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THE ABORTION-FUNDING ISSUE: A STUDY IN MIXED CONSTITUTIONAL CUES

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Harris v. McRae[1] and other recent Supreme Court decisions[2] have upheld the exclusion of non-therapeutic and most therapeutic abortions from welfare funding, subjecting such restrictions only to a lenient, rational-basis standard of scrutiny. In *McRae*, moreover, Justice Stewart emphasized for a five-to-four majority that the Court's position in no way represents a departure from the principles of *Roe v. Wade*.[3] Wrote Stewart:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, . . . government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.[4]

One can readily understand the *McRae* majority's reluctance to convert constitutional guarantees against undue official interference with individual freedom into a general requirement that government fund the exercise of constitutional rights. Arguably, however, the Court's refusal to accord abortion-funding restrictions meaningful scrutiny is inconsistent with earlier cases invalidating regulations that conditioned the receipt of governmental largesse on the surrender of a basic liberty.[5] This essay critically examines *McRae* and related abortion-funding decisions in the light of relevant earlier cases. Its underlying thesis is that subjecting abortion-funding regulations to some degree of meaningful scrutiny would be more compatible with precedent than

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1. 100 S. Ct. 2671 (1980).

2. Williams v. Zbaraz, 100 S. Ct. 2694 (1980); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

3. 410 U.S. 113 (1973).

4. 100 S. Ct. at 2688-89 (citations omitted).

5. *E.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926). *Cf.* Southeastern Promotions v. Conrad, 420 U.S. 546 (1975) (constitutional procedural safeguards required in order to justify prior restraint under the first amendment); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (invalidating requirement that all members of a household be related to each other as violative of due process); Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring due process safeguards in termination of welfare benefits).

the Burger Court's current approach and would not necessarily mean that government is generally obligated to finance the exercise of constitutional rights.

I. THE BURGER MAJORITY RATIONALE

To date, *McRae* and *Maher v. Roe*[6] are the Burger Court's major decisions regarding the constitutional status of abortion-funding restrictions. *Maher* upheld a Connecticut regulation limiting state Medicaid benefits for first trimester abortions to "medically necessary" procedures. In *McRae* the Court went considerably further. Through joint resolution and riders to annual appropriations measures, Congress since 1976 has severely limited use of federal Medicaid funds for abortions, even when the procedure is medically necessary. Commonly known as the Hyde Amendment, the regulation's 1980 version prohibited Medicaid payments for abortions except when the mother's life was endangered by her continued pregnancy, or when the pregnancy had resulted from rape or incest.[7] On June 30, 1980 the *McRae* majority upheld the Hyde Amendment against a variety of constitutional claims.[8]

During the Warren Era the calculus for determining the level of scrutiny to be accorded discriminatory regulations was relatively uncomplicated: forms of discrimination that affected fundamental rights or were based on "suspect" categories of classification were presumptively invalid and struck down unless found necessary to protect some compelling governmental interest; other classifications were required to satisfy only an extremely lenient rationality standard.[9] In certain discrimination contexts, the Burger Court has supplemented this simple, two-tiered formula with intermediate standards of scrutiny both more stringent than the rational-basis test and less severe than the compelling-interest standard.[10] When doctrinally convenient, however,

6. 432 U.S. 464 (1977). *See also* Williams v. Zbaraz, 100 S. Ct. 2694 (1980) (rejecting a claim that federal Medicaid regulations obligated states to fund medically necessary abortions even when federal funds were unavailable for such procedures); Poelker v. Doe, 432 U.S. 519 (1977) (rejecting a claim that a city's refusal to provide publicly financed hospital services for nontherapeutic abortions violated equal protection); Beal v. Doe, 432 U.S. 438 (1977) (holding that federal Medicaid regulations did not require states to fund nontherapeutic abortions as a condition for participation in the Medicaid program). In Singleton v. Wulff, 428 U.S. 106 (1976), moreover, the Court held that physicians had standing to challenge the constitutionality of a state statute excluding nontherapeutic abortions from welfare coverage.

7. Pub. L. No. 96-123, § 109, 93 Stat. 926 (1980).

8. 100 S. Ct. at 2693.

9. Perhaps the best Warren-era exposition of the compelling-interest doctrine in an equal protection context is found in Justice Brennan's opinion for the Court in Shapiro v. Thompson, 394 U.S. 618 (1969). For Warren Court applications of the lenient, rational-basis standard, see McDonald v. Board of Elections, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420 (1961). For a complete treatment of doctrinal developments in the equal protection field under the Warren Court, see Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969).

10. *See, e.g.*, notes 76-79 and accompanying text *infra*. For discussions of Burger Court doctrinal trends in the equal protection field, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Wilkinson, *The Supreme Court, the Equal Protection Clause and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-so-Fundamental "Rights" or "Interests" through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143.

the Court has invoked the two-tiered formula in both equal protection and substantive due process cases, thereby relieving of any meaningful review challenged regulations not found to penalize suspect classes or the exercise of fundamental rights.[11] In *Maher* and *McRae* the Court took this tack in rejecting meaningful scrutiny of abortion-funding restrictions.

In the view of the current majority, the exclusion of abortions from welfare coverage affects no suspect class. As the *Maher* Court, per Justice Powell, observed: "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."[12] In a *Maher* dissent, Justice Marshall suggested that indigent women denied welfare funding for abortions constitute a suspect or quasi-suspect class even under Burger Court standards.[13] Marshall noted that Justice Powell had intimated for the Court in *San Antonio Independent School District v. Rodriguez*[14] that poor persons might constitute a suspect class if they "[share] two distinguishing characteristics: because of their impecunity they [are] completely unable to pay for some desired benefit, and as a consequence, they [sustain] an absolute deprivation of a meaningful opportunity to enjoy that benefit."[15] Indigent women who are denied abortion funding clearly fit this description. When the passage is read in context, however, it is equally clear that Justice Powell was simply attempting to distinguish *Rodriguez* from earlier cases upholding indigent claims; he was not trying to establish a general test for determining the suspectness of specific sub-classes of indigents. The overwhelming tenor of *Rodriguez* and related Burger Court cases is that "poverty, standing alone, is not a suspect classification."[16]

Albeit with considerably greater difficulty, the Court has also rejected the claim that the exclusion of abortions from welfare coverage sufficiently affects the fundamental right to an abortion recognized in *Roe v. Wade*[17] so that strict scrutiny is triggered. The majority's position reduces essentially to these prop-

11. *See, e.g.*, Kelley v. Johnson, 425 U.S. 238 (1976) (upholding on rationality due process grounds a hair code for uniformed policemen.); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (subjecting to minimal equal protection scrutiny a Texas scheme for financing public schools largely through local property taxes). *See also* Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

12. 432 U.S. at 471.

13. Beal v. Doe, 432 U.S. at 459 (Marshall, J., dissenting).

14. 411 U.S. 1 (1973).

15. *Id.* at 20.

16. Harris v. McRae, 100 S. Ct. at 2691. The *McRae* Court cited James v. Valtierra, 402 U.S. 137 (1971), which had upheld with only a modicum of scrutiny a California constitutional provision requiring that low-rent housing projects be approved by a majority vote in a community election. The Warren Court, however, subjected the discriminatory effects of poverty to strict scrutiny in voting, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax), and the criminal process, Douglas v. California, 372 U.S. 353 (1963) (counsel for first appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (trial transcript in preparing appeal). Moreover, the Burger Court has subjected the discriminatory effects of poverty in the imposition of criminal punishment, to substantially meaningful scrutiny, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

17. 410 U.S. 113 (1973).

ositions: there is a "basic difference" between "direct" official interference with a protected activity and state encouragement of an alternative activity;[18] moreover, while government cannot unduly obstruct exercise of a constitutional right, "it need not remove [obstacles] not of its own creation."[19] Poverty, not government, obstructs the indigent woman's access to an abortion. A government's refusal to fund abortions "places no obstacle—absolute or otherwise—in the pregnant woman's path to an abortion . . .; she continues as before to be dependent on private sources for the service she desires."[20]

In addition to rejecting claims for strict scrutiny review via due process and equal protection, the Court has also disputed claims that the denial of welfare funding for abortions violates the first amendment's religious establishment provisions. The *McRae* appellees bottomed their establishment claim on the contention that the Hyde Amendment incorporates Roman Catholic doctrine condemning abortions. In rejecting this argument, however, Justice Stewart stressed the obvious—that a law cannot be considered in conflict with the establishment clause simply because it "happens to coincide or harmonize with the tenets of some or all religions."[21] He added: "That the Judaeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny."[22] The appellees also urged strict scrutiny of the Hyde Amendment under the free exercise guarantee, but again to no avail. Justice Stewart noted the appellees' contention that a decision to seek a medically necessary abortion may be the product of a woman's religious beliefs under certain Protestant and Jewish tenets; he concluded, however, that none of the appellees had standing to raise such a claim.[23]

Having thus disposed of claims to strict scrutiny of abortion-funding restrictions, the Court has reviewed such regulations under a lenient rationality standard and has found them rationally related to a governmental interest in encouraging childbirth. The majority Justices readily concede that, under *Roe*, an interest in potential life is not sufficiently compelling to support any restrictions on abortions through a pregnancy's first two trimesters, or even during the third trimester for therapeutic abortions.[24] They emphasize, how-

18. Maher v. Roe, 432 U.S. at 475.

19. Harris v. McRae, 100 S. Ct. at 2688.

20. Maher v. Roe, 432 U.S. at 474.

21. Harris v. McRae, 100 S. Ct. at 2689 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

22. 100 S. Ct. at 2689.

23. The appellees included indigent pregnant women, two officers of a Methodist women's organization, and the organization. None of the indigent women had sought an abortion on religious grounds, and neither church officer alleged that she was pregnant, expected to become pregnant, or was eligible for Medicaid funds. Although the organization alleged that its membership included pregnant indigent women who would choose an abortion on religious grounds, Justice Stewart concluded that the organization had no standing to assert the rights of its members in the case, "[s]ince 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.'" *Id.* at 2690 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

24. *See* Harris v. McRae, 100 S. Ct. at 2693 (White, J., concurring). In *Roe*, Justice Blackmun observed:

ever, that there is a legitimate governmental interest in fetal life through all stages of a pregnancy and that, under the rationality standard, a classification need bear some rational relationship only to a legitimate (though not necessarily compelling) interest.[25] In *Maher* the Court could speak of the state's interest in encouraging "normal" childbirth since the regulation at issue there excluded only nontherapeutic abortions from welfare coverage. Under the Hyde Amendment, however, indigent women are denied abortion funding even "in cases where the fetus will die shortly after birth, or in which the mother's life will be shortened or her health otherwise gravely impaired by the birth."[26] The *McRae* majority could thus "scarcely speak of 'normal childbirth,' " as Justice Marshall caustically pointed out in his *McRae* dissent.[27] In *McRae*, therefore, the Court spoke simply of the state's interest in encouraging childbirth and protecting the potential (though perhaps extremely abnormal and short) life of the fetus.

II. A Partial Rebuttal

The Burger Court's treatment of abortion-funding restrictions appears inconsistent with the tenor of a variety of earlier cases invalidating governmentally-imposed conditions on the receipt of public benefits. Four cases seem especially pertinent: *Sherbert v. Verner*,[28] *Speiser v. Randall*,[29] *Shapiro v. Thompson*,[30] and *Memorial Hospital v. Maricopa County*.[31]

In *Sherbert*, decided in 1963, the Court, per Justice Brennan, invalidated on religious free exercise grounds South Carolina's refusal to provide unemployment compensation to a Seventh Day Adventist unable to find employment not requiring work on Saturday, her day of worship. Under regulations at issue in the abortion-funding cases decided to date in the Supreme Court, pregnant indigent women, such as those in *Maher v. Roe*, who forego exercise of a constitutional right (to abort the pregnancy) are eligible for a government

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> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb . . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

410 U.S. at 163-64.

25. Harris v. McRae, 100 S. Ct. at 2692-93. Justice Blackmun's *Roe* opinion does seem to support the notion that a state has a legitimate interest in potential life from the point of conception in a pregnancy.

> We repeat . . . that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . , and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

410 U.S. at 162-63 (emphasis in original).

26. Harris v. McRae, 100 S. Ct. at 2709 (Marshall, J., dissenting).

27. *Id.*

28. 374 U.S. 398 (1963).

29. 357 U.S. 513 (1958).

30. 394 U.S. 618 (1969).

31. 415 U.S. 250 (1974).

benefit (Medicaid coverage for childbirth and related maternal expenses). Like them, Mrs. Sherbert also would have been eligible for a public benefit had she forfeited exercise of a constitutional right (to Saturday worship) and remained jobless. Like them, too, she had confronted no direct official obstacle to her exercise of religious freedom; "she continue[d] as before to be dependent on private sources" of support.[32] Yet in her case, in a seven-to-two decision that presumably remains good law, the Court found the imposition of an unconstitutional state burden on the exercise of a constitutional right.[33]

In another Brennan opinion, the *Speiser* majority invalidated a California scheme under which tax exemptions ordinarily extended to military veterans were denied those veterans who had advocated governmental overthrow through force, violence, or other illegal means.[34] Under the regulation an oath required by the state was not conclusive evidence of a veteran's loyalty; the tax assessor was free to reject the veteran's declaration and require the claimant to present additional evidence of his loyalty.[35] Brennan concluded that the scheme lacked procedural safeguards to prevent a chilling effect on the exercise of free speech.[36] He further observed:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe free speech . . . . [H]ere, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.[37]

In *Shapiro* and *Memorial Hospital* the Court encountered still other conditions on the receipt of welfare benefits, again in contexts similar to those of the abortion-funding cases. *Shapiro* invalidated a one year residency requirement conditioning eligibility for benefits under the Aid to Families with Dependent Children (AFDC) program; *Memorial Hospital* invalidated the same requirement for receiving medical services. Like indigent pregnant women who were denied welfare coverage because they chose a constitutionally protected abortion rather than childbirth as a medical response to a pregnancy, indigents who exercised the right of interstate travel temporarily gave up their eligibility for welfare benefits under the regulations at issue in *Shapiro*[38] and *Memorial Hospital*.[39] Yet the latter prevailed in the Supreme Court, while the former have not.[40]

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32. Maher v. Roe, 432 U.S. at 474.
33. Sherbert v. Verner, 374 U.S. at 403-06.
34. Speiser v. Randall, 357 U.S. 513 (1958).
35. *Id.* at 517, 528.
36. *Id.* at 526-29.
37. *Id.* at 518-19.
38. 394 U.S. at 622-23.
39. 415 U.S. at 251-52.
40. Also relevant are United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (invalidating a federal food stamp regulation generally excluding from coverage any household

In attempting to distinguish these cases, the *Maher* and *McRae* majorities relied primarily on what they viewed as a meaningful distinction between "direct" interferences with the exercise of a constitutional right and mere state encouragement of alternative activities. Justice Powell observed in *Maher* that *Shapiro* and *Memorial Hospital* "recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny."[41] *Sherbert*, he added, was "similarly . . . inapplicable."[42] Powell cited, however, no specific passage from the opinions in these cases to support his "penalty" interpretation. Moreover, Justice Brennan took pains in *Sherbert* to emphasize that even very indirect governmental burdens on constitutional liberties may trigger strict scrutiny. He wrote:

> In a sense the consequences of such a disqualification [from unemployment compensation] to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[43]

Nor has the Burger Court been very convincing in its assertion that its own earlier decisions have recognized the direct-indirect distinction, saving indirect burdens on constitutional rights from any meaningful judicial scrutiny. In *Maher*, for example, Justice Powell cited *Buckley v. Valeo*[44] and *American Party v. White*[45] in attempting to justify the Court's approach. *American Party* and related cases[46] had invalidated restrictions on candidate and party access to the ballot, while *Buckley* had upheld a more indirect burden on the election process, selective public financing of presidential cam-

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containing an individual unrelated to any other household member); Goldberg v. Kelly, 397 U.S. 254 (1970) (holding that welfare recipients are entitled to notice and hearing before termination of benefits); Elfbrandt v. Russell, 384 U.S. 11 (1966) (overturning an Arizona scheme under which state employees were subject to discharge for knowing membership in organizations dedicated to the illegal overthrow of state government).

41. 432 U.S. at 474 n.8.

42. *Id.*

43. Sherbert v. Verner, 374 U.S. at 403-04 (footnote omitted). Elaborating, Justice Brennan further observed:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404.

44. 424 U.S. 1 (1976).

45. 415 U.S. 767 (1974).

46. *E.g.*, Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

paigns. In distinguishing *American Party*, moreover, the *Buckley* Court had emphasized that "the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions."[47] Having so distinguished the ballot-access and public-funding issues, however, the *Buckley* Court did not then subject the funding provisions to mere rationality review. Instead, it found that selective funding of presidential campaigns served "sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate."[48] Thus, even though the *Buckley* Court found selective public funding "generally less restrictive of access to the electoral process than the ballot-access regulations dealt with in prior cases,"[49] it nevertheless gave the funding provisions reasonably strict review.[50] This approach stands in marked contrast to that pursued in *Maher* and *McRae*.

The Court has attempted to distinguish certain of the arguable precedents discussed earlier in other ways, although again the effort has not been convincing. The current majority has contended, for example, that *Shapiro* and *Memorial Hospital* would have been more analogous to the abortion-funding cases—and a firmer basis for upholding constitutional claims to funded abortions—had the regulations attacked in *Shapiro* and *Memorial Hospital* denied funding for interstate travel expenses rather than merely inhibiting such travel through restrictive residency requirements.[51] Clearly, indigent women claiming a right to funded abortions are seeking financial support for the exercise of a constitutional right, whereas the *Shapiro* and *Memorial Hospital* plaintiffs were claiming only that state denial of welfare benefits to newcomers might inhibit their decision to exercise a right (interstate travel) not subsidized by the government. In neither the welfare-residency nor the abortion-funding cases, however, could the regulation at issue be viewed as imposing a direct restriction on the exercise of a constitutional right. If anything, the exclusion of abortions from a general program of welfare medical services would seem to place a clearer burden on an indigent woman's decision to exercise the right to abort an unwanted pregnancy than that which a temporary exclusion from welfare benefits would pose for the right of interstate travel.

In attempting to distinguish *Sherbert v. Verner*, perhaps the most troublesome precedent for the *Maher* and *McRae* majority position, Justice Stewart observed for the *McRae* Court:

> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible

47. 424 U.S. at 94-95.

48. *Id.* at 95-96.

49. *Id.* at 95.

50. Of course, the Burger Court has also upheld certain restrictions on access to the ballot. *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974) (upholding state regulations that required independent candidates for office to be affiliated with no political party at least one year prior to the immediately preceding primary election; such regulation held to serve a compelling interest in protecting the electoral process from unrestrained factionalism).

51. Maher v. Roe, 432 U.S. at 474 n.8.

> candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to *Sherbert v. Verner*, . . . where this Court held that a State may not, consistent with the First and Fourteenth Amendments, withhold *all* unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she is unwilling to work one day per week on her Sabbath. But the Hyde Amendment . . . does not provide for such a broad disqualification from receipt of public benefits.[52]

But again, is this a meaningful distinction? It is true, of course, that Mrs. Sherbert was disqualified from all unemployment compensation, while indigent women denied funded abortions are eligible for other types of medical services. But Mrs. Sherbert's refusal to take Saturday work did not exclude her from all public benefits, only those benefits related to her exercise of a constitutional right. Thus, her position would appear to have been little different from that of the indigent woman excluded from one benefit (abortion funding) but not others because of her choice of abortion over childbirth. In neither situation, moreover, had government actually forbidden a constitutionally protected activity.

Whatever precedential problems may infect its approach to abortion-funding claims, however, the Burger Court's obvious concerns about the potential impact on the scope of civil liberties of a ruling upholding such claims appear well taken. It is an exaggeration to suggest, as did Justice Stewart in *McRae*, that a decision supporting funded abortions would mean that government has a general obligation to finance the exercise of constitutional rights. Counsel for the *Maher* and *McRae* plaintiffs were not claiming a general constitutional right to funded abortions; they were simply contending that indigent women cannot constitutionally be denied funding for a particular medical procedure when the government in question finances a host of medical services and the procedure involved is itself constitutionally protected. Even so, had the Court required funded abortions in the *Maher* and *McRae* contexts, its decision would seem logically to have required similar funding in any situation in which government has chosen to fund an activity relating to the exercise of a constitutional right.

Consider, for example, *Pierce v. Society of Sisters*[53] and *Meyer v. Nebraska*,[54] two early cases normally employed to bolster expansive conceptions of constitutional rights. *Pierce* resorted to substantive due process in upholding a parent's right to enroll his child in a private rather than public school. But the *Pierce* Court in no way implied a state obligation to fund private schools; nor has the Court ever given *Pierce* such an interpretation. In fact, in *Norwood v. Harrison*,[55] invalidating state assistance for segregated private schools, the Court, per Chief Justice Burger, said of *Pierce*:

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52. 100 S. Ct. at 2688 n.19.
53. 268 U.S. 510 (1925).
54. 262 U.S. 390 (1925).
55. 413 U.S. 455 (1973).

> In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.[56]

Similarly, in *Meyer* the Court upheld the right of a parent to have his child receive private instruction in a particular foreign language, yet it also recognized state authority to prescribe English but exclude German in a public school curriculum.[57] Were the Court to require funded abortions as part of a general-welfare, medical-service program, however, it would appear to follow that state funding of private schools (when the state maintains public schools) and instruction in a particular foreign language (when the state provides some language instruction) also would be constitutionally required. As Justice Powell observed in *Maher*, "were we to accept appellees' argument, an indigent parent could challenge the state policy of favoring public rather than private schools, or of preferring instruction in English rather than German, on grounds identical in principle to those advanced here."[58]

Given the breadth and depth of government involvement in American life, the broad potential impact of such an approach, if applied indiscriminately, is obvious. Moreover, when a form of government spending related to the exercise of a constitutional right is not conditioned on a showing of indigency, poverty would not appear to be a necessary predicate for the receipt of public funding. Whenever government propagandizes, for example, it would seem obliged to fund those who wish to exercise their first amendment right to attack its position. Thus, government funding of an anti-smoking campaign would seem to require public financing for industry counterattacks. As in *Maher* and *McRae*, in which the government indicated a financial preference for childbirth over another constitutionally protected activity, government would have elected to fund only one side in the constitutionally protected smoking debate. If government is constitutionally required to fund abortions when it finances childbirth, logic would seem to require government also to finance both sides in the tobacco debate if it elects to fund one side of the issue.

III. A POSSIBLE ALTERNATIVE

It is difficult to be entirely comfortable with judicial acceptance or rejection of funded abortions as a constitutional requirement, even within the con-

56. *Id.* at 462.

57. Such power, said Justice McReynolds for the *Meyer* Court, "is not questioned." 262 U.S. at 402.

58. 432 U.S. at 477.

text of a general program of welfare medical services. Acceptance of the current majority's formula seems inconsistent with precedent closely scrutinizing laws conditioning the receipt of public largesse upon the forfeiture of a constitutional right. Acceptance of constitutional claims to funded abortions, on the other hand, could have enormous implications for the scope of governmental obligations in a variety of civil liberties fields. Perhaps, however, an approach to the abortion-funding issue can be developed that would keep faith with what presumably is desirable precedent yet also avoid the problems that seem to have influenced the *Maher* and *McRae* majorities in their rejection of constitutional claims to funded abortions.

An equal protection formula that Justice Marshall has advanced for a number of years may be the most viable alternative to the current majority's approach. Justice Marshall has repeatedly criticized the Court's two-tiered equal protection formula and has contended that the Court itself does not consistently follow the two-tiered doctrine. Marshall first registered his complaints and articulated an alternative position in *Dandridge v. Williams*,[59] a 1970 case upholding a state-imposed family ceiling on the receipt of AFDC funds. Speaking for the majority, Justice Stewart conceded that welfare assistance "involves the most basic economic needs of impoverished human beings."[60] He emphasized, however, that there was no constitutional right to such benefits and that discriminatory regulations affecting important interests trigger strict scrutiny only if those interests are also constitutional rights.[61] Finding strict review inappropriate in the case, Stewart subjected the challenged regulation to an extremely lenient, rational-basis standard, holding that the AFDC ceiling was rationally related to the legitimate state objectives of encouraging employment and maintaining an equitable balance between the incomes of welfare families and the working poor. Stewart agreed that the rational-basis standard applied in the case was the virtually meaningless one applied to regulations of business and industry, and he recognized that welfare benefits were normally of greater imporance than interests affected by commercial legislation. In his view, however, this "dramatically real factual differ-

59. 397 U.S. 471 (1970).

60. *Id.* at 485.

61. In challenging the ceiling on welfare benefits, litigants had urged the Court to adapt the overbreadth variety of strict scrutiny occasionally applied in first amendment cases to the welfare-ceiling context. In rejecting strict review, Justice Stewart observed:

> [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." . . . That era long ago passed into history.

Id. at 484 (footnote omitted).

Later Burger Court cases, of course, more clearly indicated that strict scrutiny under the fundamental-rights branch of modern equal protection doctrine was to be limited to discriminatory regulations claimed to affect rights "explicitly or implicitly guaranteed by the Constitution." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See also* Lindsey v. Normet, 405 U.S. 56, 74 (1972).

ence" was "no basis for applying a different constitutional standard."[62]

Justice Marshall vigorously disagreed. In dissent, he argued that "[t]his case simply defies easy characterization in terms of one or the other of" the tests available under the two-tiered formula.[63] Marshall rejected Stewart's conclusion that discriminatory regulations found to affect no constitutional right or suspect class should escape any meaningful judicial scrutiny. Instead, he proposed that such regulations be evaluated according to a flexible, balancing-of-interests standard in which "concentration [would] be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[64]

Dissenting also from later decisions that rejected strict scrutiny for a variety of discriminatory regulations,[65] Justice Marshall elaborated upon his *Dandridge* approach and sought to explain its advantages over the two-tiered formula. While agreeing that the stricter upper-tier review should be continued for regulations affecting fundamental constitutional rights as well as racial and other traditionally suspect classes, he argued that some degree of meaningful judicial protection should be extended to interests, "not now classified as 'fundamental,' that remain vital to the flourishing of a free society, and classes, not now classified as 'suspect,' that are unfairly burdened by invidious discrimination unrelated to the individual worth of their members."[66] He also added: "All interests not 'fundamental' and all classes not 'suspect' are not the same . . . ."[67]

Marshall has urged application of this flexible, balancing-of-interests formula in the abortion-funding cases. Dissenting in *Maher*, for example, he employed the approach in opposing the exclusion of non-therapeutic abortions from welfare coverage. In evaluating the governmental benefits at issue in the case, he wrote:

> [W]hile perhaps not representing large amounts of money for any individual, [abortion funds] are nevertheless of absolutely vital importance in the lives of the recipients. The right of every woman to choose whether to bear a child is, as *Roe v. Wade* held, of fundamental importance. An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facil-

62. 397 U.S. at 485 (footnotes omitted).

63. *Id.* at 520 (Marshall, J., dissenting).

64. *Id.* at 520-21.

65. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. at 70.

66. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 320 (Marshall, J., dissenting).

67. *Id.* at 321 (Marshall, J., dissenting).

> ities, she will be forced into full-time child care for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch the budget past the breaking point. All chance to control the direction of her own life will have been lost.[68]

Marshall was "appalled," moreover, "at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children."[69]

In Marshall's judgment, the character of the class affected by the exclusion of abortions from Medicaid funding also supported more meaningful scrutiny of the challenged regulation than that to which commercial controls are subjected. He conceded that poverty alone does not qualify one for governmental largesse. As noted earlier, however, he quoted the formula announced by Justice Powell in the *Rodriguez* case for determining whether regulations affecting indigent persons should be subjected to meaningful review,[70] concluding: "Medicaid recipients are, almost by definition, 'completely unable to pay for' abortions, and are thereby completely denied 'a meaningful opportunity' to obtain them."[71] He estimated, moreover, that nonwhite women now obtain abortions at nearly twice the rate of whites and that forty percent of minority women, as opposed to only about seven percent of white women, are dependent on Medicaid assistance. "Even if this strongly disparate racial impact does not alone violate the Equal Protection Clause," he maintained, " 'at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant.' "[72]

The only state interest asserted in support of the "brutal effect" of laws excluding nontherapeutic abortions from welfare coverage, on the other hand, was the state's interest in potential human life. Yet, before the point of viability in a pregnancy, said Marshall, this interest had been held insufficient even to require several physicians' concurrence in a colleague's decision to perform an abortion. "If there is any state interest in potential life before the point of viability," he maintained, "it certainly does not outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women."[73]

If a state interest in potential human life is inadequate to justify a denial of Medicaid funding for nontherapeutic abortions, such an interest seems even less viable to Marshall when therapeutic abortions are involved. In his *McRae* dissent, for example, he observed that the Hyde Amendment denies abortion

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68. 432 U.S. at 458-59 (Marshall, J., dissenting).

69. *Id.* at 456-57.

70. Justice Powell referred to "two distinguishing characteristics: because of their impecunity [indigents are] completely unable to pay for some desired benefit, and as a consequence, they [sustain] an absolute deprivation of a meaningful opportunity to enjoy that benefit." 411 U.S. at 20.

71. 432 U.S. at 459 (Marshall, J., dissenting) (footnote omitted).

72. *Id.* at 460 (footnote omitted).

73. *Id.* at 461 (footnote omitted).

funding even when there is no likelihood of normal childbirth, adding: "In these circumstances, I am unable to see how even a minimally rational legislature could conclude that the interest in fetal life outweighs the brutal effect of the Hyde Amendment on indigent women."[74]

Justice Marshall is surely correct when he contends that the Court now invokes something approximating his formula in many discrimination cases.[75] While refusing, for example, to add gender and illegitimacy to the list of suspect classes, the Burger Court has not exempted such discrimination from all meaningful review. Instead, a majority has concluded that gender and illegitimacy in effect are quasi-suspects, finding that sex classifications must "be substantially related to achievement" of "important governmental objectives,"[76] while discrimination based on illegitimacy must be "substantially related to permissible state interests."[77] Moreover, while denying age classifications even quasi-suspect status, the Court has concluded that the standard of scrutiny accorded such discrimination is "a relatively relaxed" one,[78] thereby suggesting that age classifications may be subject to some degree of meaningful review. Finally, the Court has applied similar intermediate standards of review in cases involving regulations affecting important but nonconstitutional interests related to the enjoyment of constitutional rights.[79] This "newer" equal protection—the application of intermediate review to regulations not subject to strictest scrutiny under the two-tiered formula—substantially parallels Justice Marshall's approach.

Marshall's approach, as well as the form of it being used selectively by the Burger Court, is no more vulnerable to a charge of judicial lawmaking than the two-tiered formula. Outside the racial field, there is simply no basis in history or constitutional language for the Court's view that certain forms of discrimination are subject to strict review and others to virtually no judicial scrutiny. Except in racial cases—and to a substantial extent even in them—the gloss that the Court has placed on the equal protection guarantee has reflected more the changing values of society (and judges) than constitutional text or

74. 100 S. Ct. at 2709 (Marshall, J., dissenting).

75. Marshall drew his model, moreover, largely from a Warren Court decision. In Williams v. Rhodes, 393 U.S. 23 (1968), the Court, per Justice Black, invalidated Ohio regulations restricting party access to the ballot. Black employed two-tiered rhetoric in his opinion, observing that the challenged regulations interfered with fundamental associational and voting rights and concluding that no compelling interest justified such burdens. He prefaced his application of the compelling interest test, however, with a more general statement of the Court's task in equal protection cases: "In determining whether or not a state law violates the Equal Protection Clause," he observed, "we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Id.* at 30 (footnote omitted).

76. Craig v. Boren, 429 U.S. 190, 197 (1976).

77. Lalli v. Lalli, 439 U.S. 259, 265 (1978).

78. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976).

79. *See, e.g.*, American Party v. White, 415 U.S. 767 (1974); Bullock v. Carter, 405 U.S. 134 (1972) (candidate and party access to the ballot). On occasion, too, the Court has applied intermediate standards in reviewing regulations seemingly vulnerable to strict scrutiny analysis. *See, e.g.*, Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973); (voting and travel); Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy).

historical intent. The two-tiered formula thus no more reflects a "strict" constitutional interpretation than does Marshall's formula or the Court's own practice.

One may argue, of course, that the degree of judicial creativity/interventionism is greater under the balancing approach than its two-tiered counterpart. When the latter formula is applied, certain forms of discrimination are virtually certain victims of judicial review, while others—presumably many others—escape all meaningful scrutiny. Under the former approach on the other hand, most discriminatory regulations are subject to some degree of meaningful review. Via the two-tiered formula's upper tier, however, the Court is free to expand indefinitely the number of rights and classes subject to special judicial protection. Moreover, since the Court now appears selectively to embrace in practice an approach paralleling Justice Marshall's, the question of degree would appear to be purely academic.

Even conceding, however, that there may be good reason to reject Marshall's formula as a general approach to equal protection issues, his stance makes good sense in the abortion-funding context. Concern that a decision requiring funded abortions would call also for the general public funding of constitutional rights has clearly influenced the Court's position in the abortion-funding cases. Under the two-tiered equal protection standard, these concerns are well founded, since any discriminatory regulation subjected to upper-tier review is virtually certain to fall. Under Marshall's flexible balancing approach, however, a decision requiring funded abortions would not necessarily mean that government is required to fund the exercise of other constitutional rights as well, even when the government is funding related activities. As Justice Marshall has observed:

> Application of the flexible equal protection standard would allow the Court to strike down [abortion-funding restrictions] without calling into question laws funding [for example] public education [given *Pierce*] or English language teaching in public schools [given *Meyer*]. . . . By permitting a court to weigh all relevant factors, the flexible standard does not logically require acceptance of any equal protection claim that is "identical in principle" under the traditional approach to those advanced here.[80]

Consider, for example, the right to attend private schools recognized in *Pierce*. The majority in the abortion-funding cases expressed concern that a decision requiring funded abortions would require the funding of private school attendance, at least when government operates public schools. Under the two-tiered formula, such an extension would seem to be a logical corollary of a decision requiring funded abortions. Under Justice Marshall's approach, however, a more individualized review—and decisional pattern—would emerge. A court might well conclude that substantial interests justify a government's decision to fund education only through public schools and that the availability of free public education obviates the interests of parents and stu-

80. Maher v. Roe, 432 U.S. at 461 n.6 (Marshall, J., dissenting).

dents in publicly funded private schooling. A similar ad hoc weighing of interests could be applied to other suits seeking extension of a decision requiring funded abortions to a variety of related contexts, with no particular ruling dictated by the outcome of earlier cases. By rejecting Marshall's approach and thus all meaningful review of abortion-funding restrictions, the Burger Court has denied itself this flexibility. At the same time, it has called into question the continued viability of *Sherbert v. Verner* and other cases that have subjected to varying degrees of exacting scrutiny laws conditioning the receipt of governmental largesse on the forfeiture of a constitutional right.

IV. CONCLUSION

This essay's central theme may be briefly summarized: the Supreme Court's recognition of a constitutional right to abort unwanted pregnancies obviously has no roots in constitutional text or historical intent. Instead, *Roe v. Wade* is best viewed as "an exercise of raw judicial power,"[81] a logical extension of earlier decisions reflecting judicial creativity in a variety of privacy fields.[82] For students of the Constitution who believe that judges should be faithful to constitutional language and intent—however infrequently constitutional meaning emerges with any clarity from those sources—*Roe* is thus a troublesome decision, whatever its ethical or policy merits.

Even so, the Constitution does now include a right of abortion, a right considered "fundamental" and thus deserving of special judicial protection. Precedent and logic would seem to indicate, therefore, that welfare medical programs conditioning the receipt of public benefits on the forfeiture of such a right should be subjected to some degree of meaningful scrutiny. Precedent also indicates that such a review is necessary whether funding restrictions are viewed as "direct" or "indirect" burdens on the right in question, while logic suggests that attempts to draw such distinctions are generally doomed to failure.[83] The Burger Court has thus erred in rejecting all meaningful review for Medicaid regulations funding childbirth but denying funds for abortions.

The Court's stance no doubt reflects the majority's concern that a decision requiring abortion funding as part of a program of welfare medical services would provide a logical basis for general claims to public funds for the exercise of constitutional rights. Under the two-tiered equal protection/due process formula, that concern would appear well taken, since challenges to regulations subject to meaningful (upper-tier) review under that doctrine are almost inevitably successful. Adaptation of Justice Marshall's flexible, interest-balancing mode of review to the abortion-funding context, however, would

81. Roe v. Wade, 410 U.S. at 222 (White, J., dissenting).

82. *E.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

83. Consider, for example, the criticism directed at Justice Black's efforts to draw such distinctions in first amendment cases. *See, e.g.*, McBride, *Mr. Justice Black and his Qualified Absolutes*, 2 LOY. L.A. L. REV. 37, 49-54 (1969).

relieve the Court of such concerns while allowing it to remain faithful to precedent.

Of course, the *Maher* and *McRae* majorities may have been motivated purely by the financial stakes at issue in the abortion-funding cases. After all, a judicial requirement that a state provide unemployment compensation to a Seventh-Day Adventist, or veterans benefits to persons with communist or socialist leanings, is not likely to have a significant effect on the state's treasury.[84] A requirement that abortions be covered by a medical services program, on the other hand, clearly would have such an impact. This financial factor may best explain the Court's opposition to any meaningful scrutiny of abortion-funding restrictions—a review, the majority may have been convinced, those restrictions (especially the extreme Hyde Amendment variety) simply could not survive.

If such thinking ultimately dictated the Court's resort to the two-tiered formula in the abortion-funding cases, the majority should still rethink its approach. Under Justice Marshall's flexible, interest-balancing formula, the Court could obviously give the financial factor full consideration. Application of the formula, moreover, would not necessarily lead to different results in abortion-funding cases. Its use would simply eliminate the doctrinal confusion that has been generated by the Court's current approach. And for those who believe that doctrinal clarity and consistency bear a strong relationship to the legitimacy of judicial decisions, such an approach would appear well worth the effort.

84. This factor may have influenced the Court in the *Sherbert* case. In the second footnote to his *Sherbert* opinion, Justice Brennan observed: "The record indicates that of the 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment." 374 U.S. at 399 n.2.