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MEDICAID FUNDING FOR ABORTIONS:
THE MEDICAID STATUTE AND THE
EQUAL PROTECTION CLAUSE

Blanket proscriptions of abortions by state statute were invali-
dated by the Supreme Court in Roe v. Wade.\(^1\) However, many
states have subsequently enacted regulations which limit the use of
Medicaid funds\(^2\) to therapeutic abortions and to the expenses inci-
dent to live births, thereby prohibiting such use for nontherapeutic,
or elective, abortions.\(^3\) Many such regulations have been attacked as
violating both Title XIX of the Social Security Act,\(^4\) which estab-
lished Medicaid, and the equal protection clause of the fourteenth
amendment.\(^5\) The Supreme Court recently upheld two such regu-
lations. In Beal v. Doe,\(^6\) the Court held that the Medicaid statute
allows, but does not require, the states to provide Medicaid fund-
ing for nontherapeutic abortions. In Maher v. Roe,\(^7\) the Court held
that a regulatory scheme which failed to fund elective abortions,
while funding therapeutic abortions and live births, does not vio-
late the equal protection clause.\(^8\) This note analyzes the implica-
tions of these decisions for the Medicaid statute, the right to pri-
vacy established in Wade, and the equal protection clause.

2. Medicaid funds are grants to states for medical assistance programs. These
   grants are governed by the provisions of 42 U.S.C. §§ 1396-1397f (1970 & Supp. V
   1975).
3. Elective abortions are generally deemed not “medically necessary.” This
   characterization usually means that there is documented medical evidence that con-
   tinuation of the pregnancy will not threaten the health of the mother. See Beal v.
   Doe, 97 S. Ct. 2366, 2369 n.3 (1977). The regulations at issue in Beal v. Doe, id., de-
   fined health as including psychological, physical, emotional, and familial factors,
   which must relate to the “well-being” of the mother. See id. at 2374 (Brennan, J.,
   dissenting). The regulations upheld in Maher v. Roe, 97 S. Ct. 2376 (1977), included
   “psychiatric necessity” within the term “medically necessary.” See id. at 2378 n.2.
5. The fourteenth amendment provides in pertinent part: “No state shall . . .
deny to any person within its jurisdiction the equal protection of the laws.” U.S.
   Const. amend. XIV, § 1.
8. In Poelker v. Doe, 97 S. Ct. 2391 (1977), a companion case to Beal v. Doe,
   97 S. Ct. 2366 (1977), and Maher v. Roe, 97 S. Ct. 2376 (1977), the Court held that it
   is not unconstitutional for a public hospital to refuse to perform elective abortions.
THE RIGHT TO CHOOSE ABORTION

The Supreme Court held in Roe v. Wade\(^9\) that the constitutionally protected right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”\(^10\) However, this right is not absolute, because the state has important interests in the regulation of abortion.\(^11\) But, because the right of privacy is “fundamental,” such state interests must be “compelling” to justify limiting the abortion decision.\(^12\)

The Court identified two state interests that become compelling at specific points during pregnancy.\(^13\) The first is the interest in preserving and protecting the health of the pregnant woman.\(^14\) This interest does not become compelling until the end of the first trimester of pregnancy because the mortality rate for first trimester abortions is lower than the mortality rate for normal childbirth.\(^15\) Regulation of the abortion procedure during the second trimester was therefore allowed if it relates to the “preservation and protection of maternal health.”\(^16\) The second state interest recognized as compelling is the interest in “protecting the potentiality of human life.”\(^17\) This interest becomes compelling at viability, which the Supreme Court defined as the point at which the fetus is capable of “meaningful life outside the mother’s womb.”\(^18\) Therefore, state regulation aimed at protecting fetal life may proscribe abortion subsequent to viability, unless an abortion is necessary to preserve the life or health of the mother.\(^19\) During the first trimester, 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.

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10. Id. at 153.
11. Id. at 154.
12. Id. The Texas criminal abortion laws at issue in Roe v. Wade, 410 U.S. 113 (1973), did not further a “compelling state interest,” and therefore were declared unconstitutional. These laws prohibited abortions that were not performed based on medical advice to save the life of the mother. Id. at 164.
13. See id. at 162.
14. Id.
15. See id. at 163.
16. Id.
17. Id. at 162.
18. Id. at 163-64.
19. Id.
THE STATUTORY ISSUE

Title XIX of the Social Security Act established Medicaid, a program administered by the states which provides federally funded medical assistance to the needy. State participation, while not mandatory, must satisfy certain requirements. Medical coverage must be extended to the categorically needy. This group includes indigent persons with dependent children, the aged, the blind, and the disabled. Other indigents, designated medically needy, may receive Medicaid benefits at the discretion of the states.

Aside from these and other minimal requirements, the states have wide discretion in designing their medical assistance plans. Several courts and commentators have relied on the congressional intent to give the states wide discretion to reach the conclusion that the statute does not require the states to fund nontherapeutic abortions. For example, in Doe v. Wohlgemuth.
muth, the court confronted a Pennsylvania regulation which provided Medicaid assistance only for abortions which had been certified medically necessary by physicians. The court principally relied on *Dandridge v. Williams*, in which the Supreme Court deferred to state discretion in administering programs under the Social Security Act by upholding a Maryland regulation that limited the total amount of aid one family unit could receive under Aid for Families with Dependent Children. The district court in *Wohlgemuth* reasoned that, given Congress' silence with respect to Medicaid funding for abortions, the great latitude conferred on the states in administering programs under the Social Security Act compelled the conclusion that the refusal to provide Medicaid funding for non-therapeutic abortions did not violate the Social Security Act.

*Roe v. Norton* concerned a Connecticut Welfare Department regulation which limited the provision of Medicaid benefits to those first trimester abortions which were "medically necessary." The Second Circuit recognized that the Medicaid statute allows participating states to fund elective abortions, because Medicaid funding is not limited to services that are medically necessary.

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29. *Doe v. Wohlgemuth*, 376 F. Supp. 173 (W.D. Pa. 1974), modified sub nom. Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), rev'd, 97 S. Ct. 2366 (1977). While the district court concluded that the statute did not require the states to fund elective abortions, it nevertheless held that the Pennsylvania regulation at issue violated the equal protection clause. The Third Circuit reversed the finding below on the statutory ground alone, holding that the statute did require such funding, and therefore did not reach the constitutional question. See *Doe v. Beal*, 523 F.2d 611 (3d Cir. 1975), rev'd, 97 S. Ct. 2366 (1977). This decision was reversed by the Supreme Court in *Beal v. Doe*, 97 S. Ct. 2366 (1977).

30. See also Note, Medicaid and the Abortion Right, supra note 26.


32. This holding reversed the district court's determination that the Medicaid statute required the states to fund elective abortions. See id., rev'd 380 F. Supp. 726 (D. Conn. 1974). After deciding the statutory issue, the appellate court remanded the case to a three-judge district court for resolution of the constitutional issue. On remand, the three-judge court held that the regulation at issue violated the equal protection clause. See *Roe v. Norton*, 408 F. Supp. 660 (D. Conn. 1975), rev'd sub nom. *Maher v. Roe*, 97 S. Ct. 2376 (1977). This decision was then reversed by the Supreme Court. See *Maher v. Roe*, 97 S. Ct. 2376 (1977). See also text accompanying notes 75 & 76 infra.

33. The view that Medicaid funding is only authorized for "medically neces-
Even if the Medicaid statute does limit payments to medical services which are "necessary," elective abortions could be covered because they are "medically necessary." The court reasoned that pregnancy is a condition which requires medical attention. This condition can be treated either by carrying the pregnancy to term or by procuring an abortion. Neither choice can be deemed more necessary than the other. However, the Second Circuit based its holding that the statute does not require states to fund non-therapeutic abortions on the illegality, in most states, of elective abortions when Congress enacted the Medicaid statute. Thus, the court reasoned, it could not be presumed that Congress intended to require Medicaid funding of nontherapeutic abortions, in light of the conditions and circumstances that existed at the time of the passage of the statute and in the absence of statutory language regarding abortion and legislative history supporting coverage of abortion by Medicaid.

Other courts have concluded that the Medicaid statute does require states to fund nontherapeutic abortions because of the limitations placed on the discretion of participating states by the statute. This reasoning was used by the Third Circuit in Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974), modified sub nom. Doe v. Beal, 523 F.2d 611 (3d Cir. 1977), rev'd, 97 S. Ct. 2366 (1977); Note, Medicaid and the Abortion Right, supra note 26. The lack of congressional intent to require Medicaid funding of nontherapeutic abortions is also indicated by the congressional enactment of an amendment to the 1977 appropriations bill for the Department of Health, Education, and Welfare and the Department of Labor which prohibited the funding of abortions not necessary to protect the life of the mother, see Departments of Labor and Health, Education, and Welfare, Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418 (1976).

See Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), rev’d, 97 S. Ct. 2366 (1977);
Unlike the Second Circuit in Norton, the Third Circuit in Beal believed that the Medicaid statute only extended coverage to "medically necessary" treatments. However, the court rejected Pennsylvania's argument that because nontherapeutic abortions are "elective," Medicaid funding cannot be provided for them.

A further restriction on state discretion in administering medical assistance programs is title XIX's requirement that medical assistance be equitably distributed among its recipients. The Third Circuit concluded that the exclusion of nontherapeutic abortions from Medicaid coverage violated this requirement. The court reasoned that since funding was provided for full-term deliveries and therapeutic abortions, the failure to provide funding for elective abortions required pregnant Medicaid recipients to choose the "least voluntary method of treatment" for their condition. Since no other class of recipients was subject to such a constraint, the court concluded that Pennsylvania's refusal to fund elective abortions violated the Medicaid statute's equality requirement.

The court in Beal found further limitations on state discretion in the Medicaid statute's requirement that the states use "reason-


37. 523 F.2d 611 (3d Cir. 1975), rev'd, 97 S. Ct. 2366 (1977). This decision was later reversed by the Supreme Court. See Beal v. Doe, 97 S. Ct. 2366 (1977). See also notes 52-74 infra and accompanying text.


39. See id.


42. See id. See also Coe v. Hooker, 406 F. Supp. 1072, 1084 (D.N.H. 1976); Doe v. Westby, 402 F. Supp. 140, 143 (D.S.D. 1975). The court in Coe agreed with the court in Beal that by funding only therapeutic abortions and live births, the states violated the equality provision of title XIX by differentiating between pregnant Medicaid recipients and all other recipients. Indicative of this differentiation is that only pregnant Medicaid recipients are required to establish the existence of "medical necessity" to receive a chosen treatment. The regulation at issue in Coe was also objectionable because it differentiated between "women who elect and women who are under medical constraints to terminate their pregnancies." Coe v. Hooker, 406 F. Supp. 1072, 1084 (D.N.H. 1976). The court in Coe found no legitimate justification for denying certain pregnant women a service that is extended to those pregnant Medicaid recipients who meet the state's moral prerequisites for an abortion. For a different interpretation of the equality requirement, see Note, Medicaid and the Abortion Right, supra note 26, in which it is suggested that the Medicaid statute's equality mandate is not violated by the failure to fund nontherapeutic abortions because the requirement only mandates equality as to the amount, duration, and scope of services extended to recipients; such restriction therefore allows a specific type of service, such as elective abortion, to be excluded, as long as it is excluded for all.
able standards,” consistent with the objectives of the Medicaid Act, to determine the types of medical services that they will fund. According to *Beal*, two statutory objectives that the states must further are (1) allowance of considerable physician discretion in choosing how to treat the patient and (2) economy. The court in *Beal* reasoned that because Pennsylvania funds therapeutic abortions and live births, it “has determined, in its discretion, that pregnancy is a condition for which medical treatment is ‘necessary’ within the meaning of Title XIX.” No justification for limiting a physician’s discretion by preventing him from treating pregnancy with a nontherapeutic abortion was found. Furthermore, economy was not an acceptable rationale for this limitation because, “in most cases non-therapeutic abortion is the cheapest method of treatment.” Protection of the recipient’s health was also deemed an insufficient justification as “the state itself admitted . . . that non-therapeutic abortion is the least dangerous alternative for the pregnant woman, at least during the first trimester.” Thus, the court in *Beal* concluded that the failure to fund elective abortions, while funding nontherapeutic abortions and live births, violated the statutory mandate that participating states serve the objectives of the Act, as well as the equality requirement. The Pennsylvania regulations were therefore invalidated as inconsistent with the Medicaid Act.

The issue of whether title XIX mandates provision of Medicaid funding for elective abortions was finally resolved by the Supreme Court in *Beal v. Doe.* Justice Powell, who wrote the majority opinion, limited his analysis to the requirement in the statute that

45. *Id.* at 621.
46. *Id.* at 620-22.
47. *Id.* at 622 (citation omitted).
48. *Id.*
49. *Id.* (citation omitted).
50. *See id.*
51. See notes 40-42 *supra* and accompanying text.
52. 97 S. Ct. 2366 (1977). For the prior history of this case, see note 27 *supra.*
the states adopt standards for determining the extent of medical assistance which are both reasonable and consistent with the objectives of the Act.\textsuperscript{53}

The Supreme Court identified the primary purpose of the Social Security Act: to "‘enabl[e] each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance [to] individuals . . . whose income and resources are insufficient to meet the costs of necessary medical services.’"\textsuperscript{54} The Court stated in dictum that this provision placed a heavy burden on the states to justify failure to provide assistance for necessary medical services, asserting that "serious statutory questions might be presented if a state medicaid plan excluded necessary medical treatment from its coverage . . . ."\textsuperscript{55} However, no such problems were raised by the Pennsylvania regulations at issue, because, in the majority's view, nontherapeutic abortions are "unnecessary—though perhaps desirable—medical services."\textsuperscript{56} Thus, the regulations were held to be consistent with the objectives of the statute.\textsuperscript{57}

The Court then analyzed respondents' argument that the regulations are unreasonable. While the Court did not contest that nontherapeutic abortion is generally a safer and less expensive medical procedure than childbirth, the Court did not agree with respondents' reasoning that the denial of Medicaid funding for nontherapeutic abortions is therefore unreasonable under title XIX. Rather, the Court held that the state's interest in protecting the potentiality of human life recognized in \textit{Roe v. Wade}\textsuperscript{58} included a "valid and important interest in encouraging normal childbirth,"\textsuperscript{59} which continues throughout the pregnancy. This interest justifies regulation of the abortion decision as long as such regulation does not unduly burden the right to choose abortion.\textsuperscript{60} The Court would not "presume that Congress intended to condition a State's participation in the Medicaid Program on its willingness to undercut [its strong and legitimate interest in encouraging childbirth] by subsidizing the costs of nontherapeutic abortions."\textsuperscript{61}

\begin{flushright}
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} 410 U.S. 113 (1973).
\textsuperscript{59} Beal v. Doe, 97 S. Ct. 2366, 2371 (1977).
\textsuperscript{60} \textit{See id. at} 2371-72.
\textsuperscript{61} \textit{Id. at} 2372 (footnote omitted).
\end{flushright}
The decision of the Court in Roe v. Wade does not support its later conclusion in Beal that the state has a legitimate interest in encouraging childbirth throughout the pregnancy, thereby permitting interference with the abortion decision. According to Wade, the interest in fetal life does not become sufficiently compelling to justify regulating the abortion decision until the fetus is viable. Therefore, state interference with the abortion decision prior to viability was proscribed. Thus, Beal’s view that Wade stands for the proposition that the state’s interest in potential life exists throughout the pregnancy, thereby allowing the state to interfere with the abortion decision prior to viability, albeit in a manner that is “less burdensome” than the criminal sanctions at issue in Wade, is not supported by the language of Wade.

Furthermore, the Court’s finding that the Pennsylvania regulation constitutes a substantially less burdensome interference with the abortion decision than the criminal abortion law invalidated in Wade is unfounded. As Justice Marshall noted in dissent: “Medicaid recipients are, almost by definition, ‘completely unable to pay for’ abortions . . . .” Similarly, Justice Brennan stated in dissent that the failure to extend Medicaid benefits to elective abortions will “result as a practical matter in forcing penniless pregnant women to have children they would not have borne if the State had not weighted the scales to make their choice to have abortions substantially more onerous.” Although not noted by the dissenters, denying Medicaid funds for nontherapeutic abortions is an inappropriate method of promoting childbirth because such denial only affects a narrow class of people. Only poor women who do not desire children are forced to give birth. Those women who can afford elective abortions are in no way encouraged by this regulatory scheme to carry their pregnancies to term.

The Medicaid statute contains no explicit language regarding the funding of elective abortions. Its language and provisions give rise to many possible interpretations. This is evidenced by the variety of decisions as to whether or not the statute compels the funding of elective abortions and by the various analyses that dif-

63. See id. at 163.
65. Id. at 2376 (Brennan, J., dissenting). See also id. at 2398 (Blackmun, J., dissenting) (dissenting opinion for three companion cases); Singleton v. Wulff, 428 U.S. 106, 118-19 (1976).
ferent courts have used even to reach similar conclusions. The Supreme Court relied on one provision in the statute—that the states adopt reasonable standards for determining the extent of medical assistance which are consistent with the objectives of the Act—to support its finding that the funding of elective abortions is not required. In so doing, it ignored other provisions that could justify the opposite result. For example, the Court could have agreed with the Second Circuit in Norton that the statute does not limit Medicaid funding to necessary medical services. Or, the Court could have found, as did the Third Circuit in Beal, that abortion is a necessary medical service. It also could have determined that the Pennsylvania regulation violates the equality requirement of the Medicaid statute. In analyzing whether the regulation at issue is consistent with the objectives of the statute, the Court could have considered, as did the Third Circuit below, the objectives of economy and of affording considerable physician discretion. Instead, the Court focused on only one statutory objective: granting the states discretion in providing medical assistance to the indigent. The Court's unnecessarily narrow reading of the Medicaid statute will force many indigent women to have children they would not otherwise have, thus causing insurmountable financial and emotional problems. This decision is, therefore, contrary to the statute's fundamental purpose of promoting the best interests of recipients.

THE EQUAL PROTECTION ISSUE

In Maher v. Roe, the Supreme Court considered whether a Connecticut Welfare Department regulation violated the equal protection clause of the fourteenth amendment. This regulation allowed for the provision of funding for two methods of pregnancy termination, therapeutic abortion and live birth, while denying Medicaid benefits for elective abortions during the first trimes-

66. See text accompanying notes 26-51 supra.
68. See notes 30-33 supra and accompanying text.
69. See text accompanying notes 38 & 39 supra.
70. See notes 40-42 supra and accompanying text.
72. See text accompanying notes 44-47 supra.
73. See note 53 supra and accompanying text.
74. See Beal v. Doe, 97 S. Ct. 2366, 2376 (1977) (Brennan, J., dissenting).
75. 97 S. Ct. 2376 (1977). For the procedural history of this case, see note 32 supra.
This regulatory scheme therefore created two classes of indigent pregnant women; these two classes are indistinguishable, except that pregnancies are terminated by different methods and that one class is granted pregnancy-related medical assistance, whereas the other is not.

Equal protection analysis has traditionally followed a two-tiered approach; either a rational basis or a strict scrutiny test is applied. Legislative classifications which are based on a suspect class or which impinge upon a fundamental right are strictly scrutinized; such classifications will be upheld only if they further a "compelling state interest." All other classifications are valid if a mere rational relationship between the classification and a legitimate state objective is found. This two-tiered approach involves opposite extremes. A rational relationship between a legislative classification and a legitimate state interest can usually be found. On the other hand, few classifications can be said to further a compelling governmental interest.

Although Justice Powell, again writing for the majority, described this two-tiered method for determining the validity of legislative classifications as "well-settled," the Burger Court has frequently indicated dissatisfaction with this mode of equal protection.

78. Suspect classifications are based on immutable characteristics present at birth, such as race, see, e.g., Loving v. Virginia, 388 U.S. 1, 9 (1967); national origin, see, e.g., Oyama v. California, 332 U.S. 633, 646 (1948); alienage, see, e.g., Graham v. Richardson, 403 U.S. 365, 371-72 (1971). While a plurality of the Court has voted to make sex a suspect class, Frontiero v. Richardson, 411 U.S. 677 (1973), a majority of the Court has never accepted this proposition.
80. Cf. cases cited note 77 supra (discussing two-tiered analysis).
81. But see Korematsu v. United States, 323 U.S. 214 (1944), in which the Supreme Court upheld the conviction of a Japanese-American for violating a military order during World War II which excluded all such persons from the west coast and removed them to relocation camps. The Court upheld the conviction, even though the order created a classification based on race which was "immediately suspect." Id. at 216.
analysis. This Court has often required more state justification than did the Warren Court to pass the rational basis test.83 Moreover, strict scrutiny analysis has been reduced in importance, as demonstrated by the Burger Court’s refusal to recognize new fundamental rights84 and suspect classifications.85

The rigidity of the two-tiered approach often leads to undesirable results. The distinctions between suspect and nonsuspect classes and between fundamental and nonfundamental rights involve opposite extremes. However, many classes and rights do not easily fit into one of these categories, as evidenced by the holdings that the right to travel is fundamental,86 while the rights to education87 and decent housing are not.88 Thus, classifications that discriminate on the basis of such “nonsuspect” classes as poverty or illegitimacy89 or impinge upon a right that is important, although not deemed fundamental,90 are generally upheld under rational basis analysis.

Justice Marshall has advocated replacing the two-tiered test with an equal protection analysis which weighs “‘the importance of the governmental benefits denied, the character of the class, and the asserted state interests.’”91 This approach is superior to the two-tiered mode of equal protection analysis, because it does not

83. See, e.g., Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

84. The Supreme Court has rejected the notions that fundamental rights include decent housing, Lindsey v. Normet, 405 U.S. 56, 74 (1972), or education, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).


89. See note 85 supra.

90. See note 84 supra.

determine the validity of a classification based on whether a class or right fits into one of two rigid and extreme categorizations. Instead, all relevant factors are considered in conjunction with each other. This analysis differs significantly from the analysis used by the Court. Once a determination regarding the suspect nature of a class is made under the two-tiered analysis, the nature of the class is no longer considered. Similarly, once it has been determined whether or not a right interfered with is fundamental, the nature of the right is no longer relevant. Thus, it is possible for classifications that discriminate on the basis of poverty or illegitimacy, or impinge upon important although not fundamental rights, to be upheld under rational basis analysis even though they further only a minor state interest. In addition, two-tiered analysis does not consider the nature of the class discriminated against and the right impinged upon in conjunction with each other. Thus, a classification that both discriminates against a class in need of protection, but not deemed suspect, and impinges upon an important, although not fundamental right, could be upheld when balanced against an insignificant state interest under the rational basis test. These undesirable results are avoided by considering the nature of the class discriminated against and the right impinged upon in conjunction with the asserted state interest. This analysis would only uphold a classification that discriminates against a class in need of protection, but not deemed suspect, and/or impinges upon an important, but not fundamental right, if the state interest justifies the undesirable results of the classification.

Once the Court in *Maher* asserted that the two-tiered approach was the applicable mode of analysis to resolve the issues in question, it followed the procedure dictated by this analysis. First, the Court considered whether the legislative classification under attack involved a suspect class. Citing *Dandridge v. Williams*, the Court asserted, without further discussion, that the poor are not a suspect class. Then, the Court discussed whether

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92. See note 85 *supra*.
93. See note 84 *supra*.
95. Maher v. Roe, 97 S. Ct. 2376, 2381 (1977) (citing Dandridge v. Williams, 397 U.S. 471 (1970)). Although poverty has not been deemed a suspect classification, Justice Powell's majority opinion in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), articulated a special test for determining the validity of a classification based on wealth. This test would invalidate a classification which discriminates against those individuals who have "two distinguishing characteristics:
the Connecticut regulation "'impinges upon a fundamental right explicitly or implicitly protected by the Constitution.'"96 The three-judge district court below found that the denial of funding for elective abortions, coupled with the provision of funding for therapeutic abortions and prenatal and postnatal care, "weights the choice of the pregnant mother against choosing to exercise her constitutionally protected right to an elective abortion."97 A woman's decision 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 the abortion."98 This regulatory scheme was seen as an infringement upon a woman's fundamental right to choose between the two methods of pregnancy termination, live birth and abortion.99

because of their impecunity they [are] completely unable to pay for some desired benefit, and as a consequence, they [sustain] an absolute deprivation of a meaningful opportunity to enjoy that benefit." Id. at 20. In a dissenting opinion to the three cases under discussion in this note, Justice Marshall argued that the denial of Medicaid for nontherapeutic abortions would be struck down under this test, as "'Medicaid recipients are, almost by definition, 'completely unable to pay for' abortions, and are thereby completely denied 'a meaningful opportunity' to obtain them.'" Beal v. Doe, 97 S. Ct. 2366, 2397 (1977) (Marshall, J., dissenting) (footnote omitted).


98. Id. at 663-64. Other courts have described the nature of this infringement in stronger terms. E.g., Coe v. Hooker, 406 F. Supp. 1072 (D.N.H. 1976), asserted that the inability of Medicaid recipients to afford an elective abortion suggests that funding live births and therapeutic abortions, while denying funding for elective abortions, not only weighs a woman's choice against choosing an elective abortion but effectively eliminates her ability to choose abortion. Id. at 1074. Similarly, the Third Circuit in Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), rev'd, 97 S. Ct. 2366 (1977), asserted that the state has "forced the pregnant woman to use the least voluntary method of treatment." Id. at 619 (emphasis added). The abolition of a woman's right to choose abortion was also stressed in Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y. 1973), where the court suggested that an indigent pregnant woman is advised "that the state will deny her medical assistance unless she resigns her freedom of choice and bears the child." Id. at 500 (emphasis added). Accord, McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976); Roe v. Norton, 408 F. Supp. 660 (D. Conn. 1975), rev'd sub nom. Maher v. Roe, 97 S. Ct. 2376 (1977); Doe v. Wohlgemuth, 376 F. Supp. 173 (W.D. Pa. 1974), modified sub nom. Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), rev'd, 97 S. Ct. 2366 (1977); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973).
The court below relied on the Supreme Court holdings in Shapiro v. Thompson, Dunn v. Blumstein, and Memorial Hospital v. Maricopa County to reach its conclusion. At issue in Shapiro was a Connecticut one-year residency requirement for welfare assistance. This requirement raised equal protection problems because it created “two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year . . . .” The strict scrutiny test was triggered because the latter class’s fundamental right to travel was impinged upon by the statutory requirement. The state interests asserted in support of the classification were the need to save fiscal expenditures and to maintain an orderly welfare system; these interests, however, were deemed not compelling enough to justify interference with a fundamental right.

A durational residency requirement for the right to vote was challenged in Dunn. The Supreme Court found that a residency requirement which divided citizens into two classes, old and new residents, and which denied the latter class the right to vote, impinged upon two fundamental rights: the right to vote and the right to travel. Although the residency requirement only penalized, rather than eliminated, the right to travel, the right was still infringed. The Court declared: “[A] State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . . ‘Constitutional rights would be of little value if they could be indirectly denied’ . . . .” Neither the state’s interest in insuring the purity of the ballot box nor its interest in insuring voter knowledgeability were considered reasons adequately compelling to satisfy the strict scrutiny test.

Memorial Hospital involved an Arizona statute which conditioned free nonemergency medical care for indigents on one-year residence in the county. The Court found that the “constitutional

104. Id. at 634-38.
105. Id. at 638.
106. See Dunn v. Blumstein, 405 U.S. 330, 340 (1972)
107. Id. at 341 (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965)) (footnote omitted).
108. See id. at 345, 360.
right of interstate migration'"\textsuperscript{109} was penalized because its exercise was conditioned on the forfeiture of medical care, which the Court characterized as a "basic necessity of life."\textsuperscript{110} Relying on \textit{Shapiro} and \textit{Dunn}, the Court in \textit{Memorial Hospital} held that a classification which penalizes the exercise of a constitutional right must further a compelling state interest.\textsuperscript{111} Because the Arizona statute at issue did not pass this strict scrutiny test, it was declared unconstitutional.\textsuperscript{112}

\textit{Memorial Hospital}, \textit{Dunn}, and \textit{Shapiro} are relevant to the issue of Medicaid funding of abortions. The class of indigent women who elect to terminate their pregnancies are penalized for exercising this right by the regulation at issue in \textit{Maher}, because they must forfeit pregnancy-related medical assistance. Indeed, their right to choose abortion as a means of pregnancy termination can be said to be eliminated, rather than merely penalized.\textsuperscript{113} Thus, strict scrutiny of the legislative classification in the instant case is particularly appropriate.

However, the Supreme Court in \textit{Maher} held that the \textit{Shapiro} and \textit{Memorial Hospital} penalty analysis was not applicable.\textsuperscript{114} The court found "only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right."\textsuperscript{115} The Court analogized penalties to sanctions imposed by the criminal law. The denial of welfare benefits to those who had recently exercised their right to travel to another state was deemed similar to a criminal sanction so as to warrant strict scrutiny.\textsuperscript{116} However, \textit{Maher} was distinguishable from \textit{Shapiro} and \textit{Memorial Hospital} because Connecticut did not deny "general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits."\textsuperscript{117} The Court asserted that such a close analogy to the facts in \textit{Shapiro} would be required before strict scrutiny would be appropriate.\textsuperscript{118}

\begin{itemize}
\item \textsuperscript{110} See id. at 259-60 (footnote omitted).
\item \textsuperscript{111} See id. at 258.
\item \textsuperscript{112} See id. at 269.
\item \textsuperscript{113} See text accompanying notes 64 & 65 supra.
\item \textsuperscript{114} See Maher v. Roe, 97 S. Ct. 2376, 2383 n.8 (1977).
\item \textsuperscript{115} See id.
\item \textsuperscript{116} See id.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} See id.
\end{itemize}
Moreover, the majority reasoned that just as the right to travel interstate is not penalized by the refusal to pay for it, the state does not penalize the choice to have an abortion by refusing to pay for it.\footnote{119. See id.}

The flaws inherent in this analysis are apparent. In \textit{Shapiro} the Court emphasized that a regulation which deters or interferes with the exercise of a fundamental right is unconstitutional unless supported by a compelling state interest.\footnote{120. See \textit{Shapiro v. Thompson}, 394 U.S. 618, 634 (1969).} A penalty was distinguished from deterrence in \textit{Dunn}:

\textit{Shapiro} did not rest upon a finding that denial of welfare actually deterred travel. Nor have other “right to travel” cases in this Court always relied on the presence of actual deterrence. In \textit{Shapiro} we explicitly stated that the compelling-state-interest test would be triggered by “any classification which serves to penalize the exercise of that right \textit{[to travel]} . . . .”\footnote{121. Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972) (footnote omitted) \textit{(emphasis in original)} \textit{(quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)).}}

This clarification of the meaning of \textit{Shapiro} was designed to broaden, rather than narrow, the application of the strict scrutiny test. In essence, \textit{Dunn} asserted that a regulation does not even have to deter the exercise of a fundamental right to trigger strict scrutiny. Rather, if a regulation merely penalizes one who exercises a fundamental right, the strict scrutiny test applies. Thus, \textit{Maher's} analogy of a penalty to a criminal sanction is inappropriate. \textit{Maher} recognized that the regulation at issue would make it difficult, if not impossible, for indigent women to exercise their fundamental right to choose abortion.\footnote{122. See \textit{Maher v. Roe}, 97 S. Ct. 2376, 2383 (1977).} Thus, the Connecticut regulation not only penalizes, but actually deters, the exercise of a constitutional right. Strict scrutiny is therefore particularly appropriate.

Nevertheless, the Court concluded that the Connecticut regulation does not impinge upon a fundamental right. This finding was reached by considering a woman’s interest in choosing abortion in conjunction with the nature of the state’s interference with such choice.\footnote{123. See \textit{id. at 2382.}} In effect, the Court used a balancing test similar to that proposed by Justice Marshall.\footnote{124. See text accompanying note 91 \textit{supra}.} However, while Justice Marshall’s test may be used to determine the validity of a legislative classifica-
tion, the Court's test was used merely to determine whether the right to choose abortion had been sufficiently interfered with so as to trigger strict scrutiny. The Court in *Maher* deemed this test appropriate because it believed that the right recognized in *Wade* is only impinged upon by "unduly burdensome" interference.\(^{125}\)

This view is based on the recognition in *Wade* that the state has an interest in protecting potential human life. The Court in *Beal* asserted that this interest exists "throughout the course of the woman's pregnancy."\(^ {126}\) The Court in *Beal* read *Wade* to hold that the point at which this interest becomes sufficiently compelling to justify interfering with the abortion decision depends upon the nature of the interference. However, *Wade* prevents the state's interest in potential life from justifying any regulation of the abortion decision prior to viability, as such regulation only "has both logical and biological justifications" at this point.\(^ {127}\) In addition, under the holding in *Wade*, only narrowly circumscribed regulation of the abortion decision is permissible. For example, abortions can be regulated, and even proscribed, to protect the state's interest in potential human life only after viability, and only if the life or health of the mother is not endangered by the pregnancy.\(^ {128}\) Regulations aimed at promoting maternal health are only permissible during the second and third trimesters. The types of regulation *Wade* deemed permissible to promote maternal health during the second and third trimesters constitute very minor interferences, which indicates that the limitations imposed by the decision apply to any regulation of the abortion decision, not just to unduly burdensome interferences, as the Court in *Maher* asserted.

The regulation at issue in *Maher* does not satisfy the standards established in *Wade*. It interferes with the abortion decision during the first and second trimesters, without promoting maternal health. *Maher* nevertheless sanctioned the regulation as it deemed the criteria established in *Wade* inapplicable to regulations which do not unduly burden the right to choose abortion.\(^ {129}\) By misreading *Wade*, the Court in *Maher* avoided invalidating the regulations on constitutional grounds. A correct reading would compel the opposite result.


\(^ {126}\) *Beal* v. Doe, 97 S. Ct. 2366, 2372 (1977).


\(^ {129}\) The conclusion that the regulations at issue in *Maher* do not unduly burden the right to choose abortion is faulty. See text accompanying notes 64 & 65 *supra*. 
Maher found the regulation at issue not sufficiently burdensome to impinge upon the fundamental right to choose abortion by balancing the state's interest in potential life against the woman's interest in choosing how to terminate her pregnancy. Therefore, strict scrutiny was not invoked. This finding was based primarily on the Court's interpretation of the state's decision to fund childbirth, while denying funding to elective abortion, to encourage childbirth. Thus, the purported state interest in potential human life, which can also be seen as an interest in promoting normal childbirth, provided support for the regulation at issue. The Court particularly emphasized that the state did not erect a direct obstacle to choosing abortion, but rather made the alternative choice of childbirth much more attractive. Indeed, the Court observed that Connecticut placed no obstacles "in the pregnant women's path to abortion" that were not already there.

This reasoning suggests that preventing women from exercising their constitutional right to choose abortion is permissible if done indirectly. However, the means chosen by the legislature had particular significance for the Court. Maher embraced the view that the state should have broad power to "encourage actions deemed to be in the public interest." Thus, the distinction between encouraging an "activity consonant with legislative policy," such as normal childbirth, and directly interfering with a protected activity, for example, by prohibiting abortion, is important. The former type of state action is protected, for it involves what the Court believed to be the state prerogative of promoting what the legislature considers to be in the public interest. The latter mode of state action, on the other hand, lacks the positive element of state encouragement of a favored activity, and merely involves interference with constitutionally protected activity. Thus, the Court will protect fundamental rights only from direct prevention of their exercise. However, because it is within the state's prerogative to promote the public interest by encouraging certain activities, if a right is interfered with indirectly by state encouragement of alternative activity deemed to be in the public interest, less constitutional scrutiny will be applied. Therefore, in cases involving the fundamental right to choose abortion, strict scrutiny will only be

131. Id.
132. Id. at 2383.
133. Id.
134. Id.
invoked if the state creates a classification which directly interferes with that right.\textsuperscript{135} This reasoning directly opposes the declaration in \textit{Dunn v. Blumstein}\textsuperscript{136} that “‘Constitutional rights would be of little value if they could be . . . indirectly denied’ . . .”\textsuperscript{137}

The failure of the Court to apply strict scrutiny simply because the Connecticut regulation imposed an indirect barrier to the right to choose abortion also ignores practical realities. The Court itself acknowledged that without Medicaid funding for abortion indigency “may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions.”\textsuperscript{138} Therefore, \textit{Maher} avoided strictly scrutinizing a legislative classification that infringed upon a fundamental right because the Court focused on the method used by the state to interfere with the right established in \textit{Wade}, rather than on the practical result of this interference.

After finding that the classification at issue in \textit{Maher} was not subject to strict scrutiny, the rational basis test was applied.\textsuperscript{139} The distinction in the Connecticut regulation between childbirth and elective abortion was found to relate rationally to the constitutionally permissible purpose of encouraging normal childbirth.\textsuperscript{140} That this interest is legitimate throughout the pregnancy was supported by statements in \textit{Wade} that the state’s interest in protecting the potential life of the fetus grows “‘in substantiality as the woman approaches term,’ ”\textsuperscript{141} and that the pregnant woman “‘cannot be isolated in her privacy.’ ”\textsuperscript{142} However, these statements were dicta, meant only to support the state’s compelling interest in the potential life of the fetus after viability. The Court in \textit{Wade} emphasized that this interest could not justify interference with the abortion decision prior to viability.\textsuperscript{143} Thus, \textit{Maher}’s conclusion that the state has an “‘unquestionably . . . ‘strong and legitimate interest in encouraging normal childbirth’ ”\textsuperscript{144} throughout the pregnancy is

\textsuperscript{135} E.g., A Missouri consent requirement for the procurement of an abortion was declared unconstitutional in Planned Parenthood v. Danforth, 428 U.S. 52 (1976). This requirement was invalidated because it constituted “an absolute obstacle” to a woman’s right to choose how to terminate her pregnancy. \textit{See id.} at 70 n.11.

\textsuperscript{136} 405 U.S. 330 (1972).

\textsuperscript{137} \textit{Id.} at 341 (quoting Harman v. Forssenius, 380 U.S. 528, 540 (1965)).


\textsuperscript{139} \textit{See id.} at 2385.

\textsuperscript{140} \textit{See id.}

\textsuperscript{141} \textit{Id.} (quoting \textit{Roe v. Wade}, 410 U.S. 113, 162-63 (1973)).

\textsuperscript{142} \textit{Id.} (quoting \textit{Roe v. Wade}, 410 U.S. 113, 159 (1973)).


\textsuperscript{144} \textit{Maher v. Roe}, 97 S. Ct. 2376, 2385 (1977) (quoting \textit{Beal v. Doe}, 97 S. Ct. 2366, 2372 (1977)).
based on the Court's misreading of *Wade*. Nevertheless, the Court continued this argument by noting:

> The medical costs associated with childbirth are substantial, and have increased significantly in recent years. As recognized by the District Court in this case, such costs are significantly greater than those normally associated with elective abortions during the first trimester. The subsidizing of costs incident to childbirth is a rational means of encouraging childbirth.\(^{145}\)

However, denying Medicaid funding for elective abortion while providing it for childbirth is not a rational means of protecting potential life by encouraging childbirth, because such a regulation only encourages a narrow class of people to carry their fetuses to term, that is, women who cannot afford abortions.

The Court dismissed the notion that its holding could be seen as "unsympathetic to the plight of an indigent woman who desires an abortion"\(^{146}\) by the meager assertion that "‘the Constitution does not provide judicial remedies for every social and economic ill.’"\(^{147}\) Citing *Dandridge*, the Court also emphasized the wide latitude given the states in "choosing among competing demands for limited public funds."\(^{148}\) This latitude exists even though the "‘most basic needs of impoverished human beings’"\(^{149}\) are involved. Yet reliance on *Dandridge* is particularly inappropriate, given that abortion is a less costly medical procedure than childbirth.\(^{150}\) Thus, the state's fiscal integrity would be preserved by funding abortions.

Application of Justice Marshall's equal protection analysis\(^{151}\) to the regulations at issue in these cases would result in invalidation of the regulations. In dissent, Justice Marshall characterized the benefits denied in *Beal* and *Maher* as "of absolutely vital importance in the lives of the recipients."\(^{152}\) Without public financing for nontherapeutic abortions, a poor woman will be forced either to risk her life by undergoing an illegal abortion or give birth to an unwanted child and thereby "give up all chance of escaping the

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145. *Id.*
146. *Id.*
147. *Id.* (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).
148. *Id.* (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).
149. *Id.* (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).
151. See text accompanying note 91 *supra*.
cycle of poverty.” Justice Marshall asserted that worthy of consideration is that the class affected by this denial is poor, although he acknowledged that poverty does not constitute a suspect class. He further observed that minority women will be most strongly affected by the denial. The asserted state interest was measured against these considerations. This interest was described by the Court as "a strong interest in protecting the potential life of the fetus." However, Justice Marshall cited the assertion in *Doe v. Bolton*, the companion case to *Wade*, that no state interest can justify interference with the abortion decision during the first trimester to refute this aspect of the majority opinion. He further asserted: "If there is any state interest in potential life before the point of viability, it certainly does not outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women." Therefore, under Justice Marshall’s flexible equal protection analysis, the regulations at issue would be invalid. Finally, Justice Marshall charged that the majority invoked the traditional two-tiered equal protection approach so as to test the Connecticut regulation under a rational basis analysis. In his opinion, application of this test "leaves little doubt about the outcome; the challenged legislation is . . . always upheld." "

CONCLUSION

Two recent Supreme Court decisions have resolved statutory and constitutional challenges to state regulations which restrict a woman’s right to choose abortion. In *Beal v. Doe*, the Court held that the Medicaid statute does not require, but allows, participating states to provide Medicaid funding for nontherapeutic

153. *Id.* at 2397 (Marshall, J., dissenting).
154. *See id.* (Marshall, J., dissenting). *See also* text accompanying notes 94 & 95 *supra*.
156. *Id.* at 2398 (Marshall, J., dissenting) (quoting *Maher v. Roe, 97 S. Ct. 2376, 2385 (1977)*).
159. *Id.* (Marshall, J., dissenting) (footnote omitted).
aborted. In *Beal* the Court found the regulation at issue to be both consistent with Title XIX of the Social Security Act and a reasonable means to encourage childbirth, which is a legitimate state interest. The Court also held in *Maher v. Roe*\(^{163}\) that the failure to provide Medicaid funding for elective abortions, while extending it to therapeutic abortions and live births, does not constitute a denial of equal protection. The Court in *Maher* construed *Wade* and other precedent to support the proposition that only unduly burdensome and direct interference with the right to choose abortion constitutes an infringement of that fundamental right, and that strict scrutiny would only be appropriate in such cases. The regulation at issue in *Maher* was seen as encouraging childbirth, an activity deemed to be in the public interest, rather than as a direct obstacle to a woman’s ability to choose abortion. This led to the validation of the regulation, because it was found to “rationally relate” to the “legitimate state interest” of encouraging normal childbirth.

By holding that strict scrutiny will only apply to unduly burdensome state action, the Supreme Court has severely diminished the privacy right established in *Wade*. This conclusion is especially true given that the Court did not consider the denial of Medicaid funding for elective abortions an undue burden on the right to choose abortion, while funding for therapeutic abortions and live births was permitted. Only a criminal prohibition, such as the statute invalidated in *Wade*, is a more severe burden on this right. Thus, the decision in *Maher* indicates that most state interferences with a woman’s constitutionally protected right to choose abortion will now be subject to rational basis analysis, rather than to strict scrutiny. The application of such an analysis will undoubtedly result in upholding abortion regulations if the Court continues to misread *Wade*, as it did in *Beal* and *Maher*, to suggest that the state’s interest in encouraging childbirth can justify regulating the abortion decision throughout the pregnancy. Thus, the rational basis standard is easily met. The decisions under discussion subvert the principles established in *Wade* to the disadvantage of indigent women.

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\(^{163}\) 97 S. Ct. 2376 (1977).