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# State Funding of Nontherapeutic Abortions; Medicaid Plans; Equal protection; Right to Choose an Abortion; Beal v. Doe, Maher v. Roe, Poelker v. Doe

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contacts test.<sup>65</sup> The existence of the property within the state will be of little assistance to the court in finding whether minimum contacts are present. The consequence for all three types of in rem actions<sup>66</sup> is that what was once simple and certain has become complicated and tenuous.

Nevertheless, despite the uncertainties and confusion *Shaffer* portends, it is a decision which is long overdue. The concept of in rem jurisdiction has proved over time to be an inadequate means to insure the fairness which the Due Process Clause seeks to protect. *Shaffer v. Heitner* corrects this defect.

RICHARD S. MILLIGAN

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<sup>65</sup> See text accompanying notes 52-57 *supra*.

<sup>66</sup> See note 21 *supra*.

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## CONSTITUTIONAL LAW

### *State Funding of Nontherapeutic Abortions • Medicaid Plans • Equal Protection • Right to Choose an Abortion*

*Beal v. Doe*, 97 S. Ct. 2366 (1977).

*Maher v. Roe*, 97 S. Ct. 2376 (1977).

*Poelker v. Doe*, 97 S. Ct. 2391 (1977).

**I**n *Beal v. Doe*<sup>1</sup> the United States Supreme Court held that Title XIX of the Social Security Act<sup>2</sup> permits but does not require states participating in the Medicaid program established by that Act to fund nontherapeutic abortions. In the companion cases of *Maher v. Roe*<sup>3</sup> and *Poelker v. Doe*,<sup>4</sup> the same majority<sup>5</sup> held in *Maher* that the Equal Protection Clause does not require a state that funds childbirth and therapeutic abortions to also fund the costs of nontherapeutic abortions, and in *Poelker*, that the Constitution does not prohibit a state or city from forbidding the performance of elective abortions in public hospitals while providing hospital services for child-

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<sup>1</sup> 97 S. Ct. 2366 (1977).

<sup>2</sup> 42 U.S.C. § 1396 (1970).

<sup>3</sup> 97 S. Ct. 2376 (1977).

<sup>4</sup> 97 S. Ct. 2391 (1977).

birth. Thus, the Court addressed both the statutory and constitutional issues which have divided the lower federal courts.<sup>6</sup>

The respondents in *Beal* were pregnant women who were eligible to receive medical assistance under Pennsylvania's federally approved Medicaid plan. They were denied funding for desired abortions because the Pennsylvania regulation limits such assistance to those abortions which have been certified by physicians as medically necessary.<sup>7</sup> After hearing the case, the District Court for the Western District of Pennsylvania found that the regulation was not inconsistent with Title XIX but that it did deny respondents equal protection of the laws.<sup>8</sup> The Court of Appeals for the Third Circuit reversed on the statutory issue, finding that Title XIX prohibits participating states from requiring a physician's certificate of medical necessity as a condition for funding abortions during both the first and second trimesters.<sup>9</sup>

Title XIX provides a means by which participating states distribute federally funded medical assistance to two classes of needy people: the "categorically" and the "medically" needy.<sup>10</sup> To participate in the program, states must provide for the first group and may provide for the second.<sup>11</sup> Those in the first group must be given financial assistance in at least five designated general areas of medical treatment, including inpatient hospital care, physician's services and family planning services.<sup>12</sup> As to the latter

<sup>6</sup> For courts deciding the statutory issue, see: *Roe v. Ferguson*, 515 F.2d 279 (6th Cir. 1975); *Roe v. Norton*, 380 F. Supp. 726 (D. Conn. 1974), *rev'd and remanded*, 522 F.2d 928 (2d Cir. 1975); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972), *aff'd in part sub nom. Ryan v. Klein*, 412 U.S. 924, *vacated and remanded in part*, 412 U.S. 925 (1973). (In *Roe v. Norton* the district court held that the benefits were required by statute if the state provides treatment for pregnancy; in the *Klein* case the district court found that the statute permitted payment for elective abortions and prohibited state regulations that impair a woman's right to have an abortion). For a comparison of the lower court rulings on the statutory issue, see generally, Note, 22 WAYNE L. REV. 857 (1976). See also note 45 *infra* for listing of cases dealing with the constitutional issue.

<sup>7</sup> 97 S. Ct. at 2369. The state's definition of medical necessity includes three categories which relate to a) a woman's health b) any incapacitating physical deformity or mental deficiency of the infant that is anticipated c) pregnancy caused by statutory or forcible rape or incest which may threaten mental or physical health of the woman. These findings must be confirmed by two physicians other than the attending physician and the procedure must be performed in an accredited hospital. 97 S. Ct. at 2369 n.3, citing Brief for Petitioners, at 4, citing 3 Pennsylvania Bulletin 2207, 2209 (Sept. 29, 1973).

<sup>8</sup> *Doe v. Wohlgenuth*, 376 F. Supp. 173, 191 (W.D. Pa. 1974), *modified*, 523 F.2d 611 (3d Cir. 1975).

<sup>9</sup> *Doe v. Beal*, 523 F.2d 611 (3d Cir. 1975).

<sup>10</sup> The categorically needy refer to those persons with dependent children, the aged, the blind and the disabled. 42 U.S.C. § 1396a (10) (A) (1970). The medically needy are persons whose income is too great to qualify for cash assistance as the other group but yet insufficient to meet costs of medical care. *Id.* § 1396a (10) (B).

<sup>11</sup> *Id.* § 1396d (a).

group, the state is not compelled to give assistance in any particular area of medical treatment, but is required to fund a minimum number of treatment areas from a wide range of choices.<sup>13</sup>

In reversing the Third Circuit's decision, Justice Powell, speaking for the Court, based his determination on the statutory guidelines which provide that the state Medicaid plans must establish "reasonable standards . . . for determining . . . the extent of medical assistance under the plan which are consistent with the objectives of [Title XIX]."<sup>14</sup> The Court found this to indicate a "broad discretion" left to the states, limited only by the test of reasonableness and consistency with objectives.<sup>15</sup>

The majority noted that the objective of the Act was to enable "each state, as far as practicable under the conditions of such State, to furnish . . . medical assistance [to] individuals . . . whose income and resources are insufficient to meet the costs of necessary medical services."<sup>16</sup> Justice Powell found that the state regulation easily met the test of reason because he concluded, as Pennsylvania had, that abortions based on reasons other than those allowed under the medical necessity definition of the state were not necessary medical services and, therefore, no statutory mandate existed to fund such procedures.<sup>17</sup> Apparently, the Court categorized an abortion other than one for health reasons among such elective medical services as cosmetic surgery or cosmetic orthodontics. The majority conceded, however, that there would be a "serious statutory question" if a state plan excluded necessary medical treatment from its coverage.<sup>18</sup>

The dissenting justices, however, through Justice Brennan, reasoned from another viewpoint. They viewed the necessity requirement of the Act to refer to medical *conditions* rather than to particular medical *procedures*,<sup>19</sup> and saw as unquestionable the fact that pregnancy is a condition requiring medical services.<sup>20</sup> Therefore, they asserted that because of the constitutionally protected right recognized in *Roe v. Wade*,<sup>21</sup> two alternative medical procedures existed for dealing with pregnancy: either "medical procedures

<sup>13</sup> *Id.* § 1396a (a) (13) (C).

<sup>14</sup> *Id.* § 1396a (a) (17).

<sup>15</sup> 97 S. Ct. at 2371.

<sup>16</sup> 42 U.S.C. § 1396.

<sup>17</sup> 97 S. Ct. at 2371.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2373.

<sup>20</sup> *Id.* See *Roe v. Norton*, 380 F. Supp. 726, 729 (D. Conn. 1974); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496, 500 (E.D.N.Y. 1972).

<sup>21</sup> 410 U.S. 113, 164 (1973). The abortion decision, during the first trimester, must be left to the woman and her doctor. Once reached, the decision's effectuation must be free from interference by the state.

for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth," with moral considerations alone to distinguish them.<sup>22</sup>

Justice Brennan also interpreted the Act and its legislative history as placing the state under an obligation to provide that the "physician and patient have complete freedom to choose those medical procedures for a given condition which are best suited to the needs of the patient."<sup>23</sup> He argued that by requiring a certificate of "medical necessity" which is related strictly to the woman's mental and physical health, Pennsylvania has curtailed the autonomy of the doctor and patient in choosing the best method of treatment based on that patient's needs.<sup>24</sup>

Because *Roe v. Wade* and *Doe v. Bolton*<sup>25</sup> recognize abortion as a legal alternative choice to childbirth subject to certain qualifications, the dissent's viewpoint seems to be more consistent with the prior cases which protect the right to make a choice free of unduly burdensome state interference. In *Roe*, the Court allowed such a private decision, based upon factors which may or may not relate directly to health,<sup>26</sup> to be left strictly to the woman and her doctor during the first trimester. Because of the state's other interests in protecting the woman's health and the potential life of the fetus, the state has the right to regulate procedures in the second trimester and proscribe abortions in the third.<sup>27</sup>

The Court in *Beal* also examined the affirmative policy considerations that a state might have for a regulation of this type and the majority agreed with the respondents that health and fiscal reasons are not well-founded.<sup>28</sup> The health of the mother has been recognized to be endangered more by normal childbirth than by early abortion.<sup>29</sup> Therefore, the state

<sup>22</sup> 97 S. Ct. at 2373. See also *Roe v. Norton*, 408 F. Supp. 660, 663 n.3 (D. Conn. 1975).

<sup>23</sup> 97 S. Ct. at 2374 (construing 42 U.S.C. § 1396a (a) (19) (1970)).

<sup>24</sup> 3 Pennsylvania Bulletin 2207, 2209 (Sept. 29, 1973) (the statute also provides for an abortion if there is "documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency").

<sup>25</sup> 410 U.S. 179 (1973).

<sup>26</sup> 410 U.S. at 153.

Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these factors the woman and her responsible physician necessarily will consider in consultation.

<sup>27</sup> 410 U.S. at 164-65.

<sup>28</sup> 97 S. Ct. at 2371.

<sup>29</sup> See 410 U.S. at 149.

could not logically assert that the health of the mother was protected by excluding funding for all nontherapeutic abortions (including those in the first trimester) which involve little risk, while providing funding for childbirth, which involves a greater risk. Also, it is difficult to accept the state's contention that it has a reasonable financial interest in determining that a nontherapeutic abortion is unnecessary medical care while determining that child delivery and therapeutic abortions are necessary medical care for the same condition.<sup>30</sup> The costs of abortion are considerably lower than those of prenatal and postnatal care and delivery.<sup>31</sup>

The Court, therefore, did not contend that health or fiscal considerations supported its determination that the state regulation was reasonable. Instead, Justice Powell emphasized that the state has a "valid and important interest in encouraging childbirth," which is expressly recognized in *Roe* as the "important and legitimate interest [of the State] in protecting the potentiality of human life."<sup>32</sup> However, in *Roe*, the focus on this interest had been to determine the point at which it became compelling. The Court stated that "it is reasonable and appropriate for the State to decide that at some point in time [this interest] . . . becomes significantly involved,"<sup>33</sup> and that this interest "grows in substantiality as the woman approaches term,"<sup>34</sup> becoming compelling at the point of viability. At this time the fetus is presumed capable of living a meaningful life outside the womb. Because of this presumption, "state regulation protective of fetal life after viability thus has both logical and biological justification."<sup>35</sup> The *Roe* Court, however, did not recognize this interest as being significant enough to warrant state interference in the woman's decision until the point of viability. The Court found her right to privacy in this area to be protected by the liberty guarantees of the Due Process Clause of the fourteenth amendment.<sup>36</sup> Nevertheless, relying on *Roe* for support,<sup>37</sup> the *Beal* Court considered this state interest adequate grounds upon which to find the state regulation limiting the funding of abortions in all three trimesters of pregnancy to be reasonable.

Justice Powell suggested that an additional reason for interpreting the statute as he did was the fact that abortions were illegal in 1965 when

<sup>30</sup> 97 S. Ct. at 2371.

<sup>31</sup> *Id.* The costs have been estimated to average \$64 for outpatient abortions and \$177 for inpatient operations. The average costs of prenatal care and delivery were \$800. AFDC payments were established to run \$624 a year. See Note, 41 *FORDHAM L. REV.* 921, 941 n.135 (1973) (these are 1971 estimates).

<sup>32</sup> 97 S. Ct. at 2371, citing *Roe*, 410 U.S. at 162.

<sup>33</sup> 410 U.S. at 159.

<sup>34</sup> *Id.* at 162-63.

<sup>35</sup> *Id.* at 163.

<sup>36</sup> *Id.* at 153, 164.

Congress passed Title XIX; thus it would be illogical to assume that Congress required the states to fund them.<sup>38</sup> His interpretation of statutory intent is much narrower than the view expressed by the Third Circuit, which Justice Brennan accepts:

It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973.<sup>39</sup>

The majority also saw the administrative interpretation of the Department of Health, Education and Welfare, which parallels their own interpretation, as persuasive reinforcement.<sup>40</sup>

The Court acknowledged that as a result of its decision in *Beal* which provided that Title XIX permits, but does not require abortion funding, it must also decide the constitutional questions raised when a participating state funds childbirth and therapeutic abortions but refuses to fund nontherapeutic abortions. This question came before the Court in *Maher v. Roe*,<sup>41</sup> which involved a Connecticut regulation limiting Welfare Department funding of abortions in all trimesters to those that were "medically necessary," a term defined to include both physical and psychiatric necessity.<sup>42</sup> The respondents were women who had been denied funds for first trimester abortions because of their inability to obtain the medical necessity certificate.

At the district court level, the state regulation had been invalidated on the grounds that the Social Security Act required state funding of non-therapeutic abortions.<sup>43</sup> The court of appeals, however, remanded for consideration of the constitutional claims raised by its finding that the Act did not require, but merely allowed such funding.<sup>44</sup> Consequently, the district court invalidated the statute on the grounds that it violated the Equal Protection Clause of the fourteenth amendment.<sup>45</sup>

<sup>38</sup> *Id.* at 2372.

<sup>39</sup> *Id.* at 2375, citing 523 F.2d at 622-23.

<sup>40</sup> 97 S. Ct. at 2375.

<sup>41</sup> 97 S. Ct. 2376.

<sup>42</sup> *Id.* at 2378 n.2.

<sup>43</sup> 380 F. Supp. at 730; see note 6 *supra*.

<sup>44</sup> 522 F.2d at 938-39; see note 6 *supra*.

<sup>45</sup> 408 F. Supp. at 665. The following lower federal courts also ruled that a state policy which funded therapeutic abortions and delivery but refused to fund nontherapeutic abortions violated the fourteenth amendment by creating a classification which could not be justified

In *Poelker*, the companion case to *Maher*, the claim of unconstitutional interference with a protected right was based on the inability of an indigent woman in her first trimester of pregnancy to obtain a nontherapeutic abortion at a city-owned public hospital in St. Louis.<sup>46</sup> The Court of Appeals for the Eighth Circuit recognized that Doe's inability to obtain an abortion was due to a combination of a policy mandate issued by the mayor of St. Louis and the staffing practice of the hospital.<sup>47</sup>

The Supreme Court concluded that neither the fact situation of *Maher* nor of *Poelker* created a violation of the Equal Protection Clause. Justice Powell, speaking for the Court, acknowledged that equal protection claims existed because various classifications of those similarly situated had been created by the state regulation and city practices.<sup>48</sup> However, he concluded that there were no suspect classes involved and no impingement of a constitutionally protected right.<sup>49</sup> The majority indicated that the indigent women were attempting to claim "an unqualified right to an abortion" and that no such right had before been recognized.<sup>50</sup> The Court reasoned that the state had not acted affirmatively to interfere with respondents' decisions to terminate their pregnancies and they were free, if they could find private sources, to have nontherapeutic abortions. The only hurdle in their paths was indigency, and the state's funding of abortions for different reasons or the state's funding of childbirth had neither affected nor created their poverty.<sup>51</sup> Because the Court determined that there was no suspect class based on wealth and that no fundamental right was being impinged by the state in distinguishing between abortion and childbirth, the compelling state interest test was inapplicable. The resulting classifications could, therefore, be justified by the state upon a showing that this "scheme . . . rationally

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by a compelling state interest: *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974), *rev'd and remanded on other grounds sub nom.*, *Singleton v. Wulff*, 428 U.S. 106 (1976); *Doe v. Rose*, 499 F.2d 1112 (10th Cir. 1974); *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1974), *aff'd on other grounds sub nom.*, *Doe v. Beal*, 523 F.2d 611 (3d Cir. 1975); *Doe v. Westby*, 383 F. Supp. 1143 (W.D.S.D. 1974), *vacated and remanded*, 420 U.S. 968 (1975) (for failing to rule on possible statutory grounds); *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (E.D.N.Y. 1972), *aff'd in part sub nom.*, *Ryan v. Klein*, 412 U.S. 924, *vacated and remanded in part*, 412 U.S. 925 (1973). See also Note, 22 WAYNE L. REV. 857 (1976).

<sup>46</sup> 97 S. Ct. 2391.

<sup>47</sup> *Id.* at 2392. Specific directives were issued by the mayor several months after the Supreme Court abortion decisions of *Roe* and *Bolton*. No abortions were to be performed "in the city-owned public hospitals for reasons other than to save the mother from grave psychological injury or death." 515 F.2d at 543.

<sup>48</sup> 97 S. Ct. at 2381, 2392.

<sup>49</sup> *Id.* at 2381. *But see* Marshall's dissent at 2397 suggesting that Justice Powell's reliance on *San Antonio School District v. Rodriguez*, 411 U.S. 1, 70, 117-24 (1973) might be too narrow an interpretation of that case.

<sup>50</sup> 97 S. Ct. at 2382.

<sup>51</sup> *Id.* at 2382-83.

further some legitimate, articulated state purpose . . . ."<sup>52</sup> The justification for the disparity in funding was advanced to be the interest recognized in *Beal*, that of "encouraging childbirth."<sup>53</sup>

In attempting to understand the reasoning of the Court, it is necessary to look further to the exact nature of the right which the respondents claim was being impinged. In *Roe* the Court stated that the right of privacy, which they felt to be founded in the fourteenth amendment's concept of personal liberty and restrictions upon state action, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>54</sup> The Court classified this as a "fundamental right" that could only be regulated or interfered with by a "compelling state interest," and "that legislative enactment must be narrowly drawn to express only the legitimate state interests at stake."<sup>55</sup> These conclusions led to the decision that if the state has no compelling interests of its own to assert, "the attending physician, in consultation with his patient is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be *effectuated* by an abortion free of interference by the State."<sup>56</sup>

By examining this right in the context of *Maher*, it is clear that the state has *voluntarily* chosen to offer medical aid to indigents; there is no constitutional or congressional mandate to do so. But once the state has chosen to participate in the optional program, the methods adopted to dispense this aid must not invidiously discriminate against any one particular group nor unduly interfere in the exercise of any constitutionally guaranteed right.<sup>57</sup> The respondents in *Maher* asserted that once the state has chosen to aid indigent pregnant women, the right recognized in *Roe* is impinged if the granting of aid is conditioned upon the woman's choice concerning her pregnancy. If a woman chooses to carry her child until the pregnancy terminates in a live birth, the state will pay the expense. If the woman chooses to terminate her pregnancy for a reason other than one deemed acceptable to the state, she will be denied the aid she would have otherwise received.

The majority in *Maher* rejected respondents' argument stating that there is no *direct* state interference with their right to choose abortion or

<sup>52</sup> *Id.* at 2381.

<sup>53</sup> *Id.* at 2385.

<sup>54</sup> 410 U.S. at 153.

<sup>55</sup> *Id.* at 155. See *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

<sup>56</sup> 410 U.S. at 163 (emphasis added).

<sup>57</sup> 97 S. Ct. at 2380.

effectuate it.<sup>58</sup> But in the welfare setting, the fact that these women could rarely, if ever, effectuate a decision to terminate a pregnancy without state aid would appear to make the direct or indirect distinction of the majority misplaced. The Court appears to view the respondents' claims in the same light as any indigent who claims that his constitutional rights are being impinged because of lack of money. The indigent has no recognized "right to an abortion" that the state is obligated to fund on demand. But the state has voluntarily chosen to eliminate some of the financial barriers indigents face in obtaining adequate medical care. In doing so, the state has been allowed to weight the choice on the side of childbirth by providing funds and facilities for the birth. It has been allowed to discourage abortion in every stage of pregnancy by refusing to fund the operation in the absence of a state-approved reason. The medical necessity requirement poses an insurmountable obstacle for the vast majority of women on welfare who in consultation with their doctors may have decided for any number of other valid considerations that abortion is the appropriate action for them. These women, who cannot afford private treatment, and these doctors, who cannot afford to treat them without compensation, are effectively foreclosed from effectuating that decision.<sup>59</sup> This type of state interference would appear to be as direct and certainly more prohibitive than the technical requirements struck down as unconstitutional in *Doe v. Bolton* (i.e., hospital accreditation, committee approval, two-doctor concurrence, and residence requirements).<sup>60</sup>

The Court rejected the argument by respondents that the welfare funding cases of *Shapiro v. Thompson*,<sup>61</sup> *Memorial Hospital v. Maricopa County*,<sup>62</sup> and *Sherbert v. Verner*<sup>63</sup> were appropriate precedent for the instant case. The state residency requirement for receiving Aid to Families with Dependent Children (AFDC) was struck down in *Shapiro* and a similar requirement in *Memorial Hospital* for receiving emergency medical care was also invalidated. In both cases, the states were found not to have compelling interests which justified creating classifications which might interfere with the right to travel, a right based implicitly in the concept of liberty.<sup>64</sup> The *Sherbert* case involved the withholding of unemployment compensation from a woman whose religious beliefs prohibited her from working on Saturdays. The Court noted, however, that the compensation would have been granted

<sup>58</sup> *Id.* at 2382-83.

<sup>59</sup> See 97 S. Ct. at 2388, citing *Wulff v. Singleton*, 428 U.S. 106, 122 (1976).

<sup>60</sup> 410 U.S. at 194-200.

<sup>61</sup> 394 U.S. 618 (1969).

<sup>62</sup> 415 U.S. 250 (1974).

<sup>63</sup> 374 U.S. 398 (1963).

<sup>64</sup> 394 U.S. at 627; 415 U.S. at 269. See also Justice Brennan's dissent in *Maher*. 97 S. Ct. at 2388-90.   
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to her if her refusal to work had been based on a variety of other nonreligious reasons.<sup>65</sup> In each of these cases the Court rejects as unacceptable, state coercion to forego a constitutional right in order to gain benefits otherwise provided. Justice Powell distinguished the first two cases on the basis of a penalty analysis, and the third as involving a special "governmental obligation of neutrality" arising from the first amendment issues.<sup>66</sup>

Justice Powell in *Maher* avoided applying the compelling state interest test by limiting his analysis to the requirements of the Equal Protection Clause and relying on a distinction characterized by him as "a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."<sup>67</sup> The state's refusal to fund nontherapeutic abortions is not seen as a direct interference but rather as a scheme which furthers a legitimate state interest of encouraging childbirth.<sup>68</sup> But characterizing the state scheme in terms of *encouraging childbirth* seems to ignore that this must of necessity encompass also the converse activity of *discouraging abortion*. The Court in *Roe* stated that there are no state interests in the first trimester which are more significant than a woman's right to make this private decision without state interference.<sup>69</sup> In his discussion of this distinction, Justice Powell expressed his concern that if the arguments of the respondents are accepted and the state is required to meet the "compelling state interest test," this will lead to strict scrutiny in other areas of state regulation. He analogized that one such area would be in legislation which requires the funding of public but not private education.<sup>70</sup>

In his dissent in *Maher*, Justice Brennan argued that the majority was making a distinction between laws that can be termed direct interference or penalizing restrictions and those which merely encourage an alternate activity.<sup>71</sup> He referred to the case of *Carey v. Population Services International*,<sup>72</sup> decided only twelve days prior to the instant case, as support for his contention that the Court had previously refused to make such a distinction. *Carey* concerned a New York law which, *inter alia*, prohibited the sale of contraceptives to adults by anyone other than licensed pharmacists.

<sup>65</sup> 374 U.S. at 398.

<sup>66</sup> 97 S. Ct. at 2383 n.8.

<sup>67</sup> *Id.* at 2383.

<sup>68</sup> *Id.* at 2385.

<sup>69</sup> 410 U.S. at 113.

<sup>70</sup> 97 S. Ct. at 2384.

<sup>71</sup> *Id.* at 2388.

In invalidating this restriction, a majority accepted the rationale<sup>73</sup> that the Due Process Clause requires in recognized areas of privacy, *e.g.*, the decision of whether or not to bear a child, that a state is justified in interfering only if it can advance a compelling state interest.<sup>74</sup> The Court found that a state law which restricted the distribution of contraceptives placed a burden upon an individual's freedom to make such a private decision. The majority analogized the case to those of *Roe*, *Bolton*, and *Planned Parenthood of Central Missouri v. Danforth*<sup>75</sup> since the statutes invalidated in those cases had also not prohibited "abortions outright but limited in a variety of ways a woman's access to them."<sup>76</sup> The Court went on to advance the proposition that:

The significance of these cases is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by a 'compelling state interest' and . . . must be narrowly drawn to express only the legitimate state interests at stake."<sup>77</sup>

Justice Marshall agreed that the previous cases decided by the Court do not support the majority's distinction which he characterized as distinguishing between "laws that absolutely prevent exercise of the fundamental right to abortion and those that 'merely' make its exercise difficult for some people."<sup>78</sup> He suggested that the majority developed such a distinction because of the inadequacy of the traditional two-tiered analysis; namely, that a law subjected to strict scrutiny will sometimes too easily fall and a law required to meet the mere rationality test will too easily be upheld.<sup>79</sup>

To alleviate this problem, he again suggested<sup>80</sup> that a more reasonable and workable approach would be to carefully weigh three factors, "the importance of the governmental benefits denied, the character of the class,

<sup>73</sup> *Id.* at 2018. Justice Brennan wrote for the Court and five other justices joined in Part III which states this rationale.

<sup>74</sup> 97 S. Ct. at 2017.

<sup>75</sup> 428 U.S. 52 (1976). The restrictions in *Danforth* were based on the requirement of spousal consent to an elective abortion. Those declared unconstitutional in *Bolton* were hospital accreditation requirements, committee approval, two-doctor concurrence, and residence requirements. 410 U.S. at 194-200.

<sup>76</sup> 97 S. Ct. at 2018.

<sup>77</sup> *Id.*, citing 410 U.S. at 155.

<sup>78</sup> 97 S. Ct. at 2396.

<sup>79</sup> *Id.*

<sup>80</sup> See generally *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976),  
 (Marshall, J., dissenting).  
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and the asserted state interests."<sup>81</sup> In his subsequent analysis of these factors in this case, Justice Marshall found that the significance of the first two far outweigh the asserted state interest in "encouraging childbirth."

As to underlying policy in these decisions, Justice Powell has suggested that an issue so fraught with substantial social and economic overtones should be left to the elected representatives and not the Court.<sup>82</sup> On the other hand, there is the differing opinion of Justice Marshall wherein he identifies a constitutionally imposed duty of the Supreme Court to protect the rights of those who are "poor and powerless" and virtually unrepresented among the powerful and well-financed lobbyists who greatly influence Congress.<sup>83</sup> Also, the majority cannot escape the fact that by ruling on the constitutionality of a state law, they greatly influence the political processes regardless of the determination made. As to the influence of the Court's decision, Professor Bickel pointed out that a ruling of constitutionality may have unintended and far-ranging results:

It is true enough that the Court does not approve or otherwise anoint a legislative policy when it finds it not unconstitutional. No doubt, in one of the late Charles P. Curtis' phrases, "to call a statute constitutional is no more of a compliment than it is to say that it is not intolerable." But, though not a compliment, it is a not inconsequential appreciation. To declare that a statute is not intolerable because it is not inconsistent with principle amounts to a significant intervention in the political process different in degree only from a declaration of unconstitutionality. It is no small matter, as Professor Black has argued, to "legitimate" a legislative measure. The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution. The Court, regardless of what it intends, can generate consent and may impart permanence.<sup>84</sup>

Evidence of that can be seen in legislation now pending in both houses of Congress which in some cases includes stricter regulation of abortion funding than that condoned in the instant cases.<sup>85</sup>

The extent to which the consequences of these decisions will affect the rights recognized in *Roe* remains to be seen. It does appear highly probable that the practical effects will be felt by a majority of the nation's women who might wish to have nontherapeutic abortions. The reason of-

<sup>81</sup> 97 S. Ct. at 2396.

<sup>82</sup> *Id.* at 2373 n.15.

<sup>83</sup> *Id.* at 2394, 2398.

<sup>84</sup> Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40, 48 (1961).

<sup>85</sup> *The New Abortion Debate*, 104 COMMONWEALTH 451 (1977).

ferred for the individual's decision to have an abortion and the wealth of the woman involved will determine how significantly she is affected. Those who are not able to afford private doctors or the travel expenses needed to find available facilities (if the public facilities in their area are closed to them) will have no way to effectuate their decisions safely and legally.

The Court's requirement that state interference must be "direct" to warrant strict scrutiny will most likely affect other welfare and right to privacy issues. If this is a new direction, as the dissenting justices suggest, many areas of the law which now appear settled may be open to new attack.

Another significant aspect of these decisions is the seeming ease with which the state met the rationality test. This would appear to be somewhat of a retreat from the Court's detailed analysis in such welfare and right to privacy cases as *U.S. Department of Agriculture v. Moreno*<sup>86</sup> and *Eisenstadt v. Baird*,<sup>87</sup> where the Court scrutinized closely the rational basis asserted by a state for a challenged classification.<sup>88</sup> In *Maher*, the Court itself, without the State's assertion, assumed the rational basis for the state's action to be that of "encouraging childbirth," even going so far as to predict hypothetical demographic concerns a state might have to justify such an interest.<sup>89</sup>

Also noteworthy was the majority's complete avoidance of any discussion of due process analysis which had predominated in most of the cases dealing with the right to privacy in the context of contraceptives or abortions. If the right to choose an abortion is derived from the due process liberty guarantees, it seems incomplete to divorce such analysis from a case which involves that right. Whether this approach resulted from a failure of the respondents to present a due process argument or because the Court found of its own accord that the due process analysis was inappropriate may be made clearer if the Court addresses similar issues in future cases. But since the majority characterized the right being asserted as one not previously recognized by the Court (*i.e.*, "right to an abortion"), it is doubtful that an emphasis on due process would have led to a different result.

The Court faced sensitive and controversial issues in these cases which were compounded by the welfare context in which they were raised. Because of the conclusion that state restriction on abortions of Medicaid recipients does not offend the Constitution, the state and federal legislative bodies

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<sup>86</sup> 413 U.S. 528 (1973).

<sup>87</sup> 405 U.S. 438 (1972).

<sup>88</sup> *Butler, Right to Abortion Under Medicaid*, 7 CLEARING HOUSE REV. 713, 716 (1974).

<sup>89</sup> See Justice Brennan's dissent, 79 S. Ct. at 2390.

must decide what the will of the American people is in this area.<sup>90</sup> The spread of welfare as a way of life, and the enduring poverty of millions of families already too large and financially, physically and psychologically unable to cope with unplanned and unwanted children are serious consequences which may result if this large group is denied their only access to abortion.<sup>91</sup> The abortion issue has significant moral and religious overtones which cannot be overlooked, but certainly the legislators are under a duty to recognize that the varying moral and religious views of those most affected by the law are worthy of as much consideration as the well defined views of those who are able to lobby extensively.<sup>92</sup>

Therefore, although the Court has found that the letter of the law has not been violated by these legislative restrictions on funding abortions for indigent women, certainly the spirit of the law appears to have been violated. Hopefully, legislators will decide that at least in the first trimester of pregnancy, a poor woman as well as a wealthy one should have the right to decide with her doctor, in a purely private way, what is the appropriate choice for her. And that choice, whether it be abortion or live birth, will be funded where necessary in order to uphold equal protection of the law.

CONSTANCE LEISTIKO

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<sup>90</sup> See *The Unborn and the Born Again*, THE NEW REPUBLIC, July 2, 1977, at 5-6 for discussion of polls indicating that the majority sees the abortion decision as a private one free of government control.

<sup>91</sup> See generally *The American Underclass*, TIME, August 29, 1977, at 14. Besides giving a view of how poverty affects those born into it and unable to get out, the article suggests that welfare has become a way of life for this class.

<sup>92</sup> See generally *Punitive and Tragic*, NATION, July 2, 1977, at 34.