Women's Health Center of West Virginia, Inc. v. Panepinto
Nos. 21924, 21925 and 21926

McHugh, Justice, dissenting:

I dissent from the majority opinion because I believe that a state is not required to provide funding to enable a woman to exercise her right to have an abortion. Like the majority, I agree that the question before the Court "does not turn on the morality or immorality of abortion, and most decidedly does not concern the personal views of the individual justices as to the wisdom of the legislation itself or the ethical considerations involved in a woman's individual decision whether or not to bear a child." Committee to Defend Reprod. Rights v. Myers, 625 P.2d 779, 780, 172 Cal. Rptr. 866, 867 (1981). However, unlike the majority, I conclude

that W. Va. Code, 9-2-11 [1993] does not violate the West Virginia Constitution.

The Supreme Court of Michigan was faced with the same issue in Doe v. Dept. of Social Services, 487 N.W.2d 166 (Mich. 1992) and concluded that the Michigan Medicaid statute which funded childbirth, but not abortion unless the abortion was medically necessary to save the mother's life, does not violate the equal protection clause in the Michigan Constitution.[1] I find the analysis of the Supreme Court of Michigan to be

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[1]The Supreme Court of Michigan noted that the relevant language found in § 109a of the Social Welfare Act provides:

> 'Notwithstanding any other provision of this act, an abortion shall not be a service provided with public funds to a recipient of welfare benefits, whether through a program of medical assistance, general assistance, or categorical assistance or through any other type of public aid or assistance program, unless the abortion is necessary to save the life of the mother. It is the policy of this state to prohibit the appropriation of public funds for the

persuasive. Therefore, I will follow the Supreme Court of Michigan's analysis in my dissent.

As the majority points out and as the Supreme Court of Michigan notes, the Supreme Court of the United States has analyzed this very issue in a series of cases. In Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977) the Supreme Court of the United States upheld a Connecticut statute which limited state funding for abortions to medically necessary abortions performed during the first trimester of pregnancy. In reaching its conclusion the Supreme Court of the United States acknowledged that Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) gave a woman the right under the federal constitution

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> purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother.' M.C.L. § 400.109a; M.S.A. § 16.490(19a).

Doe, 487 N.W.2d at 169.

to choose an abortion. However, in Maher the Supreme Court of the United States clarified the Roe decision:

> Roe did not declare an unqualified 'constitutional right to an abortion,' . . . . 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.

Maher, 432 U.S. at 473-74, 97 S. Ct. at 2382, 53 L. Ed. 2d at 494. The Court in Maher explained that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." Id. at 475, 97 S. Ct. at 2383, 53 L. Ed. 2d at 495 (footnote omitted).

In Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980), the Supreme Court of the United States held that the Hyde Amendment, which placed federal restrictions on Medicaid funds for

abortions except in a limited number of circumstances, did not violate the establishment clause in the First Amendment nor the equal protection clause of the Fifth Amendment of the United States Constitution. In reaching its conclusion the Supreme Court of the United States noted that

> although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency. Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.

Id. at 316-17, 100 S. Ct. at 2688, 65 L. Ed. 2d at 804 (citing Maher, supra).

The Supreme Court of Michigan in Doe, supra, discussed the Supreme Court of the United States' equal protection analysis found in Harris, supra, and Maher, supra, in detail. Doe points out that with this issue there are two levels at which an equal protection analysis can take place.[2] Ordinarily, the legislation must be rationally related to a legitimate

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[2]In Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 691, 408 S.E.2d 634, 641 (1991) this Court pointed out that there are three types of equal protection analyses:

> First, when a suspect classification, such as race, or a fundamental, constitutional right, such as speech, is involved, the legislation must survive 'strict scrutiny,' that is, the legislative classification must be necessary to obtain a compelling state interest . . . . Second, a so-called intermediate level of protection is accorded certain legislative classifications, such as those which are gender-based, and the classifications must serve an important governmental objective and must be substantially related to the achievement of that objective . . . . [H]owever, this 'middle-tier' equal protection analysis is 'substantially equivalent' to the 'strict scrutiny' test stated immediately above . . . .

governmental purpose. However, if the legislation creates a classification which is based on suspect factors or prevents the exercise of a fundamental right, then the legislation must be analyzed with strict scrutiny. This analysis, although ignored by the majority, is not foreign to this Court. E.g., Gibson v. W. Va. Dept. of Highways, 185 W. Va. 214, 406 S.E.2d 440 (1991); Means v. Sidiropolis, 184 W. Va. 514, 401 S.E.2d 447 (1990); Courtney v. State Dept. of Health, 182 W. Va. 465, 470, 388 S.E.2d 491,

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> Third, all other legislative classifications . . . are subjected to the least level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose.

(citations omitted). Although there are technically three levels of equal protection analyses in West Virginia, in the case before us only two need to be considered.

496 (1989); and Israel v. West Virginia Secondary Schools Activities Commission, 182 W. Va. 454, 388 S.E.2d 480 (1989).

The Supreme Court of the United States determined that strict scrutiny did not apply to the issue. In Maher, the Supreme Court of the United States pointed out that "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." Maher, 432 U.S. at 471, 97 S. Ct. at 2381, 53 L. Ed. 2d at 492-93 (citations omitted). Furthermore, the Supreme Court of Michigan pointed out that "[t]he United States Supreme Court has held in other cases that a legislature's election not to fund the exercise of a fundamental right does not impinge upon that right[.]" Doe, 487 N.W.2d at 172 (citing Regan v. Taxation with Representation, 461 U.S. 540, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983) and footnote omitted). Therefore, the Supreme Court of the United States found that the failure to fund abortions did not

interfere with an indigent woman's fundamental right to choose an abortion. See Maher, supra.

Since strict scrutiny is not applicable, then the legislation needs only to be rationally related to a legitimate governmental interest. As Doe, supra, points out, even the Roe decision acknowledges that the state does have an "'important and legitimate interest . . . in protecting the potentiality of human life.'" Id. at 173, citing Roe v. Wade, 410 U.S. at 162, 93 S. Ct. at 731, 35 L. Ed. 2d at 182 (1973). In fact, the Supreme Court of the United States

> has emphasized that no burden is imposed upon the government to remain neutral regarding abortion: '[The right recognized in Roe] 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.' Maher, 432 U.S. at 474, 97 S. Ct. at 2382.

Id. Therefore, the Supreme Court of the United States concluded that the legislation which refused to fund abortions except in limited circumstances

was rationally related to a legitimate governmental interest. See Maher, supra, and Harris, supra.

In Doe, supra, the court below had found that the Michigan Constitution provided greater protection under its equal protection clause than its federal counterpart. The Supreme Court of Michigan disagreed and held that the equal protection clause in the state constitution provided the same protection as its federal counterpart and applied the same analysis the United States Supreme Court had to the issue. Like the Supreme Court of Michigan I find that the more sound approach to this issue is to follow the analysis provided by the Supreme Court of the United States.

However, unlike Doe, the majority, in the case before us, found that the West Virginia Constitution provides greater protection than the United States Constitution. The rationale of the majority is that "the common benefit clause of article III, section 3 of the West Virginia

Constitution imposes an 'obligation upon state government . . . to preserve its neutrality when it provides a vehicle' for the exercise of constitutional rights." Women's Health Center of West Virginia, Inc. v. Panepinto, Nos. 21924, 21925, 21926, slip op. at 14, __ W. Va. __, __, __ S.E.2d __, __ (filed December 17, 1993) (citing United Workers v. Parsons, 172 W. Va. 386, 398, 305 S.E.2d 343, 354 (1983)). Based on the above premise, the majority went on to hold that once the government provides medical care to an indigent woman it must do so in a neutral manner, and that funding childbirth but not abortion in some circumstances was not neutral.

Although not clear, it appears that the majority applied a strict scrutiny analysis. The majority made a two-fold finding. The first is that W. Va. Code, 9-2-11 [1993], impinges upon a woman's fundamental right to an abortion since as a practical matter an indigent woman would not have the freedom to choose an abortion. Within this analysis, the majority found that if the government does not equally fund two competing

fundamental rights, then it is infringing upon one of those fundamental rights. The second is that W. Va. Code, 9-2-11 [1993], infringes upon a woman's fundamental right to safety found in article III, section 1 of the West Virginia Constitution.

I recognize that this Court has previously held that the West Virginia Constitution, in rare circumstances, affords a higher degree of protection than the United States Constitution does. However, the case before us does not present a need for such protection. In fact, the majority's adoption of the "neutrality in funding" principle could have a profound adverse impact on the indigent or others who seek government assistance. The frightening effect of the majority's reasoning will be to chill government aid since it would be virtually impossible financially to fund all competing fundamental rights equally.

For instance, in syllabus point 3, in relevant part, of Pauley v. Kelly, 162 W. Va. 672, 255 S.E.2d 859 (1979) this Court held that an

education is a "fundamental, constitutional right in this State." Does this mean that the state government must fund private schools since it funds public schools? If the majority holds to its position, the answer is yes. The majority's reliance on the neutrality in funding principle could logically authorize private religious and non-religious schools to seek and obtain equal funding for the exercise of their fundamental right to education. Norwood v. Harrison, 413 U.S. 455, 462, 93 S. Ct. 2804, 2809, 37 L. Ed. 2d 723, 729 (1973) points out the difficulties of the majority's position: "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." (quoted in Doe, 487 N.W.2d at 172).

More importantly, the government has always enacted laws which encourage one right as opposed to a competing right. For instance, many state governments have enacted legislation which benefits marriage. See Doe, supra (Levin, J., concurring). However, a person has just as much

of a right to choose to be single; yet, governments do not accord the same benefits to the single person as they do to the married couple.

The majority's concept of government neutrality in the case before us would make most government aid or lack thereof unconstitutional:

> It will always be possible to argue that an entitlement created by the state promotes one bundle of fundamental rights at the expense of another. A requirement of neutrality would mean that the government could create no entitlement without also creating an equal and opposite entitlement. Under such a scheme of government, the role of the judiciary would be to police neutrality in legislation, steadfastly striking down any legislation that expressed an idea, contained a thought, or took a position on the issues that matter most. Only legislation consisting of dull gray matter would survive.

Doe, 487 N.W.2d at 185 (Levin, J., concurring).[3] Obviously, this is not

what the constitutional framers had in mind when they drafted the state constitution.

Additionally, the safety argument of the majority, based on article III, section 1 of the West Virginia Constitution, is without merit. W. Va. Code, 9-2-11 [1993], in relevant part, specifically states that funds will be provided for an abortion if a physician determines in his best clinical judgment that there is

> (i) A medical emergency that so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a delay will create grave peril of irreversible loss of major bodily function or an equivalent injury to the

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[3]The United States Supreme Court has noted that "our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196, 109 S. Ct. 998, 1003, 103 L. Ed. 2d 249, 259 (1989).

> mother: Provided, That an independent physician concurs with the physician's clinical judgment; or
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> (ii) Clear clinical medical evidence that the fetus has severe congenital defects or terminal disease or is not expected to be delivered; or
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> (2) The individual is a victim of incest or the individual is a victim of rape when the rape is reported to a law-enforcement agency.

It is apparent that the legislature did consider the woman's psychological and physiological safety when drafting W. Va. Code, 9-2-11 [1993].

Moreover, we have stated that "[a] fact once determined by the legislature, and made the basis of a legislative act, is not thereafter open to judicial investigation." Syl. pt. 4, State ex rel. W. Va. Housing and Development Fund v. Copenhaver, 153 W. Va. 636, 171 S.E.2d 545 (1960). In chapter 16 of the West Virginia Code, which is entitled "Parental Notification of Abortions Performed on Unemancipated Minors," the legislature found that "the medical, emotional and psychological

consequences of abortion are serious and of indeterminate duration, particularly when the patient is immature[.]" W. Va. Code, 16-2F-1 [1984], in relevant part. Even though the above legislative finding of fact concerns minors, it is equally applicable to the issue before this Court. Therefore, this Court may not ignore the legislature's determination that abortions may pose a threat to a woman's safety.

Abortion is an emotionally charged issue. Therefore, as long as the government does not interfere with a woman's right to choose an abortion, the decisions regarding the funding for abortions should be left to the legislature. As we have previously stated, "[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]" State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). See also syl. pt. 1, Consumer Advocate

Division of the Public Service Commission v. Public Service Commission, 182 W. Va. 152, 386 S.E.2d 650 (1989).

Additionally, this Court has consistently recognized that whenever possible statutes should be found to be constitutional:

> 'In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.' Point 1 Syllabus, State ex rel. Appalachian Power Company v. Gainer, 149 W. Va. 740 [143 S.E.2d 351].

Syl. pt. 3, State ex rel. W. Va. Housing Development Fund, supra. Whether or not the government should fund abortions and/or childbirth for the indigent woman is a matter of legislative policy. The legislature is the proper forum for debating whether W. Va. Code, 9-2-11 [1993] is unwise, not the judiciary. As we recently stated, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Tony P. Sellitti Construction Co. v. Caryl, 185 W. Va. 584, 593, 408 S.E.2d 336, 345 (1991), cert. den., __ U.S. __, 112 S. Ct. 969, 117 L. Ed. 2d 135 (1992) (citing City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L. Ed. 2d 511, 517 (1976)).

W. Va. Code, 9-2-11 [1993] does not trample on a constitutional right. It does not prevent a woman from exercising her fundamental right to choose an abortion. The majority has chosen to cast

aside well-established legal principles to reach its conclusion. The holding will have limited precedential value because the majority will not be able to adhere to the result of the neutrality in funding issue when it comes up in other contexts. Accordingly, based on the above discussion, I respectfully dissent. I am authorized to state that Chief Justice Brotherton joins me in this dissent.