**Maher v. Roe**

432 U.S. 464 (1977)

**Justice Powell delivered the opinion of the Court.**

In Beal v. Doe, 432 U.S. 438, we hold today that Title XIX of the Social Security Act does not require the funding of nontherapeutic abortions as a condition of participation in the joint federal-state medicaid program established by that statute. In this case, as a result of our decision in Beal, we must decide whether the Constitution requires a participating State to pay for nontherapeutic abortions when it pays for childbirth.

A regulation of the Connecticut Welfare Department limits state Medicaid benefits for first trimester abortions to those that are "medically necessary," a term defined to include psychiatric necessity. Connecticut enforces this limitation through a system of prior authorization from its Department of Social Services. In order to obtain authorization for a first trimester abortion, the hospital or clinic where the abortion is to be performed must submit, among other things, a certificate from the patient's attending physician stating that the abortion is medically necessary.

This attack on the validity of the Connecticut regulation was brought against appellant Maher, the Commissioner of Social Services, by appellees Poe and Roe, two indigent women who were unable to obtain a physician's certificate of medical necessity…

Although it found no independent constitutional right to a state-financed abortion, the District Court held that the Equal Protection Clause forbids the exclusion of nontherapeutic abortions from a state welfare program that generally subsidizes the medical expenses incident to pregnancy and childbirth…

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The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations. Appellees' claim is that Connecticut must accord equal treatment to both abortion and childbirth, and may not evidence a policy preference by funding only the medical expenses incident to childbirth. This challenge to the classifications established by the Connecticut regulation presents a question arising under the Equal Protection Clause of the Fourteenth Amendment. The basic framework of analysis of such a claim is well settled:

"We must decide, first, whether (state legislation) operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the (legislative) scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination . . .." San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)… Applying this analysis here, we think the District Court erred in holding that the Connecticut regulation violated the Equal Protection Clause of the Fourteenth Amendment.

This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis. See Rodriguez, supra, 411 U.S. at 29; Dandridge v. Williams, 397 U.S. 471 (1970). Accordingly, the central question in this case is whether the regulation "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." The District Court read our decisions in Roe v. Wade, 410 U.S. 113 (1973), and the subsequent cases applying it, as establishing a fundamental right to abortion and therefore concluded that nothing less than a compelling state interest would justify Connecticut's different treatment of abortion and childbirth. We think the District Court misconceived the nature and scope of the fundamental right recognized in Roe.

At issue in Roe was the constitutionality of a Texas law making it a crime to procure or attempt to procure an abortion, except on medical advice for the purpose of saving the life of the mother. Drawing on a group of disparate cases restricting governmental intrusion, physical coercion, and criminal prohibition of certain activities, we concluded that the Fourteenth Amendment's concept of personal liberty affords constitutional protection against state interference with certain aspects of an individual's personal "privacy," including a woman's decision to terminate her pregnancy.

The Texas statute imposed severe criminal sanctions on the physicians and other medical personnel who performed abortions, thus drastically limiting the availability and safety of the desired service…We held that only a compelling state interest would justify such a sweeping restriction on a constitutionally protected interest, and we found no such state interest during the first trimester. Even when judged against this demanding standard, however, the State's dual interest in the health of the pregnant woman and the potential life of the fetus were deemed sufficient to justify substantial regulation of abortions in the second and third trimesters…In the second trimester, the State's interest in the health of the pregnant woman justifies state regulation reasonably related to that concern. At viability, usually in the third trimester, the State's interest in the potential life of the fetus justifies prohibition with criminal penalties, except where the life or health of the mother is threatened.

The Texas law in Roe was a stark example of impermissible interference with the pregnant woman's decision to terminate her pregnancy. In subsequent cases, we have invalidated other types of restrictions, different in form but similar in effect, on the woman's freedom of choice…

These cases recognize a constitutionally protected interest "in making certain kinds of important decisions" free from governmental compulsion. Whalen v. Roe, 429 U.S. 589 (1977). As Whalen makes clear, the right in Roe v. Wade can be understood only by considering both the woman's interest and the nature of the State's interference with it. Roe did not declare an unqualified "constitutional right to an abortion," as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.

The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles absolute or otherwise in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult and in some cases, perhaps, impossible for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in Roe.

Our conclusion signals no retreat from Roe or the cases applying it. There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

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The question remains whether Connecticut's regulation can be sustained under the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right. This test requires that the distinction drawn between childbirth and nontherapeutic abortion by the regulation be "rationally related" to a "constitutionally permissible" purpose. Lindsey v. Normet, 405 U.S. 56 (1972); Massachusetts Board of Retirement v. Murgia, 427 U.S.307 (1976). We hold that the Connecticut funding scheme satisfies this standard.

Roe itself explicitly acknowledged the State's strong interest in protecting the potential life of the fetus. That interest exists throughout the pregnancy, "grow(ing) in substantiality as the woman approaches term." Because the pregnant woman carries a potential human being she "cannot be isolated in her privacy. . . . (Her) privacy is no longer sole and any right of privacy she possesses must be measured accordingly." The State unquestionably has a "strong and legitimate interest in encouraging normal childbirth," Beal v. Doe, 432 U.S. 438, an interest honored over the centuries. Nor can there be any question that the Connecticut regulation rationally furthers that interest. The medical costs associated with childbirth are substantial, and have increased significantly in recent years. As recognized by the District Court in this case, such costs are significantly greater than those normally associated with elective abortions during the first trimester. The subsidizing of costs incident to childbirth is a rational means of encouraging childbirth.

We certainly are not unsympathetic to the plight of an indigent woman who desires an abortion, but "the Constitution does not provide judicial remedies for every social and economic ill," Lindsey v. Normet, supra. Our cases uniformly have accorded the States a wider latitude in choosing among competing demands for limited public funds…

The decision whether to expend state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature…

In conclusion, we emphasize that our decision today does not proscribe government funding of nontherapeutic abortions. It is open to Congress to require provision of Medicaid benefits for such abortions as a condition of state participation in the Medicaid program. Also, Connecticut is free through normal democratic processes to decide that such benefits should be provided. We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues.

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this opinion.

[Concurring opinion of Chief Justice Burger omitted.]

**Justice Brennan, with whom Justice Marshall and Justice Blackmun join, dissenting.**

A distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court's analysis. The stark realty for too many, not just "some," indigent pregnant women is that indigency makes access to competent licensed physicians not merely "difficult" but "impossible." As a practical matter, many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions if the State had also provided funds for that procedure, or indeed if the State had provided funds for neither procedure. This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure. Mr. Justice Frankfurter's words are apt:

"To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by the State, would justify a latter-day Anatole France to add one more item to his ironic comments on the 'majestic equality' of the law. 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread' . . . ." Griffin v. Illinois, 351 U.S. 12 (1956) (concurring opinion).

The Court's premise is that only an equal protection claim is presented here. Claims of interference with enjoyment of fundamental rights have, however, occupied a rather protean position in our constitutional jurisprudence. Whether or not the Court's analysis may reasonably proceed under the Equal Protection Clause, the Court plainly errs in ignoring, as it does, the unanswerable argument of appellees, and the holding of the District Court, that the regulation unconstitutionally impinges upon their claim of privacy derived from the Due Process Clause.

Roe v. Wade and cases following it hold that an area of privacy invulnerable to the State's intrusion surrounds the decision of a pregnant woman whether or not to carry her pregnancy to term. The Connecticut scheme clearly infringes upon that area of privacy by bringing financial pressures on indigent women that force them to bear children they would not otherwise have. That is an obvious impairment of the fundamental right established by Roe v. Wade. Yet the Court concludes that "the Connecticut regulation does not impinge upon (that) fundamental right." This conclusion is based on a perceived distinction, on the one hand, between the imposition of criminal penalties for the procurement of an abortion present in Roe v. Wade…and, on the other, the assertedly lesser inhibition imposed by the Connecticut scheme.

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Cases involving other fundamental rights also make clear that the Court's concept of what constitutes an impermissible infringement upon the fundamental right of a pregnant women to choose to have an abortion makes new law. We have repeatedly found that infringements of fundamental rights are not limited to outright denials of those rights. First Amendment decisions have consistently held in a wide variety of contexts that the compelling-state-interest test is applicable not only to outright denials but also to restraints that make exercise of those rights more difficult…The compelling-state-interest test has been applied in voting cases, even where only relatively small infringements upon voting power, such as dilution of voting strength caused by malapportionment, have been involved…And indigents asserting a fundamental right of access to the courts have been excused payment of entry costs without being required first to show that their indigency was an absolute bar to access. Griffin v. Illinois, 351 U.S. 12 (1956)…

Until today, I had not thought the nature of the fundamental right established in Roe was open to question, let alone susceptible of the interpretation advanced by the Court. The fact that the Connecticut scheme may not operate as an absolute bar preventing all indigent women from having abortions is not critical. What is critical is that the State has inhibited their fundamental right to make that choice free from state interference.