Dissent by Thurgood Marshall in

***Beal v. Doe* (1977)**

Marshall categorically supported a woman's control of her own body, and hence her right to choose whether to have an abortion. He gladly joined the majority opinion in 1973's Roe v Wade*, which declared a woman's right to have constitutional protection. He later vigorously dissented from all attempts by his brethren to limit this right, whether substantively or procedurally. One such example was his dissent in 1977's* Beal v Doe*. The issue in this case was whether Title XIX of the Social Security Act required states participating in the Medicaid program to fund the cost of non-therapeutic abortions. The majority said no. Marshall, along with Brennan and Blackman, disagreed.*

BEAL v. DOE

SUPREME COURT OF THE UNITED STATES

432 U.S. 438 (1977)

MR. JUSTICE MARSHALL, dissenting.

It is all too obvious that the governmental actions in these cases, ostensibly taken to "encourage" women to carry pregnancies to term, are in reality intended to impose a moral viewpoint that no State may constitutionally enforce. Since efforts to overturn those decisions have been unsuccessful, the opponents of abortion have attempted every imaginable means to circumvent the commands of the Constitution and impose their moral choices upon the rest of

society. The present cases involve the most vicious attacks yet devised. The impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions.

The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives in foster homes, orphanages, and "reform" schools. Many children of the poor, sadly, will attend second-rate segregated schools. And opposition remains strong against increasing Aid to Families With Dependent Children benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. I am appalled 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.

I

The Court's insensitivity to the human dimension of these decisions is particularly obvious in its cursory discussion of appellees' equal protection claims in *Maher* v. *Roe.* That case points up once again the need for this Court to repudiate its outdated and intellectually disingenuous "two-tier" equal protection analysis. As I have suggested before, this "model's two fixed modes of analysis, strict scrutiny and mere rationality, simply do not describe the inquiry the Court has undertaken—or should undertake—in equal protection cases." In the present case, in its evident desire to avoid strict scrutiny—or indeed any meaningful scrutiny—of the challenged legislation, which would almost surely result in its invalidation, the Court pulls

from thin air a distinction between laws that absolutely prevent exercise of the fundamental right to abortion and those that "merely" make its exercise difficult for some people. (See *Maher* v. *Roe,* [where] MR. JUSTICE BRENNAN demonstrates that our cases support no such distinction, and I have argued above that the challenged regulations are little different from a total prohibition from the viewpoint of the poor). But the Court's legal legerdemain has produced the desired result: A fundamental right is no longer at stake and mere rationality becomes the appropriate mode of analysis. To no one's surprise, application of that test—combined with misreading of *Roe* v. *Wade* to generate a "strong" state interest in "potential life" during the first trimester of pregnancy; *Maher* v. *Roe,* "leaves little doubt about the outcome; the challenged legislation is [as] always upheld." And once again, "relevant factors [are] misapplied or ignored," while the Court "forgo[es] all judicial protection against discriminatory legislation bearing upon" a right "vital to the flourishing of a free society" and a class "unfairly burdened by invidious discrimination unrelated to the individual worth of [its] members."

As I have argued before, an equal protection analysis far more in keeping with the actions rather than the words of the Court, carefully weighs three factors—"the importance of the governmental benefits denied, the character of the class, and the asserted state interests." Application of this standard would invalidate the challenged regulations.

The governmental benefits at issue here, while perhaps not representing large amounts of money for any individual, 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 facilities, 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.

I have already adverted to some of the characteristics of the class burdened by these regulations. While poverty alone does not entitle a class to claim government benefits, it is surely a relevant factor in the present inquiry. Indeed, it was in … *San Antonio*[*v. Rodriguez*] … that MR. JUSTICE POWELL for the Court stated a test for analyzing discrimination on the basis of wealth that would, if fairly applied here, strike down the regulations. The Court there held that a wealth-discrimination claim is made out by persons who share "two distinguishing characteristics: because of their impecunity they [are] completely unable to pay for some desired benefit, and as a consequence, they sustai[n] an absolute deprivation of a meaningful opportunity to enjoy that benefit." Medicaid recipients are, almost by definition, "completely unable to pay for" abortions, and are thereby completely denied "a meaningful opportunity" to obtain them.

It is no less disturbing that the effect of the challenged regulations will fall with great disparity upon women of minority races. Nonwhite women now obtain abortions at nearly

twice the rate of whites, and it appears that almost 40% of minority women—more than five times the proportion of whites—are dependent upon Medicaid for their health care. Even if this strongly disparate racial impact does not alone violate the Equal Protection Clause, "at some point a showing that state action has a devastating impact on the lives of minority racial groups must be relevant.

Against the brutal effect that the challenged laws will have must be weighed the asserted state interest. The Court describes this as a "strong interest in protecting the potential life of the fetus." Yet in *Doe v. Bolton,* the Court expressly held that any state interest during the first trimester of pregnancy, when 86% of all abortions occur, was wholly insufficient to justify state interference with the right to abortion. If a State's interest in potential human life before the point of viability is insufficient to justify requiring several physicians' concurrence for an abortion, I cannot comprehend how it magically becomes adequate to allow the present infringement on rights of disfavored classes. If there is any state interest in potential life before the point of viability, it certainly does not outweigh the deprivation or serious discouragement of a vital constitutional right of especial importance to poor and minority women.

Thus, taking account of all relevant factors under the flexible standard of equal protection review, I would hold the Connecticut and Pennsylvania Medicaid regulations and the St. Louis public hospital policy violative of the Fourteenth Amendment.

II

When this Court decided *Roe* v. *Wade* and *Doe* v. *Bolton,* it properly embarked on a course of constitutional adjudication no less controversial than that begun by *Brown* v. *Board of Education*. The abortion decisions are sound law and undoubtedly good policy. They have never

been questioned by the Court, and we are told that today's cases "signa[l] no retreat from *Roe* or the cases applying it." The logic of those cases inexorably requires invalidation of the present enactments. Yet I fear that the Court's decisions will be an invitation to public officials, already under extraordinary pressure from well-financed and carefully orchestrated lobbying campaigns, to approve more such restrictions. The effect will be to relegate millions of people to lives of poverty and despair. When elected leaders cower before public pressure, this Court, more than ever, must not shirk its duty to enforce the Constitution for the benefit of the poor and powerless.