basis for their argument that the right to state funded abortions is guaranteed in the North Carolina Constitution. This Article supports the court’s position that there is no state constitutional right to state funding of abortion. It focuses on three areas often neglected by appellate courts. First, this article will look at the legal environment in which the Constitution of 1868 was adopted. As of 1868, the law of North Carolina would have been hostile to a claim of a right to abortion or a right to state funding of abortion. Abortion rights litigants offer several state cases as precedent for their position. Next, this article will demonstrate that many of these cases are not persuasive or are distinguishable. Those few decided on state constitutional grounds include persuasive dissents or are based on logical fallacies. By focusing on state court decisions in favor of their position, abortion rights litigants misdirect the courts from the fact that the great majority of American states do not pay for state funded abortions, except to the very limited extent required by federal law, and have not suffered a known legal challenge on state constitutional grounds. And finally, the history of North Carolina’s State Abortion Fund will be examined along with the term “medically necessary,” often used by courts, in the context of abortion funding.

II. OVERVIEW OF NORTH CAROLINA’S LEGAL HISTORY RELEVANT TO CONSTRUCTION OF THE CONSTITUTION OF 1868

Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption . . . A Court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration.”\textsuperscript{19}

\textsuperscript{17} N.C. Gen. Stat. § 143-23 (1978).


\textsuperscript{19} Perry v. Stancil, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953).
A. North Carolina Criminal Law and Abortion

In 1859, Horatio R. Storer of Boston reported for the Committee on Criminal Abortion of the American Medical Association and obtained unanimous adoption of a resolution condemning the act of procuring abortion at every period of gestation, except as necessary for preserving the life of either mother or child. The reason for the resolution was stated to be the increasing frequency "of such unwarrantable destruction of human life." In 1868, Francis Wharton urged the injustice of the quickening distinction in abortion statutes and argued that the unborn child should be protected regardless of gestational age.

North Carolina did not have an abortion statute at the time, due to the fact that the common law incriminated abortion from the time of conception. In the first hearing of *State v. Slagle*, Judge Ashe held that abortion was a misdemeanor at common law and quoted with approval from Wharton. "It has been said it is not an indictable offense . . . unless the mother is quick with child, though such a distinction, it is submitted, is neither in accordance with the results of medical experience or with the principles of the common law." In the second hearing of *Slagle*, Chief Justice Smith reiterated the prior holding that abortion was a common law misdemeanor and approvingly quoted the following: "The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated."

The common law to which the court made reference in 1880 is:

All such parts of the common law as were heretofore in force and use within this state, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force within this State.

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21. *Id*.
23. 82 N.C. 653 (1880).
24. *Id.* at 655 (quoting 2 Wharton, American Criminal Law §1220, pages 210-211 (6th rev. ed. 1868)).
26. *Id.* at 632.
This law has been held by the North Carolina Supreme Court to be the common law of England as of the signing of the American Declaration of Independence in 1776. When Judge Ashe, in 1880, held that abortion was a crime at common law and Chief Justice Smith in 1880 stated that this was true at “the moment the womb is instinct with life and gestation is begun,” the North Carolina Supreme Court was not purporting to create a new crime, but rather to recognize that abortion was a crime as of 1776.

B. Civil Rights of the Unborn Child in North Carolina

By 1868, North Carolina civil law, in contexts where it would benefit the child, considered the child in esse to be protected from the time of conception. Consider the law of intestate succession, wills, deeds and trusts. As to both realty and personalty, the common law of North Carolina was that the property of an intestate immediately vested in the child en ventre sa mere. In Deal v. Sexton, a partition proceeding had been brought and lands sold thereunder. One of the ancestor’s children, who was en ventre sa mere at the time, was not made a party to the action. The lands were sold to a bona fide purchaser for value who had no knowledge of the existence of the unborn child. In securing the child’s inheritance, the court stated that:

If we hold, as we must, that the inheritance vested immediately in the plaintiff while en ventre sa mere, upon the death of the father, the conclusion must follow that such inheritance ought not to be divested and the child’s estate destroyed by judicial proceedings to which it was in no form or manner a party; and for which not even a guardian ad litem was appointed. It may be that our civil procedure is defective in not providing for such contingencies, but that is no reason why the vested estate of the unborn child in esse should be taken from it. The general rule in this country and the

29. Slagle, 83 N.C. at 632.
30. In esse is defined as “in actual existence, in being.” Black’s Law Dictionary 780 (7th ed. 1999).
31. En ventre sa mere is defined as “in the mother’s womb; refers to an unborn child, usually in the context of a discussion of that child’s rights,” Black’s Law Dictionary 555 (7th ed. 1999); See Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907) (realty); Hill v. Moore, 5 N.C. 233 (1809) (personalty).
32. 144 N.C. 157, 56 S.E. 691 (1907)
33. Id.
34. Id.
acknowledged rule of the English law is that posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him, and for all the beneficial purposes of heirship a child en ventre sa mere is considered absolutely born. This has been the recognized law of this State since Hill v. Moore, 5 NC 233, decided in 1809. . . . . From most remote times the common law of England regarded such child as capable of inheriting direct from the ancestor as much so as if born.35

In Grant v. Bustin,36 it was made clear that only posthumous children en ventre sa mere at the time of death can take by inheritance and those conceived after death but before time for distribution cannot. In Grant, a half-brother of the intestate, born ten and a half months after her death but before distribution, claimed a share along with his older brothers and sisters.37 The court was careful to point out that the half brother did not claim that he was en ventre sa mere at the date of death.38 Therefore, the court held that:

the rule [ ] is that the right to the distributive share vests at the death of the intestate. "It is said the rule is liable to an exception in the case of a child in ventre sa mere. In truth, however, a child in ventre sa mere is held capable of taking a distributive share, because for all beneficial purposes it is in rerum natura, is regarded as actually in esse." [citations omitted] The very reason on which these adjudications are founded shows that one not in being, and not considered as in being at the death of an intestate, can, under the statute of distributions, prefer no claim to a share of that intestate’s estate. It is not stated in this case, nor can we infer from the facts set forth, that Benjamin Bustin was in ventre sa mere at the death of Patience Pitts, and we therefore hold that he was not entitled to the distributive share claimed for him in her personal estate.39

In 1823, the General Assembly enacted a statute that said “[n]o inheritance shall descend to any person, as heir of the person last seized, unless such person shall be in life at the death of the person last seized, or shall be born within ten months after the death of the person last seized.”40 It was not enacted to affect the

35. Id. at 158-9, 56 S.E. at 692.
36. 21 N.C. 77 (1835).
37. Id.
38. Id. at 78.
39. Id. at 77-78.
common law rights of the child of the decedent _en ventre sa mere_ at his death. Its purpose, rather, was to prevent persons conceived long after the death of the person last seized from claiming inheritance as collateral relatives and thus leaving the title in indefinite suspension.  

41 Current North Carolina law states that “[l]ineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him.”  

42 The normal length of pregnancy is 266 days.  

43 By choosing ten lunar months as the cutoff, it is apparent that the legislature wanted first, to provide some certainty as to titles and second, to allow the child who is a collateral relative to take from conception, with some margin of error for the late pregnancy. The child of an intestate who is born more than 10 lunar months after death of the intestate is still able to take by inheritance if he is indeed the child of the intestate. The common law presumption that pregnancy lasts only ten lunar months is a factual presumption, which may be rebutted by evidence to the contrary.

In the case of wills, the common law held that a child, if conceived, could take a vested interest under a devise to “children.” Several cases decided in North Carolina before the 1868 Constitution illustrate this principle.  

45 In _Barringer v. Cowan_, the devise was to “the children of James L. Cowan.”  

46 When the testator died, Cowan had three living children plus one _in ventre sa mere_.  

47 It was held that the afterborn child took a share as a child of Cowan.  

48 In _Flora v. Wilson_, the testator devised lands to his wife during widowhood and, upon her remarriage, to her heirs by consanguinity. No children were born to the testator during his lifetime. However, after his death, his widow remarried and gave birth to a child sired by the testator.  


43. Keith Moore, The Developing Human, 82 (2d ed.1977)  

44. Byerly, 250 N.C. at 35.  

45. Flora v. Wilson, 35 N.C. 344 (1852); Barringer v. Cowan, 55 N.C. 436 (1856); (See also Petway v. Powell, 22 N.C. 308 (1839); Picot v. Armistead, 37 N.C. 226 (1842)).  

46. 55 N.C. 436 (1856).  

47. _Id._ at 437.  

48. _Id._ at 438  

49. _Id._ at 439.  

50. 35 N.C. 344 (1852).  

51. _Id._ at 345.
remarriage, the land vested in the child, *en ventre sa mere*, and, on its death, descended to its heirs *ex parte paterna*.52

In the case of deeds, the situation is more complex. By 1868, the unborn child was capable of taking a vested interest in property by deed from conception. However, a question arose because of the common law requirement that a deed must be delivered in order to be valid. In *Dupree v. Dupree*,53 a conveyance of personal property was executed on January 9, 1817 to “Washington and Lewis Dupree, sons of Robert and Rachel Dupree, and to the next of their heirs lawfully begotten of their bodies.”54 On October 9, 1817, James Dupree was born to Robert and Rachel and claimed an interest in the personal property.55 The court denied his claim, stating that in the case of chattels, actual delivery was necessary.56 While the court recognized that a conveyance under the doctrine of uses or a conveyance by will could be made to an infant *en ventre sa mere* as a thing *in esse*, it puzzled over the status of the unborn as a grantee in a deed.57 The court in *Dupree* realized that an unborn child could take on a use.58 But, it made a distinction between taking property by a common law conveyance and taking it on a use.59

The General Assembly apparently thought little of the arid reasoning in *Dupree*, which would allow an unborn child to take by will, by trust, or by use, but not directly by deed. In 1854, it enacted a remedial statute, which stated that “[a]n infant unborn, but *in esse*, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born.”60 In *Heath v. Heath*,61 the North Carolina Supreme Court recognized that G.S. 41-5 overruled *Dupree* as to unborn children who were conceived at the time of the conveyance. As the ability of the unborn child to take as beneficiary of a passive trust is admitted in *Dupree*, such a child could also have a property

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52. Id. at 346. *Ex parte paterna* is defined as “on the father's side,” Black's Law Dictionary 780 (7th ed. 1999).
53. 45 N.C. 164 (1853).
54. Id. at 166.
55. Id. at 166-67.
56. Id. at 167.
57. Id. at 168-69.
58. Id. at 168.
61. 114 N.C. 547, 19 S.E. 155 (1894).
right as a beneficiary of an active trust. In *Gay v. Baker*, a slave was conveyed to a trustee for the benefit of Elizabeth Gay and her children in common. At the time of the creation of the trust, Elizabeth Gay had given birth to four children. A fifth was born six months afterward, and several more children were born subsequently. The court ruled that the first five children took as tenants in common with their mother, but that those children not even conceived at the time of the creation of the trust took nothing. The court noted that allowing a conveyance of a use in order to allow an unborn but conceived child to take a vested property right was "an indirect adoption of the more humane and practical rule of the civil code, which regarded a child in the womb as already born for all beneficial purposes." From the decisions in these cases, a conclusion can be drawn. For all purposes beneficial to her, the unborn child was protected by the law of North Carolina. By 1868, law and biology had converged and considered the child in the womb to be within the protection of North Carolina law from the time of conception.

III. Original Intent of North Carolina's Constitution

There is no historically relevant argument from the state constitutional provisions that supports a claim for state paid abortions. The North Carolina Constitution says nothing which remotely supports a claim for abortions funded by the state. The North Carolina Constitution provides: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." This provision was originally adopted by the Constitutional Convention of 1868. The origin of Section I of the Declaration of Rights is the original draft of the Declaration of Independence of the United States. It does not seem likely that, in 1776, the founders of the nation were contemplating a constitutional right to state funded abortion. Nor does it seem feasible that the framers of the North Carolina Constitution of 1868

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62. 58 N.C. 344 (1860).
63. *Id.* at 346.
64. *Id.*
65. *Id.* at 347.
66. *Id.*
68. *Id.*
contemplated state funded abortions when they proposed Article I, Section 19, which provides:

No person shall be taken, imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property but by the law of the land. No person should be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or natural origin.69

This provision derives from the Constitution of 1868, but, before that, it was Section 44 of the Constitution of 1776.70 Its origins are rooted in the Magna Carta.71 It does not seem feasible that the Barons72 were asserting a constitutional right to government funded abortions, or any state funded benefit, against King John when they demanded that "[n]o free man shall be taken, imprisoned, or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."73

The plaintiffs in Rosie J., also relied on Article XI, Section 4 of the North Carolina Constitution which states that a "[b]eneficent provision for the poor, the unfortunate, and the orphan, is one of the first duties of a civilized and a Christian state. Therefore, the General Assembly shall provide for and define the duties of a board of public welfare."74 It does not seem likely that the Constitutional Convention of 1868 contemplated that Christian civilization was dependent on the provision of state funded abortions.

These three provisions are of ancient vintage, ranging from the time of the Magna Carta in 1215 A.D. to the Declaration of 1776 and on through the Constitutional Convention of 1868. That the framers of these provisions would have intended a state constitutional right to state funding of abortions challenges the imagination. At the time these provisions were incorporated into our Constitution, abortion was a crime at common law. And, for every purpose beneficial to the unborn child, she had been held to be within the protection of the law as soon as she was conceived. Simply because the United States Supreme Court has subsequently transformed a crime into a protected liberty, and the Gen-

70. U.S. Const. art. I, § 44 (1776).
71. June 15, 1215 A.D. at Runnymede.
73. Magna Carta, Chapter 39 (1215 A.D.).
eral Assembly has conformed its criminal statute G.S. 14-45.1\textsuperscript{75} under the Supremacy Clause, does not change the original intent or the interpretation of these three state constitutional provisions.

IV. SIMILAR HOLDINGS IN OTHER JURISDICTIONS

Several cases argue persuasively against a state constitutional right for state funding of abortion. The decision of the North Carolina Supreme Court in Rosie J. was not unique. In Fischer v. Department of Public Welfare,\textsuperscript{76} the Pennsylvania Supreme Court considered an abortion-funding restriction denying the use of state funds for abortion except where an abortion is necessary to avert the death of the mother and in cases of rape and incest. Justice McDermott, writing for the majority, acknowledged the United States Supreme Court decision in Maher v. Roe,\textsuperscript{77} which held that there was no constitutional requirement for a state to accord equal treatment to both abortion and childbirth, and that it was not unconstitutional for a state to pay for the expenses of childbirth while at the same time refusing to pay for therapeutic abortions.\textsuperscript{78}

The Fischer court noted that in Harris v. McRae,\textsuperscript{79} the United States Supreme Court held that Congress may limit the funding of abortions to life-threatening situations, and that such restriction does not contravene the constitutional rights of those indigent women who seek abortions in less than life-threatening situations.\textsuperscript{80} The United States Supreme Court also held that a state may even enact a statute prohibiting "medically necessary" abortion funding.\textsuperscript{81} Justice McDermott noted that the United States Supreme Court had found the congressional interest in protecting potential life to be a rational basis for the Hyde Amendment, noting that "abortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life."\textsuperscript{82} The Fischer court held that the funding restriction violated none of the provisions of the state constitution including: the "inherent rights of mankind," "no local or

\begin{itemize}
\item \textsuperscript{75} N.C. Gen. Stat. § 14-45.1.
\item \textsuperscript{76} 502 A.2d 114 (Pa. 1985).
\item \textsuperscript{77} 432 U.S. 464 (1977).
\item \textsuperscript{78} Fischer, 502 A.2d at 118 (citing Maher, 432 U.S. at 470).
\item \textsuperscript{79} 448 U.S. 297 (1980).
\item \textsuperscript{80} Fischer, 502 A.2d at 118 (citing Harris, 448 U.S. 297.).
\item \textsuperscript{81} Williams v. Zbaraz, 448 U.S. 358 (1980).
\item \textsuperscript{82} Fischer, 502 A.2d at 120.
\end{itemize}
special law," its "Equal Rights" Amendment, and its "no discrimination" provision. 83

In Doe v. Department of Social Services, 84 the Michigan Supreme Court upheld a state law prohibiting the use of public funds to pay for an abortion unless the abortion is necessary to save the mother's life. 85 The Michigan Court held that the restriction did not violate the Equal Protection clause. The court concluded that:

there is no constitutional obligation on the state to remain neutral regarding abortion any more than there is any obligation on the state to remain neutral regarding the exercise of other fundamental rights. The state has a legitimate interest in protecting potential life, and it has a legitimate interest in promoting childbirth. Equally important, the legislature has a legitimate interest in allocating state benefits in a way that reflects its determination of the public policy of the state. Our constitution does not require that we have a government without values; it requires only that in the pursuit of certain values, our government will not improperly interfere with the exercise of fundamental rights. Because no medical procedure besides abortion involves the deliberate termination of fetal life, and because of the high costs of childbirth and the relatively lower cost of abortion, it is rational for the state to pursue its legitimate interest by paying for childbirth, but not abortion. 86

In concurrence, Justice Levin noted that only 7% of women indicated that concern for their own health contributed to their decision to have an abortion. 87 Of that 7%, only half said that a doctor had told them that "their condition would be made worse by being pregnant." 88 Justice Levin went on to say that:

[i]t therefore appears that an abortion may be medically indicated for less than 4% of the . . . pregnant women . . . Obtaining funds to pay for an abortion may be the least of the obstacles, or, in reality, no substantial obstacle for the relatively few indigent women for whom an abortion is medically indicated . . . Indeed, the entire concept of government neutrality on the abortion/childbirth issue is fallacious. The government must embrace one position or another. It is at least [a] fair argument to say that the govern-

83. Id. at 120-24.
85. Id.
86. Id. at 179 (Levin, J., concurring).
87. Id. at 180-81 (Levin, J., concurring).
88. Id at 181 (Levin, J., concurring).
ment would promote abortion by providing funding, even for a medically indicated abortion. Such funding would offend those who oppose abortion as much as a contrary result offends those who favor choice. In short, there is no middle ground. The decision to promote "choice" is as much an expression of values as a decision to promote childbirth. 89

In *Doe v. Childers*, 90 a Kentucky trial court rejected a right to state-funded abortion. The appeal was dismissed upon joint motion of the parties. Therefore, the North Carolina Supreme Court's decision in *Rosie J.* joins similar decisions in Pennsylvania, Michigan, and Kentucky that rejected the right of an individual to a state funded abortion.

V. CONTRARY HOLDINGS FROM OTHER STATE COURTS ARE DISTINGUISHABLE

Decisions of some state courts that recognize a state constitutional right to state funding of abortion are not persuasive or are distinguishable. The plaintiffs in *Rosie J.* alleged that a majority of state courts had found a state constitutional right to state funded abortion. This is misleading because it does not take into account the great majority of states which, by statute, have severely restricted or prohibited abortion funding, and these restrictions have not been challenged. For example, Virginia prohibits most state abortion funding. State funded abortions are only allowed in cases of rape or incest, which have been reported to a law enforcement or public health agency and in cases where a fetus "will be born with a gross and totally incapacitating physical deformity or with a gross and totally incapacitating mental deficiency". 91 A publication of the abortion industry shows South Carolina, Tennessee and Georgia using zero state dollars for abortion and Virginia only funding 147 abortions in the fiscal Year of 1992. 92

Abortion rights litigants have the ability to pick and choose the states where they file challenges to bans on state abortion funding. However, the great majority of states refuse to provide state abortion funding, and their courts have not been asked to

89. Id at 181-85 (Levin, J., concurring).
91. See Virginia Code Annotated Section 32.1-92.1 and 92.2.
92. Public Funding of Contraceptive Services, 25 Family Planning Perspectives 6 (November/December 1993) (Table 3, Reported Public Expenditures for Abortions).
find a state constitutional right to such funding. One report shows 32 states that restrict abortion funding in ways similar to or more restrictive than North Carolina. This report is consistent with the findings of National Right of Life Committee, Inc.

Several cases find a state constitutional right to funding of abortion only because of prior decisions that there is a state constitutional right to an abortion. The appellate courts of North Carolina have never made such a decision independent of their recognition that, under the Supremacy Clause, there is currently a federal constitutional right to procure an abortion from a doctor. In *Women of Minnesota v. Gomez*, the Minnesota Attorney General conceded a fundamental right to obtain an abortion under the Minnesota Constitution. However, the decision in the Minnesota case was a "narrow one," only holding that there is a state constitutional right for funding for "therapeutic abortions" and not for "abortion on demand." This is an illusory and constitutionally insignificant distinction.

The dissent by Justice Mary Jean Coyne points out the fallacy of arguing for state funding of abortion based on the present legality of abortion. Justice Coyne stated in the dissent that:

[in the present case, the majority promptly abandons all vestige of neutrality. First, the majority frankly extols abortion as a positive good and the cure for all the ills from which a pregnant woman could possibly suffer. Cloaking its discourse in the garb of medical necessity and pregnancy by rape and incest, the majority concludes that the right to decide without fear of criminal complicity to have an abortion is the right to require the state to provide abortion at taxpayer expense.

At bottom, the majority's quarrel is with the political reality: selective funding. Although the magnitude of the national debt may be thought to suggest otherwise, the government cannot fund

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95. 542 N.W.2d 17 (Minn. 1995).
96. *Id.* at 19.
97. *Id.* at 32.
98. See *supra* text accompanying notes 142 - 144.
everything—a proposition with which I presume every member of this Court, as well as every citizen of this state, would agree. Government must be selective. For example, the freedom to engage in interstate travel and to choose in what state one wishes to reside is recognized as a fundamental constitutional right, but even when a homeless Minnesotan whose frostbitten fingers and toes, ears and nose prompt the desire to travel to a warmer clime, to date it has not been suggested that the availability of Minnesota's general assistance by the state declines to fund the purchase of a bus, train, or airplane ticket, or to fill the gasoline tank of the frozen indigent's automobile has impermissibly "coerced" the choice to remain in Minnesota. The right of free speech does not compel the government to purchase a newspaper or publishing house for any citizen who wishes to be a publisher. 100

Justice Coyne next addressed the supposed distinction between therapeutic abortions and abortion on demand.

The repeated references in the majority opinion to health care services and therapeutic abortions suggest an expectation that only abortions necessitated by significant health considerations will be state-funded, an implication articulated in the statement of the holding: "[w]e [i.e., the majority] hold that the state cannot refuse to provide abortion to MA/GAMC eligible women when the procedure is necessary for therapeutic reasons." For two reasons, however, I consider any such expectation doomed to failure. First, there is the practical problem posed by the court's inability to set any standard for determining when an abortion is "necessary for therapeutic reasons." If a woman has decided that she does not want the child and that she does not want to carry it to term, it seems to me more than likely that she will find a physician who will agree that the stress of continuing an unwanted pregnancy justifies an abortion . . . [Second,] . . . [t]hat the limitations the court imposes are less restrictive than those set by the legislature does not alter the fact that if financial considerations can be said to "coerce" a decision in violation of a constitutional right to decide, any restriction of state funding is "coercive" and, therefore, violative of the fundamental right of privacy. 101

In Woman's Health Center of West Virginia, Inc. v. Panepinto, 102 Justice McHugh, in dissent, noted that:

[In fact, the majority's adoption of the "neutrality in funding" principal could have a profound adverse impact on the indigent or

100. Id. at 36 (Coyne, J. dissenting).
101. Id. at 42 (Coyne, J. dissenting).
others who seek government assistance. The frightening effect of the majority’s reasoning will be to chill government aid since it would be virtually impossible financially to fund all competing fundamental rights equally.103

The Panepinto Court relied on two West Virginia constitutional provisions which do not exist in the North Carolina Constitution, the “safety” provision and the “common benefit” provision.104

In Right to Choose v. Byrne,105 the New Jersey Supreme Court relied on an equal protection analysis and held that a right to abortion was a fundamental right under the state constitution.106 North Carolina appellate courts have never so held. The Byrne court distinguished, on state constitutional grounds, the difference between medically necessary abortions and non-therapeutic abortions that do not implicate the health of the mother.107 It then rendered this distinction illusory by placing that determination with the abortionist. “When an abortion is [considered] medically necessary is a decision best made by the patient in consultation with her physician without the complication of deciding if that procedure is required to protect her life but not her health.”108 The Byrne court made this statement notwithstanding its statement that elective non-therapeutic abortions may be excluded.109 It again stated “that the determination of medical necessity [was] the proper province of physicians.”110 Justice Pashman, in a concurring opinion, noted that the majority’s reasoning was equally applicable to a non-therapeutic abortion and found the distinction not of constitutional significance.111

In Moe v. Secretary of Administration,112 Chief Justice Hennessey pointed out in his dissent that the majority recognized the state’s interest in protecting potential life.113 Chief Justice Hennessey noted “that one effective way in which the State can advance this interest, aside from exercising its limited power to

103. Id. at 670 (McHugh, J. dissenting).
104. Id. at 663.
105. 450 A.2d 925 (N.J. 1982).
106. Id. at 934.
107. Id. at 935, n. 6.
108. Id.
109. Id. at 937.
110. Id. at 938.
111. Byrne, 450 A.2d at 942 (Pashman, J., concurring).
113. Id. at 407 (Hennessey, C.J. dissenting).
regulate and prohibit abortion, is to provide disparate funding which favors birth over abortion.”

In Committee to Defend Reproductive Rights v. Myers, the Supreme Court of California noted that, in 1969, it had recognized a state constitutional right to an abortion. North Carolina appellate courts have never so held. In his dissent, Justice Richardson noted that:

[it] cannot assume[d] that the California legislature is less protective of potential life than is the United States Congress. The Legislature also could assume that other women, no longer able to obtain abortions paid for by the taxpayers, might be encouraged before conception to discover and practice more effective birth control methods, thereby reducing to a considerable degree public welfare expenditures. Thus, while the majority compares the cost of abortions with the cost of childbearing . . . it disregards a third “procreative choice” available to the indigent woman who prefers not to bear a child: use of effective contraception . . . A citizen clearly has a constitutional right to travel where and when he pleases. I have never heard it suggested that he is constitutionally entitled to a free trip to the Bahamas paid for from the public treasury. Every citizen has a constitutional right to vote, but he has no constitutional right to a free taxi ride to the polling place.

In New Mexico Right to Choose / NARAL v. Johnson, Attorney General Tom Udall filed an amicus curiae brief arguing against his own state department’s limitation on abortion funding. The trial judge and the New Mexico Supreme Court relied on the New Mexico Equal Rights amendment, which provided “[e]quality of rights under law shall not be denied on account of the sex of any person.” The New Mexico Supreme Court felt that, since Medicare generally covered services which were “medically necessary” for men and women, it was unlawful gender discrimination not to apply the standard of “medical necessity” to abortion. In this, the court succumbed to the logical fallacy known as the “fallacy of the fourth term,” which is assuming that a term used in two differ-

114. Id. (Hennessey, C.J. dissenting).
116. Id at 784.
117. Id at 810 (Richardson, J., dissenting).
119. N.M. Const. art. II, § 18 (This provision is present neither in the U.S. Constitution nor in the North Carolina Constitution).
120. Johnson, 975 P.2d at 855.
ent contexts has an identical meaning. It is clear that, in the context of abortion law, the term “medically necessary” is a term of art, which is not remotely kin to either “medicine” or “necessity.”

The Idaho decision in *Roe v. Harris* is inapposite because the trial court merely struck down a regulation that was inconsistent with an Idaho statute which did provide for abortion funding in cases of danger to health or in cases of rape or incest. The departmental regulation was inconsistent with the statute, and that was enough to support the judgment. On appeal, the appellate court disapproved the rule *in dicta* in an opinion related to attorney fees.

There are four trial court decisions, from Montana, Illinois, Connecticut and Vermont, which required state abortion funding. However, none of the cases were appealed and each of them can be distinguished from the case of *Rosie J.*

The decision of the Montana district court in *Jeannette R. v. Ellery,* is inapposite because it held that an administrative rule violated an enabling statute. The District Court Judge held that “the problem here is that the funding ban operates as a sort of administrative Hyde amendment. The legislature can pass its own Hyde amendment if it wishes; however, it exceeds the power of the Department for it to limit the services provided by the legislature.” The rest of the Montana decision is dictum. The Montana trial court found a state constitutional right to abortion, a finding that the appellate courts of North Carolina have never made.

An Illinois trial court decision, *Doe v. Wright,* is a hand-written one page decision which contains no reasoning whatsoever, therefore it cannot be used as effective precedent. In *Doe v.*

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121. See *supra* text accompanying notes 142 - 144. It is ironic that the New Mexico Court relied on an “Equal Rights Amendment” to support abortion funding. When the Federal Equal Rights Amendment was before the states for ratification, ERA supporters assured lawmakers that the ERA “ha[d] nothing to do with the power of states to stop or regulate abortions, or the right of women to demand abortions.” Thomas I. Emerson and Barbara G. Lifon, *Should the ERA Be Ratified?* 55 Conn. B.J. 227, 232 (June 1981).

122. 917 P.2d 403 (Idaho 1996).

123. *Id.*


125. *Id.* at 14.

126. No. 91 CH 1958, (Ill. Cir. Ct., Cook County, Dec. 2, 1994)
Maher,\(^\text{127}\) the Connecticut trial court appears to base its holding on a state constitutional right to an abortion,\(^\text{128}\) a holding that the appellate courts of North Carolina have never made. The Connecticut court took special pains to note that the existence of Connecticut's Equal Rights Amendment strengthened the plaintiffs' case,\(^\text{129}\) an amendment North Carolina has never adopted.

In *Doe v. Celani*,\(^\text{130}\) the Vermont trial court relied on a specific Vermont constitutional provision which guaranteed the right to "safety." The Constitution of North Carolina does not have such a provision. The Vermont court struck down an administrative rule as contrary to Vermont statute. In contrast, the North Carolina funding prohibition is by direct act of the legislature, not an administrative rule.\(^\text{131}\)

VI. A BRIEF HISTORY OF NORTH CAROLINA'S ABORTION FUNDING

In 1977, James B. Hunt took office as Governor of North Carolina for the first of four terms.\(^\text{132}\) Later in 1977, Congress virtually ended the practice of using federal taxes to pay for medically unnecessary abortions through the Hyde Amendment\(^\text{133}\).

Governor Hunt created a State Abortion Fund\(^\text{134}\), effective February 1, 1978, to pay for medically unnecessary abortions for the first twenty weeks of pregnancy. That spring, the Governor took $250,000 appropriated by the legislature for mental health and used these funds to pay for abortions.\(^\text{135}\) Later, he requested from the General Assembly $1 million per year for taxpayer financed abortions. In 1979, he transferred $303,000 that had been appropriated for rest homes and used that money to pay for medically unnecessary abortions beyond the $1 million the Gen-

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\(^{127}\) 515 A.2d 134 (Conn. 1986).

\(^{128}\) *Id.* at 150.

\(^{129}\) *Id.* at 157.

\(^{130}\) No. S81-84 CnC (Vt. Super. Ct., Chittenden County, May 26, 1986).


\(^{132}\) Governor Hunt served his first two terms from 1977 to 1985, his third term from 1993 to 1997 and as of this writing, he is serving his fourth term, 1997 to 2001.

\(^{133}\) 112 Stat. 2681-385, Public Law 105-277, Section 508 and 509, Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act, October 21, 1998 is the current version.


eral Assembly had appropriated at his request. In 1980, Governor Hunt again needed more than the $1,000,000 the General Assembly had provided. He transferred $367,000 from Aid to Families with Dependent Children for tax paid abortions. In 1981, he again needed to find more money for abortion and again transferred $235,000 from Aid to Families with Dependent Children, which increased the abortion fund to $1,235,000.

James Martin served two terms as governor from 1985 to 1993. During these years, abortion funding fluctuated. Abortion funding was reduced to $924,000 from 1985 until 1989 and then to $424,000 per year from 1989 to 1993. When James B. Hunt took office again as Governor in 1993, abortion spending tripled at his request with yearly totals of $1,212,000.00 until 1995. In 1995, the General Assembly, for all practical purposes, ended state abortion funding and ended North Carolina's seventeen-year history as the only southern state to pay for elective abortions.

Prior to 1985, medically necessary abortions were explicitly not funded by the state. Beginning in 1985 and continuing thereafter until July 1, 1995, a "health impairment exception" was included in the annual appropriations. This exception was so broad as to effectively allow abortion on demand since the sole determinant was the description written by the doctor performing the abortion. The diagnoses that were listed under the exception included a vast majority of indications that are euphemisms for "elective" or non-therapeutic abortion. For example, of the 3233 "health impairment" abortions in the fiscal year of 1987-1988, 1,931 were "non specific"; 208 were for "adjustment reaction"; 156 for "emotional problems"; 239 for "stress reactions".

tions funded by the NC State Abortion Fund since its inception are:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>No. of Abortions</th>
<th>Fiscal Year</th>
<th>No. of Abortions</th>
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These numbers do not include the few abortions paid under the federal Medicaid program. In 1997, public funds paid for 59 abortions involving claims of rape, 2 cases involving incest, and 5 cases involving danger to the life of the mother.145

VII. THE “MEDICALLY NECESSARY” DISTINCTION

The distinction between “medically necessary” and elective abortions is illusory and not of constitutional significance. The North Carolina Supreme Court in Stam v. State146 addresses “medically unnecessary” abortions in the following terms: “[b]y no stretch of the imagination can we consider medically unnecessary abortions as ‘essential to the health and welfare’ of the recipients.”147 “Medically unnecessary” abortions were the type of abortion addressed in the opinion because “medically necessary abortions” were not reimbursable in 1981.148

Despite the change in nomenclature, these are the same type of abortions that abortion rights litigants desire to compel the state to fund. “These women will likely suffer the social and economic costs of compulsory childbirth. . . .” and medical necessity

147. Id. at 360.
includes such concepts as "age," "genetic anomalies" (either "discovered" or "suspected"), the "homeless," "those in abusive relationships," "addicted to drugs or alcohol," "young," or "living in dysfunctional families." 149

In Williams v. Zbaraz, 150 the United States Supreme Court demonstrated that there is no constitutional significance between "medically necessary" abortions and any other type of abortion when dealing with government funding. And the current version of the federal Hyde Amendment contains no exception for "medically necessary" abortion greater in scope than the current North Carolina legislation. 151 The Hyde Amendment provides as follows:

Sec. 508 (a) None of the funds appropriated under this Act and none of the funds in any trust fund to which funds are appropriated under this Act shall be expended for any abortion. (b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion. (c) The term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

Sec. 509 (a) The limitations established in the preceding section shall not apply to an abortion—(1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. (b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds). (c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other

149. Plaintiff's Brief at pages 7-8. It is noteworthy that Rosie J. complained only of severe nausea. It is a fact that every pregnancy that goes to term will either result in serious discomfort and pain or, in the case of a Caesarian section delivery, will result in major surgery. If "medical necessity" for an abortion includes Rosie J.'s nausea it would, a fortiori, encompass all pregnancies.

150. 448 U.S. 358 (1980).

than a State's or locality's contribution of Medicaid matching funds).\textsuperscript{152}

After the Hyde Amendment was passed, some critics of it argued that restricting state abortion funding would increase the number of abortion related complications due to an increase [in the number of women] that resort to illegal abortions. That projection did not materialize. In a natural comparison the Center for Disease Control undertook a review of 600 consecutive hospital charts of women in Texas with abortion related complications that caused them to seek emergency medical care. Texas was one of the then 31 states that ended the use of state funds for abortion.\textsuperscript{153}

However, the argument did not follow. A review showed "no increase after the restriction, compared to the time interval before the restriction, in either the number or proportion of Medicaid or Title XX - eligible women admitted for abortion complication."\textsuperscript{154}

VIII. CRITICISM

While the North Carolina Supreme Court's judgment is sound in \textit{Rosie J.}, one part of the opinion needs to be clarified. The court found there was a legitimate governmental objective of encouraging childbirth.\textsuperscript{155} The individual child who is born to the mother whose abortion is not paid by the state is now alive, and that child's life, protected by Article I, Section 1 of the North Carolina Declaration of Rights, should be a legitimate object of the court's attention. But, whether denial of the tax funds for abortion encourages childbirth in general is doubtful. If a permanent prohibition on state abortion funding is in place, it probably reduces pregnancies sufficiently to offset the number of births avoided.

To the extent that it is known in advance, the cost of obtaining an abortion may also influence the initial decisions regarding sex. The vast increase in abortions following legalization in the early 1970s was associated with a far-smaller reduction in births, indicating (together with direct evidence on sexual prac-

\begin{itemize}
\item \textsuperscript{152} 112 Stat. 2681-385, Public Law 105-277, Section 508 and 509, Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act, October 21, 1998.
\item \textsuperscript{153} Center for Disease Control, \textit{Morbidity and Mortality Weekly Report}, Vol. 29, No. 22, June 6, 1980.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Rosie J.}, 347 N.C. at 251, 491 S.E.2d at 537.
\end{itemize}
...that there was a considerable 'moral hazard' effect from legalization.

...For women who did not want a baby but were willing to abort if pregnant, legalization reduced the expected cost of taking a chance of becoming pregnant. The result was a large increase in unwanted pregnancies.

A number of authors have pointed out a possible paradoxical effect on birth rates. While reducing the cost of abortion reduces the probability of birth given pregnancy, the pregnancy rate may increase by enough to more than compensate. ... Hence the effect of abortion costs on the birth rate is indeterminate.\textsuperscript{156}

**IX. Conclusion**

The North Carolina Supreme Court correctly held that there is no state constitutional right to state funding of abortion. Such a claimed right is contrary to the history of North Carolina law as it related to the unborn child as of 1868. Persuasive authorities from sister states do not recognize such a right. The majority of states do not provide state funding of abortion beyond that provided by North Carolina. The "medically necessary" formulation is illusory and not constitutionally significant.

\textsuperscript{156} Cook, \textit{supra} note 141, at 243, n. 84.