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INDIGENT WOMEN AND ABORTION: LIMITATION OF THE RIGHT OF PRIVACY IN *MAHER V. ROE*

> [A]s you know there are many things in life that are not fair, that wealthy people can afford and poor people can't. But I don't believe that the Federal Government should take action to try to make these opportunities exactly equal, particularly when there is a moral factor involved.[1]

These were the words of President Carter,[2] commenting on the *Maher v. Roe*[3] ruling that states can deny Medicaid funds for elective abortions while, at the same time, provide the funds for services associated with childbirth and therapeutic abortions.[4] The practical effect of such a ruling is to preclude indigent women from procuring an abortion while leaving women who can afford an abortion with no state imposed obstacle to their constitutionally protected right to choose an abortion. Because a state may subsidize expenses related to childbirth but not abortion, indigent women are effectively deprived of their right to decide whether or not to terminate their pregnancies. These disparate results raise fundamental issues in the due process and equal protection context.

In the 1973 landmark case of *Roe v. Wade*,[5] the Supreme Court established the right of a woman to choose whether or not to terminate her pregnancy.[6] Although the right enunciated in *Roe* was not absolute,[7]

1. N.Y. Times, July 13, 1977 at 1, col. 4.
2. Carter was severely criticized for the moral judgment implicit in his statement as well as for his willingness to sanction inequality for abortion treatment. *See generally* Time, July 4, 1977 at 6; Newsweek, July 4, 1977 at 12; The Nation, July 23, 1977; Time, August 1, 1977 at 49.
3. 97 S. Ct. 2376 (1977).
4. In the wake of the Court's decision in *Maher*, Congress enacted federal legislation within the parameters of the Court's pronouncement. The final version of the bill allows Medicaid reimbursement for abortion only in order to save the mother's life if two doctors certify she would suffer severe and long-lasting physical health damage, and for victims of rape and incest if the attacks are promptly reported to law enforcement or public health authorities. Act of Dec. 9, 1977, Pub. L. No. 95-205.
5. 410 U.S. 113 (1973). *See also* Doe v. Bolton, 410 U.S. 179 (1973).
6. 410 U.S. at 162-64.
7. *Id.* at 154.

it was declared that the woman's choice, in concurrence with her physician, was to be free from any state interference in the first trimester of pregnancy.[8] Four years later in *Maher*, the Supreme Court has restricted the nature and scope of that fundamental right.[9]

This note will examine the nature and scope of the fundamental right recognized in *Roe*, the interpretation of that right as set forth in *Maher*, and the implication of this decision on the abortion right.

THE *MAHER* DECISION

In accordance with a regulation issued by the Connecticut Welfare Department,[10] state Medicaid benefits for first trimester abortions were provided only for those deemed medically necessary. Mary Poe, a sixteen year old student who had obtained an abortion in a Connecticut hospital, was denied reimbursement for the procedure by the Department of Social Services because of her failure to obtain a certificate of medical necessity. Similarly, due to her physician's refusal to certify that the procedure was medically necessary, Susan Roe, an unwed mother of three children, was unable to obtain an abortion.[11] As a result Poe, Roe, and the class they represented brought an action in federal district court[12] challenging the regulation as inconsistent with the requirements of Title XIX of the Social Security Act,[13] and as a violation of their constitutional

8. *Id.* at 164.
9. 97 S. Ct. 2376 (1977).
10. CONNECTICUT WELFARE DEPARTMENT, 3 PUBLIC ASSISTANCE PROGRAM MANUAL § 275. Section 275 provides in relevant part:

> The Department makes payment for abortion services under the Medical Assistance (Title XIX) program when the following conditions are met:
> 1. In the opinion of the attending physician the abortion is medically necessary. The term "medically necessary" includes psychiatric necessity.
> 2. The abortion is to be performed in an accredited hospital or licensed clinic when the patient is in the first trimester of pregnancy . . .
> 3. The written request for the abortion is submitted by the patient and in the case of a minor, from the parent or guardian. . . .
> 4. Prior authorization for the abortion is secured from the Chief of Medical Services, Division of Health Services, Department of Social Services. *Id.*

11. 97 S. Ct. at 2379 n.3.
12. Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975). This action had been brought as a class action.

In a companion case decided the same day as *Maher*, the Supreme Court reversed a three-judge district court decision and held that Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396i (1970 & Supp. V 1975), did not require the funding of non-therapeutic abortions as a condition of participation in the Medicaid program established by the Act. *See* Beal v. Doe, 97 S. Ct. 2366 (1977).

In a third related case, the Court upheld a policy choice implemented by the Mayor of St. Louis to provide publicly financed hospital services for childbirth without providing corresponding services for non-therapeutic abortions. *See* Poelker v. Doe, 97 S. Ct. 2391 (1977).

13. 42 U.S.C. §§ 1396-1396i (1970 & Supp. V 1975).

rights to due process and equal protection under the fourteenth amendment.[14]

The district court held that Title XIX of the Social Security Act, not only allowed state funding of non-therapeutic abortions, *but also required it*, as the statute must be construed in such a manner as to avoid the infringement of constitutionally protected rights.[15] The court reasoned that it would be improper for state regulation of Medicaid funding for abortions in the first trimester of pregnancy to impose requirements or conditions that were not equally applicable to Medicaid funding for childbirth.[16]

On appeal, the United States Court of Appeals for the Second Circuit held that the Social Security Act was neutral concerning payments, that the Act allowed payments for elective abortions, but did not require the state to pay for the services.[17] The appellate court stated that it would be wrong to construe the statute as including a requirement which is not present in its language and which Congress did not intend to include and remanded the case to the district court to consider the constitutional issues raised.[18]

Accordingly, a three-judge district court was convened in order to hear the constitutional issues raised in the complaint.[19] In declaring the Connecticut regulation invalid, the court held that although there is no independent constitutional right to a state-financed abortion, the equal protection clause prohibits the exclusion of non-therapeutic abortions from a state welfare program that generally subsidizes those medical expenses associated with pregnancy and childbirth.[20] The court found implicit in *Roe*, the view that "abortion and childbirth . . . are simply two alternative medical methods dealing with pregnancy."[21]

The Supreme Court granted certiorari and held that the equal protection clause does not require a state participating in the Medicaid program

14. Primary emphasis will be placed on the equal protection analysis by which the Supreme Court treated this case, with special attention being accorded the "fundamental interest" strand of equal protection.
15. Roe v. Norton, 380 F. Supp. 726, 730-31 (D. Conn. 1974).
16. *Id.* at 731.
17. Roe v. Norton, 522 F.2d 928 (2d Cir. 1975).
18. *Id.* at 935.
19. A three-judge district court panel was empowered to enjoin the enforcement of any state statute as unconstitutional pursuant to Act of June 25, 1948, ch. 646, 62 Stat. 968 (then codified at 28 U.S.C. § 2281 (1970)). This section was repealed: Act of August 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119. Repeal of § 2281 however, was not applicable to any action commenced on or before August 12, 1976.
20. Roe v. Norton, 408 F. Supp. 660, 663-64 (1975).
21. *Id.* at 663 n.3.

to pay those expenses associated with non-therapeutic abortions merely because it has chosen to bear the expenses incident to childbirth.[22]

THE ABORTION RIGHT AND THE FUNDAMENTAL RIGHT OF PRIVACY

A woman's right to elect an abortion was found to be a constitutionally protected one in the landmark decision of *Roe v. Wade*[23] and its companion case, *Doe v. Bolton*.[24] In *Roe*, a Texas statute making it a crime to procure an abortion except when the mother's life was in danger was declared invalid.[25] The Supreme Court held that encompassed within the constitutional right of privacy was a qualified right for a woman to terminate her pregnancy.[26] The Court ruled that during the first trimester of pregnancy the decision to terminate a pregnancy was to be left exclusively to the woman in concurrence with her physician.[27] In the second trimester, the state was allowed to regulate the abortion procedure to the extent that it was necessary for the health of the mother;[28] and in the third trimester, that stage subsequent to "viability," the state was permitted to regulate and even proscribe abortion except when the life or health of the mother was in jeopardy.[29] In *Doe*, the Supreme Court, in addition to striking down the criminal prohibition of a Georgia abortion statute,[30] invalidated a number of procedural requirements on the basis that they too severely limited the patient's rights.[31]

22. Maher v. Roe, 97 S. Ct. 2376 (1977). In addition to upholding the regulation which denied expenses for elective abortions, the Supreme Court upheld provisions of the Connecticut regulation requiring prior written consent by the woman and prior authorization by the Department of Social Services for abortions. *Id.* at 2386.

23. 410 U.S. 113 (1973). For the purposes of this note, the *Roe v. Wade* decision will be emphasized because it contains a more comprehensive analysis of the nature and scope of the abortion right than does its companion case, Doe v. Bolton, 410 U.S. 179 (1973), decided the same day.

24. 410 U.S. 179 (1973).

25. Tex. Laws 1907, ch. 33, at 55 (codified as TEX. REV. CIV. STAT. ANN. art. 4512.1 (Vernon 1976)).

26. The Court concluded: "The right of privacy, however based, is broad enough to include the abortion choice, nevertheless, it is not an absolute right and is subject to some limitations." 410 U.S. at 155.

27. *Id.* at 164.

28. *Id.*

29. *Id.* It is in the last two stages of pregnancy that the state interest is considered compelling enough to warrant intrusion into the woman's decisional right.

30. GA. CODE ANN. § 26-1201 (1972). The Georgia abortion statute was more liberal than the Texas statute stricken in *Roe*. Whereas the Texas statute only permitted abortions when the mother's life was endangered, the Georgia statute permitted abortions when the pregnancy resulted from rape or it was likely the fetus would be born with serious defects. The new Georgia abortion statute enacted after Doe v. Bolton, 410 U.S. 179 (1973), is codified at GA. CODE ANN. § 26-1201 (Supp. 1977).

31. The following procedures were declared invalid: (1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals; (2) that the procedure be approved by the hospital staff abortion committee; (3) that two other

A woman's right to decide whether or not to terminate her pregnancy arises from that area of the law known as the right of privacy.[32]

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[33]

Although the right of privacy had manifested itself in a number of different contexts since 1886,[34] it was not until the 1965 Supreme Court decision of *Griswold v. Connecticut*[35] that this right achieved true constitutional status as a "fundamental right."[36] By way of invalidating a law which prohibited the use of contraceptives, Justice Douglas drew on a number of prior decisions which suggested that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance."[37] The Court in *Roe*

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licensed physicians beside the patient's attending physician confirm the procedure and (4) that the patient be a resident of Georgia. 410 U.S. at 193-201.

32. Roe v. Wade, 410 U.S. 113, 153 (1973). *See* note 26 *supra*.

33. *Id.*

34. In that year the Supreme Court declared that individuals shall be protected against all government invasions of "the sanctity of a man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630 (1886). The expression "right of privacy" was introduced in 1890 with the publication of Samuel Warren and Louis Brandeis' famous work, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Since that time the Supreme Court has recognized the right of privacy as implicit in the following amendments to the Constitution: first amendment, *see, e.g.*, Gibson v. Florida Legislative Investigating Comm'n, 372 U.S. 539, 544 (1963) (first amendment right of free association allowing individuals to forego disclosure of membership lists before investigating committee); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (right of expression protects the possession of obscene materials in the privacy of one's home). Fourth amendment, *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 654-55 (1961) (right of privacy protects individuals from having their houses searched without a warrant); Katz v. United States, 389 U.S. 347, 350 (1967) (the use of electronic eavesdropping devices constitutes an illegal search and seizure infringing on the right of privacy); Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (right to be free from unreasonable searches and seizures is applicable to pedestrians as well as individuals who are in their homes). Fifth amendment, *see, e.g.*, Tehan v. United States, 382 U.S. 406, 416 (1966) (the self-incrimination clause allows an individual to resist making statements that invade his right to lead a private life). Ninth amendment, *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 486-98 (1965) (Goldberg, J. concurring) (right of privacy protects certain rights not necessarily enumerated in the Constitution).

35. 381 U.S. 479 (1965).

36. *Id.* at 484-86. *See id.* at 491 (Goldberg, J., concurring). Instead of relying upon segments of other amendments to formulate the right of privacy, the *Griswold* decision signaled the creation of an independent constitutional right of privacy. *See* Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1423 (1974).

37. 381 U.S. at 482. Those decisions upon which Justice Douglas relied included: NAACP v. Alabama, 357 U.S. 449, 462 (1958) (freedom to associate and privacy in one's associations, recognized as a peripheral first amendment right); Sweezy v. New Hampshire, 354 U.S. 234, 249-50, 261-63 (1957) (freedom of association overrides overbroad legislative investigation of loyalty); Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (denial

gave even greater protection to the right of privacy by securing a position for it in the fourteenth amendment's concept of personal liberty.[38] Relying on *Griswold* and a number of prior decisions relating to procreative,[39] marital[40] and familial rights,[41] the Supreme Court extended the right of privacy from a penumbral right to one firmly established in the due process clause of the fourteenth amendment.[42]

In spite of its new found status as an enumerated, due process protected right, the "*Roe* recognized right" was not deemed absolute. It was acknowledged that the right to decide whether or not to terminate a pregnancy must be measured against conceivable state interests in regulation.[43] The extent that this right could be interfered with, however, was dependent on the state's ability to demonstrate a compelling interest.[44] In *Roe*, the Supreme Court did not recognize any such compelling interest

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of employment based on taking loyalty oath cannot be arbitrary); Martin v. Struthers, 319 U.S. 141, 143 (1943) (right to distribute, receive, and read, grounded in first amendment); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the right to educate one's children as one chooses derived from the force of the first and fourteenth amendments); Meyer v. Nebraska, 262 U.S. 390 (1923) (right of access to spectrum of available knowledge implicitly recognized in the first amendment).

38. 410 U.S. at 153. *See* note 42 *infra*.

39. *See* Eisenstadt v. Baird, 405 U.S. 438, 435-54 (1967) (the right of equal access to contraceptives for single people as well as married couples); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (sterilization laws held to be an infringement on the basic liberties of marriage and procreation).

40. *See* Loving v. Virginia, 388 U.S. 1 (1967) (invalidation of anti-miscegenation law).

41. *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (recognition of private realm of family life which state cannot infringe upon); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (liberty of parents to educate and rear their children as they choose).

42. Unlike Griswold v. Connecticut, 381 U.S. 479, 484-85 (1964), which held that the right of privacy was a fundamental but unenumerated right, the right in *Roe* was recognized as a fundamental *enumerated* right falling within the concept of liberty guaranteed by the fourteenth amendment. Roe v. Wade, 410 U.S. 113, 152-53 (1973).

For a harsh criticism of the *Roe* decision and its expansive interpretation of the right of privacy, *see* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). For a contrary view supporting the decision, *see* Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765 (1973); *see also* Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); For an excellent satire on the right of privacy in the abortion context, *see* Choate, *Exploring the Boundaries of the Roe Doctrine: An Imaginary Supreme Court Opinion*, J. MO. B. 242 (1977), *reprinted in*, 11 ARK. LAW. 110 (1977); Choate, *An Examination of the Right of Privacy: A Modern Proposal*, (Jan. 22, 1977) (unpublished article in University of Tulsa College of Law Library).

43. 410 U.S. at 155. *See also* notes 27-29 *supra* and accompanying text.

44. *See id.* Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest. *See, e.g.*, Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Sherbert v. Verner, 374 U.S. 398, 406 (1963). Examples of legitimate state regulation in this area are requirements as to qualifications of the person who is to perform the abortion; as to licensing; as to facilities where the procedure is to be performed (hospital, clinic, or less-than-hospital status). 410 U.S. at 163.

in the first trimester of pregnancy,[45] and thereby preserved the woman's right of privacy and the attendant right to choose an abortion, precluding any infringement by the state. It was not until the second and third trimesters of pregnancy that the state's interest in the health of the mother[46] and the fetus,[47] warranted state intrusion into the woman's fundamental right of privacy.

With the advent of this fundamental, albeit qualified, right of privacy recognized in *Roe*, it became a matter of considerable speculation as to how comprehensive this right was and what type and degree of state pre-emption would constitute an improper infringement upon it.[48] This was the focus in a number of subsequent decisions where the Court elaborated on the nature and scope of the right established in *Roe*. In *Planned Parenthood v. Danforth*,[49] requirements that women and minors obtain consent from their spouses and parents before they could have an abortion were held unconstitutional.[50] The Court reasoned that because the state was absolutely prohibited from interfering with the woman's decisional right in the first trimester of pregnancy, it was not permissible to delegate a potential veto power to a third party.[51] In *Bellotti v. Baird*,[52] a parental consent requirement similar to the provision stricken in *Planned Parenthood* was at issue.[53] In that case, a new standard was articulated for determining the validity of restrictive abortion regulations. It was declared that a state requirement would be deemed unconstitutional if it "unduly burdened the right to seek an abortion."[54] Finally, in another privacy case, *Carey v. Population Services International*,[55] the Court invalidated a New York statute which forbade the sale of contraceptives to minors under sixteen years old, limited the authority to sell contraceptives to pharmacists, and forbade the public display and

45. 410 U.S. at 164.
46. *Id.* at 163.
47. The Court noted: "With respect to the state's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.*
48. For commentary on the nature of the right to an abortion, *see* Comment, *Abortion on Demand In A Post-Wade Context: Must The State Pay The Bills?* 41 FORDHAM L. REV. 921 (1973).
49. 428 U.S. 52 (1976).
50. *Id.* at 68-72 (such a requirement was seen as allowing a third party veto).
51. *Id.* at 69.
52. 428 U.S. 132 (1976).
53. The requirements applied only to unmarried women under age 18. *Id.* at 151.
54. *Id.* at 147.
55. 431 U.S. 678 (1977). This case differs from *Maher* only in the sense that the state-created restrictions there dealt with access to contraceptives rather than abortions. *See* 97 S. Ct. 2376, 2384 n.10.

advertisement of the devices.[56] Placing primary reliance on *Roe, Doe* and *Planned Parenthood*, the Court stated:

> 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 contraception 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*.[57]

These subsequent cases interpreted the nature and scope of the fundamental right recognized in *Roe* in a broad manner: The criminal prohibition of abortion invalidated in *Roe* constituted an absolute impediment to the exercise of a protected right, whereas the restrictions set forth in the New York statute, and invalidated in *Carey*, constituted a much lesser burden on the exercise of a protected right. Despite the varying degree to which these regulations burdened the exercise of the right, both were invalidated. In order that the right of privacy be adequately protected, the Court enunciated a single standard for analyzing state regulations and their potential impact on the right. According to this standard, laws shown to have a substantial impact on the right to decide whether to prevent or terminate pregnancy will be invalidated as well as those which absolutely preclude the exercise of that right.[58]

Although the Supreme Court had not directly addressed the issue of the denial of Medicaid benefits for elective abortions prior to *Maher*, it had some exposure to the issue in the case of *Singleton v. Wulff*.[59] In that case the Court held that two physicians had standing to challenge a Missouri statute which excluded elective abortions from Medicaid coverage.[60] In spite of the fact that the Supreme Court did not reach the merits in this case,[61] the decision is significant in light of the Court's refutation of Mr. Justice Powell's contention that the statute should be upheld on the ground that it did not "directly" interfere with the abortion decision.[62] In response to the proposal of this direct interference or

56. 431 U.S. at 678.
57. *Id.* at 688 (emphasis added). *See also* Bigelow v. Virginia, 421 U.S. 809 (1975).
58. Carey v. Population Services Int'l, 431 U.S. 678, 688 (1977).
59. 428 U.S. 107 (1976).
60. *Id.* at 118. This case involved two physicians who sought standing to challenge a Missouri statute which only allowed reimbursement for abortions which were "medically indicated." The Court determined that the physicians had alleged "injury in fact" (their business would suffer because indigent women would not be reimbursed if they had an elective abortion) and thus had standing.
61. The Court, in an extensive discussion of the abortion issue, ruled that the two doctors had standing to challenge a regulation similar to the one in *Maher*, and remanded the case to the district court for a decision on the merits. *See id.*
62. Justice Powell relied on the Court's prior decisions in Griswold v. Connecticut,

"interdiction" test, the Court declared, "For a doctor who cannot afford to work for nothing and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an "interdiction" of it as would ever be necessary."[63]

In a number of lower federal court decisions, regulations similar to the one presented in *Maher* were invalidated on statutory grounds[64] as well as under due process[65] and equal protection analyses.[66] In *Roe v. Norton*,[67] the decision appealed in *Maher*, a three-judge district court declared the Medicaid regulation invalid, reasoning that a state which declines to subsidize elective abortions, while subsidizing therapeutic abortions, prenatal and postnatal care, effectively inhibits women from exercising their constitutionally protected right to an elective abortion.[68]

Under an equal protection analysis, such regulations serve to deprive women, otherwise eligible, of Medicaid assistance solely on the basis that they have elected to have an abortion.[69] The denial of these benefits in this context would appear to create a sufficient state-imposed burden to warrant a showing of compelling state interests.[70]

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381 U.S. 479 (1964), Doe v. Bolton, 410 U.S. 179 (1973), and Planned Parenthood v. Danforth, 428 U.S. 52 (1972), in pointing out that, in those instances, the state directly interdicted the normal functioning of the physician-patient relationship by criminalizing certain procedures whereas the regulation in this case constituted a lesser infringement upon the relationship. *Id.* at 128.

63. 428 U.S. at 118 n.7.

64. Doe v. Wohlegmuth, 376 F. Supp. 173 (W.D. Pa. 1973) (where the state has already determined that pregnancy necessitates medical services, elective abortions can not validly be classified as unnecessary so as to render them non-reimbursable under the Pennsylvania medical assistance program). *See also* Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1972) *aff'd mem.*, 412 U.S. 924 (1973), *vacated and remanded*, 412 U.S. 925 (1973) in light of Roe v. Wade, 410 U.S. 113 (1973).

65. Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974) (informal policy of executive director of state department of social services, precluding indigent pregnant women from receiving welfare subsidized abortions unless necessary to save woman's life, regardless of her trimester, constituted invidious discrimination in violation of fourteenth amendment); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (state infringement on the effectuation of woman's decision whether or not to terminate pregnancy in concurrence with her physician in the first trimester violates woman's ninth and fourteenth amendments rights of privacy and liberty).

66. Doe v. Westby, 383 F. Supp. 1143 (W.D.S.D. 1974) (equal protection clause does not prohibit disparate treatment per se, but where fundamental rights are limited by a state-created classification, state must exhibit a compelling interest justifying classification, expressed by a narrowly drawn statute reflecting these compelling state interests only).

67. 408 F. Supp. 660 (D. Conn. 1975).

68. Her choice is affected not simply by the absence of payment for the abortion, but by the availability of public funds for childbirth if she chooses not to have an abortion. When the State thus infringes upon a fundamental interest, it must assert a compelling state interest that justifies the incursion.
Id. at 663 (citing Dunn v. Blumstein, 405 U.S. 330, 338 (1973)). *See* note 12 *supra*.

69. *See* note 66 *supra*. *See also* Doe v. Wohlegmuth, 376 F. Supp. 173 (W.D. Pa. 1973). *See* note 64 *supra*.

70. Doe v. Wohlegmuth, 376 F. Supp. 173, 191 (W.D. Pa. 1973).

JUDICIAL TREATMENT OF "THE ABORTION RIGHT" IN *MAHER V. ROE*

Recognizing the challenge to the Connecticut regulation as one arising under the equal protection clause of the fourteenth amendment, the Court analyzed the case within the framework of the accepted equal protection test: Initially, a determination must be made of whether the regulation has an adverse effect on some recognized suspect class, or whether it impinges on a fundamental right that is explicitly or implicitly recognized in the Constitution. If such an interference is present, the legislation must undergo strict judicial scrutiny. If neither a suspect class nor fundamental right is present, the regulation must still be analyzed to determine whether its means are rationally related to some permissible and articulated state purpose.[71]

The *Maher* Court, determining that indigent women seeking an abortion did not fall within a suspect class,[72] went on to address the major question in this case, "whether the regulation impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[73] Declaring that the district court misinterpreted the nature and scope of the

71. The Court relied upon the test as stated in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); *accord*, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976). In order to better understand the Court's analysis under equal protection, a brief history and commentary is set out below:

The Warren Court in its later years used a two-tiered equal protection analysis whereby laws which had an adverse impact on a suspect class or impinged upon a fundamental right would be subject to strict judicial scrutiny and therefore require a compelling state interest for justification. In other cases, the law was required to bear only a rational relationship to its statutory purpose. This method of equal protection analysis has been referred to as the "new equal protection," with scrutiny that was "strict" in theory and fatal in fact, as opposed to the deferential "old" equal protection, which required minimal scrutiny in theory, and virtually none in fact. Gunther, *Foreward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther].

The Burger Court, not finding the rigid two-tiered approach suited to its purposes, altered the equal protection scheme by requiring more state justification when implementing the rational basis analysis and using less rigor than the Warren Court in applying strict scrutiny. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1974). This intermediate level of scrutiny has been christened the "Newer" equal protection or minimum scrutiny with "bite." *See* Gunther, *supra* this note, at 20. *See generally* Wilkonson, *The Supreme Court, The Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975).

72. "[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." 97 S. Ct. at 2381. *See also* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973); Dandridge v. Williams, 397 U.S. 471 (1970). Those categories which the Court has characterized as suspect include: race, *see, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944); alienage, *see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); and, to a limited degree, illegitimacy, *see, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).

73. 97 S. Ct. at 2381.

right recognized in *Roe*, the Court concluded that there was no infringement upon a fundamental right.[74] This conclusion was based on the premise that there is a constitutionally significant distinction between direct state infringement on a protected right and state support of a policy preference initiated by the legislature.[75] Mr. Justice Powell, writing for the majority, characterized the Connecticut regulation as merely evincing encouragement by the state of an alternative activity. The fact that state aid was provided for prenatal and postnatal care and not for elective abortions, according to Justice Powell, did not place any "obstacles—absolute or otherwise—in the pregnant woman's path to an abortion."[76]

In distinguishing this case from prior invalidations of abortion-related regulations, the majority utilized the following comparative approach: A criminal statute, proscribing the procurement of an abortion[77] or a requirement of spousal consent before a woman can obtain an abortion,[78] constitute absolute obstacles to the procurement of an abortion and thus are constitutionally impermissible. However, the right recognized in *Roe* was not an unqualified right to an abortion and the woman was only protected from unduly burdensome interference with her choice in deciding whether or not to terminate her pregnancy.[79] The Court, in the instant case, concluded that the Connecticut regulation did not establish an absolute obstacle to, *nor* did it unduly burden the woman's right to decide to terminate her pregnancy.[80] Justice Powell reasoned that, "[t]he State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."[81]

Having found neither the presence of a suspect class nor the infringement of a fundamental right, the Court then analyzed the Connecticut

74. *Id.* The Roe v. Wade 410 U.S. 113 (1973) decision, which held that a woman had a fundamental right to choose to terminate her pregnancy, was created in the context of substantive due process. The status of this right as analyzed under equal protection is not as clear-cut. It has been argued that on this basis, in spite of its fundamental right status, a regulation impinging upon the woman's right to decide need not be accorded the same scrutiny as it would in the context of due process. *See* Note, *Doe v. Beal: Abortion, Medicaid and Equal Protection*, 62 VA. L. REV. 811 (1976).

75. *See* Maher v. Roe, 97 S. Ct. 2376 (1977); Singleton v. Wulff, 428 U.S. 107, 128 (1976) (Powell, J., dissenting); *see* note 62 *supra* and accompanying text.

76. 97 S. Ct. at 2382. *See* note 60 and accompanying text.

77. *See* notes 25 & 30 *supra*.

78. *See* Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See* text accompanying notes 49-53 *supra*.

79. 97 S. Ct. at 2382.

80. The Court relied primarily on Bellotti v. Baird, 428 U.S. 132, 147 (1976). *See* 97 S. Ct. at 2382.

81. 97 S. Ct. at 2383.

scheme to determine whether the distinction made between childbirth and non-therapeutic abortions was rationally related to a constitutionally permissible state purpose.[82]

Drawing on dicta from *Roe* which acknowledged that a state has a strong interest in protecting the potential life of the fetus, and considering the rising costs of medical care, the majority concluded that state subsidization of costs associated with childbirth was a rational means of encouraging childbirth.[83] By way of summation, Justice Powell let it be known that the Court was not unmindful of the plight of indigent women who cannot afford an abortion, but pointed out that an issue of this sort, fraught with conflicting policy, religious and moral considerations, was a matter best left to legislative judgment.[84]

In a vigorous dissent, Justice Brennan assailed the majority opinion declaring that, "[a] distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court's analysis. The stark reality for too many, not just "some," indigent pregnant women is that indigency makes access to competent licensed physicians not merely "difficult" but "impossible."[85]

Recalling the *Singleton* decision, which rejected Justice Powell's direct interference or interdiction test,[86] Justice Brennan stated that there was no precedent to support a test which distinguished between absolute obstacles to the abortion right and those obstacles which were merely less burdensome. Premising his conclusion on the right recognized in *Roe* and elucidated in its progeny, Justice Brennan reasoned that the coercive effect of the Connecticut regulation was such that it impinged upon the right recognized therein[87] and should therefore be subject to strict judicial scrutiny.

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82. 97 S. Ct. at 2385. *See also* Lindsey v. Normet, 405 U.S. 56, 74 (1972). Note that the *Lindsey* test requires the distinction drawn by a regulation to be rationally related to a *constitutionally permissible* purpose whereas the more stringent *Rodriguez* test, San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973), *see* note 71 *supra* and accompanying text, requires that the regulation be rationally related to an *articulated* state purpose. This is a critical distinction in *Maher*, because initially Connecticut declared its purpose for the regulation to be fiscal conservation. This was rejected by the lower Court, because abortion is actually the least expensive medical response to pregnancy. Roe v. Norton, 408 F. Supp. 660, 664 (D. Conn. 1974). When the Court scrutinizes the regulation under the *Lindsey* standard, however, there is much more leeway to hypothesize conceivable state purposes.

83. 97 S. Ct. at 2385. Additionally, the Court hypothesized that the state may have legitimate concerns as to its rate of population growth. *Id.* at 2385 n.11.

84. *Id.* at 2385.

85. 97 S. Ct. at 2378 (Brennan, J., dissenting).

86. *Id.* at 2388.

87. *Id.*

THE *MAHER* ANALYSIS

In order to preserve the constitutionality of the Connecticut Medicaid regulation, Justice Powell resurrected his once rejected direct interference test,[88] which had the effect of compromising the nature and scope of the right to elect an abortion as recognized in *Roe* and its progeny. In implementing this new standard, Powell distinguished prior invalidations of abortion regulations on the basis that they imposed absolute or unduly burdensome restrictions on the abortion right whereas the Connecticut regulation constituted a lesser inhibition of the right.

Such an analysis is not consistent with the *Roe* decision and the subsequent cases interpreting the right recognized therein. A number of restrictive abortion regulations constituting less than an absolute bar to abortion access had been struck down as unconstitutional.[89] Indeed, in *Carey*, another privacy case decided the same term as *Maher*, it was explicitly stated that the same test must be applied to state regulations which burden the exercise of the right to terminate a pregnancy as is applied to statutes which absolutely prohibit the action.[90]

As Justice Brennan so properly noted,[91] in the context of other fundamental rights, the Supreme Court has shown its willingness to invalidate laws which did not establish an absolute prohibition of the exercise of a right. In the context of first amendment rights it is a well accepted principle that states are not permitted to grant government funds on the condition that a citizen waive his or her constitutional rights. Thus, in *Sherbert v. Verner*,[92] a ruling denying a woman unemployment compensation because she refused to work on Saturdays, in accordance with her religious beliefs, was declared unconstitutional. This case and its progeny[93] support the proposition that a compelling state interest must be demonstrated not only when a state imposed obstacle absolutely precludes the exercise of a fundamental right, but also when restraints are imposed which simply make the exercise of that right more difficult.

The Supreme Court has also acted to invalidate laws which had a

88. *See* Singleton v. Wulff, 428 U.S. 107, 118-28 (1976). *See* notes 61 & 62 *supra*, and accompanying text.

89. Doe v. Bolton, 410 U.S. 179 (1973); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See* note 31 & notes 49-59 *supra*, and accompanying text.

90. 431 U.S. 678 (1977). *See* notes 55-57 *supra*, and accompanying text.

91. 97 S. Ct. at 2389 (Brennan, J., dissenting).

92. 374 U.S. 398 (1963).

93. *See* Perry v. Sinderman, 408 U.S. 593 (1972); Keyishian v. Board of Regents, 358 U.S. 589 (1967). *See generally* Butler, *The Right to Abortion Under Medicaid*, 7 Clearinghouse Rev. 713 (1974).

relatively minimal impact upon the fundamental right to vote. In *Reynolds v. Sims*,[94] the Court held invalid a reapportionment law which caused a dilution of voting strength in various districts. Although the malapportionment of the Alabama legislature there did not directly obstruct the right to vote, the Court struck down the plan on the basis that it denied similarly situated constituents equal protection of the law, as required by the fourteenth amendment.

A better approach to the issues in *Maher* would have adopted the "penalty analysis" utilized in *Shapiro v. Thompson*.[95] In that case a one-year residency requirement for receiving welfare benefits was held to be an unconstitutional infringement on the fundamental right to travel. Although the statute did not absolutely proscribe an individual's right to travel, it penalized the exercise of that right. Likewise, the Connecticut regulation in *Maher*, while not presenting an absolute bar to the exercise of a woman's decision to terminate her pregnancy, can penalize the exercise of that right.

If Justice Powell's direct interference test had been applied in the situation presented in *Sherbert v. Verner*,[96] the conditioning of unemployment compensation there, based on the waiver of one's right to freedom of worship, could have been sustained on the basis that it merely evidenced a legislative preference which did not directly impair the protected right. Similarly, if the Powell test had been invoked in *Reynolds v. Sims*,[97] and related cases,[98] the discriminatory apportionment could have been upheld on the rationale that while it diluted the value of votes, it did not present an absolute obstacle to the right to vote. An equally undesirable result would have occurred in *Shapiro v. Thompson*[99] had the Powell test been implemented. In that case, the residency requirement for welfare benefits could have been sustained on the theory that the legislature merely made a policy choice that encouraged stable residency and that the law did not directly interfere with the fundamental right to travel.

In the context of these fundamental rights, the application of Justice

94. 377 U.S. 533 (1964). *See also* Conner v. Finch 431 U.S. 407 (1977); Chapman v. Meier, 420 U.S. 1 (1975).

95. 394 U.S. 618 (1969). *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). *See generally* Note, *Medicaid Assistance For Elective Abortions: The Statutory and Constitutional Issues*, 50 ST. JOHN'S U.L.J. 751 (1976); Note, *Medicaid And The Abortion Right*, 44 GEO. WASH. L. REV. 404 (1976).

96. 374 U.S. 398 (1963). *See* notes 92 & 93 *supra* and accompanying text.

97. 377 U.S. 533 (1964).

98. Conner v. Finch, 431 U.S. 407 (1977); Chapman v. Meier, 420 U.S. 1 (1975). *See* note 94 *supra*, and accompanying text.

99. 394 U.S. 618 (1969). *See* note 95 *supra*, and accompanying text.

Powell's test illustrates the defect inherent in his result-oriented approach. Indeed, the critical aspect presented in *Maher* is not that a total prohibition of abortion was erected by the Connecticut regulation, but that the regulation unduly interfered with a woman's fundamental right to choose whether to terminate her pregnancy free from state interference.[100]

Even assuming the validity of the Powell test, that an absolute prohibition must be present to mandate the invalidation of a regulation, it would appear that such an absolute obstacle is in fact present in *Maher*. From the standpoint of many indigent women who do not have the means to finance an abortion, the regulation may indeed serve to preclude their procurement of an abortion.[101] Inasmuch as their wealthy counterparts have no financial obstacle to overcome, the Connecticut funding scheme establishes an absolute barrier, unique to poor women.

Another defect in the Court's analysis is the implication that because the right in *Roe* was not declared to be an absolute one its status as a fundamental right is not as well established as other recognized fundamental rights. This is not an accurate assumption. The abortion right is qualified only in the limited sense that the state may have a compelling interest concomitant with the stage of pregnancy. Such an interest, however, does not appear until the second trimester, the right in the first trimester being absolute and one which the state is not allowed to interfere with.

The practical consequences of the *Maher* ruling are unfortunate. By way of inducing women to carry their pregnancies to term and thereby qualify for Medicaid subsidization, the Connecticut regulation upheld by the Court is tacitly encouraging women to bring unwanted children into an insensitive and often hostile environment. There is good reason to believe that a number of these unwanted children of indigent parents will grow up in foster homes, orphanages, and reform schools throughout the country.[102] Additionally, many of these children will likely attend second-rate segregated schools.[103] There is a grim irony inherent in the

100. 97 S. Ct. at 2390.

101. In a companion case, the Court noted:

> Although an abortion performed during the first trimester of pregnancy is a relatively inexpensive surgical procedure, usually costing under $200, even this modest sum is far beyond the means of most medicaid recipients. And "if one does not have it and is unable to get it the fee might as well be" one hundred times as great.

Beal v. Doe, 97 S. Ct. 2394, 2395 n.1 (1977) (quoting from Smith v. Bennett, 365 U.S. 708, 712 (1961)).

102. Beal v. Doe, 97 S. Ct. 2394, 2396 (1977) (Marshall, J., dissenting) citing Smith v. Organization of Foster Families, 431 U.S. 816 (1977).

103. Beal v. Doe, 97 S. Ct. 2394, 2396 (1977) (Marshall, J., dissenting) (citing Milliken v. Bradley, 418 U.S. 717 (1974)).

proponents of the "right to life" argument, in that many of those lives, for whom they purport to speak, will ultimately be tainted by bare subsistence and, in some instances, the stigma of parental rejection.

IMPLICATIONS

The *Maher* decision substantially erodes the constitutionally protected right to terminate one's pregnancy as enunciated in *Roe*. Under Justice Powell's direct interference test, presently enacted abortion regulations will be more likely to escape judicial scrutiny under the compelling state interest standard. Implementation of this direct interference test would permit the Supreme Court to simply regard a regulation as evincing a legislative policy preference, thereby immunizing it from the rigorous scrutiny accorded fundamental rights in the past. One of the primary arguments advanced by the Court in support of its decision was that an issue such as the abortion controversy should be resolved in the more public forum, the legislature.[104] This ignores the crux of the *Roe* decision. In *Roe*, the Court, upon recognizing the controversial and personal nature of the abortion issue, sought to remove its consideration from the political arena by leaving the decision to terminate one's pregnancy with the woman and her physician. *Maher* disregards this sound rationale and once again moves the moral and religious issues of the abortion controversy to the forefront of the political arena. This is an unfortunate result.

To the extent that the history of the fundamental interest strand of the equal protection clause has been the protection of certain inalienable rights and liberties, the Court seems to have foresaken one of its primary functions in the *Maher* decision. This is made clear by the apparent willingness of the Court to characterize an abortion regulation which impinged upon the constitutionally protected right to decide to terminate a pregnancy as a mere legislative directive. In this regard, it is evident that *Maher* has substantially compromised the fundamental right to terminate one's pregnancy. By deferring to the Connecticut legislature, it appears that the Court is now willing to uphold attempts by states to impose moral viewpoints on their constituents.[105] Such attempts should not be constitutionally permissible. Furthermore, Justice Powell's direct interference test may surface again in subsequent Court decisions and have a significant impact on other fundamental rights as well.[106]

104. Maher v. Roe, 97 S. Ct. 2376, 2385-86 (1977). *See* note 84 *supra* and accompanying text.

105. This was the conclusion of Justice Marshall in Beal v. Doe, 97 S. Ct. 2394, 2395 (Marshall, J., dissenting) (1977).

106. *See* notes 96-100 *supra*, and accompanying text.

CONCLUSION

Roe recognized that a woman has a constitutionally protected right to decide whether or not to terminate her pregnancy. Subsequent cases interpreting the nature and scope of that right have construed it in a broad manner. Indeed, those cases established the principle that the same test must be applied to regulations which burden the right to decide to terminate a pregnancy, as are applied to those which absolutely prohibit the exercise of the right.

Maher was decided in a way flatly inconsistent with this line of development. By implementing a new, less stringent standard to determine the validity of regulations impinging upon the abortion decision, the Supreme Court has not only misconstrued the nature and scope of the right recognized in *Roe*, but it has dealt a severe blow to a woman's constitutionally protected right to decide whether or not to terminate her pregnancy.

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