Commentary

PRIVACY AND PUBLIC FUNDING: *MAHER V. ROE* AS THE INTERACTION OF *ROE V. WADE* AND *DANDRIDGE V. WILLIAMS*

David T. Hardy*

Constitutional law has generally been characterized by slow and methodical change. From the origin of the exclusionary rule in *Weeks v. United States*[1] to its application to the states in *Mapp v. Ohio*,[2] was a span of 47 years. The right to appointed counsel, recognized on a limited basis in 1932,[3] restricted 10 years later,[4] and then given general application almost a generation after,[5] is still developing.[6] The favor shown gradual development is dictated largely by the judicial role in the political function, a role which may bring it into conflict with elected institutions and popular sentiments, under conditions where overextension is most hazardous.[7]

This caution has not, until very recently, been a significant consideration when the right to abortion is at issue. In 1970, the Legislature of New York enacted the first complete state liberalization of abortion statutes;[8] hardly 3 years later, the Supreme Court declared such liberalization a constitutional duty in *Roe v. Wade*[9] and *Doe v.*

---

* Partner, Sharp, Sando, Alfred, & Hardy, Tucson, Arizona. B.A. 1972, J.D. 1975, University of Arizona. Member of the Arizona bar. The author would like to acknowledge the assistance of Ronald Sommer, Esq., in the research incident to this Commentary.

1. 232 U.S. 383 (1914).
2. 367 U.S. 643 (1961).
3. *See* Powell v. Alabama, 287 U.S. 45, 71-73 (1932).
4. *See* Betts v. Brady, 316 U.S. 455, 471-73 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335, 339 (1963).
5. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963).
6. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972); Anders v. California, 386 U.S. 738 (1967); Douglas v. California, 372 U.S. 353 (1963).
7. Doe v. Mathews, 420 F. Supp. 865, 872 (D.N.J. 1976). *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).
8. *See* ch. 127, § 1, 1970 N.Y. Laws 170, (codified at N.Y. PENAL LAW § 125.05(3) (McKinney 1975)); Charles & Alexander, *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection?*, 23 HASTINGS L.J. 147, 147 (1971).
9. 410 U.S. 113 (1973).

Bolton.[10] The lower courts immediately took up the torch and began striking down all manner of laws showing disfavor to abortion.[11] Within 5 years, abortion had changed from a felony to a right which a legislature might be unable to limit even by providing lifesaving measures for a fetus born alive,[12] by preventing physicians with conscientious objections from being compelled to take part in abortions,[13] nor by refusing to provide state funding for elective abortions.[14]

None of the conflicts over the boundaries of *Roe* and *Doe* were litigated as intensively as the possibility of a governmental duty to finance or provide facilities for abortion. Substantial public funding had already been devoted to abortion; federal funds presently underwrite a quarter of a million abortions per year.[15] Additional assistance was provided by state, local, and private sources.[16] Where there was reluctance to devote tax money to elective abortion, actions to compel such appropriation were brought. Whether brought by patients alleging inability to obtain abortions, or by physicians seeking public underwriting of their fees, these actions proved almost uniformly

---

10. 410 U.S. 179 (1973).

11. *See, e.g.*, Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1975), *rev'd on other grounds*, 428 U.S. 106 (1976) (refusal of public funding); Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (various regulations on medical procedures); Doe v. Hale Hosp., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975) (denial of use of public hospital); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974), *appeal dismissed sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975) (various regulations). *Cf.* Roe v. Norton, 522 F.2d 926 (2d Cir. 1975) (absence of coverage of elective abortions by Medicaid is not dispositive of constitutional requirement of coverage); Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975) (to same effect); Taylor v. Hill, 420 F. Supp. 1020, 1031 (W.D.N.C. 1976) (rejecting argument that denial of Aid to Families with Dependent Children to unborn children impairs right of procreation by creating financial pressures favoring abortion). *But see* Roe v. Arizona Bd. of Regents, 113 Ariz. 178, 549 P.2d 150 (1976) (holding that teaching hospitals need not provide elective abortions).

12. Hodgson v. Anderson, 378 F. Supp. 1008, 1016-17 (D. Minn. 1974), *appeal dismissed sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975); Doe v. Rampton, 366 F. Supp. 189, 192 (D. Utah 1973), *vacated*, 410 U.S. 950 (1973).

13. Hodgson v. Anderson, 378 F. Supp. 1008, 1017-18 (D. Minn. 1974), *appeal dismissed sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975).

14. Wulff v. Singleton, 508 F.2d 1211, 1215 (8th Cir. 1975), *rev'd on other grounds*, 428 U.S. 106 (1976); Doe v. Rose, 499 F.2d 1112, 1115 (10th Cir. 1974).

15. During the fiscal year of 1973 to 1974, $50 million in federal funds were expended to subsidize 250,000 abortions. Schulte, *Tax-Supported Abortions: The Legal Issues*, 21 CATH. LAW. 1, 2 (1975); *Proposed Amendments to the Constitution: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on Judiciary*, 94th Cong., 2d Sess., vol. 1, at 76 (1976) (testimony of J. Noonan). The United States Solicitor General has taken the position, however, that the Medicaid program does not require funding of abortions, but makes coverage of abortions optional with the disbursing state. *See* Memorandum for the United States as Amicus Curiae at 6-7, Petition for Writ of Certiorari, Beal v. Doe, No. 75-554 (U.S., filed Mar. 1976).

16. Schulte, *supra* note 15. The total amount of present state and local funding is unknown. One indication may be gained from the fact that $100,000 was spent for 421 publicly provided abortions in Pima County, Arizona, during one fiscal year. Tucson Daily Citizen, Mar. 24, 1976, at 1, col. 1.

The amount of private assistance is likewise unknown. Some clinics will provide services at low or no cost to the indigent. David, *Abortion: Public Health Concerns and Needed Psychosocial Research*, 61 AM. J. PUB. HEALTH 510, 512 (1971).

successful in the lower courts.[17] This trend met a sharp check last term, when the Supreme Court held in *Maher v. Roe*,[18] *Beal v. Doe*,[19] and *Poelker v. Doe*[20] that state aid for nontherapeutic abortions is mandated neither by the Constitution nor by title 19 of the Social Security Act. The six man majority treated the state choice to fund or provide facilities for childbirth but not for elective abortion as a valid state election to encourage delivery, rather than an impermissible increase of existing burdens on abortion.[21]

It will be the purpose of this Commentary to explore the possible rationales for a constitutional requirement of government funding of abortion. First a determination of whether the legal bases which have already surfaced can be reconciled with established constitutional principles will be made. The due process limitations on state action will initially be examined, after which the effect of the equal protection clause on state abortion funding will be analyzed. Once it is established that neither due process nor equal protection mandate state funding of abortion, the existence of such a requirement will be examined using a hybrid formulation of constitutional law. Finally, the Commentary will discuss possible state interests in refraining from providing assistance, particularly the need to conserve state resources, and the moral opposition to abortion among large segments of American society.

---

17. Five circuits had held that states are under a duty to provide funding or make facilities available for abortion. *See* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977); Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), *rev'd*, 97 S. Ct. 2391 (1977); Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1975), *rev'd on other grounds*, 428 U.S. 106 (1976); Friendship Medical Center, Ltd. v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975; Doe v. Hale Hosp., 500 F.2d 144 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974). Two other circuits had refused to hold that funding is required by the Federal Social Security Act, and have remanded on constitutional grounds, noting that the Supreme Court's opinions in *Doe v. Bolton* and *Roe v. Wade* do not clearly dispose of such issues. *See* Roe v. Norton, 522 F.2d 928, 938 (2d Cir. 1975); Roe v. Ferguson, 515 F.2d 279, 284 (6th Cir. 1975). *See also* Roe v. Arizona Bd. of Regents, 113 Ariz. 178, 549 P.2d 150 (1976).

18. 97 S. Ct. 2376 (1977).

19. 97 S. Ct. 2366 (1977).

20. 97 S. Ct. 2391 (1977) (per curiam). Of the three companion cases, *Maher* will receive primary attention in this Commentary. *Maher* concerned a state choice to refuse funding for physicians performing elective abortions, and dealt extensively with the constitutional issue which is the focus of this Commentary. *Beal*, in contrast, dealt with the statutory issue. *Poelker*, which concerned an alleged limitation on use of public hospital facilities, was disposed of in a per curiam opinion upon the strength of the other two decisions. While the primary focus will be upon *Maher*, that decision cannot be discussed in total isolation from its companion cases, for the dissenters placed the bulk of their constitutional analysis in their opinions following the *Beal* majority opinion.

21. 97 S. Ct. at 2382-83. The minority, in contrast, viewed the differential treatment as indirect use of financial pressures toward an unconstitutional end, that is, the coercion of indigents into delivery rather than elective abortion. *See* 97 S. Ct. at 2376 (Brennan, J., dissenting); *id.* at 2395 (Marshall, J., dissenting); *id.* at 2399 (Blackmun, J., dissenting).

POSSIBLE CONSTITUTIONAL BASES FOR A RIGHT TO ASSISTED ABORTION

Due Process Right to Public Assistance of Abortion as an Outgrowth of its Decriminalization

The most direct approach to the creation of a constitutional right to assistance for abortion lies in the implication of such a right from *Roe* and *Doe*. Although those decisions held only that abortion, based on mutual consent of physician and patient, could not be criminalized,[22] the lower courts have readily implied from them a right to public assistance in the implementation of the abortion decision.[23] This process of implication has been based upon several traditional concepts, applied with perhaps too little critical analysis: That failure to fund abortion constitutes a governmental deprivation of,[24] or limitation upon,[25] the right to such procedures; that it levies a penalty upon the exercise of that right or conditions welfare upon its waiver;[26] or that there is a duty to finance constitutional privileges where an individual cannot obtain them from others on his own.[27] The applicability of these characterizations can best be examined by formulating them into general statements of law, which can then be tested in light of the present development of constitutional privileges.

1. *If a state cannot constitutionally criminalize the purchase of a service, does it have a corresponding duty to provide financing and facilities for the implementation of that service for indigents?* When

22. *See* Roe v. Norton, 522 F.2d 928, 938 (2d Cir. 1975); Roe v. Ferguson, 515 F.2d 279, 284 (6th Cir. 1975); Doe v. Wohlgemuth, 376 F. Supp. 173, 195 (W.D. Pa. 1974) (Weis, J., dissenting), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977); Schulte, *supra* note 15, at 30. *Cf.* Bigelow v. Virginia, 421 U.S. 809, 815 n.5 (1975) (abortion advertising poses first amendment and not right of privacy problem).

23. The only decision at the circuit level to rely purely upon substantive due process grounds is Nyberg v. City of Va., 495 F.2d 1342 (8th Cir. 1974), *appeal dismissed*, 419 U.S. 891 (1974), one of the earliest decisions on the issue of public assistance for abortion. Later cases have opened with references to *Roe* and *Doe*, but then changed to an equal protection argument. *See, e.g.*, Doe v. Mundy, 378 F. Supp. 731 (E.D. Wis. 1974), *aff'd*, 514 F.2d 1179 (7th Cir. 1975); Orr v. Koefoot, 377 F. Supp. 673 (D. Neb. 1974); 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), *vacated*, 410 U.S. 950 (1973); cases cited note 11 *supra*.

24. *See* Doe v. Wohlgemuth, 376 F. Supp. 173, 191-92 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977).

25. *See* Doe v. Rose, 499 F.2d 1112, 1115 (10th Cir. 1974); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah), *vacated*, 410 U.S. 950 (1973).

26. *See* Doe v. Wohlgemuth, 376 F. Supp. 173, 191 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977).

27. *See* Doe v. Rose, 499 F.2d 1112, 1115 (10th Cir. 1974); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973); *cf.* Hathaway v. Worchester City Hosp., 475 F.2d 701, 705 & n.2 (1st Cir. 1973) (holding that a state cannot deny use of hospital facilities to perform consensual sterilization when it permits use of facilities for other procedures of equal risk and for nontherapeutic procedures; such a limitation of fundamental right is a violation of equal protection).

put in the form of a general doctrine, an affirmative answer seems most questionable. A distinction may be drawn between having a constitutional "right" in the sense that the government cannot prohibit a given act, and having a "right" in the sense that the government must provide economic assistance when private individuals refuse to perform the service unless compensated.[28] To fail to distinguish these two types of rights would make the Bill of Rights a mandate for governmental interference, rather than a bulwark against it.[29] It would also require largely overruling the traditional state action doctrine,[30] and would create inconsistencies within the Constitution itself.[31] The practical problems of mandating such funding would be no less serious.[32] It has

28. Doe v. Wohlgemuth, 376 F. Supp. 173, 194 (W.D. Pa. 1974) (Weis, J., dissenting), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977); Comment, *Abortion on Demand in a Post-Wade Context: Must the State Pay the Bills?*, 41 FORDHAM L. REV. 921, 929-30 (1973). *See also* Maher v. Roe, 97 S. Ct. at 2382; text & note 34 *infra*.

29. Comment, *supra* note 28.

30. The essense of the state action doctrine is that the fourteenth amendment proscribes denial of due process and equal protection by the states and parties closely connected with the state, but does not apply to purely private acts. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961); Civil Rights Cases, 109 U.S. 3 (1884). If the state's inability to deny an individual a right implies a corresponding duty to facilitate the meaningful exercise of that right by overcoming private barriers, then it would be no defense to allege that the right-denying act was purely private in character.

31. For example, the first amendment, which prohibits both state interference with religion and state assistance of religion, would contain mutually exclusive provisions. *Cf.* Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970) (state may not unreasonably restrict a prison inmate's religious exercise, but is not required to supply clergymen).

32. The most extensive discussion of practical difficulties created by judicial requirements that social programs be funded has been made by Professor Winter. *See* Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41. The more important of Winter's arguments may be condensed as follows:

1. The determination of which rights are so vital that they require funding involves subjective value judgments which the judiciary is no better equipped to make than are the other branches of government. *See id.* at 67-68, 92-93.

2. Whether an invididual is so indigent that he will be unable to satisfy his vital needs depends upon whether he used his resources to purchase other desired goods and services, and in turn on whether those desires are subjectively labeled necessities or luxuries. *See id.* at 67.

3. Since the resources of society are limited, satisfaction of one want is acheived only by reducing the supply of another wanted item, which may increase its cost and thus deny its fulfillment to the poor. *See id.* at 75.

4. Redistribution of income or services from rich to poor should be accomplished as a coordinated package; the judicial process of case-by-case decisionmaking cannot make the necessary compromises, tradeoffs, and coordination for an optimum mix of services. *See id.* at 94.

5. Planning the financial end of such a program requires information as to the income of the society, resistance of taxpayers, the point at which higher taxes will result in diminishing returns due to disincentive effect, the possibility of benefits themselves reducing incentives to earn, and similar informaton not available to courts nor likely to be presented by individual litigants. *See id.* at 71-84, 94-95.

6. If a want cannot be entirely and perfectly satisfied, the determination of how much satisfaction is adequate becomes impossible once the countervailing price penalty is removed from the equation. *See id.* at 73, 95.

The financing of abortion poses problems of the type outlined by Winter. For example, free provision of abortion may give disincentives to good contraception. *See* text & notes 127-30 *infra*. In addition, the tax structures of state and local governments are presently posing special dangers and difficulties, *see* text & notes 114-16 *infra*, and, while

therefore been noted that the Supreme Court has declined to create a duty to finance services which cannot be outlawed.[33] Nor does labeling the right fundamental create such a duty. The fundamentality of a right, which will trigger close scrutiny of any governmental attempt to criminalize it, does not necessarily command similar protection when the issue is one of financing. A determination, for example, that education is a fundamental right, does not entail a requirement that a state show a compelling interest when it elects to fund education in a specific manner.[34] The Court has instead implied a right to affirmative provision of a service only where there is a complete governmental monopoly of the desired service and a lack of any nongovernmental equivalent;[35] the fact that a private equivalent may be subject to a fee, or even impractical in some cases, is insufficient to create a governmental duty to provide a free substitute.[36] The requirement that government be the sole source of the benefit sought is not met in the abortion scenario, as the *Maher* majority notes.[37] Existing concepts of due process rights

---

an "adequate" abortion is easily defined, *accord*, text & note 124 *infra*, how much must be offered to physicians in order to avoid infringing upon their "right to practice" may be difficult to determine. *See also* R. STEVENS & R. STEVENS, WELFARE MEDICINE IN AMERICA 313 (1974).

33. Doe v. Wohlgemuth, 376 F. Supp. 173, 193 (W.D. Pa. 1974) (Weis, J., dissenting), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *cert. granted*, 428 U.S. 909 (1976); *see* Schulte, *supra* note 15, at 3. *See also* text & note 34 *infra*.

34. *Compare* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (constitutional right to education such that state cannot prohibit its private acquisition), *with* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education not constitutionally protected in the sense that state must show compelling interest in order to fund unequally). *See also* Gittlemacker v. Prasse, 428 F.2d 1, 4 (3d Cir. 1970); Maher v. Roe, 97 S. Ct. at 2384.

35. *Compare* Boddie v. Connecticut, 401 U.S. 371 (1971), *with* United States v. Kras, 409 U.S. 434 (1973). *See also* Ortwein v. Schwab, 410 U.S. 656 (1973); Comment, *supra* note 28, at 928-29. In *Boddie*, the Court struck down a requirement of filing fees for divorce, noting that the state had required access to courts as a prerequisite for marriage dissolution and that it could not "pre-empt the right to dissolve" without affording equal access. 401 U.S. at 383. The emphasis upon exclusivity of state remedies was strong:

> Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. . . . [R]esort to the state courts is the only avenue to dissolution of their marriages . . . . [T]his process is not only the paramount dispute-settlement technique, but, in fact, the only available one.

Id. at 376-77. The *Kras* Court relied upon this reasoning to distinguish the imposition of bankruptcy filing fees, noting that the debtor's position might be ameliorated by private arrangements with creditors, which would require no state approval. 409 U.S. at 445-46.

36. The private creditor arrangements mentioned in United States v. Kras, 409 U.S. 434 (1973) (see discussion note 35 *supra*), would almost certainly not be without cost to the debtor, but the Court noted that, "[h]owever unrealistic the remedy may be in a particular situation," it was available as a private solution. *Id.* at 434, 445.

37. 97 S. Ct. at 2380 n.5. It might be argued that a state, by licensing doctors, renders them a state monopoly for equal protection purposes. *See* Comment, *supra* note 28, at 928 n.50. Such an argument is unpersuasive. The logical basis of the "state monopoly" exception lies in the state's forcing citizens to purchase services from itself and then imposing its own price barriers upon them. The state, however, has no ability to set physicians' fees in a manner analogous to its power to set court fees. Doe v. Wohlgemuth, 376 F. Supp. 173, 193 (W.D. Pa. 1974) (Weis, J., dissenting), *modified sub*

thus will not support an argument for constitutionally mandated government-supplied abortion.

Portions of the minority *Maher* opinions seem to suggest the Court should attempt to formulate a general requirement of affirmative provision of certain classes of goods and services.[38] Such a general doctrine might imply a duty to provide for certain "just wants"—most notably

---

nom. Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977). Courts have for similar reasons, refused to hold that state licensing of attorneys, or their status as officers of the court, renders their acts state action. *See* Steward v. Meeker, 459 F.2d 670 (3d Cir. 1972); Dyer v. Rosenberg, 434 F.2d 648, 649 (9th Cir. 1970); Mulligan v. Schlachter, 389 F.2d 231, 233 (6th Cir. 1968). The same approach could, moreover, be used in the legal setting to argue for a right to funding of civil actions, a right recently rejected by the Supreme Court. *See* Ortwein v. Schwab, 410 U.S. 656, 659 (1973). Similarly, attorneys might argue for a constitutional right to payment for appointed criminal defenses, an argument which has fared little better. *See* Wayne County v. Waller, 90 Pa. 99, 104 (1879); Pardee v. Salt Lake County, 39 Utah 482, 489-91, 118 P. 122, 125 (1911). *See also* State v. Rush, 46 N.J. 399, 407-09, 217 A.2d 441, 445-46 (1966). *But see* Board of Comm'rs v. McGregor, 171 Ind. 634, 640-41, 87 N.E. 1, 3-4 (1909). Moreover, since the remedy in *Boddie* was to require the state agents to waive the filing fee, the logical result of such a petition in the abortion context would be to order that physicians henceforth must perform abortions for indigents without compensation.

38. For example, Justice Blackmun's dissent criticizes the majority position on grounds that it "concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that existence and realization are separate and distinct." He further rejects the argument that an indigent may seek abortion via nongovernmental means as "condescension": "I find that disingenuous and alarming, almost reminiscent of 'let them eat cake.'" *Beal v. Doe*, 97 S. Ct. at 2398-99. The Justice does not suggest, however, any method for formulating a general rule as to what rights may and may not generate a duty to fund. That he does not accept such a duty as applicable to all rights is suggested by his opinion in United States v. Kras, 409 U.S. 434 (1973), upholding the conditioning of discharge in bankruptcy upon payment of a $50 filing fee as applied to an individual, unemployed for 4 years, with a child afflicted with cystic fibrosis, and who "[b]ecause of his poverty . . . is wholly unable to pay or promise to pay the bankruptcy fees, even in small installments." *Id.* at 438. Justice Blackmun there noted that "[h]owever unrealistic the remedy might be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. . . . Resort to the court, therefore, is not Kras' sole path to relief." *Id.* at 445-46.

Justice Marshall's minority opinion in *Beal* does suggest a proposed general test, appearing to treat a denial of funding, along with outright prohibition, as subject to a three-prong balancing test which would weigh the importance of the governmental benefits, the nature of the class to which they are denied, and the contravening state interests. 97 S. Ct. at 2396. Marshall's application of the test to the abortion issue suggests that its scope would not be narrow. Abortion benefits are important since they involve the *Roe v. Wade* right—illegal abortions are dangerous, and additional children may decrease income. The class affected is completely unable to pay and thus sustains a deprivation of a meaningful opportunity to enjoy the benefit. The state interest is dismissed as insufficient. *Id.* at 2396-98. It seems likely that almost any governmental benefits would weigh strongly on the first two prongs, as most benefits affect matters important to physical health and escaping poverty in one way or another, and most are extended or denied to low income and minority groups. It might also be questioned if the Court obtains the empirical data necessary for each of the prongs. Marshall's assertion that "Medicaid recipients are, almost by definition, 'completely unable to pay for' abortions," *id.* at 2397, is supported by geographical rather than income data, *see id.* at 2395 n.1, and by an unsupported note that "private generosity is unlikely to give many poor women 'a meaningful opportunity' to obtain abortions." *Id.* at 2397 n.2. Even his estimates on such a quantifiable issue as the number of minority groups receiving government funded abortions must be based on several layers of extrapolation from admittedly incomplete initial figures. *Id.* at 2397 n.4. How the Court may obtain full data on the considerably more complex financial and political questions surrounding governmental aid, see discussion note 32 *supra*, and involving abortion in particular may be open to doubt.

food, shelter, and similar necessities to life—in situations where the desire to acquire the good or service is not a function of price.[39] Such situations would essentially involve the satisfaction of needs that justice requires everyone have satisfied, and which everyone presumably would choose to satisfy if he were able.[40] If such a test were adopted, however, it seems doubtful that free abortion would fall within its scope.[41] Whether abortion is a desire that "justice requires" be satisfied will depend upon the attitudes of the decisionmaker. It may be suggested that there are many more pressing needs for the limited public resources available. Moreover, not everyone would choose abortion if she had the money. Even among those with no conscientious objection to abortion, there are many who desire children or are sufficiently ambivalent that, had they the money, they would spend it on other goods or services.[42] Abortion does not qualify as a just want which substantive due process requires the state provide. Under existing theories of due process, the lack of state monopoly removes an element essential to the implication of such a right. The direct line between *Doe* and *Roe* and the duty to assist abortions is thus untenable: A prohibition against criminalization does not, per se, imply a right to governmental assistance.

2. *If an individual has a constitutional right to purchase a service, but lacks the money to do so on his own, does the state's refusal to provide financial assistance constitute a constraint or limitation upon*

---

39. Perhaps the most influential of the suggested general doctrines is that advocated by Professor Frank Michelman. *See* Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

40. *Id.* at 30. These criteria do not offer clear guidelines and have been strongly criticized on practical grounds. *See* Winter, *supra* note 32, at 67. It is not clear whether Professor Michelman proposes to define "just wants" in terms of the universal desires of society or the ideas of a bureaucrat as to public needs. Clearly, the concept is viable only if the term reflects a generalized societal goal. Otherwise, it would be illogical to predicate the satisfaction of the desires on any notion of justice. The determination of such a consensus is never easy; for the judicial branch, one of whose essential characteristics is a relative isolation from public opinion, such a determination is especially difficult.

41. A variant of the Michelman argument has been said to be applicable to abortion. *See* Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 42-50 (1973) *criticized in Proposed Constitutional Amendments on Abortion, supra* note 15, at 69-70 (1976) (testimony of J. Noonan). Professor Tribe argues that certain constitutional doctrines may be seen as role allocating, and that abortion decisionmaking may be a role allocated to the woman and protected by the federal judiciary, with the state's decisionmaking role bypassed. *Id.* at 43-45. Tribe's approach, however, fails to explain why a decision concerning state finances ought to be omitted from the state's decisionmaking role. It also is flawed by a dismissal of the state role in protecting its taxpayers' moral sense. This refutation simply notes that the Constitution can "hardly require government to avoid supporting every action to which some religion objects," *id.* at 47 n.215, without considering the power of the state to expand constitutional protections beyond their scope for purposes of judicial mandate. *See* text accompanying note 169 *infra*.

42. Just wants, those that are basic needs of human beings, generally tend to be price inelastic. Demand for elective abortion, however, tends to be very responsive to fluctuations in price and availability. This phenomenon tends to derogate from the conclusion that abortion is a just want. See text & note 110 *infra*.

the underlying right? An affirmative answer to this question seems less tenable than to the first. The economic limitations upon the procurement of abortion, where they truly exist,[43] are not created by government, but rather by private physicians who demand fee guarantees prior to the surgery.[44] While such private economic barriers exist as to almost all acts which cannot be made criminal, the state has no duty to fund such rights as the right to travel,[45] the right of free press,[46] or the right to free exercise of religion.[47] As long as the state imposes no barriers to the right, it cannot be obligated to break down private ones. The state's failure to fund or provide facilities for abortion does not impair existing access, but rather leaves the party exactly where she was prior to the state's inaction. To argue that, when a private physician demands payment in advance from his patient, a state which does not meet his demand is using programs "to limit abortions"[48] or to "unlawfully impinge" upon the patient's rights,[49] is to ignore both reality and stare

43. The argument that indigents cannot obtain abortions in the absence of public funding is more easily alleged than proven. None of the many reported cases state that the plaintiff was in fact forced to bear a child to term, despite court delays which generally exceed the period of human gestation. In one case, it has been reported that a private organization, desiring a test case, made an agreement with the plaintiff prior to filing the suit, providing that the organization would finance an abortion shortly after the suit was filed, in addition to providing attorneys and assuming costs of litigation. *See* Petition for Writ of Certiorari at 12, Poelker v. Doe, No. 75-442 (U.S., filed Sept. 20, 1975). In another case, an affiant swearing that a failure to provide funding would lead to the preclusion of indigents from abortion, elsewhere was shown to have made public statements prior to such funding that the response of local physicians to the needs of indigents seeking abortion had relieved any worries over economic inequities. Affidavits of Ruth Green & Ronald Sommer, Zuravsky v. Asta, No. 2CA-Civ. 2320 (Ariz. App., rehearing denied, Aug. 30, 1977). It was also disclosed that an organization of physicians had contributed several thousand dollars for indigents' abortions, following out-of-state referrals. *Id.* Private clinics providing low-cost abortions or waiving fees for indigents have also been reported. *See* David, *supra* note 17. A Colorado survey shortly after liberalization of that state's abortion law indicated that 19% of the legal abortions had been performed on women with incomes under $3,000 per year, a percentage equal to that income group's proportion of the population as a whole. D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 141 (1970).

The assertions of the minority justices that the *Maher* and *Beal* decisions "inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions," 97 S. Ct. at 2395 (Marshall, J., dissenting), may thus be subject to question.

44. Doe v. Wohlgemuth, 376 F. Supp. 173, 193 (W.D. Pa. 1974) (Weis, J., dissenting), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *cert. granted,* 428 U.S. 909 (1976).

45. Roe v. Arizona Bd. of Regents, 23 Ariz. App. 477, 483, 534 P.2d 285, 291 (1975) (Hathaway, J., dissenting), *vacated,* 113 Ariz. 178, 549 P.2d 150 (1976).

46. *Cf.* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (government may not mandate a private right of access); Pell v. Procunier, 417 U.S. 817, 833-34 (1974) (newsmen are granted no special right of access to prisons). In the *Miami Herald* case, the Court, while noting that appellee had argued strongly "that government has an obligation to ensure that a wide variety of views reach the public," 418 U.S. at 247-48, nonetheless struck down a right-of-reply statute.

47. *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973); Gittlemacker v. Prasse, 428 F.2d 1 (3d Cir. 1970).

48. *See* Doe v. Rose, 499 F.2d 1112, 1115 (10th Cir. 1974); Doe v. Rampton, 366 F. Supp. 189, 193 (D. Utah 1973), *vacated,* 410 U.S. 950 (1973).

49. *See* Doe v. Wohlgemuth, 376 F. Supp. 173, 191-92 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd,* 97 S. Ct. 2366 (1977); *see also* Maher v. Roe, 97 S. Ct. at 2388 (Brennan, J., dissenting).

decisis. The inability of the state to restrict a fundamental right does not lead ineluctably to the conclusion that a failure to actively promote it is an unconstitutional limitation of the substantive right.

3. *If the state cannot criminalize the purchase of a service, can its omission of that service from a general program of free medical service to the indigent be considered the use of the general program to penalize exercise of a right, or a conditioning of welfare upon waiver of a constitutional right?* This approach has less apparent validity than either of the first two. The state exacts no penalty for the abortion decision. The barrier is created by private sellers of the service and the purchaser is not made worse off by the state for his choice of it. The failure to fund cannot, unless conceptualizations triumph over reality, "exclude certain of the poor" from the general program "solely because they have elected to have an abortion."[50] The election has no effect on the recipient's status, nor, after the service is provided, does the state deny any rights that existed before.[51] The holding that a failure to provide affirmative assistance to abortion is a penalty would support the argument that a failure to provide paid vacations for welfare recipients penalizes a decision to travel, or that a refusal to provide foodstamps for alcohol conditions welfare upon waiver of a right to drink.

In light of the foregoing considerations, it may be safely concluded that the right to public assistance of abortion does not fall within traditional concepts of substantive due process. Most of the courts which found such a right began, in fact, by referring to *Roe* and *Doe* but ultimately declined to base their decision on due process grounds, noting that such a holding might require states to fund abortion even if they funded no other medical procedures and, moreover, that such a general principle might compel government funding of all manner of rights.[52] It therefore remains to be determined whether such a right to assistance can be formulated under the equal protection clause.

50. Doe v. Wohlgemuth, 376 F. Supp. 173, 191 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977).

51. It is vital to distinguish, for purposes of this construct, between government action that proclaims that, if a given right is exercised, aid of an unrelated kind will be forfeited as a penalty, and action which simply provides that, if a right is exercised, the state will not provide it but will also not make the actor worse off for having sought it. *See* Fuller v. Oregon, 417 U.S. 40, 54 (1974) (requirement that state be reimbursed for appointed counsel not penalty on choice of attorney); Doe v. Wohlgemuth, 376 F. Supp. 173, 194 n.7 (W.D. Pa. 1974) (Weis, J., dissenting) (decision to have abortion not a deprivation of welfare rights or income), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977); *see also* Maher v. Roe, 97 S. Ct. at 2383 n.8.

52. *See, e.g.*, Doe v. Ceci, 517 F.2d 1203, 1205-06 n.2 (7th Cir. 1975); Doe v. Poelker, 515 F.2d 541, 545 (8th Cir. 1975), *rev'd*, 97 S. Ct. 2391 (1977); Doe v. Wohlgemuth, 376 F. Supp. 173, 192 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977). The only decision which rests upon *Roe* and *Doe* alone is Nyberg v. City of Va., 495 F.2d 1342 (8th Cir. 1974), *appeal dismissed*, 419 U.S. 891 (1974), one of the earliest circuit decisions on the issue. *See also* Maher v. Roe, 97 S. Ct. 2376, 2386 n.13 (1977).

Failure to Finance Abortion as Violative of Equal Protection

The Supreme Court has stressed the importance of making a threshold examination of equal protection claims to determine whether, and to what degree the asserted right is, in fact, susceptible of equal protection analysis.[53] The suggested right to public assistance for abortion may not survive this threshold examination. In refusing to fund abortion, the state does not act on classifications of *persons* as such. Rather, it classifies *services* demanded by those persons.[54] Since the Constitution requires equal protection of persons, but not services, and any person can choose the assisted or unassisted services, it may be questionable whether equal protection analysis in its normal sense applies.[55]

Assuming, however, that equal protection does apply, the usual procedure would begin with a determination of the degree of judicial scrutiny to be employed. If a "suspect classification" is at stake, or the rights at question are "fundamental," strict scrutiny is applied.[56] Under this test, the state is required to show a compelling interest in the distinction,[57] and the statute will probably be struck down.[58] Lacking

53. In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court criticized decisions which held interdistrict school financing inequalities subject to strict scrutiny and invalid as a violation of equal protection. In the Court's view, the lower courts had not devoted sufficient attention to the identification of the classes allegedly created by the state, and had cavalierly characterized the classification as suspect. These intermediate steps are critical to proper equal protection analysis. *Id.* at 19. *See also* Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974). The suggestion is strong that the Supreme Court requires a searching threshold analysis of the supposed classifications prior to application of equal protection analysis.

54. *See* Geduldig v. Aiello, 417 U.S. 484, 494-95 (1974) (exclusion of disability payments for pregnancy and childbirth upheld). Nor can it be maintained that a classification of persons is made by arguing that the state distinguishes between persons intending abortion and those intending delivery. No one is deprived of any funding based upon intent. Rather, the failure to finance relates purely to the actual performance of the service. *See* Maher v. Roe, 97 S. Ct. 2376, 2382-83 (1977).

55. The possibility that a variant upon traditional equal protection may be employed is discussed below. See text & notes 95-112 *infra.*

56. Johnson v. Robison, 415 U.S. 361, 375n.14 (1974); Korematsu v. United States, 323 U.S. 214, 216 (1944). Suspect classifications have been found in a variety of situations. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968) (political beliefs); Levy v. Louisiana, 391 U.S. 68 (1968) (legitimacy); Loving v. Virginia, 388 U.S. 1 (1967) (race); Sherbert v. Verner, 374 U.S. 398 (1963) (religion); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (foreign citizenship); Korematsu v. United States, 323 U.S. 214 (1944) (national origin). On the other hand, the Court has refused to find suspect classifications for distinctions based upon economic status, *see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970), conscientious objection to war, *see* Johnson v. Robison, 415 U.S. 361 (1974), and has been ambivalent at best on sex-based classifications. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636, 648-52 (1975) (applying rational basis test); Kahn v. Shevin, 416 U.S. 351, 355 (1974) (disfavoring sex classification, but employing rational basis standard); Frontiero v. Richardson, 411 U.S. 677, 686-88 (1973) (plurality opinion holding sex a suspect category).

57. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

58. Winter, *The Changing Parameters of Substantive Equal Protection: From the Warren to the Burger Era*, 23 EMORY L.J. 657, 663n.14 (1974). The upholding of a classification which has been held entitled to strict judicial scrutiny is a most rare

suspect classifications or fundamental rights, a lesser standard of scrutiny is employed, so that a rational basis for the distinction suffices and the legislation is frequently upheld.[59] The invocation of strict scrutiny in the context of publicly assisted abortions could be based on either of two approaches. It could be argued that the refusal to assist creates a distinction based on poverty, since the wealthy can obtain abortions more easily than the poor, and that poverty should be classified a suspect category. In the alternative, it might be contended that abortion is a fundamental right, thus requiring that the state's refusal to finance it be scrutinized closely.

1. *Does a governmental refusal to finance abortion for indigents invoke strict scrutiny as a discrimination based on wealth?* Proponents of state assisted abortion have argued that failure to provide free abortions for indigents involves a discrimination based upon economic status, which should trigger strict scrutiny equal protection analysis.[60] This argument is flawed in two important ways. First, it is not clear that the state has in fact made a distinction between wealth and indigency. It is not alleged that the state provides abortions to the wealthy but rather that, by failing to provide them free to anyone, it fails to lift a price barrier created by private sellers.[61] Since there is no state action involved in the creation of the private price barrier, and no economic discrimination in the uniform refusal of the state to pay, there is serious ground to question whether a failure to provide free abortions can be considered state discrimination based upon wealth.[62] It has been suggested, however, that since the state licenses physicians, the state might be responsible for price barriers created by physicians.[63] Such an approach is of doubtful merit. First, the state only licenses the practice; it does not mandate the imposition of price barriers. Such a tangential connection is hardly state action.[64] Second, the logical remedy under

event. *But cf.* Rosario v. Rockefeller, 410 U.S. 752 (1973) (Court upholds restriction upon the right to vote, without clearly stating the applicable equal protection standard).

59. *See, e.g.*, Johnson v. Robison, 415 U.S. 361 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970); Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935).

Recently the Supreme Court has begun to utilize a more stringent version of the rational basis test in certain situations, and has actually struck down state legislation on this basis. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Gomez v. Perez, 409 U.S. 535 (1973); Reed v. Reed, 404 U.S. 71 (1971). For excellent commentary on this trend, see Canby, *The Burger Court and the Validity of Classifications in Social Legislation: Currents of Federalism*, 1975 ARIZ. ST. L.J. 1; Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

60. *See* Comment, *supra* note 28, at 941-43.

61. See text accompanying notes 43-44 *supra*.

62. *See also* Comment, *supra* note 28, at 928-30.

63. *See id.* at 928n.50. For further discussion of this point, see text & note 37 *supra*.

64. *See* Moose Lodge No. 7 v. Irvis, 407 U.S. 163 (1972) (issuance of liquor license insufficient to make private club's racial barrier state action).

such an approach would be to force the state agents—the private physicians—to perform abortions without payment, not to require the state to provide them with whatever funds they demand before they will voluntarily undertake to provide their services.

Even assuming that the responsibility for the private physicians' price barriers can be laid at the door of the state, a second difficulty becomes apparent. Despite various predictions,[65] the Supreme Court has repeatedly and strongly refused to find economic status a suspect classification. In *Dandridge v. Williams*,[66] the Court, faced with welfare regulations reducing per capita payments to large families,[67] refused to invoke strict scrutiny; the Court stated that welfare statutes would be judged by the standards of review applied to business regulations.[68] *Dandridge* was followed by *Jefferson v. Hackney*,[69] which upheld welfare regulations reducing Aid to Families with Dependent Children payments—largely given to minority groups—while maintaining funds for aged and disabled persons at nearly their full needs.[70] The Court's emphasis in those decisions upon the finite resources of the state,[71] the power to allocate those resources selectively to some problems, while leaving others for later solution,[72] and its classification of welfare programs as social or economic regulation,[73] have been viewed as "a fatal blow" to arguments for characterizing poverty as a suspect classification.[74] Thus the refusal to treat poverty as a suspect classification in *Maher*[75] was in accord with accepted doctrine. Such a repudiation has a strong theoretical base, for indigency lacks the characteristics present in recognized suspect classifications. Poverty is an alterable characteristic, bearing at least some relationship to merit.[76] Moreover, the poverty line is difficult to define and identify.[77]

65. *See* Michelman, *supra* note 39; Comment, *supra* note 28, at 941-42.
66. 397 U.S. 471 (1970).
67. The Maryland Aid to Families with Dependent Children [AFDC] legislation challenged in *Dandridge* allocated welfare payments on a per capita basis, with an upper limit of $250 per family per month, regardless of family size. *Id.* at 473-74.
68. *Id.* at 485.
69. 406 U.S. 535 (1972).
70. AFDC payments were set at 75% of minimum needs, payments to the disabled at 95%, and to the aged at 100%. *Id.* at 537-38.
71. 406 U.S. at 549; 397 U.S. at 479.
72. 406 U.S. at 546-47, 549.
73. *Id.* at 546-47; 397 U.S. at 84-85. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Ortwein v. Schwab, 410 U.S. 656, 660 (1973); James v. Valtierra, 402 U.S. 137, 141-42 (1971).
74. *See* Charles & Alexander, *supra* note 8, at 163.
75. Maher v. Roe, 97 S. Ct. 2376, 2381 (1977).
76. *See* Winter, *supra* note 32, at 97-99. Winter notes that poverty, unlike race, was not an original target of the fourteenth amendment. He recognizes also that poverty is not an unalterable characteristic, is not a systematic vehicle of government discrimination, has at least limited relation to merit, and is defined only by arbitrary standards. *See also* Johnson v. Robison, 415 U.S. 361, 375n.14 (1974); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124-27 (1969).
77. Aside from the subjectivity of determining "poverty lines"—standards necessar-

Further, judicial interference in social programs creates significant practical problems which can prove extremely complex and serious.[78] It may therefore be concluded that poverty is not a suspect classification for equal protection purposes, even if it is assumed that failure to assist abortion involves state use of such a classification.

2. *Does a failure to provide free abortions for indigents invoke strict scrutiny because of the fundamentality of the right?* Even in the absence of a suspect classification, the limitation of a fundamental right on an unequal basis may invoke strict scrutiny.[79] The definition of a fundamental right, however, is far from clear. A right deemed fundamental where criminalization is involved may not fall into that classification when the issue is the state's duty to finance. In *Dandridge*, for example, the state had limited a service which the court noted "involves the most basic economic needs of impoverished human beings."[80] That finding, however, was inadequate to invoke the title of "fundamental right" for equal protection purposes.[81] Further, the fact that the denied service is "perhaps the most important function of state and local governments,"[82] one of "great significance both to the individual and to our society,"[83] to which the judiciary has an "historical dedication"[84] is not sufficient to invoke the strict scrutiny standard.

The Supreme Court has been more clear on what are not fundamental rights than on what are;[85] it may be observed, however, that the rights generally accorded fundamental status have been largely political rights, dealing with elections,[86] criminal trials,[87] or penalties

---

ily based on the material expectations and potentials of society and the decisionmaker—it is often difficult merely to determine a particular person's income. Under-reporting is frequent and may cause income to be understated by 25-50% on the average. E. BANFIELD, THE UNHEAVENLY CITY REVISITED 128-29 (1974).

78. *See generally* Winter, *supra* note 32.

79. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Douglas v. California, 372 U.S. 353, 357 (1963); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

80. Dandridge v. Williams, 397 U.S. 471, 485 (1970).

81. *Id.*

82. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) (referring to education).

83. *Id.* at 30.

84. *Id.*

85. In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), for example, virtually the only conclusion drawn by the Court is that education is not a fundamental right. The Court emphasizes in reaching this conclusion that great importance, of itself, does not make a right fundamental. *Id.* at 31. The Court then notes that the label "fundamental" is simply one applied to "an established constitutional right," *id.*, whether given express or implicit inclusion in the Constitution. *Id.* at 33-35. Yet if this view were taken, the "fundamental" label would be largely superfluous: Any state act subject to strict scrutiny on equal protection grounds would be invalid under a separate constitutional restriction, or at least subject to due process strict review.

86. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

87. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

imposed by government.[88] For example, the sole application of equal protection fundamental rights analysis to procreation and marriage involved compulsory sterilization for certain convicts,[89] a procedure falling within the category of criminal penalties traditionally considered fundamental, and one involving a far more significant invasion of rights than a refusal to fund voluntary surgery. It could be suggested, however, that the proscription of compulsory sterilization creates a broad category of fundamental rights, embracing the decision to procreate or not procreate. The Supreme Court has not, however, so broadly applied the equal protection test of fundamentality in this context;[90] even in the due process context, this broad an interpretation may not have commanded a pre-*Maher* majority.[91] The realities and complexities of public finance also suggest that the label "fundamental," with its consequent expansion of the judicial role, might be better confined to situations involving government prohibition or compulsion, rather than failure to finance.[92] The evident reluctance of the Court to

88. *See* Tate v. Short, 401 U.S. 395, 398-99 (1971); Williams v. Illinois, 399 U.S. 235, 241-42 (1970); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

89. *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

90. In *Dandridge*, for example, a limit on AFDC payments to large families was challenged as being discrimination based on, *inter alia*, exercise of the right to procreate, 397 U.S. at 475, and the state sought to justify the regulation as an incentive toward contraception and against procreation. *Id.* at 484. The Court nonetheless refused to apply strict scrutiny. *Id.* at 483-87. *See also* Taylor v. Hill, 420 F. Supp. 1020, 1031 (W.D.N.C. 1976) (rejecting a similar attack on denial of AFDC benefits to unborn children as "so wholly without merit it is difficult to articulate").

Another possible difficulty may arise if the procreation decision generally is held entitled to equal aid. In light of the cost of raising a child, where abortion is decided against, a mere payment of delivery costs might prove inadequate: It could be asserted that limiting compensation to medical costs biases the economic pressures toward abortion for the poor, discriminates against those who choose large families, and limits the freedom of indigent women to have children. Inadequate welfare payments for dependent children, or for unborn children, have occasionally been challenged on these grounds, uniformly without success. *See* Dandridge v. Williams, 397 U.S. at 475; Taylor v. Hill, 420 F. Supp. at 1031 (W.D.N.C. 1976); Murrow v. Clifford, 404 F. Supp. at 1001 (D.N.J. 1975).

91. Prior to *Maher*, the four major due process decisions dealing with state criminalization of procreation choices were Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); and Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, the Court struck down a prohibition on the distribution of information concerning contraceptives, largely on the basis that the statute's enforcement would involve highly intrusive searches. Although the majority's opinion did not thoroughly analyze fundamentality of the right involved or countervailing state interests, four justices, two of whom still sit, did argue fundamentality. *See* 381 U.S. at 497 (Goldberg, J., joined by Warren, C.J. & Brennan, J., concurring); *id.* at 504 (White, J., concurring). In *Eisenstadt*, a restriction on distributing contraceptives was struck down on grounds of irrationality, without actually labeling the interest fundamental. *See* 405 U.S. at 448-49. In *Doe* and *Roe*, such a label finally commanded a narrow majority of five justices, but only four of these still sit. The lead opinion in *Roe* stressed fundamentality for due process purposes, 410 U.S. at 155, and was written and joined by four justices. Justice Douglas, concurring on similar grounds, made the fifth. *Id.* at 211. Mr. Justice Stewart did not mention fundamentality in his concurrence, *id.* at 167-71, nor did Chief Justice Burger, *id.* at 207-08; the two dissenters, as might be expected, took a stand that precluded such a view. *Id.* at 171-78, 221-23.

92. *See generally* Winter, *supra* note 32. The Supreme Court appears to be tending toward this view. In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1

intrude into matters of state and local finance by imposition of strict review[93] thus tends to have pragmatic support.

On these bases, it can be concluded that equal protection, at least in its traditional form, gives a highly uncertain foundation for a proposed governmental duty to assist abortion. There is substantial ground for questioning whether equal protection applies at all to distinctions such as that made in the state's decision not to fund abortion, drawn between actions rather than persons. Moreover, if classical equal protection analysis were to be applied, it is likely that strict review could not be imposed under either the suspect classification or the fundamental rights approach. At the same time, the tendency among the courts finding a duty to assist abortion to rely upon equal protection[94] instead of due process, suggests that this general approach to constitutional rights cannot be discarded lightly. A close analysis will disclose that the most tenable position, and the one which seems closest to the actual logical basis of these decisions invoking strict scrutiny, is grounded on a theory related but not identical to traditional equal protection concepts.

Due Process and Equal Protection as Interacting Concepts

It is possible to formulate a third and more conceptually pure basis for a duty to assist abortion. This argument would avoid the practical objections to a due process approach, by conceding that the state is not bound to assist abortion absent other factors, and avoids

---

(1975), the Court declined to apply strict scrutiny to a school financing system that allegedly gave unequal aid:

> We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which "deprived," "infringed," or "interfered" with the free exercise of some such fundamental personal right or liberty. . . . A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. MR. JUSTICE BRENNAN, writing for the Court in Katzenbach v. Morgan, . . . expresses well the salient point:
>
> "This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected [to others similarly situated] . . . .
>
> "[The federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be *denied* it by state law. . . . We need only decide whether the challenged limitation on the relief effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable . . . ."

Id. at 37-39 (emphasis in original).

93. See text & notes 66-75 *supra.*

94. *See* text & note 52 *supra.*

the conceptual objections to equal protection, by refraining from traditional arguments based on discrimination between persons. Instead, this hybrid between due process and equal protection would use the *Roe* and *Doe* holdings—that states cannot criminalize the abortion decision—to argue that the delivery or abortion choice is protected in such a manner that the state cannot aid one alternative without extending equal aid to the other.[95] Under this mixed approach, an unequal extension of aid could be viewed as indirect pressure to influence a choice in which the government has no proper decisionmaking role. In order to assess the validity of this hypothetical right, it is necessary to inquire whether equality in the granting of governmental aid has been accepted as a general constitutional doctrine and, if not, whether such a right can be formulated as an outgrowth of the *Roe* and *Doe* principles.

At a general level, the infirmity of providing unequal assistance to constitutionally protected choices has been recognized, but only in a restricted context. The decisions recognizing such rights to equal aid have been primarily first amendment decisions dealing with propagation of ideas and beliefs.[96] Requiring that in this context the state provide equal assistance, or none at all, reflects the competitive nature of ideas; governmental assistance to one belief may enable it to triumph despite its falsity, or it may allow a government to perpetuate itself by improper means. Such a concept is more applicable to advocacy of abortion than to the act itself.[97] In nonideological areas, however, the Court has allowed governments to grant unequal aid to alternate courses of action, despite constitutional protection of the choice between those courses.[98] The application of the decisions which strike down such

95. While it seems that most courts finding a right to state assisted abortion rest their decision upon concepts similar to this, none have expressly recognized the unusual nature of the asserted right. Most have instead tried to fit the right within traditional formats of equal protection. *See* cases cited note 52 *supra.*

96. *See* Sherbert v. Verner, 374 U.S. 398, 403-06 (1963); Speiser v. Randall, 357 U.S. 513, 518-20 (1958). *Cf.* School Dist. v. Schempp, 374 U.S. 203, 225-26 (1963) (due to first amendment's prohibition against establishment of religion, neither the school board nor state law may require reciting the Lord's Prayer in school); Engle v. Vitale, 370 U.S. 421, 435-36 (1962) (to same effect).

97. *Cf.* Prince v. Massachusetts, 321 U.S. 158 (1944) (the right to hold a belief does not carry with it the right to violate the law in furtherance of that belief); Reynolds v. United States, 98 U.S. 145 (1879) (to same effect). *See also* Maher v. Roe, 97 S. Ct. 2376, 2383 n.8 (1977).

98. *See, e.g.*, Steward Mach. Co. v. Davis, 301 U.S. 548, 580-84 (1937); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 525-26 (1937); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923). *See also* Dandridge v. Williams, 397 U.S. 471 (1970) (welfare limitations effectively reducing per capita allocations for larger families, and aimed partially at discouraging childbearing upheld). To the extent that most social programs involve incentives or pressures toward "reform"—such as prohibitions on the use of food stamps for the purchase of alcoholic beverages, greater benefits for those holding jobs or attending school, or day-care centers for those who choose to work rather than raise children—it may well be that almost all social programs allot aid unequally, clearly affecting matters of personal choice which probably could not be criminalized.

unequal aid might, moreover, offer little comfort to those advocating mandatory abortion assistance, as most decisions using this approach have struck down the government aid instead of mandating its extension.[99] This process of equalizing differences by eliminating rather than extending is probably the most practical alternative for dealing with any sizable government program.[100] A general right to equal assistance in matters of constitutionally protected choice thus cannot presently be formulated in a manner supporting those advocating abortion assistance.

Despite the absence of a general basis for the formulation of the right to equal state aid, it is possible to argue that the right may be based on the special nature of the abortion or delivery choice. If such a right is treated as sui generis, its essential characteristics may suggest a status comparable to rights protected by the first amendment and thus infer a right to equalization of assistance.[101] The logical starting point for an inquiry of this type must be an examination of the right recognized in *Roe* and *Doe* and a determination whether that right is particularly conducive to the requirement of equalization of funding. Those decisions, however, do not justify such a conclusion. Indeed, the absence of justifiable state involvement in the abortion decision was precisely the factor which weighted the Court's holdings in favor of the woman's right to privacy. A radically different balance between the right to privacy and state interests obtains when the question calls for the introduction of government agents, facilities, and funds.[102]

---

99. See cases cited note 96 *supra.*

100. An unequal level of assistance can be made equal either by reducing the higher level or by increasing the lower one. Reducing the higher level does not increase financial demands on the government, while increasing the lower level increases total government expenditures, and thus fiscal needs, and may create serious economic difficulties for the state. *See* Winter, *supra* note 32.

101. See text & note 96 *supra.*

102. Indeed, an examination of the authorities cited by the Supreme Court in *Roe* supports the conclusion reached here. In laying the groundwork for the right of privacy, the *Roe* Court cites Stanley v. Georgia, 394 U.S. 557 (1969) (right to possess pornographic material in the home upheld). *See* Roe v. Wade, 410 U.S. at 152 (1973). However, the *Stanley* right to possess such materials in the privacy of one's home has been held inapplicable to the actual commercial purchase of the work. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). Also cited in *Roe* are Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923), which established the right to educate one's children in private schools and choose curricula without state interference. *See* 410 U.S. at 152. *See also* Whalen v. Roe, 97 S. Ct. 869, 876 n.26 (1977). The Court has held, however, that those decisions do not create fundamental rights with reference to equal public funding. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 30-31 (1973). The remaining decisions cited by the Court in *Roe* as bases for the right of privacy have not been passed upon in the public funding context and concern physical privacy involved when certain items are concealed in an individual's clothing, when information is transmitted over the telephone, and rights involved with marriage or procreation. *See* cases cited 410 U.S. at 152. It seems doubtful that the Court will in the future require governments to provide clothing, telephones, or matchmakers in order to fulfill these rights for indigents. *See generally* text & notes 68-75 *supra.* Thus, the decisions which form the

In *Roe* and *Doe*, the Court invoked a balancing of the interests of the individual in the private doctor-patient relationship against the interests of the state in intruding into and controlling that relationship. The privacy of the doctor-patient relationship weighed heavily on one side of the scale, which the limited interest of the state in controlling the conduct of the patient's doctor failed to counterbalance.[103] The patient's reliance on a public agent or public facilities for the operation alters this balance. The state's interest in controlling its own agents is traditionally quite strong, sometimes even overriding clearly established

basis for the *Roe* and *Doe* right have not been held to establish parallel rights to public assistance, and are unlikely to be found to establish such rights in the foreseeable future.

103. *See* Roe v. Wade, 410 U.S. at 153-54, 156-64.

The *Beal* dissents tend to treat *Wade* and *Bolton* as establishing a manner of absolute right, rather than declaring an "interest" in privacy which must be weighed against interests in control, and, on those facts, was not outweighed. Blackmun, for example, treats the *Beal* refusal to finance as an attempt to evade *Boulton*, rather than as presenting a new balance. 97 S. Ct. at 2398-99.

Beal indeed may mark a significant turn in the interpretation of the underlying *Bolton* right itself. The majority begins by noting that the challenged program's criteria for a "medically necessary" abortion were broad enough to include all the factors *Bolton* stated the physician should consider in assessing an "elective" abortion. *Id.* at 2369n.3. Yet the Court closes by commenting that the *Beal* and *Maher* decisions hold that elective abortion is not constitutionally mandated. *Id.* at 2373n.15. If the first statement is correct, the second is pure dictum; indeed, it is questionable how anyone could have objected that the regulations violate *Bolton*. But Brennan's dissent notes that the challenged procedure, while allowing the doctor to consider all the medical factors listed in *Bolton*, requires him to conclude that they indicate an actual effect on the woman's health: By contrast, Brennan's view is that *Bolton* delineates an area of personal freedom centering on reproduction, whether the choice is exercised for reasons of physical health, family size, or otherwise. *Id.* at 2374n.*. Reading the majority with the dissent, it may be possible to discern a trend away from elective abortion as a personal freedom and toward treatment as a medical procedure which cannot be irrationally limited, in reversal of its initial trend from medical treatment into personal freedom. The author is indebted to Alan Davidon, Deputy County Attorney, Pima County, Arizona, for the suggestion that the footnotes cited from the majority may be in conflict unless read in light of the minority interpretation.

Even as a matter of medical procedure, however, the link between the *Wade* principles and the *Beal* and *Maher* facts is not impossible to make, if one is willing to go beyond reliance on pure stare decisis. It may be argued that *Wade* and *Bolton* stand for two propositions: First, that a first trimester abortion is safer to life and limb than delivery, and second, that the state cannot impose the more risky of the two alternatives absent some other, stronger, interest. From this, it could be reasoned that the state cannot arrange financial assistance such that the dangerous alternative is aided and the safer one not, without some adequate nonsafety purpose. Possible purposes could then be refuted: The financial one on the basis of the alleged lower cost of abortion and the moral one on the assumption that *Wade* and *Bolton* in some manner dealt with the question. The conclusion would be that the *Beal* and *Maher* regulations favored a more dangerous outcome for no acceptable offsetting reason and hence were void under *Wade* and *Bolton*, or, for that matter, any rational basis concept.

While such an approach would avoid the problems of reduced privacy interest per se and increased state interest when state help is sought, it might well encounter some difficulties of its own. First, since *Wade* cites a number of bases for the interest in privacy other than those of risk, 410 U.S. at 154, the interest might be arguably more attenuated where the facts have forced reliance upon that single basis. Second, the question of whether abortion is in fact less costly than delivery involves evaluation of complex pragmatic issues which suggest it may in fact be more expensive in the long run. *See* text & notes 124-55 *infra*. Third, the morality question is scarcely dealt with in *Wade*, where the Court avoided the issue with a note that the statutes there questioned were not founded upon moral considerations, 410 U.S. at 150-51, and that "[w]hen those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* at 159.

constitutional rights, such as those protected by the first amendment.[104] Even the need for the government to maintain an appearance of neutrality can justify imposition of such controls.[105]

The individual's assertion that the state provide funds to enforce the right of privacy established by *Roe* and *Doe* is weakened further by the very posture of the case. In *Roe* and *Doe*, the Court explicitly held that the state may not thrust itself into a private relationship by criminalizing the outcome of that relation.[106] Where the argument is for state funding of abortions, however, the individual effectively thrusts herself upon the state by demanding that it provide money, facilities, or personnel to carry out her decision. Such a reversal of roles tends to make the individual's complaint of governmental intrusion less compelling; instead of demanding state neutrality in the exercise of the right to privacy, the individual is actively seeking the state's interference.

Several additional arguments militate against finding a right to equal funding. First, the injection of public financing affects categorization of the right sought to be established in a manner adverse to the complaining party. To the extent that the right asserted is not one to abortion per se, but rather to payment of a physician's fee for the performance of the abortion, the emphasis shifts from a "civil" right toward status as an "economic" right,[107] which traditionally has been afforded lesser protection and more casual judicial review.[108] In addition, the change from a right against criminalization to a right of equal funding may bring in several pragmatic objections which should make

104. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134, 162 (1974) (upholding discharge of government employee for improperly impairing reputation of federal agency); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (holding that Congress may properly prevent federal employees from holding party office, working at polls, organizing political clubs, or becoming candidates for political office); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (governmental interest in regulating conduct of its employees differs significantly from its interest in regulating conduct of private citizens).

Moreover, the use of government agents affects parties other than the woman seeking a state provided abortion, in that the limited rights of taxpayers to influence decisions as to the type of activities they fund become involved. *See* Flast v. Cohen, 392 U.S. 83 (1968); *cf.* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59 (1973) (right to purchase obscene book distinguished from right to possess: "*[T]o grant him his right is to affect the world about the rest of us, and to impinge on other privacies*"); Organization for a Better Austin v. Keef, 402 U.S. 415, 420 (1971) (injunction disallowed where "respondent is not attempting to stop the flow of information into his own household, but to the public").

105. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973).

106. *See* Doe v. Bolton, 410 U.S. at 214; Roe v. Wade, 410 U.S. at 152-54, 165-66.

107. *See* Doe v. Wohlgemuth, 376 F. Supp. 173, 193 (W.D. Pa. 1974) (Weis, J., dissenting), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *cert. granted*, 428 U.S. 909 (1976).

108. *See* Dean v. Gadsen Times Publishing Corp., 412 U.S. 543 (1973); Ohio Mun. Judges Ass'n v. Davis, 411 U.S. 144 (1973) (per curiam), *aff'g* 57 F.R.D. 64 (N.D. Ohio 1972) (affirming dismissal of suit by state judges alleging that other judges were improperly granted pay raises, violating equal protection principles on grounds that constitutional claim is "without merit").

the courts more reluctant to intervene. The *Doe* and *Roe* decisions created a relatively simple and objective standard: Criminalization of certain acts is constitutionally prohibited; criminal prosecutions based on such acts cannot be permitted. In contrast, the extension of these concepts to equalization of assistance requires the judiciary to impose standards that are doubly subjective. The finding that particular persons need financial assistance for abortion involves the subjective assessment of private resources and their adequacy;[109] the fee that must be paid in order to provide a constitutionally proper level of fulfillment is likewise less than objective.[110] The reluctance of the Supreme Court to involve the judiciary in matters of local finance and fulfillment of economic needs,[111] necessarily involving many subjective considerations, tends to suggest that this change in emphasis from decriminalization to equal funding should affect the outcome of the effort to establish a right to state funded abortion.

In short, it cannot be maintained as a general principle of constitutional law that equal assistance must be given in every instance where the underlying choice cannot be criminalized. The particular nature of the abortion or delivery choice is not sufficiently unique that it justifies atypical treatment. The balance of interests which led to the *Roe* and *Doe* decisions is significantly altered when public rather than private agents are involved; where the individual has taken the initiative and is demanding state intervention; where a right to fees rather than to legalization is alleged; and where the suggested standards necessarily become more subjective as fulfillment of individual wants, rather than governmental noninterference, is sought. Inability to find a basis for a constitutional duty to assist abortion, either on substantive due process or equal protection grounds, and the difficulty encountered when attempting to formulate such a right based on factors peculiar to abortion, leads to the conclusion that such a duty cannot be imposed. The *Maher* minority would thus seek to impose a duty in the abortion context which cannot be supported in terms of accepted constitutional

109. *See* text & note 77 *supra.*

110. The fees charged for abortions range over a wide spectrum, from $50 to over $1,000. *See* discussion & authorities cited note 124 *infra.* It is difficult to set a "fair market value" once individual needs and resources are removed from the equation, since the financial abilities of the patient may be taken into account in setting the price, and since indigents occasionally receive the services without any charge. *See* David, *supra* note 17. On the other hand, the government may be billed for its referrals at a rate in excess of that paid by private clients. In Pima County, Arizona, for example, it was disclosed that the county had financed 421 abortions at a cost of approximately $100,000, or around $240 each. *See* Tucson Daily Citizen, Mar. 24, 1976, at 1, col. 1. The national average cost for abortions funded through federal programs is about $200 per operation, one-sixth less than the rate charged to Pima county. *See* Schulte, *supra* note 15.

111. *See* text & notes 66-78 *supra.*

principles.[112] Accordingly, it becomes necessary to examine possible state interests in opposition to the hypothecated right, and to determine whether these are sufficient to overcome whatever individual interests may be determined to exist.

INTERESTS OF THE STATE IN RESTRICTING ITS ROLE IN ASSISTING ABORTION: OF MONEY AND MORALITY

The primary objection to the extension of welfare services is a lack of available funds, and the primary objection to facilitating abortion lies in a moral opposition to the act by certain citizens. When factors of welfare and abortion availability interact in the abortion assistance issue, both of these objections are given special emphasis. Courts considering the abortion assistance issue have thus far given these objections superficial treatment;[113] clearly, the importance of the question merits more exacting inquiry.

Restriction of Government Aid for Abortion as a Distinction Based on Considerations of Revenue Shortage and Optimum Allocation of Scarce Resources

The provision of goods and services to the indigent generally involves hard choices for the decision-maker. The problem is especially

112. The dissents of Justices Marshall and Brennan are, if not in accord with previous majority decisions, at least in accord with their own predelictions toward a liberal approach to governmental duties to fund. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 117-24 (1973) (Marshall, J., dissenting); United States v. Kras, 409 U.S. 456, 458-59 (Brennan & Douglas, JJ., dissenting); Jefferson v. Hackney, 406 U.S. 535, 558-76 (1972) (Marshall, J., dissenting). The position taken by Justice Blackmun may, in contrast, leave an opening for the criticism of inconsistency with his previous opinions. His argument in *Beal* that the majority incorrectly treats "existence and realization" of a right as different, 97 S. Ct. at 2399, that for the "indigent and financially helpless" the "result is punitive and tragic," *id.*, and that the argument that abortion can be obtained through nonpublic means approaches " 'let them eat cake,' " *id.*, is not in accord with his position taken with indigents seeking aid other than abortion. The most conspicuous example would be the majority opinion, written by Justice Blackmun, in United States v. Kras, 409 U.S. 434 (1973), upholding the conditioning of a discharge in bankruptcy upon payment of a filing fee which the plaintiff was concededly unable to pay even in small installments. *Id.* at 438. The statement in that opinion that bankruptcy was not the only solution for the debtor, who owed $6,428 and owned $50 in nonclothing assets, *id.* at 439, since "a debtor in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors," *id.* at 445, would seem more apropos to "let them eat cake" than is the *Maher* majority. Likewise, the justice's joining in the per curiam opinion in Ortwein v. Schwab, 410 U.S. 656 (1973), upholding imposition of a civil filing fee on indigents seeking an interpretation of old age assistance programs, and in the opinion in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973), upholding school funding systems operating to the detriment of poorer districts, does not lend much support to his comment in *Beal* that: "And so the cancer of poverty will continue to grow. This is a sad day for those who regard the Constitution as a force that would serve justice to all evenhandedly and, in so doing, would better the lot of the poorest among us." 97 S. Ct. at 2399.

113. *See, e.g.*, Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Nyberg v. City of Va., 495 F.2d 1342 (8th Cir.), *appeal dismissed*, 419 U.S. 891 (1974); Doe v. Wohlgemuth,

severe at the state and local levels, since available tax sources grow less rapidly than financial needs,[114] draw largely from the very poor for whom the programs are intended,[115] and often contribute to the creation of new social problems.[116] When health care programs are involved, these difficulties are intensified by the scarcity of medical manpower and physical resources,[117] and the tendency of prices to rise when government programs increase demand.[118] The allocation of money, personnel, and equipment to one medical need therefore is frequently accomplished only by making those same resources unavailable for the fulfillment of other medical needs.[119] Medical programs would thus seem peculiarly well suited to the Supreme Court's proclamation in *Dandridge* that the "economic, social, and even philo-

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).

114. *See* W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY 127 (1966) (noting four-fifths of state and local revenues come from property and sales taxes, which increase only in direct proportion to gross national product; by comparison, income tax revenues rise 1.6 to 1.8 times as fast as gross national product); Tydings, *Is Proposed Federal Revenue Sharing with the States a Sound National Policy?*, 48 CONG. DIG. 232, 232 (1969) (state-local needs rise by 7% but revenues rise by only 5%).

115. Most state and local tax sources are regressive, that is, they take a higher percentage of the income from the poor than from the more wealthy. D. NETZER, ECONOMICS OF THE PROPERTY TAX 40, 50-51 (1966); J. PECHMAN, FEDERAL TAX POLICY 202 (1966); Tydings, *supra* note 114. It has been estimated that for the property tax, effective rates average 6.43% of income for those earning less than $2,000 a year, and 2.29% for those earning over $15,000. D. NETZER, *supra* at 50. When the total tax picture—state, local, and federal—is taken into account, the overall result is somewhat progressive, but the poor still pay rates not far below those of the rich. Individuals earning under $2,000 a year pay about 27% of their income in taxes, while those in the $7,500 to $10,000 range pay about 33%. C. GREEN, NEGATIVE TAXES AND THE POVERTY PROBLEM 27 (1967). Thus, the taxes employed to finance social proposals impose significant burdens on the poor themselves.

116. In particular, they can worsen both poverty and slums. As an indication of how many persons are impoverished because of taxes, one economist has pointed out that, if the incomes of the poor were raised by the amount they presently lose to taxation, 3.3 million American families would be raised above the poverty line. C. GREEN, *supra* note 115, at 26-29. In addition, slum growth can be accelerated and slum rebuilding slowed by the property tax. Improvements increase assessments and, in slum areas, often more than offset any increase in income from the improvement. J. PECHMAN, *supra* note 115, at 212; REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 31 (1968); Langone, *Urban Crisis: Boston*, 3 PORTIA L. REV. 123, 123-34 (1968). New York City's property tax has stopped nearly all private construction; Boston's tax has caused a complete cessation of building. *See Financing Our Urban Needs*, 7 NATION'S CITIES, Mar. 1969, at 19, 37.

117. *See generally* A. GERBER, THE GERBER REPORT 118-44 (1971); S. GREENBERG, THE QUALITY OF MERCY (1971); E. KENNEDY, IN CRITICAL CONDITION 18 (1972).

118. *See* S. GREENBERG, *supra* note 117, at 151-52.

119. This is well illustrated by a recent legal action in Pima County, Arizona. In a reversal of the usual roles, several taxpayers challenged the financing of abortion at public expense, and the county defended on the grounds that such financing was constitutionally compelled. *See* Zuravsky v. Asta, No. 2CA-CIV 2320 (Ariz. App., rehearing denied, Aug. 30, 1977). In the course of the litigation, it was revealed that the county had spent $100,000 over the past year for elective abortions, *see* Tucson Daily Citizen, Mar. 24, 1976, at 1, col. 1, but had simultaneously discontinued elective sterilization of women, allegedly due to lack of available funds. PIMA COUNTY HEALTH DEP'T, ANN. REP. FISCAL YEAR 1975, at 14 (1975). Since the abortion rationale has been used to find a requirement of state funding for sterilization, *see* Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir. 1973), cited in Doe v. Rose, 499 F.2d 1112, 1116 (10th Cir. 1974), the county's position becomes interesting, to say the least.

sophical problems presented by public welfare assistance programs are not the business of this Court."[120]

The constitutional status of abortion assistance is not, however, so easily dismissed. Pregnancy necessarily terminates either in abortion or in delivery of a child and, by modern standards, either outcome requires medical assistance: the former to induce the outcome; and the latter to intervene against complications. The *Maher* and *Beal* dissenters, together with several lower courts, took this into account by arguing that failure to provide an abortion does not conserve medical resources, but merely postpones the need for them until delivery, at which time the patient will require the same or greater services.[121] Thus, where the state already provides funding for deliveries, it can be argued that a judicial mandate of funding for abortions neither involves the court in resource allocation nor increases the financial burden of the state.[122] The same argument may be used to negative the status of financial barriers as compelling state interests or rational bases for legislative classifications, clearing the way for constitutional attack on either substantive due process or equal protection grounds.[123]

On a case-by-case level of analysis, this argument carries much weight. Abortions do, as a general rule, consume a lesser amount of medical resources than do deliveries.[124] When viewed at the systems

120. Dandridge v. Williams, 397 U.S. at 487. The Court went on to state: "The Constitution may impose certain procedural safeguards upon systems of welfare administration . . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Id.*

121. *See* Beal v. Doe, 97 S. Ct. 2366, 2375 (1977) (Brennan, J., joined by Marshall & Blackmun, J.J., dissenting); Doe v. Hale Hosp., 500 F.2d 144, 146 (1st Cir. 1974), *cert. denied*, 420 U.S. 907 (1975); Doe v. Rose, 499 F.2d 1112, 1117 (10th Cir. 1974); City of N.Y. v. Wyman, 66 Misc. 2d 402, 407-08, 321 N.Y.S.2d 695, 701 (Sup. Ct. 1971), *rev'd*, 30 N.Y.2d 537, 281 N.E.2d 180, 330 N.Y.S.2d 385 (1972). *But see* Doe v. Wohlgemuth, 376 F. Supp. 173, 195 (W.D. Pa. 1974) (Weis, J., dissenting), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977).

122. *See* cases cited note 121 *supra.*

123. *See* Doe v. Wohlgemuth, 376 F. Supp. 173, 186 (W.D. Pa. 1974), *modified sub nom.* Doe v. Beal, 523 F.2d 611 (3d Cir. 1975), *rev'd*, 97 S. Ct. 2366 (1977); Comment, *supra* note 28, at 942-43. *Cf.* Charles & Alexander, *supra* note 8, at 164 ("Moreover, it is conceptually difficult to dispose of abortion cases with a *Dandridge* rationale, since abortion statutes serve no ostensible or underlying economic purpose.").

124. Tyler & Schneider, *The Logistics of Abortion Services in the Absence of Restrictive Criminal Legislation in the United States*, 61 AM. J. PUB. HEALTH 489, 493-94 (1971); *see* cases cited note 121 *supra.* The precise amount of resources which should be allocated to a given number of abortions is a subject of some dispute, and will depend upon value judgments as to reasonableness of preventing certain known medical complications. In terms of expense, estimates range from $50 to $1,800 per abortion. *See* D. CALLAHAN, *supra* note 43, at 141-42 (in California, in first year of liberalization, $500 to $1,800 but at Johns Hopkins Medical Center in Maryland, $250 to $650); David, *supra* note 17 (referring to New York clinics charging $50); Tyler & Schneider, *supra* at 493 (estimated cost $600 if abortions were legalized). Estimates as to required hospital time likewise vary. David, *supra* at 511-12 (abortion can be handled on outpatient basis); Rhodes, *A Gynaecologist's View* in ABORTION IN BRITAIN 28, 31 (1966) (hospital stay of 4 to 5 days, compared with 7 to 8 days for delivery); Wall, *Abortions: Ten Years' Experience at the Kansas University Medical Center*, 79 AM. J. OBSTETRICS &

level, a different result may be obtained. The cost of a systematic provision of free abortion may be considerably higher than the cost of a system of free delivery, due to a tendency of low cost abortion to encourage reliance on abortion as a contraceptive, and due to long term complications on future deliveries.

The conclusion that a government financed abortion system costs no more, but merely reduces the cost of government financed deliveries, assumes that births are supplanted by abortions on a one-for-one basis. Available medical data suggests a contrary conclusion; up to three abortions may be required for every birth averted in the long run,[125] rendering it unlikely that savings from supplanted maternity programs will offset the costs of abortion financing.[126] The difference between the short and long term results is due to the tendency of abortion—especially free abortion—to encourage haphazard contraception. Domestic studies have found that nonuse or haphazard use of contraceptives is frequently a factor leading to an abortion.[127] In nations where

---

GYNECOLOGY 510, 513 (1960) (3.2 to 7.5 days). The advisability of attempting to conserve time by outpatient or office abortions seems questionable. *See* Hall, *Abortion: Physician and Hospital Attitudes*, 61 AM. J. PUB. HEALTH 517, 518 (1971). Six deaths following office abortions were reported in the first 3½ months after the New York law was liberalized. Overstreet, *Logistic Problems of Legal Abortion*, 61 AM. J. PUB. HEALTH 496, 499 (1971). The President of the Royal College of Obstetricians and Gynecologists has stated that release within 24 hours after an abortion "is almost medical negligence." Carlova, *Legal Abortions: An Unholy Mess in Britain*, MED. ECON., Oct. 13, 1969, at 271, 286.

125. *See* D. CALLAHAN, *supra* note 43, at 290; Frederiksen & Brackett, *Demographic Effects of Abortions*, 83 PUB. HEALTH REP. 999, 1001 (1968).

126. Tyler & Schneider, *supra* note 124, at 494. It is interesting to note that one proponent of public funding of abortion has stated, arguing in favor of Medicaid coverage of abortion, that without such aid states would decline to fund abortion, due to the "crushing financial burden." *Proposed Amendments to the Constitution: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on Judiciary of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., pt. IV, at 278 (1976) (testimony of J. Mears).

This illustrates a potential contradiction in McRae v. Mathews, 421 F. Supp. 533, (E.D.N.Y. 1976), which held, prior to the *Maher* decision, that a congressional attempt to outlaw use of federal grants-in-aid for abortion was unconstitutional as having the effect of limiting the giving of abortion by state public facilities. The argument that Congress had no fiscal interest in avoiding abortion funding since abortions cost less than delivery would seem to contradict the further postulate that, without federal payment, states could not afford to pay for abortion. If indeed abortion were cheaper than delivery, and the states would have to provide delivery anyway, then providing abortion would reduce their total health care expenditures and abortion would logically be provided whether or not federal assistance were available for it.

127. *See* B. SARVIS & H. RODMAN, THE ABORTION CONTROVERSY 147-49 (1973); Ford, Castelnuovo-Tedesco, & Long, *Women Who Seek Therapeutic Abortion: A Comparison with Women Who Complete Their Pregnancies*, 129 AM. J. PSYCH. 546, 548 (1972); Pion, Wabrek, & Wilson, *Innovative Methods in the Prevention of the Need for Abortion*, in ABORTION TECHNIQUES AND SERVICES 14, 14 (S. Lewit, ed. 1972) (a Washington study found that 74% of aborting patients were not using contraceptives at time of conception).

> The majority of the women in both the abortion and control groups had adequate knowledge of, and resources for, contraception; actual failures of the method were infrequent. . . . In apparent contradiction to the frequently expressed feeling that "I could not tolerate a baby," many women in the abortion

abortions have been available on demand over a longer period than in the United States, these figures are considerably higher;[128] in fact, in some countries abortion has become the primary means of birth control.[129] Medical authorities in these nations have suggested that the availability of abortion has undermined existing birth control programs and has prevented acceptance of new contraceptive measures.[130] The result is a tendency toward repeated abortions. Studies conducted shortly after New York's liberalization of its abortion laws indicated that 6% of patients electing abortion had already had one abortion during the preceding year,[131] despite the intensive birth control education programs aimed at aborting patients.[132] By 1975, nearly 25% of New York abortions were being performed on persons who had already received one or more abortions in that state.[133]

---

group had used no contraceptive method whatever or had used available methods haphazardly.

Ford, Castelnuovo-Tedesco, & Long, *supra*.

128. *See* Fredriksen & Brackett, *supra* note 125, at 1001-02 (Hungary and Bulgaria: contraceptive use declines following abortion liberalization; proportion of Hungarian women using least reliable methods rises from one-half to two-thirds following liberalization); Stallworthy, Moolgaoker, & Walsh, *Legal Abortion: A Critical Assessment of its Risks*, 2 THE LANCET 1245, 1245 (1971) (survey of 1,182 British abortion patients; only 9% using any form of contraception); Comment, *Psychological Factors in Contraceptive Failure and Abortion Request*, 1 MED. J. AUSTL. 800 (1975) (40% of aborting Australian patients not using contraception; psychological factors significant in nonuse); MEDICAL WORLD NEWS, Nov. 9, 1973, at 37 (50% of Japanese abortion patients admit no contraceptives used).

129. *See* B. SARVIS & H. RODMAN, *supra* note 127, at 147; Frederiksen & Brackett, *supra* note 125.

Cf. Hearings on S.J. Res. 119 & 130 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., pt. 2, at 465 (1976) (study of 3,000 aborting women in Hawaii; most using abortion as primary contraception).

130. *See* D. CALLAHAN, *supra* note 43, at 250-52. Permissive abortion in Yugoslavia has been labeled that nation's "greatest obstacle to the spread of contraception." *Id.* at 250-51. *See also* President & Officers, *The Abortion Act (1967): Findings of an Inquiry into the First Year's Working of the Act Conducted by the Royal College of Obstetricians and Gynaecologists*, 24 BRIT. MED. J. 529, 534 (1970) ("Evidence from other countries suggests that easy abortion can in fact encourage unplanned pregnancy.").

131. Rovinsky, *Abortion in New York City*, 38 OBSTETRICS & GYNECOLOGY 333, 339 (1971); Downs & Clayson, Unwanted Pregnancy: A Clinical Syndrome Defined by the Similarities of Preceding Stressful Events in the Lives of Women with Particular Personality Characteristics (paper presented at the Twentieth Annual Meeting of the American College of Obstetricians and Gynecologists, Chicago, Ill., May 3, 1972). The latter study, taken of aborting patients at the Cornell University Medical Center of New York, also found that, for 45% of the patients, the present pregnancy did not represent the first illegitimate pregnancy or abortion in the family group. *Id.* at 9.

132. Rovinsky, *supra* note 131.

133. Tucson Daily Citizen, Jan. 28, 1976, at 56, col. 1. The same report suggests that such a high rate is not unexpected and that it might be caused by accidental pregnancies occurring despite contraception. Such a result seems doubtful. The report further indicates that in the first years after the enactment of the more liberal 1970 law, two-thirds of New York abortions were performed on out-of-state residents, while by 1971, the proportion had dropped to one-fourth. Presumably, *Doe* and *Roe* eliminated the necessity of a trip to New York and many more abortions were thus performed in the patients' home states. It may therefore be expected that the 22% who came for a second abortion in New York in 1975 were only a fraction of the number who obtained a repeat abortion in that year, with the remainder obtaining their second abortion in their home state and thus not being reflected in the New York figures. *See also*

Similar results have been noted in other nations. One study of abortion in the Soviet Union found that 16% of aborting women had had more than one abortion during the previous year;[134] an Hungarian study put the figure at 22%, with nearly a third of the women having had three or more abortions.[135] A Japanese study found that patients electing abortion averaged 1.1 abortions over the year;[136] another reported that only 37% of abortion patients had no prior terminations; nearly 7% have had over six.[137] The result has been that in many of these nations, the rising abortion rate is offset by a rising conception rate as effective birth control practice declines.[138] The increased demand for abortion created by discouragement of contraception is exacerbated by the capability of abortion to permit repeated conceptions within a short timespan. The most comprehensive estimates available suggest that, in the absence of effective contraception, a woman terminating pregnancies by abortion will require an abortion every 9 months, whereas a woman delivering a child will conceive once every 18 to 27 months.[139] The effects of this trend is that two to three abortions are needed for every delivery prevented.[140] The risk that repeaters will consume a large quantity of medical resources, especially where the abortion service is known to be free, is substantial.

A second factor tending to increase the cost of publicly funded abortion is the long term complication rate. While the rate of mortality for mothers in abortion tends to be lower than that in delivery,[141] the complication rate for the former remains high. Overall complication rates between 12 and 27% are confirmed by several studies of legal abortion.[142] Because of blood loss, transfusions are required in about one case in ten.[143] Postoperative infection occurs in

---

Proposed Amendments to the Const.: Hearings on S.J. Res. 119, 130 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., pt. 2, at 75-76 (1976) (exhibit).

134. D. CALLAHAN, *supra* note 43, at 250; B. SARVIS & H. RODMAN, *supra* note 127, at 151.

135. *See* authorities cited note 134 *supra*.

136. B. SARVIS & H. RODMAN, *supra* note 127, at 151.

137. *See* Koya, *The Harmful Effects of Induced Abortion*, 13 WORLD MED. J. 170, 170 (1966).

138. *See* D. CALLAHAN, *supra* note 43, at 251-52 ("the sharp rise in the total abortion rate after liberalization was accompanied by an equally sharp rise in the total pregnancy rate, which was caused by a less careful and consistent practice of contraception"); Heath, *Psychiatry and Abortion*, 16 CAN. PSYCH. A.J. 55, 59 (1971).

139. *See* D. CALLAHAN, *supra* note 43, at 290; Frederiksen & Brackett, *supra* note 125.

140. *See* authorities cited note 139 *supra*.

141. Beal v. Doe, 97 S. Ct. 2366, 2376 (1977) (Brennan, J., dissenting); Roe v. Wade, 410 U.S. at 149; D. CALLAHAN, *supra* note 43, at 287.

142. *See* Carlton & Hegarty, *The Immediate Morbidity of Therapeutic Abortion*, 2 MED. J. OF AUSTL. 1071, 1072 (1970); Rovinsky, *supra* note 131, at 336; Stallworthy, Moolgaoker, & Walsh, *supra* note 128; *Symposium—Pregnancy Termination: The Impact of New Laws*, 6 J. REPRODUCTIVE MED. 274, 291 (1971).

143. Carlton & Hegarty, *supra* note 142 (14%); Droegemueller, Taylor, & Drose, *The First Year of Experience in Colorado with the New Abortion Law*, 103 AM. J. OB-

about one-fifth of the cases.[144] Repeat operations to remove fragments of the fetus not located during the original abortion are necessary in about 11% of hospital performed abortions.[145] These figures do not adequately reflect the long term complication rate, a subject which is only now beginning to be studied in the United States. Several foreign studies of abortion have found a doubling of the rates of spontaneous abortion and premature delivery during subsequent pregnancies of aborted women.[146] Surgical intervention is necessary twice as frequently,[147] and an increase in the probability of subsequent tubal pregnancies has been reported.[148] The result is a diversion of medical resources to the patient during future pregnancies.[149] Thus, the cost of encouraging or financing abortion may be considerably greater than would appear from consideration of costs of individual abortions, due both to a greater frequency of abortion and to long term complications which may increase needed medical care in deliveries years later.

Experience with abortion both in the United States and abroad also suggests that it can form a serious drain on medical resources. Domestic hospitals have reported difficulties in providing adequate

---

STETRICS & GYNECOLOGY 694, 697 (1969) (8%). *Cf.* Koya, *supra* note 137, at 171 (22.9% experience bleeding over period of 4 days or more); Stallworthy, Moolgaoker, & Walsh, *supra* note 128, at 1246 (16.7% experience blood loss of one-half liter or more; other studies show twice or three times this percentage).

144. Carlton & Hegarty, *supra* note 142 (22%); Stallworthy, Moolgaoker & Walsh, *supra* note 128, at 1248 (27%). *Cf.* Koya, *supra* note 137, at 171 (10% experience fever lasting 2 weeks or more; 16% report abdominal pain over same period).

145. Stallworthy, Moolgaoker, & Walsh, *supra* note 128, at 1247 (11% confirmed by other studies); *Symposium, supra* note 142 (of 87 saline injection abortions, 8 failed to induce abortion; 3 others required a subsequent hysterotomy to clear uterus).

146. *See* D. CALLAHAN, *supra* note 43, at 37-39 (citing studies of Czech, Hungarian, and Polish experiences); Wynn & Wynn, *Some Consequences of Induced Abortion to Children Born Subsequently*, 4 MARR. & FAM. NEWSLETTER, Feb.-Apr. 1973, at 1, 5 (citing study of first trimester abortions, primarily by suction, finding spontaneous abortions increased by 30 to 40%); Medical Tribune, Feb. 5, 1975, at 10 (Czech study of 2 million first trimester abortions over period of 17 years: spontaneous abortion rate doubles following abortion; prematurity increased by 40% for first abortion, 70% after several). *See generally* Bachi, *Abortion in Israel*, in 1 ABORTION IN A CHANGING WORLD 274, 282 (R. Hall ed. 1970):

> According to current Israeli medical literature, the morbidity caused by abortion appears to be great. A subcommittee of four leading Israeli gynecologists recently reached the following conclusions: 'Research performed by us on the clinical material at our disposal has shown that induced abortion is an important cause and even a leading cause of different gynecological and obstetrical situations and complications, the more important of which are the following: chronic inflammation of the internal genital organs, secondary sterility, insufficiency of the os uteri, intrauterine adhesions, . . . repeated miscarriages, premature births.'

147. *See* D. CALLAHAN, *supra* note 43, at 39.

148. *See* Medical Tribune, *supra* note 146 (Czech experience). *Cf.* D. CALLAHAN, *supra* note 43, at 34-35 (Soviet Union). *But see id.* at 40-41 (Japan).

149. Thus, for example, the British Perinatal Mortality Survey recommended that any patient with a history of an abortion should be regarded as a high-risk patient for deliveries and should be marked for delivery under consultant care. Wynn & Wynn, *supra* note 146. It should also be noted that, for abortion by hysterotomy, "many physicians believe that all subsequent pregnancies will require caesarean section." *Hearings on S.J. Res. 119, 130, supra* note 133, at 80.

care for present patients and in preventing personnel fatigue brought on by abortion caseloads.[150] Staff morale has also been a problem.[151] An especially heavy burden has fallen upon teaching hospitals,[152] which would likely bear the brunt of publicly financed abortions. The foreign experience has been predictably worse. In Britain, where publicly financed abortions are available under the National Health Service Program, one-half of the Service's gynecological operating room and consultation time has had to be devoted to the performance of abortions.[153] The Royal College of Obstetricians and Gynecologists has reported that abortion caseloads in Great Britain have forced delays of up to several months in treatment of patients in urgent need of other types of medical assistance, including several with pelvic cancer.[154] Problems of this severity have not yet been encountered in the United States, possibly because of the relative novelty of legal abortion. It can be anticipated, however, that the number of American abortions

---

150. *See* B. SARVIS & H. RODMAN, *supra* note 127, at 52; Douglas, *Discussion, Impact of a Liberalized Abortion Law on the Medical Schools,* 111 AM. J. OBSTETRICS & GYNECOLOGY 728, 733 (1971); Overstreet, *supra* note 124, at 496-97 ("many hospitals have found their usual hospital and operating room activities disrupted; and their resident staffs in obstetrics and gynecology are complaining increasingly about distortion of teaching programs").

151. *See* McDermott & Char, *Abortion Repeal in Hawaii: An Unexpected Crisis in Patient Care,* 41 AM. J ORTHOPSYCHIATRY 620, 621 (1971) (reporting emotional crises, stress, and "a kind of combat fatigue" among Hawaiian nurses assisting in abortions, a majority of whom had supported the liberalizing of state abortion laws).

152. B. SARVIS & H. RODMAN, *supra* note 127, at 52; *see* Douglas, *supra* note 150. Douglas comments:

> None of these problems is [*sic*] insoluble, but for the medical school the list does not stop here. If a department is able, by good planning, collaborative effort, and much discussion, to develop a program capable of doing 50 abortions a week efficiently, the immediate reward in the following week is an increase in demand to 100. For departments with limited staff and facilities an unfortunate choice sooner or later becomes necessary—a major displacement of academic effort and teaching, or a sharp reduction in service to the public.

Id. The British experience has been similar. One survey of 233 departments, performing 27,000 abortions annually, concluded that a conscientious review of patients requesting abortion may significantly affect a consultant gynecologist's schedule: "If he is asked to assess 5 to 10 new cases a week, which is not uncommon, in the course of two gynaecological outpatient sessions, serious dislocation of his other work results, and delays in his attending to other patients suffering from gynaecological complaints are inevitable." President & Officers, *supra* note 130, at 533. The impact of abortion, as distinguished from the impact of caseload problems, on patient care in teaching hospitals, is sharply disputed. *Compare* Stone, Gordon, & Rovinsky, *The Impact of a Liberalized Abortion Law on the Medical Schools,* 111 AM. J. OBSTETRICS & GYNECOLOGY 728, 732 (1971) ("[T]raining programs are enhanced . . . not only technically but from involvement in the personal and social problems that these patients present . . . ."), *with* Douglas, *supra* note 150 ("[U]nrestricted abortion programs carry a real threat of exploitation of the resident, a risk of dehumanizing his attitudes at a critical stage of development, and a serious distortion of his concept of the discipline.").

153. *Abortion: A Painful Lesson for Britain,* TIME, Mar. 7, 1969, at 48. This overload persists despite the use of private nursing homes to absorb about one-third of the abortion demand. *Id.*

154. President & Officers, *supra* note 130, at 533. Similar results have been reported in other nations. *See generally* Veitch & Tracey, *Abortion in the Common Law World,* 22 AM. J. COMP. L. 652, 676-77 (1974); *Changes in Danish Abortion Laws,* 17 WORLD MED. J. 81 (1970).

will increase substantially in the near future,[155] which will undoubtedly increase the average caseloads.

Thus, a court which assumes that a command that abortions for indigents be provided at public expense will not increase program costs or diversion of medical resources may be taking an excessively narrow view, a common failing when a complex problem of public finance must be analyzed on the facts of an isolated case. When the potential for cost-free abortion to induce repeat abortions and permit frequent subsequent conceptions is considered, a one-for-one replacement of deliveries with abortions becomes unlikely. If this is compounded by the long term costs of complications on future deliveries, there seems to be a high probability that systematic provision of publicly financed abortions would cost more as a system than would a similar program of child delivery. Unless the state is held to a compelling interest standard,[156] this should be sufficient to uphold the validity of the state's refusal to fund. Even if a compelling interest standard is imposed, in view of the severity of the present national medical resource shortage,[157] and the consequences of these shortages to the lives and health of many citizens,[158] an interest in refraining from funding such new programs should be considered compelling.[159] At the very least, the assessment

155. *See generally* Tyler & Schneider, *supra* note 124, at 490-91 (peak in abortion rates not reached until 4 to 10 years after legalization). It has been predicted that abortion will ultimately become "by far" the most common gynecological operation in the United States. B. SARVIS & H. RODMAN, *supra* note 127, at 100.

156. See text & notes 60-78 *supra*. When the problem is analyzed as one related to funding rather than one related to abortion per se, it is doubtful that the state would have to demonstrate a compelling interest. In light of that, the existence and significance of the problems attending free abortion should enable the state to withstand any constitutional challenge to their rational basis for a refusal to fund elective abortions. *See* San Antonio Indpendent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970).

157. *See generally* A. GERBER, *supra* note 117; S. GREENBERG, *supra* note 117. The nationwide shortage of physicians has been estimated at 80,000. *Id.* at 113. *Contra*, H. SCHWARTZ, THE CASE FOR AMERICAN MEDICINE 59-187 (1972). At least 5,000 American communities lack even a single physician. A. GERBER, *supra*, at 44.

158. For example, it has been estimated that 42% of the infant deaths in New York City are avoidable with proper medical care. S. GREENBERG, *supra* note 117, at 108. Similarly, diversion of adequate resources into intensive coronary care units could save up to 45,000 lives annually. *Id.* at 197. The consequences of inadequate medical resources have been especially severe for minority groups; one-half of American low income children lack immunizations against epidemic diseases. *Id.* at 111. Black death rates for tuberculosis are four times the national average, and for influenza and pneumonia, twice the national average. *Id.* at 111, 114. *See also* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 136-38 (1967).

159. One court has stated that, even if it could be shown that a judicial command for state financing of abortion had the effect of diverting money and resources from other fields, such a command would still be justified. *See* Doe v. Rose, 499 F.2d 1112, 1117 (10th Cir. 1974). This court relied upon dicta in Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974), to the effect that conservation of expenditures could not justify infringement of the right to travel. Yet an examination of the *Memorial Hospital* decision shows that the restriction involved—a refusal to fund medical care for nonresidents, while extending it to residents—is distinguishable from the abortion case. In *Memorial Hospital*, the classification drawn had no purpose relating specifically to the needs of nonresidents. *Id.* at 252. Moreover, the state classification actually imposed

of such an economic burden in a long term systematic manner is a task for which the judicial case-by-case approach is poorly suited. The question of such allocation, it is suggested, is one best left to the legislative branch.

Restriction of Governmental Aid to Abortion as an Effort to Respect Consciences of Those Taxpayers Who Consider Abortion Morally Repugnant

If the question of abortion assistance is approached in a practical manner, it becomes apparent that the primary reason for refusing to provide such assistance is, in all probability, that substantial numbers of the citizenry who would fund the service find such an idea strongly repugnant. Obviously, many citizens find abortion ethically objectionable. The prevalence of pre-*Roe* abortion laws,[160] together with the strong post-*Roe* efforts to limit that decision's scope,[161] are sufficient illustrations. The repugnance many Americans have for abortion finds a respectable basis in medical fact.[162] The human embryo exhibits a great many of the physical reactions which are generally accepted as establishing life.[163] Indeed, a substantial number of aborted children, in apparent ignorance of court endorsed definitions of "viability," continue to live for substantial periods, and in some cases, survive to adulthood following abortion.[164] The debate as to whether abortion consti-

---

an extrinsic penalty upon movement. *Id.* at 255-56. A more precise analogy to the present case could be made if the issue was whether, under that decision, there was a duty upon the state to finance transportation into its domains, and whether its refusal was a violation of the right of movement. *See* Maher v. Roe, 97 S. Ct. 2376, 2383 n.8 (1977); Roe v. Arizona Bd. of Regents, 23 Ariz. App. 477, 483, 534 P.2d 285, 291 (1975) (Hathaway, J., dissenting), *vacated*, 113 Ariz. 178, 549 P.2d 150 (1976). *See also* Geduldig v. Aiello, 417 U.S. (1974) (upholding state disability insurance exclusion of pregnancy, based on economic grounds).

160. *See* Roe v. Wade, 410 U.S. at 136-41. *See also* Goldmark, *The Abortion Problem in the United States of America*, 17 WORLD MED. J. 74, 74 (1970).

161. *See generally* Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362 (E.D. Mo. 1975), *modified*, 428 U.S. 52 (1976); Hodgson v. Anderson, 378 F. Supp. 1008 (D. Minn. 1974), *appeal dismissed sub nom.* Spannaus v. Hodgson, 420 U.S. 903 (1975); Roe v. Arizona Bd. of Regents, 113 Ariz. 178, 549 P.2d 150 (1976). *See also* Beal v. Doe, 97 S. Ct. 2366, 2395 (1977) (Marshall, J., dissenting).

162. The argument made here is not that those opposed to abortion have superior medical ground for their position. The point is only that there is sufficient medical authority to make the antiabortion position one that a rational person can reasonably hold.

163. For example, the child has a regular heartbeat by the end of the first month of gestation, measurable electroencephalogram brain readings within 6 weeks of conception, reactions to touch and pain shortly after the second month, respiratory and swallowing motions by the end of the third, and movement in reaction to outside sound by the fifth month. Hefferman, *The Early Biography of Everyman*, in ABORTION AND SOCIAL JUSTICE 5-17 (1972).

164. In one study performed within a year after the liberal New York law's enactment, it was reported that 26 children had already been aborted alive, one of which survived a full month. Comment, *The New York Abortion Reform Law: Considerations, Application and Legal Consequences—More Than We Bargained For?*, 35 ALB. L. REV. 644, 662 (1971). Figures for the entire first year showed 49 live births and 2 survivals. *Hearings on S.J. Res.* 119, 130, *supra* note 133, at 133 (testimony of Dr. C. Tyler).

tutes homicide has been continuing since classical times,[165] and doubtless will continue for millenia into the future, but it is undisputed that

---

More recent estimates for the state put the figure in the thousands. Veitch & Tracey, *supra* note 154, at 694; *Proposed Amendments to the Constitution, supra* note 15, at 397, 407 (testimony of Dr. J. Wilke). Another survey, conducted over a 6 month period, found 27 survivals, with one child surviving entirely; another child, aborted by saline at four months, nonetheless survived another 5 months. Most fetuses aborted live, however, were dead within a few hours or days. Horan, Gorby, & Hilgers, *Abortion and the Supreme Court: Death Becomes a Way of Life*, in ABORTION AND SOCIAL JUSTICE 301, 316 (1972). These figures are hardly surprising: A study of 650,000 births had indicated that children born at less than 5 months from conception stand approximately a 20% chance of survival, increasing to 25% by five months, and to 45% by the 6 month mark. Horan, Gorby, & Hilgers, *supra* at 315. These statistics also illustrate the informational vacuum in which courts must often operate when assessing abortion. *See* Planned Parenthood of Cent. Mo. v. Danforth, 392 F. Supp. 1362, 1371 (E.D. Mo. 1975), *modified*, 428 U.S. 52 (1976) ("In the rare instance in which a live birth would result from an attempted abortion . . . .").

Such survivals have become common enough to inspire extensive discussion. One physician requested comments from the International Correspondence Society of Obstetricians and Gynecologists with regard to a mid-second-trimester abortion where the fetus "still had an active fetal heartbeat and showed muscular movements," but "expired 27 minutes later." Collected Letters of the International Correspondence Society of Obstetricians and Gynecologists, *reprinted in Proposed Amendments to the Constitution, supra* note 15, at 945. The physician noted that "[t]he nursing staff was very upset about this incident." *Id.* Responses noted that the "[s]igns of life in an aborted fetus can be a rather disquieting event: Should the fetus live, it is quite possible that the doctor will have created a greater problem than he attempted to solve." *Id.* Another response stated that

> [m]anagement of the woman and fetus with signs of life must be appropriate to the major object of therapeutic abortion: to terminate the woman's pregnancy as rapidly as possible with the least physical and psychological injury.
>
> . . . .
>
> Since viewing the abortus may be traumatic to the patient, the abortus should be separated from the patient and removed from her room . . . . If respirations or other movements continue for a few minutes, and are not just reflex movements, the patient's physician, if he is not in attendance, should probably be contacted and informed of the situation. The pediatrician on call should probably be appraised of the situation if signs of life continue.

Id. at 947. Another physician noted:

> The frequency of a live born fetus following a mid-trimester abortion is dependent upon the method of termination. This is a rare event following intra-amniotic administration of hypertonic saline since fetal death follows shortly after administration or during the prolonged interval prior to the onset of labor. On the other hand, mid-trimester abortions accomplished with Prostaglandin are associated, in our experience, with a live born fetus in less than 10% of cases. . . . With Prostaglandin, fetal [*sic*] demis usually occurs during the process of labor and delivery. At the time of delivery, it has been our policy to wrap the fetus in a towel. The fetus is then moved to another room while our attention is turned to the care of the gravida. She is examined to determine whether complete placental expulsion has occurred and the extent of vaginal bleeding. Once we are sure that her condition is stable, the fetus is evaluated. Almost invariably all signs of life have ceased.

Id. See also Bok, Nathanson, & Walters, *The Unwanted Child: Caring for the Fetus Born Alive After an Abortion*, 6 HASTINGS CENTER REP. 13 (Rep. No. 5, Oct. 1976); Manabe, *Artificial Abortion at Midpregnancy by Mechanical Stimulation of the Uterus*, 105 AM. J. OBSTETRICS & GYNECOLOGY 132, 141 (1969) (second trimester abortions; fetus normally delivered alive following uncomplicated abortion by mechanical stimulation and often delivered alive following saline); S. NEUBARDT & H. SCHULMAN, TECHNIQUES OF ABORTION 71 (1972) (professional staff finds second trimester abortions distasteful; 25% of patients decline abortion upon learning a formed fetus will be aborted); *Hearings on S.J. Res. 119 & 130, supra* note 129, at 889 (citing British gynecologist R.F.R. Gardner: while hysterotomy has surgical advantages, "the removal of a perfectly formed, heart beating, chest moving, limb waving fetus is most repugnant . . . both for the surgeon and the theatre nurse.").

165. Roe v. Wade, 410 U.S. at 130-35.

ethical rejection of abortion is widespread, not unreasonable, and possesses a sound basis in medical fact and practice.[166]

The necessity of governmental respect for the consciences of its citizens is likewise undisputed. From the famed Brandeis dissent in *Olmstead v. United States*,[167] to more recent pronouncements on freedom of belief,[168] the Court has repeatedly recognized the importance of freedom of conscience in a democratic establishment, and the duty of government to refrain from infringing that right. This constitutional duty, however, does not mark the boundaries of the legislative power to protect its citizens, for legislatures may extend constitutional freedoms even where there is no duty to do so.[169] The state, recognizing that the use of its facilities may be taken as a mark of its approval of abortion, may thus restrict the use of state monies for purposes which might indicate a lack of tolerance for the beliefs of many of its taxpayers,[170] even if it could not restrict those activities were they privately supported.[171]

The application of the principle of governmental neutrality to the abortion assistance issue raises difficult questions. Several courts, however, have recognized the desirability of maintaining neutrality in this area.[172] The question has generally arisen in the context of a suit

166. The Declaration of Geneva, adopted by the World Medical Association in 1948, 1 WORLD MEDICAL ASSOC. BULLETIN 22, Apr. 1949, bound physicians to "maintain the utmost respect for human life, from the time of conception." *Id.* Identical standards for the beginning of life were employed by the 1949 International Code of Medical Ethics and the 1970 Declaration of Oslo, which, according to the chairman of the drafting committee, were intended to condemn abortion. Horan, Gorby, & Hilgers, *supra* note 164, at 317-18.

167. "The makers of our Constitution . . . recognized the significance of man's spiritual nature, of his feelings and his intellect. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled*, Katz v. United States, 389 U.S. 347, 353 (1967).

168. *See* Sherbert v. Verner, 374 U.S. 398, 402-04 (1963); Abington Township School Dist. v. Schempp, 374 U.S. 203, 215 (1963) (describing ideal of religious freedom: "The government is neutral, and, while protecting all, it prefers none, and it *disparages* none." (emphasis in original)). Mr. Justice Douglas, concurring in *Sherbert*, stated that the first amendment "affirmatively requires government to create an atmosphere of hospitality and accomodation to individual belief or disbelief." 374 U.S. at 415-16.

169. *See, e.g.*, Hamilton v. Regents of Univ. of Cal., 293 U.S. 245, 264 (1934) (conscientious objector exemption not required by Constitution but can be granted by legislature); George v. United States, 196 F.2d 445, 450 (9th Cir.), *cert. denied*, 344 U.S. 843 (1952); Rase v. United States, 129 F.2d 204, 210 (6th Cir. 1942). *Compare* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), *with* Katzenbach v. Morgan, 384 U.S. 641 (1966). *See generally* Buchannan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 IOWA L. REV. 473, 492-95 (1971).

170. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 723-24 (1961); Falkenstein v. Department of Revenue, 350 F. Supp. 887, 889 (D. Ore. 1972), *appeal dismissed*, 409 U.S. 1099 (1973). *See also* Reitman v. Mulkey, 387 U.S. 369, 379 (1967).

171. Williams v. Eaton, 468 F.2d 1079, 1084 (10th Cir. 1972). *Cf.* text & note 104 *supra* (discussing the right of the state to control its agents). *But cf.* Panarella v. Birenbaum, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (1973) (censorship of antireligious articles in school newspaper is improper, provided paper remains neutral forum).

172. *See* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311 (9th Cir.

to compel the performance of abortions by sectarian hospitals receiving federal hospital grants.[173] Congress, after the *Roe* and *Doe* decisions, prohibited courts from requiring that a hospital provide abortions solely because of its receipt of such grants.[174] Courts have upheld the validity of this congressional action as an effort to preserve governmental neutrality in an area of serious conflict of morals and ethics.[175] Pre-*Maher* courts had been reluctant to extend this reasoning to public hospitals, however.[176] The refusal to so extend the rationale seems to be of questionable wisdom. The abortion question is one involving especially deep-seated feelings on both sides. If abortion is legal but not publicly assisted, it is possible for opponents to exist in an uneasy truce, each side secure as to its own activities.[177] If public assistance is required,

---

1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756, 760 (7th Cir. 1973).

The *Maher* minority tended to treat the moral question as having been disposed of in *Wade* and *Bolton*, and even as having been the essence of those opinions. Justice Marshall, for example, argued that the regulations challenged in *Maher* and *Beal* were "in reality intended to impose a moral viewpoint that no State may constitutionally enforce," 97 S. Ct. at 2395, and Justice Blackmun accused the Court of allowing "a presumed majority" to impose "its own concepts of the socially desirable, the publicly acceptable, and the morally sound." 97 S. Ct. at 2399. An examination of the decisions in *Wade* and *Bolton* suggests, however, that even the issue of whether criminal laws can be based upon controversial moral considerations was more evaded than met. *See* 410 U.S. at 160. To hold outright that criminal statutes cannot be based upon moral judgments, however relative they might be, would pose quite vexing problems. Laws prohibiting theft presuppose an ethic dictating the rightful owner of a given good and the proper ways of obtaining property (advertising vs. fraud; market advantages vs. extortion and unconscionability); even laws on homicide dictate an ethic which has not been universally accepted, as the existence of social groups ranging from Vikings to Crusaders to Nazis would suggest. To suggest that governmental expenditures cannot be allocated based, *inter alia*, on the moral and ethical predispositions of those who pay for the programs would seem to be, to say the least, impractical.

173. *See* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); Doe v. Bellin Memorial Hosp., 479 F.2d 756 (7th Cir. 1973).

174. Pub. L. No. 93-348, § 214, 88 Stat. 353 (1974) (codified at 42 U.S.C. § 300a-7 (a) (Supp. V 1975)).

175. The Ninth Circuit states the position most clearly: "Plaintiff fails to distinguish between action taken to preserve the 'government['s] neutrality in the face of religious differences' . . . and action which affirmatively prefers one religion over another. . . . Here Congress quite properly chose to protect the freedom of religion of those with religious or moral scruples against sterilizations and abortions." Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311-12 (9th Cir. 1974) (footnotes omitted).

Courts upholding the validity of 42 U.S.C. § 300a-7(a) (Supp. V 1975) have found support in the *Doe* Court's observation:

> [T]he hospital is free not to admit a patient for an abortion. . . . Further, a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.

Doe v. Bolton, 410 U.S. at 197-98. *See* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d at 312; Doe v. Bellin Memorial Hosp., 479 F.2d 756, 760 (7th Cir. 1973).

176. *See* Nyberg v. City of Va., 495 F.2d 1342, 1346 (8th Cir.), *appeal dismissed*, 419 U.S. 891 (1974). This position, however, has been taken in dissent. *See id. at* 1348 (Heaney & Gibson, JJ., dissenting from denial of rehearing en banc).

177. It should also be noted that one of the primary arguments made by proponents of abortion legalization was that one segment of the citizenry should not impose its values regarding abortion upon another. Veitch & Tracey, *supra* note 154, at 688. It appears that this principle has been largely ignored once *Roe* and *Doe* shifted the advantage to the proponents of abortion. Bills have been introduced in several states which would penalize physicians and nurses who refuse to perform abortions: For ex-

the rights of all parties are immediately thrust into irreconcilable conflict. It is rational for the state to choose a middle course between criminalizing abortion and assisting abortion. This middle course of noncriminalization and nonassistance minimizes infringements upon either group's rights, and minimizes the risk of religious and moral polarization of the citizenry.[178] There is also much to be said for a policy of neutrality in light of the availability of private recourse. The impact of nonassistance on indigents is reduced by private assistance from parties favoring abortion.[179] In contrast, there is little way for those opposing abortion to avoid the coercion of the taxing power.

In light of the comparative claims of opposing groups, and the availability of private recourse, it seems rational for the government to take a path of neutrality in the abortion funding decision.[180] If the legislature's use of the taxing power to coerce assistance would be unwise, the act of a court in mandating such assistance, despite legislative neutrality, would be especially dangerous. The judiciary clearly lacks direct access to physical power and the popular will: It is accordingly heavily dependent upon the influence of respect and tradition. To command an intrusion upon the freedom of conscience of a large portion of the citizenry after the legislature has decided to respect that freedom, might well do serious harm to those abstract influences upon which the courts must depend for survival.[181] It seems, therefore, proper

---

ample, a Wisconsin proposal would make "refusing, on grounds of religious belief, morality or ethics, to perform an operation to remove a human embryo or human fetus from any person" unprofessional conduct, punishable by permanent revocation of the privilege of practice. *See* Schulte, *supra* note 15, at 2 n.9.

178. *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971) (noting the unattractive possibility of public disagreement over public funding of private education). The extent to which the public assistance issue can lead to state involvement in matters of religion is illustrated by one recent case in which the lower court considered it necessary to impanel a jury to determine whether a denominational hospital's refusal to perform abortions was based on religious or medical motivations. *See* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 309 (9th Cir. 1974).

179. *See* discussion note 43 *supra.*

180. It has been suggested that neutrality in the abortion context consists of aiding both abortion and delivery. *See* Tribe, *supra* note 41, at 47 n.215. Such a suggestion seems debatable on several grounds. First, the moral conflict is over abortion: There seems to be little deep moral opposition in our society to delivery. To broaden the scope of the neutrality would be akin to reversing the parochial school cases on the ground that religious neutrality requires equal aid to all forms of education, rather than neutrality with reference to the controversial subclass. Second, in a practical sense, the dangers of polarization of the citizenry and undermining the legitimacy of the state seem confined to the abortion procedure. Third, given the necessity of striking a difficult, controversial, and possibly risky compromise, the point where the line is to be drawn on that compromise seems best left to the legislature.

181. It might be noted that the *Maher* and *Beal* opinions called forth some of the stronger language employed by members of the Court in relation to elected officials and the citizens who elected them. Blackmun's dissenting opinion refers to one decision

> [W]here a presumed majority, in electing as mayor one whom the record shows campaigned on the issue of closing public hospitals to nontherapeutic abortions, punitively impresses upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound, with a touch of the devil-take-the-hindmost.

for the judicial branch to defer to the legislature in the difficult task of effecting a reconciliation, or at least a truce, among the sharply divided elements of the public. The state's interest in refraining from coercion in matters of conscience would therefore seem proper and compelling as a justification for declining to fund the right to obtain an abortion.

CONCLUSION

Whether the judicial branch should find a constitutional duty on the part of the state to assist abortion is neither a simple nor a safe question. It should be evident, however, that such a duty cannot be predicated upon substantive due process principles nor upon traditional equal protection concepts. This duty probably cannot be predicated upon the basis of a special, hybrid right, and remain consistent with existing constitutional thinking. Assuming that such a right could nevertheless be constructed, state interests in minimizing the diversion of crucial or scarce medical resources due to repeat abortions and long term complications, and in maintaining neutrality upon a highly divisive moral question, are likely to outweigh claims to free abortions.

---

97 S. Ct. at 2399. To the majority's argument that it does not prohibit funding of abortion, but merely refuses to take upon itself the task of compelling elected institutions to fund it, *id.* at 2373n.15, Blackmun notes:

> Neither is it an acceptable answer, as the Court well knows, to say that Congress and the States are free to authorize the use of funds for nontherapeutic abortions. Why should any politician incur the demonstrated wrath and noise of the abortion opponents when mere silence and nonactivity accomplish the result the opponents want?

Id. at 2399. Likewise, Marshall adds that "the opponents of abortion have attempted every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of society," *id.* at 2395, and ends with an accusation: "When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty." *Id.* The evidence upon which the electorate is pronounced a "presumed" majority, and the decision of an elected institution labeled as cowering rather than resolving a difficult issue, unfortunately is not set forth in the opinions.