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The Implantation of Rights:  
An Argument for Unconditionally Funded Norplant Removal

Rachel Stephanie Arnow†

"It must be enough to make friends with my body . . . ."1

INTRODUCTION

This article addresses the legal implications of a Medicaid policy that provides unconditional funding for insertion of the Norplant contraceptive implant but sharply restricts the availability of funding for removal. Currently, the state Medicaid plans of all fifty states provide funding for Norplant insertion.2 Three states, however, list documented medical necessity as a prerequisite to funded Norplant removal when requested within five years of implantation.3 Those state policies which incorporate a removal restriction have the potential to place indigent Norplant users in a situation where they are unable to cease contraceptive usage, an effect that raises serious statutory and constitutional questions.

Part I of this article provides general information on the Norplant contraceptive implant and the current funding restrictions in three state Medicaid programs. Part II analyzes the current removal policy against the statutory framework of the Social Security Act and its interpretive regulations. Part III addresses issues arising under the United States Constitution. The article concludes that because of the uniquely invasive nature of the Norplant contraceptive system, applicable statutes, regulations, and constitutional principles should be read to prohibit a state plan from demanding medical necessity as a precondition to removal and require states that fund Norplant implantation to fund removal at the demand of the patient.

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1 HEATHER MCHUGH, Refusal to be Lonely, in DANGERS 84 (1977).
3 See discussion infra part I.
I. THE NORPLANT CONTRACEPTIVE IMPLANT

The recently-developed Norplant system is a long-acting method of reversible contraception for women.4 It consists of six flexible tubes, surgically implanted beneath the skin of the upper arm, which deliver a sustained low dose of levonorgestrel, a synthetic progestin.5 Once absorbed and systemically distributed, the levonorgestrel dosage works to impede fertility by inhibiting the midcycle hormonal surge necessary for ovulation, suppressing the cyclic maturation of the inner layer of the uterus, and thickening the cervical mucus which acts as a barrier to the entry of sperm.6 Effectiveness begins immediately upon insertion and continues for five years or until the device is surgically removed.7 While implanted, the failure rate is approximately equivalent to that of sterilization.8

Numerous side effects are associated with the use of Norplant, the most common being erratic menstrual bleeding. Approximately sixty to seventy percent of users experience significant alteration in bleeding patterns during the first year of use.9 Other side effects include weight gain and increase in appetite, headaches, breast tenderness, ovarian cyst formation, hair loss or hairiness, dermatitis, acne, and hyperpigmentation or scarring over the implantation site.10 Some women may find they experience mood changes, anxiety or nervousness, or depression.11 While in and of themselves these side effects are not considered medically dangerous, they may be extremely burdensome or disturbing for the user. Continued irregular bleeding in particular may be unacceptable to patients of particular religious groups that restrict women’s participation in certain activities during menstruation, to poor patients who may have trouble meeting the expense of purchasing additional sanitary products, or to any woman for whom the bleeding becomes unmanageable or unduly disruptive of life activities.12

Upon its availability, Norplant was immediately embraced by state Medicaid programs.13 It is currently available to income-eligible women in

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6 Id. at 268.
7 Id. at 269, 274.
8 Marian Segal, Norplant: Birth Control at Arm's Reach, FDA CONSUMER, May 1991, at 8, 9-10.
10 Klaisle & Wysocki, supra note 5, at 275-78.
12 See Klaisle & Wysocki, supra note 5, at 273, 275.
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all fifty states.\textsuperscript{14} The cost of Norplant insertion ranges from $500 to $750, which includes the surgical procedure as well as the price of the Norplant tubes; removal costs up to $150 per patient.\textsuperscript{15} In almost every state, Medicaid coverage extends to part or all of the cost of both insertion and removal at the patient’s election.\textsuperscript{16}

The state Medicaid plans in South Dakota, Oklahoma, and South Carolina, however, provide funding for removal prior to the expiration of the implant only in cases of medical necessity.\textsuperscript{17} The South Carolina plan expressly excludes from coverage removal intended to relieve medical side effects,\textsuperscript{18} and the Oklahoma and South Dakota plans expressly exclude removal intended for purposes of terminating contraceptive use.\textsuperscript{19} As stated in a physician’s directive issued by the State of Oklahoma:

\begin{quote}
It is not the intent of this Department to cover removal of the Norplant system prior to the expiration of five years unless there is documented medical necessity. . . . Payment is not intended to be made for the removal of the contraceptive for the convenience of the patient, minor menstrual irregularities, or for the purposes of conception.\textsuperscript{20}
\end{quote}

Except in the unlikely event of documented medical necessity, poor women who obtain Norplant through Medicaid in these three states must endure the presence of the implant and its effects for the full five-year period in order to obtain state-funded removal.

\section*{II. An Analysis of State Norplant Policy Under the Social Security Act and Its Interpretive Regulations}

The Medicaid system of government-subsidized health care for needy individuals was established by Congress in 1965 under Title XIX of the

\textsuperscript{14} Hatcher et al., supra note 2, at 291.
\textsuperscript{17} Memorandum from Linda Waldman, South Dakota State Office of Medicaid Services, to Lin Krust, Native American Women’s Health Education Resource Center (May 5, 1993) [hereinafter South Dakota Memorandum] (on file with author) (“Removal of Norplant is allowed only due to infection or rejection or when determined medically necessary.”); Health and Human Services Finance Commission, State of South Carolina, Medicaid Provider Manual for Physicians, Labs & Other Medical Professionals 200-54 (1993) [hereinafter South Carolina Manual] (“Medicaid will not reimburse for the Norplant removal except for medical complications directly related to the Norplant.”); Letter from Raymond Haddock, Division Administrator for Medical Services, State of Oklahoma Department of Human Services, to physicians (Jan. 20, 1993) [hereinafter Oklahoma Letter] (on file with author) (Medicaid not intended to “cover removal of the Norplant system prior to the expiration of five years unless there is documented medical necessity.”).
\textsuperscript{18} South Carolina Manual, supra note 17, at 200-54 (“Normal side effects related to the Norplant are not considered medical complications and the removal will be denied payment.”).
\textsuperscript{19} South Dakota Memorandum, supra note 17 (“Removal of Norplant is allowed only due to infection or rejection or when determined medically necessary, not . . . for the reversal of the intent of the implant.”); Oklahoma Letter, supra note 17 (no payment for removal intended “for the convenience of the patient, minor menstrual irregularities, or for the purposes of conception.”).
\textsuperscript{20} Oklahoma Letter, supra note 17.
Social Security Act. While it is federally authorized and largely federally funded, Medicaid is independently administered by the fifty states. Title XIX authorizes each state to establish its own program of medical assistance to the needy and allocates federal funds for the partial reimbursement of resulting state expenditures. Participation is voluntary and states are given great freedom to determine the extent of their assistance. In order to be approved for federal reimbursement, however, a state plan must conform with the federal statute and related guidelines. This section evaluates the legitimacy of the state Norplant policy with respect to those requirements.

A. State Imposition of a “Medical Necessity” Standard for Determining Eligibility for the Receipt of Family Planning Services

The removal restriction makes “medical necessity” the prerequisite to funded removal. This necessity standard derives from section 1396 of the federal Medicaid title, which allocates funds to the states for the purpose of furnishing “medical assistance on behalf of families . . . whose income and resources are insufficient to meet the costs of necessary medical services.” This section has been understood by some states to establish medical necessity as the threshold of eligibility, and indeed, necessity has generally been accepted as the standard for coverage of ordinary medical procedures. At least two circuit courts, however, have interpreted the language of the statute more narrowly, reading the “necessary medical services” clause as pertaining to the requisite qualifications for beneficiaries of Title XIX rather than establishing the minimum scope of coverage of services.

The Supreme Court has not resolved this issue, but under either reading, section 1396 goes to the problem of determining the minimum floor for

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24 State discretion is limited insofar as adopted standards must be "reasonable" and "consistent with the objectives of Title XIX." 42 U.S.C. § 1396a(a)(17) (1988 & Supp. V 1993); see also Harris v. McRae, 448 U.S. 297, 301 (1980) ("[O]nce a State elects to participate, it must comply with the requirements of Title XIX.").
26 See, e.g., Pinneke v. Preisser, 623 F.2d 546, 548 n.2 (8th Cir. 1980).
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state coverage. The section says nothing that would preclude states from covering nontherapeutic services at their discretion and certainly nothing that would require such coverage. Indeed, the Supreme Court in *Beal v. Doe* upheld a federally approved Pennsylvania regulation that limited Medicaid funding for abortions to those instances where the procedure was certified by a physician as medically necessary. The Court stated that Title XIX does not prevent a state from excluding “desirable” but “unnecessary” medical services. This language in *Beal* could support the argument that limiting Norplant funding to instances where removal is medically indicated is statutorily permissible.

The language of *Beal* is not necessarily dispositive of the Norplant removal situation, however, because *Beal* involved abortion, a unique medical procedure which has received special attention from Congress. Since 1976, Medicaid funding for abortions has been regulated under the Hyde Amendment, which-withholds federal funding for most abortions, including some that are medically indicated. Because this provision is considered to alter the funding obligations of the states in the special case of abortion, any analogy drawn between the current status of abortion and contraceptive funding is likely to be statutorily unsound.

Moreover, Norplant can be distinguished not only from abortion but from all non-contraceptive services based on specific congressional provisions concerning the distribution of “family planning services.” While section 1396 presumably applies to the federal title as a whole, the statute’s definitional provision furnishes more specific explanations of particular services and their administration. In defining “medical assistance,” the statute designates “family planning services” as one of five categories of medical treatment that must be covered by state plans. According to Congress, “The term ‘medical assistance’ means payment of part or all of the cost of . . . family planning services and supplies furnished . . . to individuals of child-bearing age . . . who are eligible under the State plan and who desire such services and supplies.” The language of this section appears to des-

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29 *Id.* at 444-45.
31 The constitutionality of this amendment has been upheld. *See* Harris v. *McRae*, 448 U.S. 297 (1980); *see also* discussion *infra* part III.A.2.
32 *See* McRae, 448 U.S. at 310.
33 *See* 42 U.S.C. § 1396d(a)(4)(C) (1988 & Supp. V 1993). The argument which follows assumes that Norplant removal falls within the category of “family planning services.” This assumption is largely intuitive but is also based on current state practice. The South Carolina policy, for instance, lists Norplant removal as a distinct service under “Family Planning,” as it does with IUD removal. *South Carolina Manual, supra* note 17, at 200-51, 200-55. While neither the federal Medicaid statute nor its legislative history specify what services are considered family planning, legislative history regarding the passage of the Family Planning Services and Population Research Act of 1970 indicates that identical language was intended to support the “full range of family planning methods.” 1970 U.S.C.C.A.N. 3068, 5074 (emphasis added). Abortion, however, is explicitly excluded. 42 U.S.C. § 300a-6 (1988).
agnate specific prerequisites to coverage in the area of family planning, different from those generally applicable to the statute as a whole.

In *T.H. v. Jones*, a Utah district court asserted that because Congress had undertaken to fully define the class of persons eligible to receive family services, a state plan could not engraft an additional requirement on the federal scheme.\(^{35}\) The district court interpreted the family planning section as establishing two prerequisites to the receipt of those services, income eligibility and voluntariness.\(^{36}\) It therefore struck down a state regulation prohibiting the provision of family planning services to minors in the absence of parental consent.

Under this rationale, the medical necessity prerequisite for Norplant removal here at issue could be considered a state-imposed eligibility requirement, establishing a condition on the provision of services not intended by Congress. The Norplant removal situation may even present an *a fortiori* case to the extent that it not only imposes an additional condition, but one which seems to contradict the federally-articulated conditions by replacing "desirability" with "necessity" as the standard for coverage.

The use of a necessity standard appears particularly inappropriate when one considers the implication of applying such a standard to all family planning services. A necessity policy would theoretically preclude funding for all contraception except in cases where pregnancy would endanger the health of the mother. Not only does such a result clearly contradict the Legislature's intent to make family planning services available to those who desire them, it confounds the ordinary social and medical understanding of the purpose of contraception. As a matter of both statutory construction and common sense, it appears that the standard for Norplant removal should be an individual's desires rather than the state's determination of medical necessity. Even if the Supreme Court were to decide that section 1396 in general permits a state to deny funding for elective procedures, there remains a strong argument that different statutory prerequisites apply to family planning services, which preclude states from placing a necessity constraint on contraceptive treatments such as Norplant removal.

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B. Patient Volition and State Coercion in the Provision of Family Planning Services

The failure to provide funding for Norplant removal upon request might unduly influence patient choice in contravention of the federal statute. As discussed in the previous section, the language of section 1396d(a), which obligates states to supply family planning services to patients “desiring” them, has been interpreted by courts to require patient “voluntariness” in the provision of these services. Because a Norplant recipient presumably requests the implant at the time of insertion for the purpose of long-term contraceptive protection, it may be difficult to argue that her continued use of the device is rendered involuntary by the removal policy. Current Health and Human Services regulations, however, require that a state plan for administering family planning services “provide that each recipient is free from coercion or mental pressure and free to choose the method of family planning to be used.” Thus, a state has affirmative obligations not only to safeguard the quality of a patient’s choice but to protect her from any constraining influence.

Whether the denial of funding for Norplant removal violates this regulation depends on court interpretation of “coercion” and “mental pressure.” The regulation does not define these terms and no judicial standard has been articulated. While the phrase “mental pressure” appears fairly anomalous, the term “coercion” has been used by Congress in connection with family planning services, particularly abortion and sterilization, in areas other than Medicaid funding. United States immigration policy, for instance, has offered asylum to immigrants seeking to avoid coercive government sterilization policies applied on the basis of race, religion, or political membership. Cases arising under this policy involve individuals

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38 As with any other medical procedure, a Norplant recipient will sign a state-drafted informed consent document prior to insertion. Some states will also provide counseling about the nature of the Norplant implant and the state removal policy. See, e.g., Oklahoma Letter, supra note 17 (“When Norplant is the contraceptive of choice, the patient should be counseled regarding its long-term nature.”). Of course, the decision to receive Norplant is strongly influenced by the availability of Medicaid funding for its implantation as well as general family planning counseling offered to patients seeking Medicaid services. For the sake of argument, however, this article assumes that the initial decision is entirely voluntary. See generally Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1446-50 (1989) (discussing normative concepts of coercion and voluntary behavior); Catherine Alhston, The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender, 9 BERKELEY WOMEN'S L.J. 9, 42-43 (1994) (rejecting argument that women who receive Norplant as a condition of probation agree to give up their procreative rights when they choose the implant option over imprisonment).
facing “coercion” in the most vivid sense of the word: government-imposed abortion or sterilization enforced by actual force or restraint.41

The Norplant removal restriction, however, involves financial rather than physical constraint. Federal statutes which refer to financial incentives in discussing coercive family planning practices suggest differing views of financial pressure as a form of coercion. Appropriations to family planning programs under the Foreign Assistance Act of 1974 indicate that no funds are to be used “to coerce or provide any financial incentive to any person to undergo sterilizations.”42 The use of the word “or” would imply that while “financial incentives” are prohibited, they are not equivalent to coercion. On the other hand, the Family Planning Services and Population Research Act of 1970 imposes a penalty on any government employee or program receiving federal funds which “coerces . . . any person to undergo an abortion or sterilization procedure by threatening . . . the loss of . . . any benefit . . . under a program receiving Federal financial assistance.”43 This language clearly implies that a financial constraint, such as the denial of benefits, is actually a means of coercion.

Historical context suggests that the Medicaid regulation prohibiting coercion should be read in a similar manner. In Relf v. Weinberger, the D.C. district court struck down the 1974 sterilization regulations issued by the Department of Health, Education, and Welfare44 on the grounds that they were potentially coercive.45 These regulations allowed situations in which states could impose involuntary sterilization on minors and incompetents.46 Evidence in the record also included documented instances in which consent to sterilization had been elicited from competent low-income adults under the pretext that submission to the operation was a precondition for other services.47 In Relf the D.C. district court not only struck down a

12,711, 55 Fed. Reg. 13,897 (1990). The most recent of these endeavors, a final rule issued by Attorney General William Barr on Jan. 22, 1993, would have conferred refugee status whenever a country’s family planning policy results in “forced abortion or coerced sterilization.” Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1337 n.5 (4th Cir. 1995). The rule never went into effect, however, because it was withdrawn from publication during the 1993 change in administration. 58 Fed. Reg. 6074 (1993). Accordingly, current law does not immediately confer refugee status based solely on an applicant’s opposition to a coercive family planning policy. Instead, applicants acquire that status upon demonstrating that the policy was enforced against them as a result of their race, religion, nationality, or social or political affiliation. Chen Zhou Chai, 48 F.3d 1331 (explaining the legislative history and current standard of proof).

41 See, e.g., Chen Zhou Chai, 48 F.3d at 1334 (petitioner’s wife was arrested by government and forced to undergo an abortion five months into her pregnancy); Guo Chun Di v. Carroll, 842 F. Supp. 858, 862 (E.D.Va. 1994) (after petitioner fled village in response to government notification of required sterilization, government officials confiscated his property and destroyed portions of his home), rev’d, 66 F.3d 315 (4th Cir. 1995).
44 The Department of Health, Education, and Welfare is the former title of the current Department of Health and Human Services.
46 Id. at 1202.
47 Id. at 1199.
regulation allowing for the involuntary sterilization of minors and incompetents, it also rejected regulations concerning the solicitation of consent to sterilization from competent adults because they failed to provide sufficient safeguards against potential coercion by physicians and administrators.\textsuperscript{48} In addition to the requirement of a written consent instrument, the court insisted that patients be verbally assured that their entitlement to benefits could not be affected by a decision to forego sterilization.\textsuperscript{49}

Thus, the \textit{Relf} opinion reflects judicial condemnation not only of forced procedures but also of state policies that economically burden or benefit particular choices. While Norplant is a temporary contraceptive measure which must be distinguished from the permanent loss of reproductive capacity at issue in that opinion, Norplant is essentially a form of temporary sterilization since it cannot be removed by the woman while implanted. The removal policy must therefore be considered in light of the controversial history of permanent sterilization reflected in the \textit{Relf} opinion.\textsuperscript{50}

Even so, the Norplant removal restriction is less forceful than the economic coercion at issue in \textit{Relf}. The state Norplant policy does not deny funding in general or create preconditions to benefits eligibility but merely withholds funding for a particular procedure. Because the current regulation includes "mental pressure" as well as coercion, however, one can assume that policies far subtler than those described in \textit{Relf} would likewise be proscribed. While there is no statutory standard for understanding "mental pressure," the dictionary defines pressure, in the sense used here, as "a constraining influence on the will or mind."\textsuperscript{51} Though the Supreme Court has held that the denial of funds does not necessarily burden the exercise of a constitutional right,\textsuperscript{52} it has acknowledged that funding restrictions are likely to strongly influence and constrain choice.\textsuperscript{53}

Moreover, the presence of physical force suggested by the immigration standard and necessary under a narrow reading of coercion is not entirely absent from the Norplant problem. A Norplant recipient who cannot afford removal is subject to the continued presence of the contraceptive device in her arm at all times, a physical constraint realized through the state's funding of the insertion procedure. Insofar as a woman is unable to actually remove the device of her own volition, she undergoes a form of bodily coercion. Thus, in the Norplant problem, the state's unique ability to influence a woman's choice by financially supporting the physical insertion of

\textsuperscript{48} Id. at 1203.
\textsuperscript{49} Id.
\textsuperscript{50} See discussion infra part III.C.1.
\textsuperscript{51} WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 931 (1988).
\textsuperscript{52} See Harris v. McRae, 448 U.S. 297, 314-18 (1980); see also discussion infra part III.A.2.
\textsuperscript{53} McRae, 448 U.S. at 315 ("[The] unequal subsidization of abortion . . . encourages alternative activity . . . .") (emphasis added); see also Maher v. Roe, 432 U.S. 464, 474 (1977) (conceding that state funding disparities "may have made childbirth a more attractive alternative [than abortion], thereby influencing the woman's decision").
the contraception, coupled with the broad regulations proscribing both
mental pressure and coercion, suggests strongly that the state removal pol-
cy contravenes the federal regulations.

III. AN ANALYSIS OF STATE POLICY UNDER THE
FEDERAL CONSTITUTION

Even if the removal restriction were found to be within statutory con-
straints, it still would have to survive constitutional review. The following
section analyzes the state policy under three approaches to federal constitu-
tional law. These “models” are intended to be neither exhaustive nor mutu-
ally exclusive, but merely represent one way of conceptualizing and
organizing the abundance of constitutional law that may be applied to the
Norplant problem. The first model frames the policy as an interference
with preferred rights to procreative and medical treatment autonomy; the
second frames the policy as a proffered benefit conditioned on the waiver of
preferred rights; and the third frames the policy as a form of unequal treat-
ment based on gender, contraceptive usage, and the exercise of rights.

A. Model I: Interference with Fundamental Rights of Privacy and
Personal Autonomy

The so-called “privacy” rights that are frequently invoked in matters of
family, sexuality, and reproduction have judicially evolved from various
constitutional sources. In Griswold v. Connecticut, the Supreme Court held
that the Constitution’s “penumbra” creates “zones of privacy” which must
be protected against government intrusion.54 Because the idea of a consti-
tutional privacy right is judicially created rather than textually rooted, its
contours are somewhat indeterminate. The areas that have received consti-
tutional protection under this theory, however, have generally been those
involving questions of personal autonomy, including both medical treat-
ment decisions55 and procreative choices.56 To the extent that a state regu-
lation, such as the Norplant funding policy, interferes with either of these
protected areas it will be held unconstitutional unless it satisfies some form
of heightened judicial scrutiny.57 This section will begin by analyzing the

55 See Cruzan v. Missouri Dep’t of Health, 497 U.S. 261, 269 (1990) (observing that “[n]o right is
held more sacred . . . than the right of every individual to the possession and control of his own
person” in recognizing a right to refuse medical treatment (quoting Union Pac. Ry. v. Botsford,
141 U.S. 250, 251 (1891))).
bear or beget a child is at the very heart of this cluster of constitutionally protected choices.”).
57 See, e.g., Griswold, 381 U.S. at 485 (stating that government may not impede protected activity
“by means which sweep unnecessarily broadly” (quoting NAACP v. Alabama, 377 U.S. 288,
307 (1964))); id. at 496 (Goldberg, J., concurring) (suggesting need for a “compelling subordinat-
ing state interest”). See generally 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON
preferred rights applicable to the Norplant problem and will then turn to an
evaluation of interference through two analogous cases.

1. Characterizing the Preferred Rights

The Norplant removal policy potentially implicates two preferred
rights: the right to withdraw medical treatment and the right to procreative
freedom. First, because the Norplant device is surgically implanted and
cannot be removed without medical assistance, a Norplant patient’s ability
to make choices about the use and duration of medical treatment is impaired
by the state’s denial of Medicaid funding. Second, because a woman is
unable to conceive as long as the Norplant device is present in her body, a
Norplant patient’s procreative choice is also restricted by the denial of
funding.

The nature of the constitutional protection for medical treatment deci-
dision-making, and its application to Norplant removal, is fairly unclear. In
Cruzan v. Missouri Department of Health, the Supreme Court articulated
the existence of a constitutional right to refuse medical treatment.\footnote{Cruzan v. Missouri Dep’t of Health, 497 U.S. 261 (1990).}
The Court held that a state could constitutionally limit the ability of a surrogate
decision-maker to demand withdrawal of life-sustaining treatment on behalf
on an incompetent adult.\footnote{Id. at 278-80.} At a minimum, Cruzan appears to recognize an
initial right to refuse a bodily invasive procedure, consistent with the com-
mon law doctrine of informed consent.\footnote{See id. at 269-78. Historically, non-consensual medical treatment was considered a battery. \textit{See} Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault . . . .") \textit{overruled on other grounds by} Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).} If this is the limit of the right,
however, it does little to protect patients seeking Medicaid funding for Nor-
plant removal. Notwithstanding any current desire to remove the device,
the Norplant patient presumably requested its initial implantation and would
therefore be unable to characterize the policy as an unconstitutional bodily
intrusion.\footnote{Where implantation is compelled, as in cases of conditional probation, there is a strong argument
that the policy violates this theory of bodily integrity. \textit{See}, e.g., Janet F. Ginzberg, \textit{Note, Compul-
sory Contraception as a Condition of Probation: The Use and Abuse of Norplant}, 58 \textit{Brooklyn L. Rev.} 979, 1016-17 (1992). Again, this paper will leave aside the argument that the financial
incentives to implantation render the validity of the patient’s initial consent suspect. \textit{See supra} note 38 and accompanying text.}

For the right of medical treatment autonomy to apply to a hypothetical
Norplant patient then, it must protect the right to withdraw treatment as well
as prevent it. It is exactly this aspect of medical treatment that is left
unclear in the Cruzan opinion. The Court assumed for the purposes of
deciding the case that the due process “liberty interest” in refusing treat-
ment would grant a competent patient the “right” to withdraw hydration and
feeding tubes.\(^{62}\) The opinions of the four dissenting Justices and the concurring opinion by Justice O'Connor indicate that at least five Justices believed the right does extend this far,\(^{63}\) and many state courts have definitively recognized a right to withdraw treatment.\(^{64}\) Thus, there is support for a presumption that the Constitution protects withdrawal.

Though the analogy is imperfect, there is a strong argument for asserting that at a minimum a right to withdraw treatment would apply in the Norplant situation. *Cruzan* and related cases are difficult ones because they involve an incompetent patient and life-sustaining treatment. Courts have been more inclined to uphold decision-making rights when the patient is competent and/or the treatment will not prevent death.\(^{65}\) Since the Norplant patient is fully competent and the use of Norplant is purely elective, the extension of a right to withdrawal of treatment does not present the murky ethical issues which complicate the *Cruzan* case.\(^{66}\) In this respect, whatever right may be at stake in the Norplant problem is perhaps more closely akin to the established right to refuse bodily intrusion than assumptions about a constitutional right to withdraw life support.

Whatever complications may arise in clarifying the right to withdraw treatment, it is certain that the constitutional right to procreative freedom does apply to the Norplant problem. As long as the Norplant device is present in the patient’s body, its hormonal discharge continues and the woman is unable to conceive. A right to privacy in procreative decision-making has been expressly embraced. In *Griswold*, the Supreme Court struck down a state law prohibiting the use of contraceptive devices by married couples, holding that the Constitution protects married couples’ decisions related to conception.\(^{67}\) While the rhetoric of this case invoked the privacy of the marital bedroom,\(^{68}\) the Court’s subsequent extension of the doctrine to unmarried persons in *Eisenstadt v. Baird* indicates that the privacy right protects individual reproductive autonomy rather than the literal privacy attached to the marital institution.\(^{69}\) Thus, any Norplant patient could invoke this form of constitutional protection.

Though the specific holdings of both *Griswold* and *Eisenstadt* protect the use of contraception, a right to avoid conception implicitly accepts a

\(^{62}\) See Cruzan, 497 U.S. at 279.

\(^{63}\) See id. at 302 (Brennan, J., dissenting); id. at 331 (Stevens, J., dissenting); id. at 287 (O'Conner, J., concurring).


\(^{65}\) See, e.g., Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978); In re Kathleen Farell, 529 A.2d 404 (N.J. 1987). Cf. Cruzan, 497 U.S. at 279 (expressing hesitation in extending right to refuse treatment due to the “dramatic consequences” of a refusal in such a case).

\(^{66}\) See Cruzan, 497 U.S. at 277 (observing that a “right to die” case presents “perplexing questions with unusually strong moral and ethical overtones”).


\(^{68}\) Id.

corresponding right to conceive. The Court has expressly characterized both facets as a single right to privacy in matters of childbearing. Indeed, the right to procreate has long been recognized by the Court as an essential freedom. As early as 1942, the Supreme Court in \textit{Skinner v. Oklahoma} struck down a state penal law providing for involuntary sterilization as a violation of the equal protection clause. The Court referred to procreation as “one of [our] basic civil rights . . . fundamental to the very existence and survival of the race.” While a prior inconsistent ruling has never been expressly overruled, the language in \textit{Skinner} read in conjunction with the protection afforded in \textit{Griswold} and \textit{Eisenstadt} clearly recognizes the right to conceive a child as basic to human privacy.

Thus, the current funding structure implicates at least one, and possibly two, preferred rights. A Norplant patient who is unable to secure funding for removal is limited in her ability to withdraw medical treatment and her right to choose between contraception and procreation. The fact that a state policy affects a fundamental right, however, does not in itself render the policy unconstitutional. A court must evaluate the policy’s justifications and the extent of the interference in relation to the identified right.

2. Evaluating the Interference

Predicting the outcome of a constitutional evaluation of the state Norplant policy with respect to fundamental rights is extremely difficult. The Supreme Court has been less than consistent in its articulation of the standard to be used in reviewing a potential interference. It has at times required a “discriminately tailored” policy serving a “compelling” state interest, at other times proposed to “‘balanc[e] [the individual’s] liberty interests against the relevant state interests,’” and still more recently, announced that state law must not impose an “undue burden” on the implicated right.

\begin{itemize}
  \item \textit{Carey v. Population Servs. Int'l}, 431 U.S. 678, 688 (1977) (affording protection to use of contraception because “such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing”).
  \item \textit{Buck v. Bell}, 274 U.S. 200 (1927) (permitting the sterilization of individuals not competent to give consent). The social eugenics rationale underlying the opinion as well as the legal significance of the holding itself have been sharply criticized. \textit{See}, \textit{e.g.}, Dorothy E. Roberts, \textit{Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy}, 104 \textit{Harv. L. Rev.} 1419, 1473-76 (1991). Because of the subsequent development of fundamental rights jurisprudence, this case cannot be considered good law. \textit{See generally Rotunda & Nowak, supra} note 57, \S 18.27.
  \item \textit{See id. at 686} (state regulation which burdens right of privacy may be validated by a sufficiently compelling state interest).
  \item \textit{Cruzan}, 497 U.S. at 279 (quoting \textit{Youngberg v. Romeo}, 457 U.S. 307, 321 (1982)).
\end{itemize}
Even a clear standard would be difficult to apply because of the obvious difference in the nature of the interference in the Norplant hypothetical versus that in key procreative freedom and medical treatment cases. The opinions dealing with procreative choice have held unconstitutional state statutes that criminalized the use or sale of contraception. Similarly, courts have confronted the issue of whether an individual may be subject to criminal prosecution for seeking to exercise his or her right to withdraw medical treatment or for assisting another in so doing. By contrast, the interference in the Norplant problem is in the form of a failure to subsidize a right rather than a penalty on its exercise. This is not to suggest that the denial of funds might not in some instances be an absolute obstacle to the exercise of a right, as effective or even more effective than the threat of criminal sanction. Because of the structural difference between the two types of cases, however, it would be somewhat unmeaningful, and perhaps disingenuous, to predict the outcome of the Norplant funding problem by comparing it to the facts of cases involving a government prohibition or affirmative limitation on conduct. There are a few loosely analogous cases, however, in which courts have held that the withholding of funds does not interfere with the exercise of protected rights. This section will focus on those cases, comparing the standards and the reasoning employed, in order to evaluate the constitutionality of the interference in the Norplant case.

In *Austin v. Berryman*, the Fourth Circuit faced a constitutional challenge to a state unemployment compensation policy which withheld compensation from unemployed individuals who had voluntarily terminated their positions. The plaintiff in *Berryman* alleged that she had been forced to leave her job in order to relocate with her husband. She argued that the state’s subsequent denial of benefits interfered with her fundamental right of marriage. The Fourth Circuit disagreed, however, finding that the policy in question did not “directly and substantially” interfere with the plaintiff’s rights.

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80 See *Eisenstadt v. Baird*, 405 U.S. 438, 440-41 (1972) (striking down Massachusetts law making it a crime to provide unmarried individual with contraception); *Griswold*, 381 U.S. at 485 (striking down Connecticut statute making the use of contraception a criminal offense).


82 The act/omission distinction has been largely deconstructed by modern jurisprudence. See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678, 688 (1977) (“[T]he same test must be applied to state regulations that burden an individual’s right . . . by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely.”); see also Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 Harv. L. Rev. 330, 330-35 (1985) (arguing that inalienable rights which involve a capacity dependent on assistance for their exercise give rise to an affirmative governmental obligation); discussion infra part III.B.


84 Id. at 1051.

While the Berryman holding may loosely support the general assumption that a denial of funds does not interfere with implicated rights in a constitutionally significant way, a closer reading reveals several factors which distinguish Berryman from the Norplant problem. A primary distinction rests in the significance of the implicated right. Notwithstanding its constitutional stature, state regulation of marriage and classification by marital status is both popularly and judicially tolerated. This is true not only of state policies that create economic incentives, such as the use of marital status as a basis for withdrawing social security, but also of the criminal regulation of marriage, including state laws that prohibit bigamy and incest. Even where the Court has invoked the fundamental character of marriage as a basis for striking down a state regulation, it has indicated that marital constraints need not always be subject to "rigorous scrutiny." Indeed, in Zablocki v. Redhail, the case cited by the Berryman court for the use of a "direct and substantial" interference test, the Supreme Court appeared to equate its test with an intermediary standard of review. While fundamental rights standards have vacillated, the Zablocki articulation is notably more deferential than the heightened standards that have been applied in the leading procreative rights cases. Even if procreative and medical treatment decisions were afforded the lesser status that has arguably been conferred upon fundamental marital rights, the Berryman case would still not require a finding that the Norplant funding policy is constitutionally sound. While one may argue that the unemployment compensation denial is not a "direct and substantial" interference because it involves the withholding of funds rather than an actual prohibition, there are more profound reasons that support the court's conclusion which would suggest a contrary result in the Norplant problem. One reason the compensation denial may be called indirect is that the potential interference is with the plaintiff's ability to live with her spouse rather than the actual right to marry. In contrast, the Norplant policy touches not on the peripheral aspects of procreative rights, such as the free-

86 See Loving v. Virginia, 388 U.S. 1, 12 (1967).
87 See, e.g., Califano v. Jobst, 434 U.S. 47 (1977) (upholding application of Social Security Act provision that terminated benefits paid to a disabled dependent child of a deceased wage earner upon the child's marriage to an individual not receiving benefits); Lyng v. Castillo, 477 U.S. 635 (1986) (upholding provision of Food Stamp Act that gave lesser benefits to nuclear families than to unrelated persons or extended families comprising a single household).
89 Id. at 386.
90 See id. at 388 (stating that interference with a fundamental right may not be upheld unless "closely tailored" to effectuate "sufficiently important state interests"); see also discussion infra part III.C.2, regarding intermediate scrutiny under equal protection.
91 See, e.g., Carey v. Population Servs. Inst., 431 U.S. 678, 686 (1977) ("[W]here a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn . . . ").
dom to access contraception or obtain pre-natal or child care, but on the very ability of the affected party to conceive and bear a child.

Similarly, the unemployment regulation is indirect because its potential effect on marriage is incidental. The stated policy of the compensation board in *Berryman* was to deny funds to individuals who “left work voluntarily without good cause,” some of whom might leave for marital reasons and some of whom might not. While the stated Norplant standard, “medical necessity,” may likewise exclude both individuals seeking to conceive and individuals desiring removal for other reasons, each and every patient denied funding is impaired in her ability to procreate and withdraw treatment.

Moreover, certain assumptions can be made about the intent of the respective policies. While both expressly deny funding to those asserting protected rights, the Norplant policy is largely motivated by the specific purpose to interfere with procreative ability. While in *Berryman* the state has a general interest in limiting its provision of unemployment compensation, it has no particular interest at stake in a recipient’s choice to live with or apart from her family. On the other hand, where Norplant is concerned, the state has a strong financial interest in actually discouraging procreation among Medicaid-dependent women. Thus, in the latter case, the state regulation is purposefully directed toward limiting a fundamental right.

Finally, the two policies differ in their effect. Central to the holding in *Berryman* was the court’s opinion that the state compensation policy would have virtually no impact on a plaintiff’s decision to exercise her marital rights. The court observed that “[i]t is ‘exceedingly unlikely’ that a spouse would decide . . . not to follow his or her spouse simply because [he or she] would be ineligible to receive unemployment benefits.” On the other hand, the withholding of funds in the Norplant problem will undoubtedly have a significant impact on the patient’s ability to choose and effectuate her ability both to procreate and withdraw treatment. Because the Norplant device is already in her arm, the woman’s choice is constrained by the absence of funding in a way not present in the unemployment case where a

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93 Austin v. Berryman, 862 F.2d 1050, 1051 (4th Cir. 1988).
94 The unemployment policy excludes relocation to join family from its definition of good cause. Berryman, 862 F.2d at 1052. The Norplant policy excludes the desire to conceive from its definition of medical necessity. See supra notes 17-20 and accompanying text. See also discussion infra part III.C.1, regarding equal protection doctrine vis-a-vis fundamental rights.
95 See discussion infra part III.B.
96 According to *Casey*, an undue burden on the exercise of the right to abortion is one that has “the purpose or effect” of placing a substantial obstacle in a woman’s path to exercising her right. Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992) (emphasis added). At least one district court has interpreted this language to mean that a restriction on abortion may be unconstitutional on the basis of its purpose alone. A Woman’s Choice v. Newman, 904 F. Supp. 1434, 1462-66 (S.D. Ind. 1995) (applying this analysis to state law requiring a woman seeking abortion to receive mandatory medical information in person rather than by telephone).
97 Berryman, 862 F.2d at 1055; see also Lyng v. Int’l Union, 485 U.S. 360, 365 (1988) (“[I]n the overwhelming majority of cases [the statute] probably has no effect at all.”) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986)).
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default decision will not result in spouses living apart rather than together. More importantly, an indigent woman will in most cases be unlikely to independently raise the funds necessary for removal, and thus the policy will constitute a real and substantial interference with her protected rights.\footnote{98} Thus, the Berryman case is at least distinguishable and may actually support the finding of a direct and substantial interference in the Norplant problem.

A harder case, with more analogous facts, is presented by the 1980 Supreme Court opinion in \textit{Harris v. McRae}.ootnote{99} In \textit{McRae}, the Supreme Court faced a statutory and constitutional challenge to the Hyde Amendment, a yearly Medicaid rider which prohibits the expenditure of federal funds for abortions not necessary to save the life of the mother or to terminate a pregnancy resulting from rape or incest.\footnote{100} After finding that the states have no independent statutory obligation to fund the federally excluded abortions,\footnote{101} the Court addressed the constitutional claims, holding that the government’s failure to provide Medicaid funding for abortions does not unconstitutionally impinge upon a woman’s due process right to choose.\footnote{102}

Unlike the Berryman case, \textit{McRae} arises within the Medicaid system and involves a direct and intentional withholding of funds necessary for the exercise of a fundamental right. Thus, \textit{McRae} appears to present stronger support for the claim that the state Norplant funding policy is constitutionally firm. The opinion, however, has been widely criticized on theoretical grounds.\footnote{103} The logic underlying \textit{McRae}, and indeed any decision which tolerates a funding exclusion, rests on the belief that the restriction does not pose an actual restraint on the exercise of the implicated right. According to the \textit{McRae} Court, the abortion funding policy “place[d] no obstacles—absolute or otherwise—in the pregnant woman’s path to an abortion.”\footnote{104} In the Court’s eyes, the only impediment to the woman’s effectuation of her protected choice was her own inability to afford a private abortion.

This logistic approach overemphasizes the largely theoretical distinction between act and omission and fails to recognize the real behavior that affects a woman’s inability to choose abortion. Insofar as Congress actively singles out a particular procedure to be treated differently from other funded

\footnote{98} Because of the relative novelty of the Norplant removal policy and the unwillingness of state Medicaid agencies to discuss their denial of removal claims, there is no statistical information available yet to support this assumption. The Supreme Court has conceded, however, in its decisions upholding the denial of abortion funding, that the failure to provide such funds may completely compromise a woman’s ability to obtain an abortion. \textit{See}, e.g., \textit{Maher v. Roe}, 432 U.S. 464, 474 (1977).


\footnote{101} \textit{McRae}, 448 U.S. at 307-11.

\footnote{102} \textit{See id.} at 318.

\footnote{103} \textit{See, e.g.}, \textit{Tribe, supra} note 82, at 336-40.

\footnote{104} \textit{McRae}, 448 U.S. at 314, (quoting \textit{Maher v. Roe}, 432 U.S. 464, 474 (1977)).
services, it is affirmatively acting to restrict access to that procedure. This is especially true given the vastly more expensive appropriations made in support of alternative services, such as pre-natal care and childbirth. Arguably, an indigent woman’s ability to exercise her constitutionally protected choice results directly from the government’s affirmative decision not to fund abortions while subsidizing the alternatives.

Similarly, the Norplant policy may be framed as an affirmative government choice to provide and encourage contraceptive use while withholding support from those seeking to end such treatment. This is particularly so, given that the removal restriction eliminates funding for the same procedure that is funded after five years of contraceptive use. It is thus nearly impossible to equate the restriction with a supposedly neutral decision to fund one procedure and not another.

Notwithstanding the theoretical limitations of the McRae opinion, its holding is consistent with a series of cases limiting the right articulated in Roe v. Wade and culminating with the decision in Planned Parenthood v. Casey. Since this treatment of abortion is unlikely to change, it is necessary to accept the McRae holding and its potential applicability to the Norplant problem.

As with Berryman, however, there are several factors which distinguish the abortion funding situation. There is again an important distinction in the legal treatment of the infringed right. The standard applicable to abortion regulations is even more deferential than those applied to marital rights and, consequently, rights pertaining to procreation and medical treatment as implicated in the Norplant problem. In upholding the abortion

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105 See Tribe, supra note 82, at 336.
106 Justice Stevens noted in dissent that an Illinois district court had determined that the average cost of an abortion to the State of Illinois was less than $150 as compared to the cost of a childbirth which averaged more than $1,350. McRae, 448 U.S. at 355 n.9 (Stevens, J., dissenting). Justice Stevens likened the failure to fund abortions to an affirmative expenditure of millions of dollars for the purpose of thwarting the exercise of a constitutional right. Id. at 356.
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funding exclusion, the *McRae* court adopted the "unduly burdensome" language coined in its previous abortion funding decision, *Maher v. Roe*.\(^{109}\) The Court did not evaluate the fit between the government regulation and the interests it intended to support or balance the interests of the government against those of the affected individuals as it has done in contraceptive decisions and medical treatment cases, respectively.\(^{110}\) More importantly, it is impossible not to account for the deep moral significance of abortion in defining the contours of a legal right to choose and selecting the appropriate standard for its review. As the *Casey* Court disclaimed, "Abortion is a unique act."\(^{111}\) While the preservation of life presents one of the most compelling state interests,\(^{112}\) the Supreme Court has stated that state contraceptive policies do not implicate that interest.\(^{113}\) On this basis, the Court in *Casey* upheld certain restrictions on a woman's freedom to choose abortion, while expressly reaffirming the more expansive constitutional protection afforded to procreative liberty and general privacy rights from which the abortion right derives.\(^{114}\)

Even if the removal restriction were evaluated under the precise framework utilized in *McRae*, it is still likely to be found unconstitutional. The recurring theme in the *McRae* opinion is that a denial of federal funding leaves an indigent woman no worse off than she would be in the absence of government benefits: "Although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."\(^{115}\) According to the Court, the government does not cause the woman's indigency or her pregnancy and therefore has no responsibility to assist the woman in terminating her condition. With Norplant, however, the government's provision of benefits does help create the "obstacle" to the exercise of rights in a very real sense. Not only does the state establish funding incentives that affect the woman's ability to afford differing options, it provides for the implantation of the contraceptive device that ultimately prevents her from exercising her protected choice. Government services thus directly cause the woman's physical condition. The logic of *McRae* does not apply in the Norplant removal context, because the absence of funding does not leave an indigent woman with "at least the same range of choice in deciding whether to obtain [the restricted

\(^{109}\) *McRae*, 448 U.S. at 314.

\(^{110}\) See [supra notes 77-79 and accompanying text.](#)

\(^{111}\) *Casey*, 505 U.S. at 852.

\(^{112}\) The interests generally recognized by the Court as "compelling" are those pertaining to health, safety, and protection of life. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 690 (1977) (citing *Roe v. Wade*, 410 U.S. 113, 154 (1973)).

\(^{113}\) See id.


\(^{115}\) *McRae*, 448 U.S. at 316; cf. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (holding that the government has no affirmative due process obligation to protect an individual against private dangers which the government had no part in creating).
service] as she would have had if Congress had chosen to subsidize no health care costs at all."

Through its Norplant policy the state supports an invasive medical procedure resulting in an altered bodily condition that restrains a woman's liberty in a physical sense. Under the exact logic of *McRae*, this type of intrusion by the government must be read as creating an affirmative obligation to support the patient's request to terminate treatment.

**B. Model II: A Government-Solicited Waiver of Rights**

One anticipated criticism of the preceding argument is that it fails to take into account the fact that Norplant patients are informed of the limitations on removal prior to their receipt of the implant. Such a critique essentially argues that women who accept Norplant agree to waive their rights to medical treatment and procreative autonomy for the five year duration of the treatment. Granting that the initial insertion is in fact consensual, however, any "waiver" of rights must itself be scrutinized through the framework of unconstitutional conditions.

The unconstitutional conditions doctrine adopts the principle that government should not be permitted to use indirect means to achieve that which it could not effectuate directly. As applied in the context of government subsidies, this means that the government cannot solicit the surrender of a protected right through the promise of a benefit which it will otherwise withhold. The existence of an unconstitutional conditions problem depends therefore on the interaction between a right and a benefit. In the Norplant problem the affected right is that of bodily autonomy in medical and procreative decision-making, and the proffered benefit is funding for Norplant removal. Because the government provides removal funding for those who agree to forego the exercise of these rights for five years, the policy appears to run afoul of the doctrine.

The analysis is complicated, however, by the somewhat inconsistent treatment of conditions problems by the Supreme Court, a result which may reflect theoretical inconsistencies in the doctrine itself. Clearly the government is not required to subsidize everything in the private marketplace; it must have leeway to selectively allocate public funds. This rationale supports the conclusion that the government may decline to subsidize abortions in the funding cases previously discussed. It has likewise

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117 *Cf. Deshkey*, 489 U.S. at 200 ("[An] affirmative duty . . . arises . . . from the limitation which [the government] has imposed on [the individual's] freedom to act on his own behalf.").
119 See *Sullivan*, *supra* note 38, at 1421-28 (identifying the components of an unconstitutional conditions problem).
120 See discussion *infra* note III.A.1.
121 See *generally* *Sullivan*, *supra* note 38, at 1416-17.
122 See *Tribe*, *supra* note 82, at 334.
been applied under the unconstitutional conditions model in evaluating the allocation of public health care funds on the condition that they not be used for abortion counseling or referral services. In *Rust v. Sullivan*, the Court rejected the argument that the allocation of a Title X grant with these constraints unconstitutionally conditioned the receipt of funds on the recipient medical providers’ waiver of First Amendment speech rights. The Court observed that the imposed condition did not require the providers to sacrifice their ability to counsel about abortion in general, but merely designated that the Title X grant could not be used for those purposes. Recognizing Congress’ discretionary funding power, the Court opined, “[H]ere the government is not denying a benefit . . . but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”

Following the reasoning in *Rust*, the Norplant policy arguably represents a constitutionally sound choice to favor contraception over procreation. The policy funds the former and not the latter, but does not prevent a recipient from pursuing her right to procreate with non-public funds. This characterization, however, oversimplifies the problem and disregards a significant structural difference between the Norplant policy and the *Rust* regulation that requires different legal outcomes in the two cases. Unlike the regulation in *Rust* which may be said to implement a valid legislative decision to decline funding for a certain service, the Norplant policy specifically authorizes the State to withhold or confer support for the same service conditional on an individual’s exercise of a protected right. The Norplant policy does not exclude the removal procedure from funding; rather, it explicitly promises a woman the benefit of funded removal, but only if she accepts the five-year sacrifice of her procreative freedom. Thus, the condition entices the concession of control from the rightholder to the government through the threat of differential treatment.

In this respect, the Norplant funding distinction cannot be dismissed as a mere “policy choice” like that in *Rust*. Indeed it follows the model of unconstitutional conditions exhibited in Supreme Court cases striking down the allocation of funds contingent on an individual’s sacrifice of religious principles. In *Sherbert v. Verner*, for instance, the Court held unconstitutional a state’s denial of unemployment compensation to an individual who, on the basis of her religion, had declined an offer of employment that required her to work on Saturdays. The Court found that the state policy forced the plaintiff to choose between following the precepts of her religion

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124 *Id.* at 196.
125 *Id.*
126 See *Sullivan*, supra note 38, at 1489-99 (proposing that the harm of unconstitutional conditions lies in their effective redistribution of rights between and among government and individuals) David S. Cole, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 Tex. L. Rev. 189 (1992) (applying a similar approach in finding constitutional the imposition of welfare incentives for Norplant implantation).
and receiving benefits for which she would otherwise be eligible. Following the same reasoning, the Court in *Thomas v. Review Board* held unconstitutional the denial of compensation where the plaintiff, on religious grounds, voluntarily left a job that involved the production of weapons parts. In neither case could the condition be excused as a legitimate directive on the use of earmarked public funds. Both in the Norplant problem and in the religious freedom cases, the government essentially penalizes certain individuals by denying them the benefit they would otherwise provide based on their desire to exercise protected rights.

Identifying the suspect conditioning of a right, however, does not end the matter. Once an unconstitutional conditions problem is established, a court must evaluate whether the condition may be justified as a narrowly-tailored means of achieving a compelling state interest. As discussed earlier, the state Norplant policy does not reflect the compelling concern for the preservation of life and safety that abortion regulations embody. Any interest that the state might assert in its Norplant policy would merely be financial. The state may try to claim its policy is designed to avoid the cost of unnecessary insertion and removal or point to the state’s financial interest in preventing the birth of dependent children. Administrative and financial interests, however, have been specifically rejected as insufficiently compelling to sustain an otherwise unconstitutional condition.

Furthermore, it is not clear that the asserted interests can be substantiated by the state, and certainly some of the state’s concerns could be addressed by means less constitutionally offensive than a conditioned waiver of rights. The state cannot assert a legitimate interest in saving removal costs since the state will pay the same cost for the medically necessary removal upon the expiration of the device. A state interest in safeguarding its initial investment in the cost of Norplant insertion is plausible but nebulous, for clearly a five-year commitment to maintaining the implant is not necessary for the state’s investment to be considerably worthwhile. The state’s interest in encouraging contraception is satisfied to some extent as long as the patient maintains the device for some minimum amount of time. Moreover, the state could seek to avoid what it may perceive as “wasteful” insertion by less intrusive means, such as more intensive counselling concerning the intent of the Norplant implant and more thorough screening of potential users.

The state’s one substantial and legitimate financial interest is, of course, in preventing the birth of children who will be dependent upon public assistance. This is an interest reflected not in the conditioning of removal per se, but in the state’s entire Norplant and family planning pol-

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128 *Id.* at 404.
130 See *Sherbert*, 374 U.S. at 406; *Thomas*, 450 U.S. at 718.
131 See discussion *infra* part III.A.2.
132 See *Thomas*, 450 U.S. at 718-19.
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icy. But while it is an interest that cannot be gainsaid, it is not one that requires the conditioned waiver of procreative and medical treatment rights or the continued use of a bodily invasive method of contraception. The state may satisfy its interest in avoiding further expenditure for dependent children by zealously promoting other forms of contraception upon the removal of Norplant and providing more extensive family planning counseling in general.

Of course, alternative forms of contraception would not serve these state interests as effectively as would the continued use of Norplant, which is actually inserted into the body. Yet policies regarding Norplant must be subjected to careful constitutional scrutiny precisely for this reason. A woman who is asked to “waive her rights” in accepting Norplant must subject herself to the presence of a foreign object within her body which she is powerless to remove. In this respect, the Norplant problem is a stronger case than Thomas and Sherbert. While these cases involved the somewhat abstract concept of religious freedom, the Norplant problem presents the very tangible right of bodily autonomy. The special protection society attributes to the integrity of the human body is illustrated in the intersection of legal and popular culture. Society’s condemnation of prostitution, surrogacy agreements, and organ sales all exemplify our deep aversion to the purchase and sale of the human body even amongst private actors. A doctrine which maintains that individuals cannot waive their liberty interests averts the commodification of otherwise inalienable rights. It would be entirely inconsistent with existing legal doctrine and moral sentiments to allow a government actor to coerce the “sale” of the bodily rights we treat with particular deference and sanctity.

C. Model III: The Unequal Treatment of Individuals Based Upon Impermissible Classifications

The application of a condition to a woman’s receipt of funded Norplant removal may also be characterized as a form of differential treatment,
based on either: (1) exercise of fundamental rights; (2) gender; or (3) choice of contraceptive form. Under the doctrine of equal protection the classification and unequal treatment of groups of individuals must be scrutinized to determine the underlying state purpose and the fit between the purpose and the policy.\(^{136}\) Whether the policy will be held constitutional depends on the rigor of judicial scrutiny applied as determined by the type of classification at issue.\(^{137}\) This section will evaluate each type of classification under the requisite level of constitutional scrutiny.

1. The Classification of Individuals Based on Their Exercise of Fundamental Rights

The Norplant policy provides funding for removal for those women who choose contraception while withholding it from those who wish to procreate, thereby discriminating on the basis of a constitutionally protected right. In such a situation, the policy at issue will be found unconstitutional if it cannot withstand strict judicial scrutiny.\(^{138}\) As discussed previously, this analysis involves an evaluation of the constitutional treatment of the rights at stake and an accounting of the state's means and interests.\(^{139}\)

The Norplant policy may be particularly vulnerable under the equal protection fundamental rights model because of its factual similarity to *Skinner v. Oklahoma,*\(^{140}\) the initial Supreme Court articulation of this constitutional approach. In *Skinner,* the Court struck down a state law that imposed sterilization on habitual criminals who had committed "crimes of moral turpitude," but expressly exempted embezzlers from penalty. The significance of procreation figured strongly in the Court's opinion: "We are dealing here with legislation which involves one of [our] basic civil rights . . . fundamental to the very existence and survival of the race."\(^{141}\) It would be anomalous for the Court in the Norplant problem to not demonstrate equal deference to the very rights whose fundamental character prompted the generation of a new jurisprudential approach to suspect classifications.

More importantly, however, the *Skinner* opinion reflects concerns about the unequal treatment of a disadvantaged class. In applying the penalty of sterilization, the Oklahoma law distinguished between white-collar criminals and individuals committing petty crimes often associated with a particular class or minority group.\(^{142}\) A concern that the strict penalty imposed by the state law could be unfairly wielded by the powerful against the powerless fueled the Court's decision: "In evil or reckless hands [the

\(^{136}\) See generally *Rotunda & Nowak,* supra note 57, § 18.3.

\(^{137}\) See id.


\(^{139}\) See discussion supra parts III.A.1. and III.B.

\(^{140}\) *Skinner,* 316 U.S. 535.

\(^{141}\) Id. at 541.

\(^{142}\) The petitioner in *Skinner* had been convicted, among other things, of "the crime of stealing chickens." Id. at 537.
power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear.\textsuperscript{143} The Norplant problem raises a similar specter. It cannot be overlooked that the burden of continued Norplant use will fall exclusively on the politically powerless: those who are needy and dependent, many of whom are members of minority groups.\textsuperscript{144} The dangers of population control techniques as applied to minority group members, to the poor, and to the mentally incompetent have been exhibited by our society's shameful history of eugenic sterilization.\textsuperscript{145} Striking down the 1974 Medicaid regulations concerning sterilization, the court in \textit{Relf v. Weinberger} noted, "The dividing line between family planning and eugenics is murky."\textsuperscript{146} To the extent that the Norplant policy further blurs that tenuous line it would be highly unlikely to survive strict judicial scrutiny.

2. \textbf{Classification by Gender}

The Norplant policy can also be framed as a gender classification: because Norplant is available only to women, women alone are burdened by the funding restriction and the difficulties ensuing from unwanted Norplant use. Of all the models advanced thus far, this approach may be one of the hardest to sustain under current jurisprudence.

The Norplant policy does not actually mention women and may therefore be able to escape scrutiny as a neutral classification which distinguishes according to Norplant use rather than on the basis of gender. Under this rationale, it would be irrelevant that women alone suffer from the policy because there is no comparable treatment available to men which is more generously funded.\textsuperscript{147} For example, the Supreme Court has expressly declined to recognize pregnancy discrimination as gender discrimination. In \textit{Geduldig v. Aiello}, the Court held that a state disability insurance policy which excluded pregnancy from coverage did not present an equal protection issue.\textsuperscript{148} The Court characterized the policy as discriminating, not on

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\item \textsuperscript{143} Id. at 541.
\item \textsuperscript{144} See Harris v. McRae, 448 U.S. 297, 332 (1980) (Brennan, J., dissenting) (observing that the Medicaid funding limitation was particularly invidious because it burdened those least able to protect their rights due to poverty and political weakness); id. at 343 (Marshall, J., dissenting) (noting that indigent women are disproportionately members of minority groups).
\item \textsuperscript{145} See, e.g., Buck v. Bell, 274 U.S. 200, 207 (1927) (sanctioning the nonconsensual sterilization of a "feeble-minded" woman, asserting that "three generations of imbeciles are enough"); Roberts, \textit{supra} note 73, at 1422-24 (discussing the disproportionate sterilization of African-American women); see also Albiston, \textit{supra} note 38, at 16-20 (discussing the disproportionate use of Norplant as a condition of probation for poor women of color as a result of historical stereotypes); discussion \textit{infra} part II.B, regarding coercion.
\item \textsuperscript{146} Relf v. Weinberger, 372 F. Supp. 1196, 1204 (D.C. Cir. 1974).
\item \textsuperscript{147} While reverse vasectomies are not funded under at least one state policy, this exclusion does not support the premise that men and women are equally treated with respect to termination of contraception. Vasectomies are intended as a permanent form of sterilization whereas the Norplant system not only contemplates termination of use but requires physical removal. Reverse vasectomies are more aptly compared with reverse tubal ligation, a procedure also excluded under the state plan.
\item \textsuperscript{148} Geduldig v. Aiello, 417 U.S. 484 (1974).
\end{itemize}
the basis of gender, but according to the condition of pregnancy.149 Because the category of "non-pregnant persons" included both men and women, the policy was considered gender-neutral; it apparently did not matter to the Court's decision that women alone comprised the category of "pregnant persons," the group burdened by the state policy.

Under the Geduldig approach, the state Norplant policy would be immune from equal protection scrutiny because it distinguishes between Norplant users, all of whom are women, and non-users, a group including both men and women. The absurdity of this formalistic approach, however, is painfully apparent, and criticism of the Geduldig opinion has "become a cottage industry."150 While feminists are split as to whether and how much the law should accommodate gender differences, the thrust of this backlash is that the Court's deference to "real differences" conflates biological characteristics and sexual stereotyping, thus erasing the possibility of true reproductive equality.151 It has been suggested by some that any biology-based categorization should be treated per se as an equality issue by the courts.152

While the Supreme Court has not yet embraced this perspective, it has shown a slight retreat from the Geduldig position in its Title VII153 opinions. Although Geduldig was initially applied to foreclose a Title VII pregnancy discrimination challenge in General Electric Co. v. Gilbert,154 this holding was superseded by Congressional passage of the Pregnancy Discrimination Act.155 Since then, the Court has conceded the significance of pregnancy discrimination as a form of facial gender discrimination.156 The Court has also shown less lenience toward the use of "real differences" in certain areas when used as the basis for classification under Title VII. It has on two occasions struck down pension policies that distinguish between men and women because of women's greater life expectancy, reflecting at least a partial recognition that even accurate biological differences must not be used to disadvantage women as individuals.157 While these small steps in no way promise that today's Court would entirely reject the significance of Geduldig in the constitutional arena, they at least suggest that the Court might be receptive to the idea that the Norplant policy is gender-based, a possibility additionally enhanced by the appointment of Justice Ruth Bader

149 Id. at 496-97 n.20.
150 Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 983 (1984) (cata-
loguing the multitude of commentaries criticizing the opinion).
151 Id. at 988; see also Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment/ Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1983-84).
152 See, e.g., Law, supra note 150, at 1008-09.
153 Title VII of the Civil Rights Act prohibits discriminatory employment practices. 42 U.S.C.
§ 2000e(k) (1988)) (amending Title VII to include discriminatory treatment based on pregnancy or childbirth as a form of sex discrimination).
Ginsburg, a strong supporter of the equal protection approach to reproductive differences.\textsuperscript{158} If the Norplant policy were recognized as a gender-based classification, it would be subjected to intermediate scrutiny, a highly flexible standard of review. Intermediate scrutiny requires that the policy in question be substantially related to the achievement of an important government objective.\textsuperscript{159} While this test is less stringent than the standards applicable to the fundamental rights and unconstitutional conditions approaches, it does not dictate that a court find the Norplant policy constitutional within the gender discrimination model. Indeed, because the intermediate review standard is largely a contrived stopping point between strict scrutiny and deferential review, it lends itself to ad hoc interpretation and its results are highly unpredictable.\textsuperscript{160}

It is unclear whether the government’s objectives with respect to the Norplant policy will pass the intermediate scrutiny test, or whether courts will even apply this standard of review. Certainly, reasons of administrative convenience will be insufficient to withstand intermediate constitutional scrutiny.\textsuperscript{161} However, the Norplant policy is based on financial concerns, at least some of which are legitimate.\textsuperscript{162} Cost effectiveness and financial stability were held to be a sufficient basis for the state’s exclusion of pregnancy from its insurance policy in \textit{Geduldig}. But because the Court failed to recognize the policy’s gender implications in that case, it applied the rationality test associated with regulations not touching upon suspect classes.\textsuperscript{163} In \textit{Michael M. v. Superior Court}, the Court recognized a state’s financial interest in preventing illegitimate teenage pregnancy in upholding a statutory rape law that punished males but not females.\textsuperscript{164} In \textit{Michael M.}, however, the Court again declined to apply intermediate scrutiny, excusing the admittedly gender-based classification for reasons of protectionism.\textsuperscript{165} Moreover, in \textit{Michael M.} the state’s financial interests were coupled with, if not overshadowed by, its interests in the health and safety of pregnant teenagers. The Court gave particular attention to the concern that teenage pregnancies end disproportionately in abortion,\textsuperscript{166} thereby invoking the quintessential state interest in protecting life.\textsuperscript{167}

\textsuperscript{159} Craig v. Boren, 429 U.S. 190, 197 (1976).
\textsuperscript{160} \textit{Rotunda & Nowak, supra} note 57, § 18.23.
\textsuperscript{161} See, e.g., \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).
\textsuperscript{162} See discussion \textit{supra} part III.B.
\textsuperscript{163} \textit{Geduldig v. Aiello}, 417 U.S. 484, 494-97 (1974); see also discussion \textit{infra} part III.C.3.
\textsuperscript{165} \textit{Id.} at 469 (observing that "a legislature may 'provide for the special problems of women' ") (quoting \textit{Weinberger v. Wiesenfeld}, 420 U.S. 636, 653 (1975)).
\textsuperscript{166} \textit{Id.} at 470-71.
\textsuperscript{167} See Craig v. Boren, 429 U.S. 190, 199-202 (1976) (accepting the legitimacy of the state’s interest in traffic safety in articulating the intermediate review standard for gender classifications).
Perhaps where judicial precedent and the identification of a particular standard is so indeterminate, a close analysis of the relevant facts of the problem and their differential effects on women is particularly helpful. At its heart, *Geduldig* is an insurance case; it deals with government treatment of risk and its aggregate distribution between the genders.\(^{168}\) In contrast, the Norplant problem involves a real and present harm that physically restrains the woman affected. Both the intrusiveness of the Norplant device and the bodily constraints that it imposes should receive special attention within the equal protection model. The *Geduldig* approach demonstrates how gender inequality often derives from and is perpetuated by biological differences. The Norplant problem is a fitting example of how a facially neutral state policy may manipulate women's physical differences to halt their reproductive abilities while no restraints are imposed on males. Moreover, because the Norplant technology requires surgical removal, it further disadvantages women by placing them in a position of dependence.\(^{169}\) The Norplant policy terminates women's procreative abilities as a result of their biological vulnerability and then leaves them to rely on the benevolence of professionals to restore their normal physical state.

3. **Classification According to the Form of Contraception**

A final way in which the state policy classifies individuals for differential treatment is according to their choice of contraceptive. At least one state which requires medical necessity for Norplant removal poses no conditions on the removal of an intrauterine device ("IUD").\(^{170}\) State policies which distinguish between individuals for reasons other than a suspect characteristic or the exercise of a fundamental right, however, are not subject to heightened scrutiny and need only withstand a rationality test. This type of moderate review merely requires that the proposed policy be rationally related to its underlying objective, a burden easily met by the state.\(^{171}\)

There is no apparent medical basis for the state's differential treatment of Norplant and IUD removal.\(^{172}\) Like Norplant, an IUD must be inserted by medical personnel, and it remains in place for a period of years.\(^{173}\) Also like Norplant the IUD is associated with various side effects, some of which


\(^{169}\) See Tribe, *supra* note 82, at 337-38 (noting the gender inequality inherent in pregnancy where a woman is unable to reject the responsibility of motherhood at her discretion, as a man may reject fatherhood, but must instead rely on the availability of abortion and the support of professionals to terminate responsibility for her).

\(^{170}\) See *South Carolina Manual*, *supra* note 17, at 200-53 to 200-54.

\(^{171}\) See *Rotunda & Nowak*, *supra* note 57, § 18.3.

\(^{172}\) The South Carolina supervisor of Norplant removal requests stated that there was no medical reason why IUDs should be treated differently from Norplant. Telephone Interview with Jackie Price, Primary Care Supervisor, Department of Physicians Services, State of South Carolina Health & Human Services (Apr. 5, 1995).

are uncomfortable though not health-threatening, others of which may give rise to more serious complications. The medical necessity standard utilized in the Norplant context, however, has not been applied to limit the ability of IUD users who face side effects to obtain removal of the device.

This distinction in policy, however, is unlikely to be found unconstitutional. Legitimate health and safety interests are not required under the rational relationship test, and a financial motive will suffice. The state may claim that Norplant is governed by different regulations because it is slightly more expensive and in greater demand than IUDs. As discussed previously, the state’s general financial interests in the cost of Norplant insertion and removal is questionable; however, there may be a legitimate cost differential as compared to the IUD. Considering the leniency of the rational review test and the reasonableness of a state assessment of comparative cost, it would be extremely difficult to find a constitutional infirmity with the state policy under this approach. There should, however, be no need to invoke this model of equal protection in a potential challenge to the policy considering that the problem implicates other types of classifications which entail more stringent judicial review.

CONCLUSION

This article has suggested that the Norplant removal restriction currently contained in the state Medicaid plans of Oklahoma, South Carolina, and South Dakota offend federal Medicaid policy. The limitation on removal directly contravenes Congress’ articulated purpose to provide family planning services to those who “desire them” and raises serious doubt as to whether long-term use of the implant can be considered “free from coercion” in accordance with applicable Health and Human Services regulations.


175 The cost of an IUD is approximately $325 in comparison to $500 to $750 for Norplant, largely because the former does not involve a surgical procedure. Telephone Interview with “Emma,” Family Planning Counselor, Planned Parenthood (Apr. 26, 1995). See also supra note 15 and accompanying text. A state might also assert, based on claims for reimbursement, that Norplant is a considerably more popular form of contraception than the IUD and therefore requires careful restriction. Telephone Interview with Jackie Price, supra note 173.

176 It should be noted, however, that under certain facts, a classification based on the form of contraception can be characterized as an interference with the right to contraception itself which requires strict scrutiny review. See supra part III.A. If, for instance, Norplant were a safer form of contraception than the IUD and a state chose to fully fund the IUD while restricting funding for Norplant removal, the state could arguably be said to be interfering with a woman’s right to obtain safe contraception. In the abortion domain, state laws outlawing a particular method of safe abortion have been struck down on grounds that these laws force women to utilize riskier procedures and therefore constitute an undue burden on the right. See Planned Parenthood v. Danforth, 428 U.S. 52, 75-79 (1976); Women’s Medical Professional Corp. v. Voinovich, No. C-3-95-414, 1995 U.S. Dist. LEXIS 19009 (S.D. Ohio Dec. 13, 1995); cf. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-71 (1986) (striking down state law requiring a physician conducting a third trimester abortion to use the method most likely to preserve the fetus).
More importantly, the removal restriction appears suspect under several models of constitutional law. From a fundamental rights perspective, the restriction infringes on protected rights to procreation and medical treatment autonomy. Unlike other funding structures which have been judicially sanctioned, the removal restriction represents a direct and purposeful interference with rights that have been afforded the highest standard of constitutional protection. While the Supreme Court upheld restrictions on abortion funding in *McRae*, the reasoning of that decision directly supports a contrary conclusion in the Norplant problem where the state’s affirmative choice to provide unconditional funding for insertion actually creates the obstacle to the exercise of implicated rights. Although one can assert that a Norplant recipient’s acceptance of the implant constitutes a waiver of procreative and medical treatment rights, such an agreement appears highly problematic under the doctrine of unconstitutional conditions. The removal restriction authorizes states to confer or deny support for the same service based on a waiver of constitutional rights for the five-year period. The justification for the policy is a mere financial interest which can arguably be ensured through less restrictive means.

Finally, the removal restriction raises equal protection concerns. Although it is difficult to find constitutional infirmity with the removal restriction as a gender classification or a distinction based on contraceptive form, the removal restriction clearly provides funding for those who choose contraception while withholding it from those who wish to conceive, thereby discriminating on the basis of a protected right.

This article has also emphasized that the statutory and constitutional issues implicated by the removal restriction must be considered in light of the unique nature of the Norplant system. While implanted, the device is as effective as sterilization and, unlike other forms of contraception, it is not dependent upon user-compliance. These attributes, while contributing to Norplant’s attractiveness as a contraceptive option, also render it particularly suspect. The dangers of coercive population control pave the history of current statutory proscriptions on the delivery of family planning services, and principles safeguarding bodily integrity appear throughout the various models of modern constitutional jurisprudence. The removal restriction allows states to surgically insert a bodily implant that both eliminates fertility and effects extreme physiological changes which the recipient is physically incapable of escaping. For the government to support such an invasive interference with a woman’s bodily integrity and protected rights without incurring an obligation to provide for the elective restoration of the woman’s natural physical state is troublesome both morally and legally.