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The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (and Some Reflections on the Uncertain Limits of Reproductive Privacy)

Susan Frelich Appleton
Washington University School of Law

THE ABORTION-FUNDING CASES AND POPULATION CONTROL: AN IMAGINARY LAWSUIT (AND SOME REFLECTIONS ON THE UNCERTAIN LIMITS OF REPRODUCTIVE PRIVACY)

*Susan Frelich Appleton**

Betty Boe v. Abbot Abraham, President of the City Council of New Gotham, New Gotham State, et al.

United States Court of Appeals, Special Circuit**

June 20, 1979

Before ADAMS, BAKER, CARSON, DANIEL, and EVERETT, Senior Circuit Judges.

ADAMS, Senior Circuit Judge.

Two issues are before us today: (I) the meaning of the term "medically necessary" in a public hospital's charter and (II) the constitutionality of state action that provides free medical treatment to indigent pregnant women seeking an abortion but denies them such assistance for prenatal care and childbirth. On the basis of recent Supreme Court authority, we find that such action violates neither the hospital's charter nor the United States Constitution.

The city of New Gotham, a large and crowded metropolis, owns and operates one hospital, which, pursuant to its charter, provides "medically necessary services" free of charge for the

* Associate Professor, Washington University School of Law. A.B. 1970, Vassar College; J.D. 1973, University of California, Berkeley.— Ed.

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** The United States Court of Appeals, Special Circuit, last sat in 1965 in order to decide *Jones & Smith v. Town of New Harmony. See* Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations,* 71 YALE L.J. 1387 (1962). With Professor Bittker's permission and this author's acknowledged debt to his article, the same judges — now senior circuit judges eager to resolve another fictitious controversy — have reconvened to decide the instant case. Any apparent changes in judicial personalities or writing styles may be attributed to the passage of time and the annual succession of law clerks.

city's indigent residents.[1] Alarmed by the recent dramatic increase in New Gotham's population, particularly among the poor, and by the resulting drain on public services,[2] the City Council of New Gotham, whose members are duly elected by the city's residents, has enacted a number of measures designed to encourage population control, consistent with the campaign promises of several councilmen.[3] Among these measures is a policy directive requiring the public hospital to cease providing all medical services related to prenatal care and childbirth. Instead, a physician on the hospital staff is to instruct every woman seeking medical care there in connection with pregnancy that an abortion[4] is available at any time throughout her pregnancy.[5]

In accordance with a longstanding staffing practice, the doctors and medical students at the public hospital's obstetrics-gynecology clinic are drawn from the faculty and student body of the New Gotham Medical School, known nationwide for its work in population control and related fields; as a result, the medical

1. The hospital is a municipal hospital established under the laws of New Gotham State and a city ordinance "for the reception of persons requiring relief during temporary sickness." As an "acute short term general hospital," it does not provide indefinite or custodial treatment. All residents of the city of New Gotham are entitled to in-patient admission for any surgical or other procedure which the hospital permits and for the performance of which it has the proper facilities. Although any city resident may have any such procedure or treatment performed at the hospital for a specified charge, under its charter the hospital is to provide all "medically necessary" services at no cost for those residents who meet the hospital's standards of indigency. Under these standards, an indigent person or family is one who falls below the federally defined poverty level. *See* 45 C.F.R. §§ 1060.2-1, .2-2 (1978) (poverty income guidelines). For a description of a similar municipal hospital, see Hathaway v. Worcester City Hosp., 475 F.2d 701 (1st Cir.), *stay of mandamus denied,* 411 U.S. 929 (1973).

2. Though New Gotham is crowded in comparison to other urban areas of roughly the same size and in recent years has experienced fiscal difficulties, there is no evidence that either of these problems has approached an emergency condition. Instead, the principal concern is that the city has too many inhabitants to be able to provide the "quality of life" that a majority of its residents desire.

3. The policy and practice at issue in this case constitute only part of a series of measures undertaken by New Gotham for the purpose of promoting population control. The city has, for example, also established throughout the metropolitan area a number of abortion clinics and family planning agencies operating independently of the public hospital.

These measures were among those included in the "quality of life" platform espoused by all of the winning candidates for the City Council in the last municipal election.

4. Neither the New Gotham policy directive nor the physicians on the hospital staff make a distinction between so-called "therapeutic" and "nontherapeutic" abortions; regardless of any particular indigent woman's physical or emotional reaction to her pregnancy, termination is available as described.

5. The legislature of New Gotham State, in which the city of New Gotham is located, also eager to encourage reduced reproduction, has repealed all criminal abortion statutes from the state's penal code, thus legalizing all abortions whenever performed.

personnel who are asked to comply with the policy directive strongly support its aims.

Immediately before the filing of this lawsuit, plaintiff Betty Boe, an indigent resident of New Gotham, consulted a physician on the public hospital staff who informed her that she was approximately six weeks pregnant and that the hospital would provide her with an abortion free of charge at any time during her pregnancy. Boe proceeded unsuccessfully to seek free prenatal care at the public hospital.[6] Because she still wishes to receive prenatal care, to carry the pregnancy to term, and to give birth to the child, but lacks the financial wherewithal to do so, she brought this action alleging a violation of the hospital's charter and challenging the constitutionality of the policy directive and hospital staffing practice that together preclude her from obtaining the desired treatment free of charge.[7] Following a trial to the court, the trial judge found for defendants and dismissed the complaint with prejudice; Boe appeals.

I

Boe first argues that the policy in question violates the public hospital's own charter, under which the hospital is to provide the indigent with all care that is "medically necessary."[8] We disagree.[9]

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6. All parties stipulate that during her initial visit to the hospital Boe was assured that her request for free childbirth and postpartum treatment would likewise be denied. At the time this appeal was argued, one month ago, Boe's attorney reported that she was beginning the seventh month of her pregnancy, that she still desired to deliver rather than abort, that she met the hospital's standards of indigency, that she remained unable to pay for the desired services herself, and that she had not found any alternative means for obtaining such medical treatment without cost. On the basis of these undisputed facts, there is no question that this lawsuit satisfies the case or controversy requirement of article III of the Constitution.

7. Boe filed this civil rights action, on behalf of herself and all others similarly situated, under 42 U.S.C. § 1983 (1976) and 28 U.S.C. § 1343 (1976). Her complaint named as defendants Abbot Abraham, the presiding member of the City Council of New Gotham, as well as the other members of the Council, and Dr. Clyde Carver, the Director of the Department of Health and Hospitals and Hospital Commissioner of New Gotham [hereinafter referred to collectively as "New Gotham" or "the city"]. Boe sought, in the words of her complaint, declaratory and injunctive relief against "the existence, application, implementation, and enforcement of express and implied policies, rules, regulations, procedures, and practices barring, thwarting, limiting, and infringing the provision by the public hospital of New Gotham of free medical treatment related to prenatal care and childbirth for the indigent residents of the city." For a similarly worded complaint, see Doe v. Poelker, 515 F.2d 541 (8th Cir. 1975), *revd. per curiam*, 432 U.S. 519 (1977).

8. *See* note 1 *supra*.

9. By itself, the construction of the hospital's charter would not present a federal

The United States Supreme Court recently confronted a related issue in *Beal v. Doe,* 432 U.S. 438 (1977), where it was asked to construe Title XIX of the Social Security Act,[10] which requires states participating in its federally funded medical assistance program for needy persons to formulate "reasonable standards" for determining the extent of assistance to be provided, consistent with the objectives of the Act.[11] Pursuant to this requirement, Pennsylvania had adopted regulations allowing such assistance for abortions only where certified by physicians to be "medically necessary."[12] Elective or nontherapeutic abortions were thus excluded from coverage. A majority of the Court found the regulations to be within the broad discretion accorded to the states by the Act, reasoning that "it is hardly inconsistent with the objectives of the Act for a State to refuse to fund *unnecessary* — though perhaps desirable — medical services." 432 U.S. at 444-45 (emphasis in original).

Dissenting, Mr. Justice Brennan pointed out that an implicit corollary of the majority's analysis was that medical services for childbirth would likewise fall outside the scope of "medically necessary" treatment if the state were to provide nontherapeutic abortions for its needy women. 432 U.S. at 451-52.[13] He reasoned that "[p]regnancy is unquestionably a condition requiring medi-

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question appropriate for our consideration. We nonetheless have pendent jurisdiction to decide the question, because of the close relationship between this issue and plaintiff's federal constitutional challenge. UMW v. Gibbs, 383 U.S. 715 (1966). In view of the strong policy disfavoring the unnecessary resolution of constitutional questions, we address it first, as did the district court below. *See* Hagans v. Lavine, 415 U.S. 528, 546-47 (1974). *See also* Hathaway v. Worcester City Hosp., 341 F. Supp. 1385, 1388 app. (D. Mass. 1972), *revd. on other grounds,* 475 F.2d 701 (1st Cir.), *stay of mandamus denied,* 411 U.S. 929 (1973). In addition, because of the continuing progression of plaintiff's pregnancy and the consequent need to resolve this case as expeditiously as possible, we decline to exercise our discretionary authority to abstain until a state court construction of the charter is available. *See also* Zbaraz v. Quern, 572 F.2d 582, 587 (7th Cir. 1978); Hathaway v. Worcester City Hosp., 475 F.2d at 705.

10. Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396k (1976 & Supp. I 1977), establishes the Medicaid program under which participating states may provide federally funded medical assistance to needy persons. *See* 432 U.S. at 440.

11. 42 U.S.C. § 1396a(a)(17) (1976).

12. *See* 432 U.S. at 441-42 n.3. The purpose of the federal statute is to "[enable] each State, as far as practicable under the conditions in such State, to furnish . . . medical assistance on behalf of [those] whose income and resources are insufficient to meet the costs of *necessary medical services.*" 42 U.S.C. § 1396 (1976) (emphasis added). *See* 42 U.S.C. § 1396a(a)(10)(C)(i) (1976).

13. Mr. Justice Brennan stated that, under the Court's analysis, "therapeutic" abortions, like care accompanying live births, would also not constitute "necessary medical services" if elective abortions were available. 432 U.S. at 451-52 (Brennan, J., dissenting). Using this logic, prenatal care would be "unnecessary" under similar circumstances.

cal services . . . . Treatment for the condition may involve medical procedures for its termination, or medical procedures to bring the pregnancy to term, resulting in a live birth." 432 U.S. at 449. Given the two mutually exclusive alternatives for responding to pregnancy,[14] it is clear that Mr. Justice Brennan is correct: the availability of one kind of medical procedure — in the instant case, abortion — necessarily renders the other — childbirth — unneeded.

Relying upon a line of reasoning employed by a majority of the United States Supreme Court and the elaboration of that reasoning offered by Mr. Justice Brennan, we therefore conclude that the implementation of the challenged policy directive by the New Gotham public hospital does not contravene that hospital's obligation under its charter to provide at no cost to the indigent all treatment that is "medically necessary."

II

Boe's complaint also raises questions of the right of privacy,[15] due process of law,[16] and equal protection.[17] Relying on *Griswold v. Connecticut,* 381 U.S. 479 (1965), and *Eisenstadt v. Baird,* 405 U.S. 438 (1972), she claims first that the ninth amendment's reservation of rights to the people[18] shields from state intrusion

14. " '[A]bortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods of dealing with pregnancy . . . .' " 432 U.S. at 449 (quoting Roe v. Norton, 408 F. Supp. 660, 663 n.3 (D. Conn. 1975), *revd. sub nom.* Maher v. Roe, 432 U.S. 464 (1977)).

15. *See, e.g.,* Carey v. Population Servs. Intl., 431 U.S. 678, 684-85 (1977); Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Planned Parenthood v. Danforth, 428 U.S. 52, 60 (1976); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). *See generally* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?,* 64 MICH. L. REV. 197 (1965); Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410 (1974); McKay, *The Right of Privacy: Emanations and Intimations,* 64 MICH. L. REV. 259 (1965); Silver, *The Future of Constitutional Privacy,* 21 ST. LOUIS U. L.J. 211 (1977).

16. *See, e.g.,* Carey v. Population Servs. Intl., 431 U.S. 678, 684 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1 (1973). *See also* Moore v. City of East Cleveland, 431 U.S. 494, 500-04 (1977) (plurality opinion).

17. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973). *See also* Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972); Skinner v. Oklahoma, 316 U.S. 535, 541-43 (1942).

18. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972); Griswold v. Connecticut, 381 U.S. 479, 488-93 (1965) (Goldberg, J., concurring). *See also* Roe v. Wade, 410 U.S. 113, 153 (1973).

her "decision whether to bear or beget a child."[19] She asserts further that a similar right of privacy, rooted in the fourteenth amendment's protection of personal liberty and explicitly recognized by the Supreme Court in *Roe v. Wade,* 410 U.S. 113, 153 (1973),[20] renders unconstitutional New Gotham's action, which, she argues, injects the government impermissibly into a private realm of decision.[21] Finally, Boe contends that the policy directive and staffing practice of the public hospital create a suspect classification, distinguishing indigent women seeking to abort from those seeking to carry their pregnancies to term,[22] that jeopardizes her fundamental right to procreate;[23] because Boe claims that defendant officials of New Gotham have failed to demonstrate any compelling state interest or emergency situation justifying the policy in question, she alleges a violation of the fourteenth amendment's guarantee of equal protection of the laws.[24]

Although the general constitutional principles that Boe invokes may be correct in the abstract, as current opinions of the United States Supreme Court demonstrate,[25] they do not invalidate the official action she challenges here, for they do not control

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19. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). The Court used similar language in Carey v. Population Servs. Intl., 431 U.S. 678, 686 (1977).

20. *See* note 16 *supra.*

21. *See* Whalen v. Roe, 429 U.S. 589, 599 & n.24, 600 & n.26 (1977); Tribe, *supra* note 16, at 11; Comment, *A Taxonomy of Privacy: Repose, Sanctuary and Intimate Decision,* 64 CALIF. L. REV. 1447, 1466-69 (1976).

22. *See also* Skinner v. Oklahoma, 316 U.S. 535 (1942).

23. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). She also claims that the city invidiously discriminates between nonindigent women who can afford to purchase medical care for childbirth and indigent women who cannot. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

24. If Boe successfully shows that the challenged policy either establishes a suspect classification or infringes a fundamental right, then she is entitled to invoke the standards of a mode of equal protection review described as "strict" judicial scrutiny. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Korematsu v. United States, 323 U.S. 214, 215 (1944). Such analysis shifts the burden of proof from the party challenging the classification and requires the party seeking to uphold it to demonstrate that it is necessary to further a compelling state interest and that there are available no less onerous alternatives for achieving that objective. 411 U.S. at 16-17. *See also* 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); *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065, 1087-131 (1969).

The compelling state interest test is likewise applied outside the equal protection context in cases where protected rights or liberties are infringed by state action that does not necessarily classify at all. *E.g.,* Carey v. Population Servs. Intl., 431 U.S. 678, 686 (1977); Roe v. Wade, 410 U.S. 113, 154-56 (1973). *See also* 410 U.S. at 173 (Rehnquist, J., dissenting).

25. *See* Maher v. Roe, 432 U.S. 464, 470-71 (1977) (equal protection); Carey v. Population Servs. Intl., 431 U.S. 678, 684-85 (1977) (privacy and due process).

on the facts of this particular case. We base our conclusion on the holdings, language, and reasoning employed by the Supreme Court in its recent decisions in *Beal v. Doe,* 432 U.S. 438 (1977), *Maher v. Roe,* 432 U.S. 464 (1977), and *Poelker v. Doe,* 432 U.S. 519 (1977).

The facts of those cases are not complex and make clear their pertinence to the controversy before us:

In *Beal,* which we summarized above,[26] a majority of the Court, reasoning that elective abortions are not "medically necessary," found no violation of the Social Security Act in Pennsylvania's refusal to extend Medicaid coverage to nontherapeutic abortions. In reaching that conclusion, the Court emphasized that, even though under *Roe v. Wade,* 410 U.S. 113 (1973), governmental interests favoring childbirth are not sufficiently compelling before fetal viability[27] to justify a proscription of abortions, such interests are of adequate legitimacy and force throughout pregnancy to support state action designed to encourage a woman to carry to term. 432 U.S. at 445-46.

The Court developed that reasoning further in two other cases decided the same day. In *Maher v. Roe,* 432 U.S. 464 (1977), a majority of the Court[28] ruled that the statutory interpretation announced in *Beal* does not violate the Constitution and that, therefore, states participating in the Medicaid program established by Title XIX of the Social Security Act are not constitutionally compelled to finance nontherapeutic abortions when they choose to pay medical expenses for childbirth. The Court thus rejected the contention that such an allocation of public funds violates the equal protection clause of the fourteenth amendment by discriminating against those indigent women who choose to exercise the constitutional right to abort instead of carrying their pregnancies to term.[29] Expanding upon the analysis employed in

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26. *See* text at notes 10-14 *supra.*

27. Roe v. Wade, 410 U.S. 113, 163-65 (1973). The Court in *Roe* defined a viable fetus as one "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160.

28. In *Beal* and *Maher,* Justice Powell wrote opinions for a majority composed of himself, Chief Justice Burger, and Justices Stewart, White, Rehnquist, and Stevens. Chief Justice Burger, though joining in the majority opinion in *Maher,* submitted a separate concurrence in that case. 432 U.S. at 481. The main opinion in *Poelker v. Doe* was published as a per curiam for the same six members of the Court.

The dissenters in all three cases — Justices Brennan, Marshall, and Blackmun — filed a number of separate opinions. 432 U.S. at 448 (Brennan, J.); 432 U.S. at 454 (Marshall, J.); 432 U.S. at 462 (Blackmun, J.); 432 U.S. at 482 (Brennan, J.); 432 U.S. at 522 (Brennan, J.).

29. Plaintiffs in *Maher* had argued that, under *Roe v. Wade,* states are required to

Beal, the majority explained that, although *Roe v. Wade* and its progeny may foreclose a state from creating an "absolute obstacle"[30] to abortion, particularly during the first trimester, those cases do not inhibit the democratic[31] adoption of policies and practices favoring one response to the condition of pregnancy, childbirth, over the alternative, abortion.[32]

Poelker v. Doe, 432 U.S. 519 (1977), the third case decided that day, applied the constitutional principle articulated in *Maher* to validate both a policy directive of Mayor John Poelker of St. Louis, Missouri,[33] and a staffing practice of one of St. Louis's city-owned hospitals[34] that together operated to prohibit nontherapeutic abortions in that public facility.[35] While observing that the mayor's personal opposition to abortion was legally irrelevant, the Supreme Court found significant the St. Louis voters' approval of policies preferring childbirth to abortion, ex-

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accord equal treatment to both abortion and childbirth. 432 U.S. at 470.

30. 432 U.S. at 473 (quoting Planned Parenthood v. Danforth, 428 U.S. 52, 70-71 n.11 (1976) (emphasis deleted)).

31. 432 U.S. at 480.

32. The Court emphasized the distinction between an "absolute obstacle," *see* note 30 *supra,* or "unduly burdensome interference with [the] freedom to decide whether to terminate [a] pregnancy," 432 U.S. at 474, on the one hand, and an official "value judgment," 432 U.S. at 474, "state encouragement," 432 U.S. at 475, or "policy choice," 432 U.S. at 477, favoring childbirth, on the other. While the former (which includes criminal penalties and withdrawals of *all* welfare benefits to those exercising the right in question, 432 U.S. at 474 n.8) must be justified by a compelling state interest, *see* 432 U.S. at 475-76, the latter (which includes refusals to subsidize the protected activity, 432 U.S. at 474 n.8) needs only to be rational in order to pass constitutional muster, 432 U.S. at 478. In developing this contrast, the Court noted by analogy that, even though parents have a constitutionally protected right to choose to educate their children in private schools, a state may nonetheless encourage the selection of public school education by making it the more attractive alternative through state funding. 432 U.S. at 476-77.

Similarly, the Court contrasted penalties on the exercise of a constitutional right, *e.g.,* the right to travel interstate, with failure to subsidize that right for the indigent, *e.g.,* the failure to provide free bus fares. 432 U.S. at 474-75 n.8. While the Constitution may prohibit the former, it does not require the latter. 432 U.S. at 474-75 n.8. *See also* D____ R____ v. Mitchell, 456 F. Supp. 609 (D. Utah 1978). The Court has continued to employ the "undue burden" language in subsequent analysis. *See* Bellotti v. Baird, 99 S. Ct. 3035, 3046, 3050, 3051 (1979) (plurality opinion).

33. The directive barred the performance of all abortions in the public hospitals absent a threat of grave physiological injury or death to the mother. 432 U.S. at 520.

34. For several years, the obstetrics-gynecology clinic at the city hospital in question had drawn its staff from the faculty and students at the St. Louis University School of Medicine, a Jesuit-operated institution opposed to abortion. 432 U.S. at 520.

35. In *Poelker,* plaintiff's challenge to the policy directive and staffing practice had been "cast . . . in an equal protection mold," 432 U.S. at 520, by the court below, which had struck down this official action as invidious discrimination against women who cannot afford to obtain abortions at private hospitals, as distinguished from those who can. 432 U.S. at 520.

pressed in their election of Poelker. 432 U.S. at 521. Whatever the right acknowledged in *Roe v. Wade,* the Court found no constitutional violation in a city's implementation of the policy choices of its electorate, even if such choices might, as a practical matter, hinder the exercise of that right.[36]

Although the precise issues before the Court in those cases, the abortion-funding cases, are the mirror image of those presented here, we think the broad governmental discretion approved in *Beal, Maher,* and *Poelker* amply supports the value judgments reflected in the New Gotham public hospital directive and staffing practice. In those cases, the majority's repeated affirmation of the constitutional validity of a state or local government's expression and implementation of policy preferences favoring childbirth[37] intimates that official policy preferences for precisely the opposite goal would be equally acceptable, at least from a constitutional perspective.[38] Thus, when the Supreme Court notes that governmental concerns falling short of compelling state interests afford sufficient constitutional support for refusal to provide abortions at public expense,[39] it suggests that less-than-overriding governmental concerns would likewise justify excluding treatment for prenatal care and childbirth from welfare coverage[40] — precisely the path chosen by New Gotham.

Similarly, when the Court explains that official value judgments fostering childbirth are appropriately determined on a democratic basis,[41] it authorizes an electorate to favor an allocation of public funds that promotes abortion instead. Surely, if voters are to have a choice, the courts must allow them to consider the available alternatives. Here, the collective will of the

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36. The Court stressed that Mayor Poelker "is an elected official responsible to the people of St. Louis," 432 U.S. at 521, whose "policy of denying city funds for [nontherapeutic] abortions . . . is subject to public debate and approval or disapproval at the polls." 432 U.S. at 521.

37. *See* Maher v. Roe, 432 U.S. at 474-77; Poelker v. Doe, 432 U.S. at 521. *See also* Beal v. Doe, 432 U.S. at 445-46.

38. Nowhere in the abortion-funding cases does the majority limit its reasoning to policy preferences favoring childbirth; it simply presents a series of broad and general reasons for upholding types of state action that, in those cases, happen to favor the value of childbirth. The analysis used is sufficiently open-ended to control in a situation in which abortion is selected as the preferred value instead. *See* Bolner & Jacobsen, *The Right to Procreate: The Dilemma of Overpopulation and the United States Judiciary,* 25 Loy. L. Rev. 235, 254-55 (1979).

39. *E.g.,* Maher v. Roe, 432 U.S. at 477.

40. *See* note 38 *supra.*

41. *See, e.g.,* Beal v. Doe, 432 U.S. at 447-48 n. 15; Maher v. Roe, 432 U.S. at 480; Poelker v. Doe, 432 U.S. at 521.

residents of New Gotham is apparent from their election to the City Council of candidates advocating population control.[42] Particularly pertinent here is the Court's specific observation in *Maher* that one sort of reason that might prompt valid state action deviating from "a position of neutrality between abortion and childbirth" would be "legitimate demographic concerns." 432 U.S. at 478 n.11. Such language is certainly broad enough to encompass New Gotham's very real concerns regarding the size of its population and its resulting efforts to limit procreation.[43]

In short, even if we concede that Boe and others similarly situated have a fundamental right, secured by the fourteenth amendment and embraced within the constitutionally protected zone of privacy, to decide whether to carry their pregnancies to term or to abort,[44] and even if, as we assume, New Gotham's interest in curbing population growth is not of a "compelling" character,[45] still we find no constitutional violation. Like the state action challenged in *Beal, Maher,* and *Poelker,* the actions of the defendants here do not obstruct absolutely or burden unduly the exercise of the asserted right.[46] Notwithstanding the policy directive and staffing practice of the public hospital, Boe may still obtain the medical treatment she seeks. The city's policy preferences do not compel her to terminate her pregnancy now or at any other time. To paraphrase the language of the Supreme Court,

> [t]he State may have made [abortion] a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to [childbirth] that was not already there. The indigency that may make it difficult — and in some cases, perhaps, impossible — for some women to [carry their pregnancies to term and deliver their children] is neither created nor in any way affected by the [city's] regulation.

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42. *See* text at note 3 *supra.*

43. The demographic concerns in *Maher* were not so clearly apparent; the majority in that case never explained whether or not a desire to combat underpopulation was, in fact, responsible for Connecticut's policy preference favoring childbirth. *But see* 432 U.S. at 489 n.* (Brennan, J., dissenting). *Cf.* Young Women's Christian Assn. v. Kugler, 342 F. Supp. 1048, 1074 (D.N.J. 1972) (pre-*Roe* abortion bar successfully challenged; court rejects state's purported interest in fostering population growth "especially in a densely populated and heavily urbanized state like New Jersey, with its attendant demographic, economic, sociological and ecological problems").

44. *See* notes 19-21 *supra* and accompanying text.

45. *See* note 2 *supra.* New Gotham, though emphasizing the importance of its concerns regarding overpopulation, has conceded that its interests are not now of the same magnitude as those that have been adjudged "compelling" under the fourteenth amendment. *See* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 314 (1978) (Powell, J.); Korematsu v. United States, 323 U.S. 214 (1944).

46. *See* note 32 *supra.*

Maher v. Roe, 432 U.S. at 474. There is no controlling authority, moreover, for the proposition suggested by Boe that her indigency somehow places her within a "suspect class."[47] As the Supreme Court has observed, it has never held that "financial need alone identifies a suspect class for purposes of equal protection analysis." 432 U.S. at 471.

Of course, even though a state may have considerably broader power to encourage actions deemed to be in the public interest than it does to interfere directly with protected activity,[48] we must still determine whether the official action challenged here satisfies "the less demanding test of rationality that applies in the absence of a suspect classification or the impingement of a fundamental right." 432 U.S. at 478.[49] We conclude that New Gotham has met that test.

First, as we noted earlier, "legitimate demographic concerns about [a state's or city's] rate of population growth" are sufficient to support governmental "departure from a position of neutrality between abortion and childbirth." 432 U.S. at 478 n.11.[50] The parties have stipulated that there has been a recent increase, albeit one short of crisis proportions, in the population of New Gotham; the voters' election to the City Council of candidates who campaigned on platforms of population control demonstrates public awareness of this phenomenon and public desire to mitigate this trend.[51]

Nor is the policy in question irrational as it relates to the health of New Gotham's pregnant residents. As the Supreme Court pointed out several years ago, abortions during early pregnancy by competent licensed physicians are now "relatively safe" and the risks to women undergoing such abortions "appear to be as low as or lower than . . . for normal childbirth." *Roe v. Wade*, 410 U.S. 113, 149 (1973).[52] Even with respect to abortions performed after the first trimester, the maternal mortality rate in

47. *See* notes 22-24 *supra* and accompanying text.

48. Maher v. Roe, 432 U.S. 464, 476 (1977).

49. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970).

50. *See also* Moore v. City of East Cleveland, 431 U.S. 494, 499-500 (1977) (plurality opinion) (preventing overcrowding, minimizing traffic and parking congestion, and avoiding undue financial burden on city's schools are legitimate goals); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (land-use restrictions designed to promote quiet, family values, and clean air are legitimate).

51. *See* note 3 *supra* and accompanying text.

52. Though New Gotham provides free abortions in later pregnancy as well, *see* note 5 *supra* and accompanying text, any woman choosing to abort may obtain such treatment as early during her pregnancy as she wishes.

childbirth exceeds the maternal mortality rate from abortions. *See Planned Parenthood v. Danforth,* 428 U.S. 52, 77 (1976).

Similarly, New Gotham's bona fide financial concerns make this policy a reasonable one. As Mr. Justice Blackmun has observed, "the cost of a nontherapeutic abortion is far less than the cost of maternity care and delivery, and holds no comparison whatsoever with the welfare costs that will burden the State for the new indigents and their support in the long, long years ahead." *Beal v. Doe,* 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).[53]

For these reasons, we reject Boe's constitutional challenges to the manner in which New Gotham has chosen to operate its public hospital.

Judges BAKER and CARSON concur; Judge DANIEL concurs in an opinion to be filed at a later time.

EVERETT, Senior Circuit Judge, dissenting.

I respectfully dissent.

I

I would find the policy directive inconsistent with the hospital's charter. Prenatal care and medical services incident to childbirth are "medically necessary" because, in today's world, that happens to be the way pregnancies are treated. That is not to say, as Justice Brennan implies in *Beal v. Doe,* 432 U.S. 438, 449-52 (1977), that pregnancy is a disease or that prenatal care and delivery are among the "cures" therefor;[1] it is simply to point out a

53. *See* Zbaraz v. Quern, 469 F. Supp. 1212, 1218 & n.8 (N.D. Ill.) (comparative costs of state-funded abortion and state-funded childbirth), *probable jurisdiction noted sub nom.* Williams v. Zbaraz, 100 S. Ct. 447 (1979). *But see* Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams,* 18 ARIZ. L. REV. 903, 927-32 (1976).

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1. The reasoning used by Justice Brennan in dissent in *Beal* and relied upon by the majority in this case is unsound. Abortions performed to terminate pregnancies that jeopardize a woman's life or health are clearly distinguishable from other abortions. Given that distinction, the *Beal* majority's interpretation of "medically necessary" cannot be reduced to the absurdity that Justice Brennan asserts; where a pregnancy does not present risks to life or health, an abortion is no different from any other elective, nonnecessary medical procedure, unless, of course, pregnancy itself is to be considered a disease that must be "cured" in every case by some sort of medical treatment. Although there appears to be no universally accepted definition of "disease," *see generally The Concept of Health,* 1 THE HASTINGS CENTER STUDIES No. 3, 1973, there is substantial authority for excluding pregnancy from the reach of that term, whatever the precise boundaries of its meaning. *See, e.g.,* Gilbert v. General Elec. Co., 375 F. Supp. 367, 375 (E.D. Va. 1974) ("pregnancy is not a disease, as that term is commonly understood"), *affd.,* 519 F.2d 661 (4th Cir.

fact of American life in this decade.[2] "The pregnancy of the mother, absent miscarriage, inevitably and biologically terminates in the birth of the child, a process which today at least requires medical attention and assistance." *Roe v. Norton,* 522 F.2d 928, 941 (2d Cir.) (Mulligan, J., concurring in part and dissenting in part), *on remand,* 408 F. Supp. 660 (D. Conn. 1975), *revd. sub nom. Maher v. Roe,* 432 U.S. 464 (1977). The availability of free abortions for indigent women does not alter this general fact although, for any given woman who elects to interrupt the natural biological course of her pregnancy by abortion, childbirth will not occur. But such cases tell us nothing about medical necessity in general, nor do they provide a meaningful basis for analyzing those situations in which no abortion is performed.[3]

1975), *revd. on other grounds,* 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484, 500 n.4 (1974) (Brennan, J., dissenting) (pregnancy is a physiological process causing a variable degree of disability on an individual basis); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 652 (1974) (Powell, J., concurring) ("pregnancy is a normal biological function"); T. STEDMAN, STEDMAN'S MEDICAL DICTIONARY, 401, 1134 (4th Unabr. Lawyers' ed. 1976) (defining "disease" as "[m]orbus; illness; sickness; an interruption, cessation, or disorder of body functions, systems, or organs" but defining "pregnancy" as "[g]estation; fetation; cyesis; cyophoria; graviditas; gravidity; the state of a female after conception until the birth of the baby"). And just as pregnancy itself is not a disease, childbirth, the would-be "alternative" to abortion, is not "treatment" for pregnancy. *See, e.g., id.* at 1473 ("treatment" defined as "[t]herapeutics; therapy; the medical or surgical care of a patient; the institution of measures or the giving of remedies designed to cure a disease"). Though childbirth restores a pregnant woman to a nonpregnant state and though, today, it is always accompanied by medical attention and assistance, *see* note 2 *infra,* it is not in itself a medical procedure at all but rather the inevitable and biological end of a pregnancy in which no abortion, spontaneous or induced, has occurred. In short, childbirth simply "happens," whether a doctor is present or not. *See* Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *vacated and remanded,* 412 U.S. 925 (1973).

See generally Chalmers, *Implications of the Current Debate on Obstetric Practice,* in THE PLACE OF BIRTH 44, 47-48 (1978); Antler & Fox, *The Movement Toward a Safe Maternity: Physician Accountability in New York City, 1915-1940,* 50 BULL. HIST. MED. 569, 571-72 (1976).

2. Periodic medical attention throughout pregnancy and during and immediately following childbirth is now accepted practice and has contributed significantly to the decreased maternal and infant mortality rate in this country. *See* A. GUTTMACHER, PREGNANCY, BIRTH, AND FAMILY PLANNING 86-89, 335 (1973); *Obstetrical Practices in the United States: Hearing Before the Subcomm. on Health and Scientific Research of the Senate Comm. on Human Resources,* 95th Cong., 2d Sess. 36-37 (1978) (statement of Donald Kennedy). *See generally* Antler & Fox, *supra* note 1, at 592-94. Today, the children of 98% of American women are delivered in hospitals. *See* BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, OUR BODIES, OUR SELVES 250 (2d ed. 1976).

See also Klein v. Nassau County Medical Center, 347 F. Supp. 496, 500 (E.D.N.Y. 1972), *vacated and remanded,* 412 U.S. 925 (1973); Roe v. Ferguson, 389 F. Supp. 387, 392 (S.D. Ohio 1974), *revd. on other grounds,* 515 F.2d 279 (6th Cir. 1975).

3. In any event, whether or not any particular medical procedure is "necessary" in a given case is a determination to be made by a physician, not by any general hospital

II

A more serious problem is the majority's decision to uphold official action that, to me, is clearly unconstitutional.

> Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, . . . "[t]here are limits to the extent to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality" of the individual . . . . In this instance these limits are, in my view, reached and passed.

Poe v. Ullman, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting) (quoting *Skinner v. Oklahoma,* 316 U.S. 535, 546 (1942) (Jackson, J., concurring)).

Were I writing on a clean slate, it would, I believe, suffice for me to point out that "the right of procreation without state interference has long been recognized as 'one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.' " *Maher v. Roe,* 432 U.S. 464, 472 n.7 (1977) (quoting *Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942)).[4] New Gotham has unquestionably interfered with that right by denying to poor women free medical care for prenatal treatment and childbirth while providing free abortions, all in the absence of any compelling governmental interest.[5]

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policy. *See also, e.g.,* Doe v. Bolton, 410 U.S. 179, 192, 197 (1973); Roe v. Wade, 410 U.S. 113, 163 (1973); Roe v. Casey, 464 F. Supp. 487, 500 (E.D. Pa. 1978); Jaffe v. Sharp, 463 F. Supp. 222, 228 (D. Mass. 1978), *affd. sub nom.* Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir.), *cert. denied,* 441 U.S. 952 (1979). *See generally* Wood & Durham, *Counseling, Consulting and Consent: Abortion and the Doctor-Patient Relationship,* 4 B.Y.U. L. REV. 783 (1978).

Finally, we should accept plaintiff's construction of the hospital charter in order to avoid the constitutional difficulties examined in Part II of this opinion. *See also, e.g.,* United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1972) (plurality opinion).

4. *See also, e.g.,* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (parent-child relationship constitutionally protected); Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 843-44 (1977) (importance of biological relationship in defining "family" for purposes of due process analysis); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (Constitution "protects the sanctity of the family"); Paul v. Davis, 424 U.S. 693, 713 (1976) (privacy, protected by substantive aspects of fourteenth amendment but limited to those rights deemed "fundamental" or "implicit in the concept of ordered liberty," encompasses matters relating to, *inter alia,* procreation); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (essential right to conceive and raise one's children); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (private realm of family life which state cannot enter); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (liberty guaranteed by fourteenth amendment includes right to "establish a home and bring up children").

5. New Gotham has not maintained that its "overpopulation" has reached crisis

To validate such interference on the theory that it is a mere policy preference that satisfies the rational basis test is — as Mr. Justice Marshall observed in dissent in *Beal, Maher,* and *Poelker* — to employ a constitutional analysis "pull[ed] from thin air." 432 U.S. at 457. Indeed, only eleven days before the decisions in *Beal, Maher,* and *Poelker* were handed down, a majority of the Court explicitly stated that, even in the absence of an "absolute obstacle," the compelling state interest test is the proper standard for assessing the constitutionality of governmental action that implicates the right of privacy by limiting an individual's access to the means necessary for the exercise of that right.[6] As a practical matter for the indigent, moreover, no interference with

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proportions or that its aim of improving the "quality of life" of its citizens is compelling. *See* majority opinion notes 2 & 45 *supra* and accompanying text. Nor has the city sought to establish that the persons whose reproduction might be decreased by this policy are genetically defective. *See* Buck v. Bell, 274 U.S. 200 (1927). Much of the literature examining the constitutionality of programs of population control has concluded that, as burdens on the right to procreate, such programs must advance a compelling state interest. *See, e.g.,* Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas,* 41 U. CIN. L. REV. 529, 547-48, 571-85 (1972); Kindregan, *State Power Over Human Fertility and Individual Liberty,* 23 HASTINGS L.J. 1401, 1422-23 (1972); Montgomery, *The Population Explosion and United States Law,* 22 HASTINGS L.J. 629, 653-59 (1971); Rabin, *Population Control Through Financial Incentives,* 23 HASTINGS L.J. 1353, 1386 (1972); Comment, *Population Control: The Legal Approach to a Biological Imperative,* 58 CALIF. L. REV. 1414, 1431-43 (1970); Note, *Legal Analysis and Population Control: The Problem of Coercion,* 84 HARV. L. REV. 1856, 1880-82 (1971); Comment, *Population: The Problem, the Constitution and a Proposal,* 11 J. FAM. L. 319, 332 (1971). The compelling state interest test has likewise been invoked in analyses of programs designed to promote eugenic goals through restrictions on procreation by certain individuals or groups. *See, e.g.,* Friedman, *Legal Implications of Amniocentesis,* 123 U. PA. L. REV. 92, 135 (1974); Shaw, *Procreation and the Population Problem,* 55 N.C. L. REV. 1165, 1166 (1977); Vukowich, *The Dawning of the Brave New World — Legal, Ethical, and Social Issues of Eugenics,* 1971 U. ILL. L.F. 189, 207-09; Waltz & Thigpen, *Genetic Screening and Counseling: The Legal and Ethical Issues,* 68 NW. U. L. REV. 696, 721-26 (1973).

6. In Carey v. Population Servs. Intl., 431 U.S. 678 (1977), where a New York statute restricting the distribution of contraceptives was found unconstitutional, a majority of the Justices observed:

> The significance of these cases [Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973)] is that they establish that the same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate a pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely. Both types of regulation "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake."

431 U.S. at 688 (quoting Roe v. Wade, 410 U.S. 113, 155 (1973)).

Only Justice Powell, in an opinion not joined by any other member of the Court, suggested that some less exacting standard of review applies where the state action implicates the right of privacy but does not "entirely frustrate[ ] or heavily burden[ ]" its exercise. 431 U.S. at 705 (Powell, J., concurring in part and concurring in the judgment).

individual freedom of choice regarding whether or not "to beget or bear a child"[7] could be more "absolute"[8] than the measure upheld today. For a woman in Boe's financial straits, the medical treatment she seeks is *completely* out of reach. Unless we are to exhume the utterly repudiated[9] right-privilege distinction,[10] the state action before us cannot stand.[11]

As a result of the Supreme Court's decisions in *Beal, Maher,* and *Poelker,* however, the slate upon which I write is not entirely clean, and a mere recitation of apparently well-settled constitutional principles antedating those decisions is therefore insufficient. But even conceding that some language from those opinions supports the result reached here, that support is at best superficial. The issues resolved in those cases are very different from those raised here.[12] The abortion-funding cases held simply that a state or local government may refuse to provide public funding for elective abortions; they did not indicate what result would obtain where the treatment in question relates to childbirth instead.

The error the majority makes is perhaps understandable. As a result of the Supreme Court's lengthening list of cases concern-

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7. Carey v. Population Servs. Intl., 431 U.S. 678, 685 (1977).

8. *But see* majority opinion notes 30-32 *supra* and accompanying text.

9. Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State,* 62 CORNELL L. REV. 445, 446 (1977).

10. *See, e.g.,* Elrod v. Burns, 427 U.S. 347, 360-61 (1976) (plurality opinion)(citations omitted):

> "[F]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." . . . [O]ne such impermissible reason [is that the] denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly . . . . " '[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege." ' "

11. One additional difficulty, which Boe does not raise and which the court therefore does not address, is the possible argument that the city's policy directive and hospital staffing practice infringe the first amendment rights of those indigent women who oppose abortion for religious reasons. Were I confronted with that question, I would again conclude that only a revival of the right-privilege distinction, *see* note 10 *supra,* could insulate such state action from otherwise certain constitutional invalidity. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) ("to condition the availability of [governmental] benefits upon [one's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties"). *Cf.* Note, *Abortion, Medicaid, and the Constitution,* 54 N.Y.U. L. REV. 120, 151-55 (1979) (first amendment problems of abortion-funding restrictions).

12. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 932 & n.70 (1978).

ing contraception[13] and abortion,[14] the concept of freedom of choice in matters of reproduction has come to refer almost exclusively to decisions *not* to bear children.[15] Clearly, however, such freedom must encompass as well the decisions of those individuals who do wish to procreate.[16]

Mr. Justice Goldberg recognized the inseparable and complementary nature of the two kinds of individual choices more than a decade ago in his concurring opinion in *Griswold v. Connecticut,* 381 U.S. 479 (1965), where he observed that failure to accord constitutional protection to the private use of contraceptives by married couples[17] would not only intrude upon the guarantees of the ninth amendment but would also establish an unacceptable precedent for state and federal limitation of family size despite the absence of a compelling state interest.[18] That is

13. *E.g.,* Carey v. Population Servs. Intl., 431 U.S. 678 (1977); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* Poe v. Ullman, 367 U.S. 497 (1961); Tileston v. Ullman, 318 U.S. 44 (1943).

14. *E.g.,* Bellotti v. Baird, 99 S. Ct. 3035 (1979); Colautti v. Franklin, 439 U.S. 379 (1979); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Connecticut v. Menillo, 423 U.S. 9 (1975) (per curiam); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). *See also* Singleton v. Wulff, 428 U.S. 106 (1976).

15. The Supreme Court has heard a comparatively small number of cases directly raising questions concerning the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); Buck v. Bell, 274 U.S. 200 (1927). A number of cases focusing on other issues have noted, in passing, rights related to childbearing. *See* note 4 *supra.*

16. The Supreme Court acknowledged this point in Maher v. Roe, 432 U.S. 464, 472 n.7 (1977), stating that "[a] woman has *at least* an equal right to choose to carry her fetus to term as to choose to abort it" (emphasis added).

17. Justice Goldberg wrote of the "basic and fundamental . . . right of privacy in marriage." 381 U.S. at 491. The holding in *Griswold* was subsequently extended to unmarried individuals via the equal protection clause. Eisenstadt v. Baird, 405 U.S. 438 (1972).

18. Justice Goldberg reasoned:

> The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In

precisely what has happened today. Just as Mr. Justice Goldberg feared, the majority here has taken "precedent" from cases limiting an individual's freedom *not* to bear children, *Beal, Maher,* and *Poelker,* to validate restrictions on the right to procreate. But "[t]he individual's freedom to . . . reproduce is 'older than the Bill of Rights.' "[19] Thus, if history and tradition are to play any role in defining those substantive rights shielded by the due process clause, *see Moore v. City of East Cleveland,* 431 U.S. 494, 503-04 (1977) (plurality opinion),[20] then surely the long-established personal right to procreate, an "intrinsic human right,"[21] should be accorded significantly greater constitutional protection than the only recently recognized "right to abort."[22]

But even if the reasoning the majority borrows from the abortion-funding cases were controlling in principle, additional difficulties would remain.

First, there is a noticeable misfit of the governmental end identified and the means selected to effectuate that goal. Even if so-called strict judicial scrutiny is not warranted in a case such

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my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

381 U.S. at 496-97. *See* note 5 *supra. See also* Katin, *Griswold v. Connecticut: The Justices and Connecticut's "Uncommonly Silly Law,"* 42 NOTRE DAME LAW. 680, 699 (1967).

19. Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 845 (1977) (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

20. A plurality of the Court explained in *Moore:*

> Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful "respect for the teachings of history [and] solid recognition of the basic values that underlie our society." *Griswold v. Connecticut,* 381 U.S., at 501 (Harlan, J., concurring). . . . Out decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.

431 U.S. at 503.

A footnote at the end of that passage added, in part, the following:

> In *Wisconsin v. Yoder,* 406 U.S. 205 (1972), the Court rested its holding in part on the constitutional right of parents to assume the primary role in decisions concerning the rearing of their children. That right is recognized because it reflects a "strong tradition" founded on "the history and culture of Western civilization," and because the parental role "is now established beyond debate as an enduring American tradition." *Id.* at 232.

431 U.S. at 503 n.12.

Justice Brennan, in a concurring opinion joined by Justice Marshall, also noted the significance of "tradition." 431 U.S. at 507. *See also* Bellotti v. Baird, 99 S. Ct. 3035, 3045 (1979) (plurality opinion); Parham v. J.R., 99 S. Ct. 2493, 2504 (1979); Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring); Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

21. Smith v. Organization of Foster Families for Equality & Reform, 434 U.S. 816, 845 (1977). *See also* Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

22. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

as this,[23] New Gotham's intrusion into a matter of "family life" is sufficiently significant to require a court at least to "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged [action]." *Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977) (plurality opinion).[24]

Granting for the moment that a governmental interest in reducing crowding may be a legitimate underlying purpose, such an end is furthered only marginally by New Gotham's denial of free treatment for childbirth. Certainly, this policy will not discourage the nonindigent from reproducing.[25] And although pregnancy and childbirth today are processes ordinarily attended by medical assistance,[26] delivery of a living infant can occur outside a hospital without any medical assistance whatsoever. A woman in Boe's financial situation, determined not to abort, can in many cases give birth to her child without a physician's aid. That very real possibility not only demonstrates the ineffectiveness of the New Gotham policy but also reveals another flaw as well: Mothers carrying their pregnancies to term and delivering without medical assistance, as well as children born under such circumstances, are in much greater jeopardy of suffering some kind of serious physical complication, including death.[27] Surely New Gotham's interest in reducing overpopulation, even among the poor, is not permissibly served by increasing risks to the health

23. *Compare* text at majority opinion note 49 *supra with* majority opinion note 24 *supra.*

24. *See* Trimble v. Gordon, 430 U.S. 762, 767-68 (1977) (though "most exacting scrutiny" not appropriate for reviewing classification disadvantaging illegitimates, challenged state action held unconstitutional because it "bears only the most attenuated relationship to the asserted goal"); 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, 18-21 (1972).

25. Those able to afford to pay for prenatal care and medical treatment for childbirth at a private facility will not be affected in a legal or a practical way by the policy. *See* majority opinion note 1 *supra.* In some small communities, however, such restrictions on a hospital's services may have a broader impact. *See also* Poelker v. Doe, 432 U.S. 519, 524 (1977)(Brennan, J., dissenting).

26. *See* note 2 *supra* and accompanying text.

27. Increased availability and acceptance of good prenatal care as well as the greater use of hospitals are significant factors in the decreasing maternal mortality rate during pregnancy, delivery and the six-week postpartum period. A. GUTTMACHER, PREGNANCY, BIRTH, AND FAMILY PLANNING 86-89 (1973). It is instructive to note in this context, moreover, that in "three of the states with the worst maternal and newborn [mortality] records, Mississippi, Alabama, and Arkansas, nearly one quarter of the births take place outside of the hospital." *Id.* at 87.

of those individuals evading the city's policy.[28]

One can imagine, moreover, more narrowly tailored schemes under which New Gotham's interests could be advanced — alternative policies both less onerous to individuals in Boe's class and more carefully designed to achieve the city's asserted objective.[29] For example, New Gotham could instead provide free contraceptives or counseling for family planning;[30] either service would promote the city's goal without burdening those women who are already pregnant and thus face what must appear to some as a medical and moral dilemma.[31] For those women in Boe's situation who oppose abortion but do not care to rear a child themselves, the city could limit its population by arranging for adoptive placements in less crowded locales. A number of other possibilities come to mind.[32]

Finally, I have grave reservations about another aspect of the New Gotham policy that Boe does not attack directly: the availability of abortions at any time throughout pregnancy.[33] It is true that *Roe v. Wade*, 410 U.S. 113 (1973), held only that a state, if it desired, could restrict abortions after the first trimester for reasons related to maternal health, 410 U.S. at 163, and could prohibit abortions following viability in order to preserve fetal life, 410 U.S. at 163-64; apparently, nothing in *Roe* requires states to enact such protective legislation. Still, I am troubled by the prospect of the New Gotham public hospital's performing abortions up through the final days of pregnancy.

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28. New Gotham, of course, has not asserted nor can we infer that it intends to cure its population difficulties by increasing the infant and maternal mortality rate occurring in connection with childbirth. Nor can I believe that the majority would approve any "modest proposal" along these lines. *See also* Poelker v. Doe, 432 U.S. 519, 523-24 (1977)(Brennan, J., dissenting).

29. *Cf.* Trimble v. Gordon, 430 U.S. 762, 772-73 (1977) (though no compelling interest need be shown, Court inquires whether classification disadvantaging illegitimates "is carefully tuned to alternative considerations" or whether it "extends well beyond the asserted purposes").

30. The family planning agencies and clinics described by the majority in majority opinion note 3 *supra* provide services only for a fee.

31. Although under the privacy decisions of the United States Supreme Court, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973), abortion and contraception may appear to be equivalent means of birth control, abortion clearly implicates interests not implicated by contraception. *See* Carey v. Population Servs. Intl., 431 U.S. 678, 690 (1977) (contraception, unlike abortion, does not implicate, *inter alia,* interest in protecting potential life).

32. Indeed, if New Gotham's concern is one regarding the sheer number of its inhabitants, the municipal hospital could provide *free* abortions for all residents and not only those who are indigent. *See* majority opinion note 1 *supra.*

33. *See* majority opinion note 5 *supra* and accompanying text.

As a woman's pregnancy progresses beyond the point of fetal viability, an abortion becomes more and more likely to result in a live birth.[34] Given that fact and in view of the official goal of promoting population control, I see little difference between New Gotham State's legalization of post-viability abortions and a state's rescission of its criminal homicide laws. If there is any meaning at all to the fourteenth amendment's command that no state "shall deprive a person of life . . . without due process of law," then a state cannot take the latter course.[35] Although *Roe* draws a bright line between a person and a fetus for purposes of fourteenth-amendment protection, 410 U.S. at 157-59, the possibility of live births in terminations of advanced pregnancies obscures any such clear distinction between the so-called alternatives, abortion and childbirth, and thus between the constitutional implications of the two procedures.

It is for this reason, in addition to those I offered in Part I of this opinion, that I think Boe's challenge to the city's interpretation of the hospital charter is correct; at some point in pregnancy, at least after viability of the fetus, childbirth *is* a "medically necessary" procedure, for an "abortion," to the extent that term implies fetal death, no longer remains an acceptable alternative.

I would therefore strike down the challenged policy as inconsistent with both the hospital's own charter and the United States Constitution.

DANIEL, Senior Circuit Judge, concurring.

On each issue, I agree with the conclusion reached by Judge Adams joined by Judges Baker and Carson. But because those results seem extraordinary, if not ironic, I add the following thoughts that I believe must be addressed en route.

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34. *See* Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 ARIZ. L. REV. 903, 933-34 n.164 (1976). *Cf.* Colautti v. Franklin, 439 U.S. 379 (1979) (invalidation for vagueness of legislation imposing medical standard of care to maximize chances of fetal survival).

35. In *Roe v. Wade*, the Court suggested that the right to life accorded to persons by the fourteenth amendment requires the states to criminalize the taking of such life. *See* 410 U.S. at 156-58 & n.54. *See also* Landrum v. Moats, 576 F.2d 1320, 1325 (8th Cir.), ("The right to life is fundamental and is protected against unreasonable or unlawful takings by the procedural due process safeguards of the fifth and fourteenth amendments."), *cert. denied*, 439 U.S. 912 (1978).

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I

The question of "medical necessity" is, in my view, far more difficult than either the majority or the dissenting opinion intimates. It raises a number of problems that neither analysis fully explores.

The majority's complete and unquestioning reliance on the opinions in *Beal v. Doe,* 432 U.S. 438 (1977), merits initial attention. The narrow issue before the Court in *Beal* was whether Pennsylvania could, consistent with Title XIX of the Social Security Act, distinguish "medically necessary" abortions from other abortions.[1] Certainly from a lay or intuitive perspective, such a distinction is not totally unsupportable: one can easily imagine a woman seeking to terminate a life-threatening ectopic pregnancy;[2] an abortion performed under such circumstances would be meaningfully described as "medically necessary."[3] Such a case

1. Pursuant to the regulations challenged in *Beal,* Pennsylvania limited Medicaid assistance "to those abortions that are certified by physicians as medically necessary." 432 U.S. at 441.

2. In an ectopic pregnancy, gestation occurs in a site other than the uterine cavity, typically in a Fallopian tube. Once diagnosed, "abdominal operation is necessary at once." A. GUTTMACHER, PREGNANCY, BIRTH AND FAMILY PLANNING 125 (1973). *See* T. STEDMAN, STEDMAN'S MEDICAL DICTIONARY 1134 (4th Unabr. Lawyers' ed. 1976).

3. Title XIX of the Social Security Act speaks in terms of medical necessity in identifying those persons eligible for Medicaid assistance (persons with "insufficient . . . income and resources to meet the costs of necessary medical . . . services") and not in describing the precise kinds of medical services to be funded under the Act. 42 U.S.C. § 1396a(a)(10)(C)(i) (1976). *See* 42 U.S.C. § 1396 (1976). *Compare* Roe v. Norton, 522 F.2d 928, 933 (2d Cir. 1975), *with* 522 F.2d at 939 (Mulligan, J., concurring in part and dissenting in part), *on remand,* 408 F. Supp. 660 (D. Conn. 1975), *revd. sub nom.* Maher v. Roe, 432 .U.S. 464 (1977).

Although the Pennsylvania regulation at issue in *Beal* purportedly provided financial assistance only for those abortions deemed "medically necessary," it is unclear whether the specifications listed in the regulation in fact comport with that description. For example, abortions performed under circumstances where continued pregnancy would jeopardize the mental health of the mother appear not to be covered unless the pregnancy resulted from "statutory or forcible rape or incest." 432 U.S. at 441 n.3. If mental or psychological factors are sufficient to create medical necessity under some circumstances, however, it makes little sense to ignore such factors under other circumstances, as the Pennsylvania regulation apparently requires; on the other hand, if mental health always presents an appropriate consideration, it is unclear what a special provision for rape and incest adds to the regulation. In addition, the Pennsylvania regulation does provide funding for abortions where "[t]here is documented medical evidence that an infant may be born with incapacitating physical deformity or mental deficiency . . . ." 432 U.S. at 441 n.3. Whatever one may think of the desirability of terminating a pregnancy in such a case, it is not self-evident that such a termination is a matter of medical necessity since continuation of the pregnancy presents no immediate health threat to the mother and any perceived "threat" to the well-being of the fetus caused by the likely abnormalities is outweighed by the greater threat of fetal death posed by the abortion. *Cf.* Becker v.

is, moreover, easily distinguishable from a termination of pregnancy sought solely for reasons of maternal convenience.[4]

Given that narrow issue, the majority in *Beal* properly began its analysis by considering Pennsylvania's effort to differentiate two classes of abortions. Resolving that question should have

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Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978) (rejecting child's asserted fundamental right to be born as a whole, functional human being), *revg.*, Park v. Chessin, 60 App. Div. 2d 80, 400 N.Y.S.2d 110 (1977); Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values,* 92 HARV. L. REV. 5, 48 n.186 (1978) (differing public opinions regarding abortions where pregnancy poses threat to mother's physical health and abortions where the baby might be born deformed).

Perhaps the Supreme Court saw Pennsylvania's goal as one of fostering only *"normal* childbirth," 432 U.S. at 446 (emphasis added), and not one of defining medical necessity. *See* Doe v. Mundy, 441 F. Supp. 447, 451 (E.D. Wis. 1977) (unsuccessful challenge to county's refusal to fund abortions where pregnancy resulted from rape or incest or when infant may be deformed). But whether or not the regulation challenged in *Beal* provides an accurate catalogue of "medically necessary abortions," I am satisfied that that term is not meaningless and is susceptible of codification. *See* Doe v. Bolton, 410 U.S. 179, 191-92 (1973).

Cf., e.g., Preterm, Inc. v. Dukakis, 591 F.2d 121, 126-27, 134 (1st Cir.) (Massachusetts's limiting Medicaid funding only to life-saving abortions unreasonable and antithetical to medical definition of medical necessity; federal "Hyde amendment" substantively alters Medicaid Act), *cert. denied*, 441 U.S. 952 (1979); Doe v. Kenley, 584 F.2d 1362, 1366 (4th Cir. 1978) ("therapeutic abortions" include all those where pregnancy poses "substantial endangerment to health"; "endangerment to life" standard ambiguous and too narrow); Zbaraz v. Quern, 572 F.2d 582, 584-85 (7th Cir. 1978) ("plain-meaning" semantic distinction between "necessary for the preservation of life" and "necessary for the preservation of health"); Doe v. Busbee, 471 F. Supp. 1326 (N.D. Ga. 1979) (reimbursement for less than all medically necessary abortions inconsistent with objectives of Title XIX; Hyde amendment does not substantively limit Title XIX); Roe v. Casey, 464 F. Supp. 487, 499-502 (E.D. Pa. 1978) (Pennsylvania cannot limit Medicaid funding only to those abortions necessary to save mother's life; Title XIX requires states to provide all medically necessary abortions); D ___ R ___ v. Mitchell, 456 F. Supp. 609 (D. Utah 1978) (reasoning in *Beal v. Doe* validates Utah's limited abortion funding for only those abortions necessary to save the life of a mother); Doe v. Mundy, 441 F. Supp. 447 (E.D. Wis. 1977) (county may choose to fund only those abortions where pregnancy threatens mother's life); Emma G. v. Edwards, 434 F. Supp. 1048, 1050 (E.D. La. 1977) (stipulation that, *inter alia*, "[t]herapeutic abortions are recognized as medically necessary procedures"); Right to Choose v. Byrne, 165 N.J. Super. 443, 454, 398 A.2d 587, 592 (Ch. Div. 1979) ("medically necessary abortions" include those where pregnancy endangers life or health); Butler, *The Right to Medicaid Payment for Abortion*, 28 HASTINGS L.J. 931, 953-61 (1977) (pre-*Beal, Maher,* and *Poelker* analysis of "medically necessary" in the abortion context); Note, *State Restrictions on Medicaid Coverage of Medically Necessary Services*, 78 COLUM. L. REV. 1491, 1495-502, 1510-16 (1978) (abortion-funding restrictions in light of analysis of "medical necessity"); Note, *Abortion, Medicaid, and the Constitution*, 54 N.Y.U. L. REV. 120, 135 (1979) (taxonomy of possible abortion-funding restrictions).

4. *See* Zbaraz v. Quern, 469 F. Supp. 1212, 1221 (N.D. Ill.) ("medically necessary" abortions constitute only one fifth of cases in which pregnant woman desires an abortion), *probable jurisdiction noted sub nom.* Williams v. Zbaraz, 100 S. Ct. 447 (1979). Judge Everett recognizes this point in his dissent, *see* dissenting opinion note 1 *supra*. *See also* Beal v. Doe, 432 U.S. 438, 450-51 n. * (1977) (Brennan, J., dissenting).

been the end of the matter.[5] But because of arguments raised by the plaintiffs and Title XIX's requirement of reasonableness,[6] the Court in *Beal* proceeded to compare abortions with childbirth. Noting the state's "important and legitimate interest . . . in protecting . . . human life,"[7] the *Beal* majority shifted its focus from therapeutic versus elective abortions to elective abortions versus childbirth,[8] thereby suggesting that the latter pair somehow constitute alternative medical responses to a single condition, pregnancy.

But such a shift in focus is misleading. Nothing in *Beal* indicates that the Pennsylvania regulation was prompted by the eventual availability of alternative services for pregnant women or even that the state's interest in protecting human life played a role in the drafting of the regulation.[9] With all due deference to the Justices of the Supreme Court, the more obvious and sensible basis for upholding the Pennsylvania regulation as "reasonable" lies in the fact that, for some women, pregnancy presents no medical difficulty while, for others, the condition may be life- or health-threatening and thus may require medical treatment.[10] Pennsylvania simply undertook to provide assistance in the latter

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5. It is unnecessary, for purposes of this analysis, to determine how the Court should have resolved the issue in *Beal,* given a clear focus on the precise question presented. *See* note 3 *supra.*

6. In challenging the statute, plaintiffs had argued that, because childbirth presents greater health risks and is costlier than abortion, the exclusion of nontherapeutic abortions from Medicaid coverage was unreasonable, in violation of the requirements of Title XIX, 42 U.S.C. § 1396a(a)(17) (1976). *See* Beal v. Doe, 432 U.S. 438, 445 (1977).

7. 432 U.S. at 445-46.

8. *See* 432 U.S. at 445-46.

As one court has observed, the Court in *Beal* "provided no direct response to [the] contentions" that the exclusion of nontherapeutic abortions from Medicaid coverage was unreasonable on both economic and health grounds. D___ R___ v. Mitchell, 456 F. Supp. 609, 618 (D. Utah 1978).

9. In its briefs, Pennsylvania did not seek to justify its regulation on this basis but invoked other grounds instead. Brief for Petitioners and Reply Brief for Petitioners, Beal v. Doe, 432 U.S. 438 (1977). *But see* Colautti v. Franklin, 439 U.S. 379 (1979) (Pennsylvania's defense of other abortion restrictions suggests goal of fetal protection); Roe v. Casey, 464 F. Supp. 487, 501 (E.D. Pa. 1978) (Pennsylvania refuses to finance nonlifesaving abortions because of "moral repugnance" felt by state legislature). Arguably, reasons related to the protection of potential life prior to viability were not offered in *Beal* because they may have appeared to have been foreclosed by Roe v. Wade, 410 U.S. 113, 150-52 (1973). *See generally* Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government,* 66 GEO. L.J. 1191, 1196 (1978); Comment, *Equal Protection and Welfare Legislation: The Need for a Principled Approach,* 1 U. PUGET SOUND L. REV. 323, 342 (1978).

10. *See* Roe v. Norton, 522 F.2d 928, 940 (2d Cir.) (Mulligan, J., concurring in part and dissenting in part), *on remand,* 408 F. Supp. 660 (D. Conn. 1975), *revd. sub nom.* Maher v. Roe, 432 U.S. 464 (1977).

category.[11] That a pregnancy presenting no medical difficulties will ultimately result in childbirth is irrelevant. The *Beal* majority thus not only obscured the relatively simple issue before it but also gratuitously invited the conclusion, articulated by Justice Brennan and then adopted by the majority in this case, that provision of abortions renders medical services related to childbirth medically "unnecessary."[12]

Though I therefore find the logic in *Beal* questionable with respect to the precise issue presented by that case, such reasoning carries considerably more force on the facts before us today. The New Gotham public hospital charter, unlike the Pennsylvania regulation, speaks not of medically necessary *abortions,* but rather of medically necessary services in general.[13] Regardless of what constitutes standard medical practice in American obstetrics today, a factor that the dissent in this case considers determinative,[14] prenatal care and medical assistance related to childbirth are certainly "unnecessary" — medically or otherwise — for any woman who is not pregnant. For each indigent pregnant woman in New Gotham who accepts the offered abortion, then, such prenatal and delivery services become not only "unnecessary" but also impossible to perform. Some such women, of course, may reject the free termination of pregnancy offered by the city. The question then becomes whether under those circumstances "medically necessary" services must include prenatal care and procedures incident to childbirth. Despite my own feeling that the New Gotham policy is unwise and perverse, I must answer that question in the negative. Considerations of fairness, akin to those underlying estoppel,[15] preclude a woman who could have voluntarily obviated all need for such services from arguing that, as a result of her choice to forgo that opportunity, those services have become "necessary."[16] Any other conclusion would drain that term of all meaning.

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11. I put aside the question whether the Pennsylvania regulation challenged in *Beal* provides a suitable tool for attaining the presumed governmental goal. *See* note 3 *supra.*

12. *See* majority opinion notes 13-14 *supra.*

13. *See* majority opinion note 1 *supra* and accompanying text.

14. *See* dissenting opinion notes 2-3 *supra* and accompanying text

15. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 691 (4th ed. 1971).

16. In such cases, the continuation of pregnancy and consequent eligibility for prenatal and delivery care are voluntary, even if conception was not. *Cf.* Gilbert v. General Elec. Co., 375 F. Supp. 367, 375 (E.D. Va. 1974) (condition of pregnancy not "voluntary" simply because statistically low birth rates indicate "pregnancy can to a large extent be avoided"), *affd.,* 519 F.2d 661 (4th Cir. 1975), *revd.,* 429 U.S. 125 (1976). There may be, of course, some indigent pregnant women who do not abort because they never learn of their opportunity to do so. *See* Note, *The Abortion Alternative and the Patient's Right to*

II

Likewise, on the constitutional question, I feel compelled to join the majority, though only after considerable further examination of the issue.

The analysis in Judge Adams's opinion, although seemingly unfamiliar, is not, as Judge Everett claims, something "pull[ed] from thin air."[17] Its roots can be traced back several years to the Supreme Court's decision in *Dandridge v. Williams,* 397 U.S. 471 (1970), upholding the constitutionality of a Maryland regulation that imposed a $240 or $250 ceiling on assistance to a single family under the Aid to Families with Dependent Children program. Plaintiffs in that case had challenged the regulation as a violation of the equal protection clause on the theory that it classified families according to size and deprived members of large families of aid sufficient to meet their subsistence requirements, as determined by the state's "standard of need" formula.[18] In refuting that challenge, the Court found the system justifiable on a number of valid and rational bases asserted by the state,[19] including Maryland's desire to provide "incentives for family planning," 397 U.S. at 484.

Not only does *Dandridge* stand for the proposition that the minimally demanding rational basis test governs a state's allocation of its limited public funds,[20] but — like *Beal, Maher,* and *Poelker* — it also endorses official involvement in matters of reproductive control,[21] even without the support of a compelling state interest, so long as that official involvement falls short of

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Know, 1978 WASH. U. L.Q. 167. One can imagine, for example, an indigent pregnant woman who, unaware of the policy directive and not desiring prenatal care, delays her initial visit to the hospital until labor has commenced. Although in such circumstances the opportunity to obviate the "need" for medical assistance related to childbirth may seem more questionable, Boe, and thus the class she represents, does not fall within this category. The mere possibility of such cases, I think, provides no answer for this lawsuit but does raise difficult questions concerning whether it is ever "too late" in a woman's pregnancy for an abortion. *See* notes 51-72 and accompanying text *infra.*

17. *See* text following dissenting opinion note 5 *supra.*

18. The Court explained the mechanics of the challenged state action, 397 U.S. at 473-75.

19. The Court stated explicitly that, since the action in question lay in the "area of economics and social welfare," it could withstand the equal protection challenge upon the showing of any "reasonable basis." 397 U.S. at 485.

20. *See* Maher v. Roe, 432 U.S. 464, 479 (1977).

21. Commentators have read *Dandridge* as a case authorizing limited governmental intrusion into individual decisions regarding family planning and procreation. Shaw, *Procreation and the Population Problem,* 55 N.C. L. REV. 1165, 1168 (1977); Note, *Legal Analysis and Population Control: The Problem of Coercion,* 84 HARV. L. REV. 1856, 1856-62 (1971). *But see* Rabin, *Population Control Through Financial Incentives,* 23 HASTINGS L.J. 1353, 1361 (1972).

imposing outright restrictions on individual choice.[22] More significantly, *Dandridge* also establishes that governmental interests in limiting family size may be among the legitimate state objectives satisfying the rationality standard.

This reading of *Dandridge* was invoked four years later by Mr. Justice Powell in his concurring opinion in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), as authority for the proposition that "[u]ndoubtedly Congress could . . . constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents." 414 U.S. at 651. Though the means for promoting population control selected by New Gotham differs from both the vehicle sanctioned in *Dandridge* and that approved by Powell in *LaFleur,* the point is clear: The Constitution permits a state, for reasons less than compelling,[23] to seek to influence individual procreative decisions, at least through less absolute means than total prohibitions.[24] New Gotham has done

22. The inquiry in *Dandridge* was confined to *"incentives* for family planning." 397 U.S. at 484 (emphasis added). *See generally* Dixon, *The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination,* 62 CORNELL L. REV. 494, 513-14 n.102 (1977); Note, *supra* note 21, at 1858-60.

23. Some elaboration of the compelling state interest doctrine becomes necessary here. The standard invocations of this test fail to make clear whether the compelling character of a particular governmental interest stems from some intrinsic feature of that interest itself, regardless of the surrounding circumstances, or whether those surrounding circumstances help determine the compelling or noncompelling nature of the interest. The phrase "compelling state interest" suggests the former. The timetable adopted in Roe v. Wade, 410 U.S. 113, 162-64 (1973), however, under which various state interests mature to an ultimately compelling point as a woman's pregnancy progresses, suggests that it is not some inherent characteristic of the interest itself that renders it compelling but rather some additional factor. Thus, while state interests in population control may become compelling in certain emergency situations of extreme and severe overcrowding, defendants do not argue that such interests are compelling under the circumstances extant in New Gotham. *See* majority opinion notes 2 & 45 *supra* and accompanying text. *Cf.* Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 314 (1978) (Powell, J.) ("interest of diversity is compelling in the context of a university's admissions program"); Korematsu v. United States, 323 U.S. 214 (1944) (military urgency, during time of war with Japanese Empire, renders governmental interest in security sufficiently compelling to justify exclusion of persons of Japanese ancestry from West Coast).

24. The Court's language in Carey v. Population Servs. Intl., 431 U.S. 678 (1978), decided immediately before the abortion-funding cases and cited by Judge Everett in his dissent, dissenting opinion note 6 *supra,* while presenting some analytical inconsistencies, is not necessarily to the contrary. Though the Court in that case confronted legislation limiting access to contraceptives rather than barring their use, the statutory scheme did prohibit the distribution of contraceptives under certain circumstances and provided criminal penalties for violations of that prohibition. Thus, the legislation invalidated in *Carey* resembles much more closely the "absolute obstacles" struck down in Roe v. Wade, 410 U.S. 113 (1973), than the positive financial incentives designed to encourage one choice over its alternative, at issue in the abortion-funding cases and before us in the instant appeal. It is the use of criminal sanctions that apparently renders an obstacle

no more.[25]

The analysis in *Dandridge* and *LaFleur* not only presages the reasoning adopted in the abortion-funding cases but also harmonizes with a number of suggestions offered by commentators for encouraging decreased reproduction.[26] Instead of responding to perceived problems of undue population growth by recommending strict limitations on family size, these commentators advocate programs designed to restructure the incentives and disincentives that presently seem to favor reproduction.[27] Thus, for example, such diverse laws as the tax exemptions for dependent children and prohibitions on homosexual marriages might be altered to encourage, though not to compel, decreased procreation.[28] Official adoption of such an incentive system would presumably be consistent with the language of *Dandridge* and with Justice Powell's reading thereof and, consequently, would be immune from the almost-always-fatal application of strict judicial scrutiny.[29] It would, moreover, find particularly strong and fresh support in the kind of reasoning used in *Beal, Maher,* and *Poelker,*[30] which commits such matters to majoritarian determination.[31] New Gotham's policy directive and manner of staffing

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impermissibly "absolute" or "direct." *See* Colautti v. Franklin, 439 U.S. 379, 386 n.7 (1979). *See also* Frug, *The Judicial Power of the Purse,* 126 U. PA. L. REV. 715, 780 (1978) (denial of *all* welfare funds to those exercising protected right constitutes impermissible penalty); Hardy, *Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams,* 18 ARIZ. L. REV. 903, 912 n.51 (1976).

25. *See* text at majority opinion note 46 *supra.*

New Gotham is seeking not to discourage childbirth itself but rather to achieve a rate of population growth it deems desirable. *Compare* Perry, *supra* note 9, at 1196, *with* Note, *Abortion, Medicaid, and the Constitution,* 54 N.Y.U. L. REV. 120, 129-30 (1979).

26. *See* Note, *supra* note 21, at 1874-75. The author classifies such proposals as part of a "regulationist," as distinguished from "voluntarist," approach to population control, while noting the "conceptual fuzziness" of the two categories. *Id.* at 1870. Similar suggestions appear in Gray, *Compulsory Sterilization in a Free Society: Choices and Dilemmas,* 41 U. CIN. L. REV. 529, 567-71 (1972), and Rabin, *supra* note 21. *See also* Emerson, *Nine Justices in Search of a Doctrine,* 64 MICH. L. REV. 219, 232 (1965).

27. *See, e.g.,* Rabin, *supra* note 21; Note, *supra* note 21, at 1870.

28. For additional suggestions, see Barnett, *The Constitutionality of Selected Fertility Control Policies,* 55 N.C. L. REV. 357 (1977); Driver, *Population Policies of State Governments in the United States: Some Preliminary Observations,* 15 VILL. L. REV. 818 (1970); Rabin, *supra* note 21; Shepard, *Federal Taxation and Population Control,* 55 N.C. L. REV. 385 (1977); Note, *supra* note 21, at 1874 n.83. *See* Dembitz, *Should Public Policy Give Incentives to Welfare Mothers to Limit the Number of Their Children?,* 4 FAM. L.Q. 130 (1970).

29. *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, 8 (1972).

30. *See* text at majority opinion notes 26-36 *supra.*

31. *Beal, Maher,* and *Poelker* arguably return to the political process decisions that

its municipal hospital constitute precisely the sort of politically fashioned incentive system that such an approach suggests.

Judge Everett's effort to distinguish on the basis of history and tradition the right to prevent or terminate a pregnancy, on the one hand, from the right to bear children, on the other,[32] does not compel a different conclusion. Allowing a woman some measure of reproductive freedom, including a limited right to abort, did not begin with *Roe v. Wade,* 410 U.S. 113 (1973). As the Court's opinion in *Roe* points out, "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, . . . a woman enjoyed a substantially broader right to terminate a pregnancy"[33] than she did immediately before *Roe* was decided. In other words, given the analysis in *Roe,* historical considerations alone will not provide sufficient support for the line Judge Everett seeks to draw. But even if such a distinction were tenable, there is another reason why Judge Everett's reliance on cases like *Moore v. City of East Cleveland,* 431 U.S. 494 (1977), misses the mark: Although *Moore* did emphasize the constitutional significance of "history and tradition," it did so in the context of striking down a city's absolute prohibition of certain kinds of family living arrangements.[34] Neither *Moore* nor the other cases Judge Everett cites, however, provide that history and tradition must limit a city in its selection of policy preferences or value judgments, the kind of official action at issue here.[35]

Of course, the tacit thrust of Judge Everett's reasoning may be that the Supreme Court's language in *Moore,* together with the holdings of *Beal, Maher,* and *Poelker,* indicates some sort of withdrawal from the broad pronouncements of *Roe.* That is, perhaps the emphasis in *Moore* on traditional or "basic values"[36] and the

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the Supreme Court had committed to individual choice in *Roe v. Wade. See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 929-32 (1978).

32. *See* text at dissenting opinion notes 12-22 *supra.*

33. 410 U.S. at 140. *See* Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,* 17 N.Y.L.F. 335 (1971). *But see* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 815-27 (1973). *See generally* J. MOHR, ABORTION IN AMERICA (1978).

34. 431 U.S. at 503 (plurality opinion). Those violating the ordinance struck down in *Moore* could stand convicted of a criminal offense. *See* 431 U.S. at 496 (plurality opinion).

35. *See* dissenting opinion notes 16-22 *supra* and accompanying text. *But see* United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (congressional effort to favor traditional living arrangements through food stamp program held unconstitutional).

36. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

"sanctity of the family,"[37] along with the Court's apparent "anti-abortion" rulings in the abortion-funding cases, constitutes a departure from the position embraced in *Roe*.[38] Read in that manner, *Beal, Maher,* and *Poelker* would offer no support for the result we reach here. Although a number of critics of the abortion-funding cases have indeed described them in this fashion,[39] I am reluctant to draw a conclusion that so completely contradicts the Supreme Court's own assertion that these decisions "signal[ ] no retreat from *Roe* or the cases applying it."[40] I leave to future students of the Court's recent decisions — and to the Court itself — the task of determining whether such far-reaching implications are to be read from between the lines of explicit statements to the contrary.

Nor am I persuaded by Judge Everett's effort to undercut the public hospital policy on the ground that it is not sufficiently tailored to the purpose for which it was adopted. First, as a mechanism for promoting population control, it is at least as effective as the policies upheld in *Beal, Maher,* and *Poelker* were for encouraging childbirth.[41] In those cases, as in the situation before us, the policy in question had an impact only upon the poor.[42] The

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37. 431 U.S. at 503 (plurality opinion).

38. Perhaps Judge Everett suggests that the Court's decision in *Roe v. Wade* deviates so significantly from American tradition that "it [cannot] long survive," Moore v. City of East Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)), and that the abortion-funding cases reflect the beginning of its demise.

39. *See, e.g.*, L. TRIBE, *supra* note 31, at 933-34 n.77; Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 1012, 1019 (1978); Perry, *supra* note 9, at 1191; Simson, *Abortion, Poverty, and the Equal Protection of the Laws*, 13 GA. L. REV. 505 (1979); Susman, *Roe v. Wade and Doe v. Bolton Revisited in 1976 and 1977 — Reviewed?; Revived?; Revested?; Reversed?; or Revoked?*, 22 ST. LOUIS U. L.J. 581 (1979); 7 CAP. U. L. REV. 483 (1978); Note, *Denial of Public Funds for Nontherapeutic Abortions*, 10 CONN. L. REV. 487, 500-07 (1978); Note, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 144-45 (1977); Note, *Medicaid Funding for Abortions: The Medicaid Statute and the Equal Protection Clause*, 6 HOFSTRA L. REV. 421, 438-41 (1978); 21 HOW. L.J. 937, 948-49 (1978); 24 LOY. L. REV. 301, 307 (1978); Note, *Indigent Women — What Right to Abortion?*, 23 N.Y. L. SCH. L. REV. 709, 739 (1978); 52 TUL. L. REV. 179, 187-88 (1977); 13 TULSA L.J. 287 (1977).

Cf. Canby, *Government Funding, Abortions, and the Public Forum*, 1979 ARIZ. ST. L.J. 11 (suggesting analogy of the public forum to resolve difficulties of abortion-funding cases); Hardy, *supra* note 24, at 919 (suggesting, but ultimately rejecting, "hybrid" constitutional approach to require public funding of abortions).

40. Maher v. Roe, 432 U.S. 464, 475 (1977).

41. *See* Simson, *supra* note 39, at 513; Note, 6 HOFSTRA L. REV., *supra* note 39, at 441.

42. Indeed, this fact may serve to enhance the legitimacy of New Gotham's policy. Buck v. Bell, 274 U.S. 200 (1927), upheld the constitutionality of compulsory sterilization of the "feebleminded" on the theory that those who "sap the strength of the State" could

fact that other avenues for procuring the desired medical treatment were available to the nonindigent did not prompt the Court in *Beal, Maher,* and *Poelker* to question the legitimacy of the vehicle used to achieve the asserted goal.[43] Indeed, under the very relaxed standard of review applied by the Court in the abortion-funding cases, it is not clear that any means-end fit need be examined at all.[44]

And, to the extent that Judge Everett suggests that the flaw in the public hospital policy lies in its failure to encourage abortion in each New Gotham pregnancy, Supreme Court authority is clearly to the contrary. It is well established that, when a state or local government embarks upon a program of reform, it is not constitutionally compelled to "strike at all evils at the same time."[45] In other words, reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute . . . ."[46] The possibility of additional or more far-reaching ways to reduce New Gotham's population does not undermine the legitimacy of the means selected.[47]

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be required to make such "sacrifices." 274 U.S. at 207. If *Buck* remains sound, the less onerous policy directive of New Gotham, because it does only affect the indigent, could be supportable on a similar theory. *See also* Bolner & Jacobsen, *The Right to Procreate: The Dilemma of Overpopulation and the United States Judiciary,* 25 LOY. L. REV. 235, 245 (1979).

43. The Court noted in *Maher* that even indigent women desiring abortions could still seek such treatment from private sources. 432 U.S. 464, 474 (1977). *See* Beal v. Doe, 432 U.S. 438, 459 n.2 (Marshall, J., dissenting).

44. The Court merely inquired whether the "distinction drawn between childbirth and nontherapeutic abortion . . . [was] 'rationally related' to a 'constitutionally permissible' purpose." Maher v. Roe, 432 U.S. at 478.

45. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 39 (1973); Katzenbach v. Morgan, 384 U.S. 641, 657 (1966). *See* Califano v. Jobst, 434 U.S. 47, 57-58 (1977); Geduldig v. Aiello, 417 U.S. 484, 495 (1974); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

46. Geduldig v. Aiello, 417 U.S. 484, 495 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 39 (1973).

47. Even reform undertaken on a piecemeal basis is, of course, subject to equal protection limitations. Thus, for example, a preliminary step in a broader population control program singling out blacks for decreased procreation would evoke rigorous judicial scrutiny under the equal protection clause. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Shaw, *supra* note 21, at 1166. *See also* Califano v. Westcott, 99 S. Ct. 2655, 2663 (1979) ("Congress may not legislate 'one step at a time' when that step is drawn along the line of gender"). But alleged classifications based on indigency do not trigger such stringent review. Maher v. Roe, 432 U.S. 464, 471 (1977).

Boe's plight, like that of the women challenging the restrictions in the abortion-funding cases, is that without state assistance she can afford to purchase neither an abortion nor medical care incident to childbirth. Given its discretion regarding the expenditure of its public funds, however, New Gotham could have chosen to subsidize neither choice. Clearly, Boe does not argue, nor could she, that the Constitution requires

It is of no moment, moreover, to observe that even poor women can continue to reproduce without any medical assistance whatsoever.[48] An analogous point, when made in the abortion-funding cases, carried negligible constitutional weight.[49] Indeed, the fact that even indigent women can choose to carry their pregnancies to term demonstrates the nonabsolute nature of the burden imposed upon them by the city. And, as the opinion for the majority in this case explains, it is precisely this nonabsolute nature of the burden that sustains the policy and practice in question.[50]

Essentially identical reasoning, with slight elaboration, answers Judge Everett's final point, where he questions New Gotham State's allowing abortions to be performed throughout pregnancy — a necessary condition for the effective implementation of the city's policy directive.[51]

Judge Everett's concern apparently stems from the possibility that an abortion performed during advanced pregnancy might result in a live birth. If that be the case, however, New Gotham State's lack of legislation prohibiting abortions is irrelevant, for upon birth, a "person" within the scope of the state's homicide laws has come into existence.[52] Whether or not the fourteenth amendment requires a state to impose criminal penalties for depriving such "persons" of life[53] is also irrelevant, for New Gotham

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states or cities to provide medical assistance for all indigent pregnant women. *See* 432 U.S. at 480 n.13.

48. *See* text at dissenting opinion notes 26, 27 *supra*.

49. In dissent in the abortion-funding cases, Justice Marshall predicted that the Court's holdings would result in the procurement of more unsafe and illegal abortions by the indigent. 432 U.S. at 455-56 n.1.

50. *See* majority opinion note 32 and text at majority opinion note 46 *supra*.

51. The absence of any state criminal prohibitions against abortion permits the policy directive to operate in a noncoercive manner *(i.e.,* simply to encourage abortions rather than to compel them) and simultaneously to maximize each indigent pregnant woman's opportunities to choose the result favored by the city.

52. Before birth, however, no such "person" exists. *See* Roe v. Wade, 410 U.S. 113, 157-59 (1973), and cases cited therein. *See also* Commonwealth v. Edelin, ___ Mass. ___, 359 N.E.2d 4, 12 (1976) (state manslaughter statute construed, in light of *Roe,* to apply only after live birth and only to defendant's acts in postnatal period). *Cf.* Planned Parenthood v. Danforth, 428 U.S. 52, 83-84 (1976) (criminal failure to protect liveborn infant "surely will be subject to prosecution . . . under the State's criminal statutes").

53. Although the matter is not free from uncertainty, the Court in *Roe* read the fourteenth amendment not merely to authorize governmental protection of a person's life but to "entitle" him to such protection from the state. *See* 410 U.S. 113, 159 (1973). *But see* L. TRIBE, *supra* note 31, at 929 n.61 (noting state action problem in such reasoning); Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 17 (1969) ("The due process

State has not repealed its criminal homicide laws, but only its abortion prohibitions.

The problem that arises, however, is that where live births do in fact result from the abortions encouraged by the city, the single goal of the official action challenged here, population control, is not advanced. The question, as I see it, then becomes whether this incongruity of means and end renders the policy directive unconstitutional because it is irrational[54] as applied to women whose pregnancies have advanced so far that any termination might yield a live birth.

The problem is complicated by the ambiguity of the term "abortion" itself. In the more typical lawsuit where plaintiffs challenge state action alleged to restrict their freedom of choice in aborting pregnancies, a number of personal privacy-based interests can be asserted. The classic case of this variety, *Roe v. Wade,* 410 U.S. 113 (1973), considered such personal interests as the possibility of direct harm from pregnancy and the future stress, both physical and psychological, of maternity and child care.[55] A more specific focus emerged in *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976), where, in overturning Missouri's spousal consent requirement, the Court emphasized the privacy interest attributable to a woman's direct and immediate physical involvement in pregnancy.[56] Theoretically, the kinds of interests recognized by the Court in those cases could be honored by a termination of pregnancy simpliciter, regardless of the fate of the fetus, or by placement of any live-born child for adoption.[57]

But as the instant case — as well as cases concerning abortions for eugenic reasons[58] — indicates, a preference for abortion

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clause inveighs only against certain 'deprivations' by the 'state,' occurrences which seemingly cannot occur by mere default."); Tribe, *The Supreme Court, 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law,* 87 HARV. L. REV. 1, 33 n.144 (1973). *Cf.* Landrum v. Moats, 576 F.2d 1320 (8th Cir.) (allegation that police officers, under color of state law, unreasonably deprived deceased of life presents cognizable claim that fourteenth amendment has been transgressed), *cert. denied,* 439 U.S. 912 (1978).

54. *See* notes 19-21 and accompanying text *supra.*

55. *See* 410 U.S. at 153. *See also* Bellotti v. Baird, 99 S. Ct. 3035, 3048 (1979) (plurality opinion); Doe v. Bolton, 410 U.S. 179, 192 (1973).

56. *See* 428 U.S. at 71.

57. In other words, satisfaction of the interests identified in *Roe* and *Planned Parenthood* do not require that an abortion cause fetal death. *See* Note, *Choice Rights and Abortion: The Begetting Choice Right and State Obstacles to Choose in Light of Artificial Womb Technology,* 51 S. CAL. L. REV. 877, 899-900 (1978). See also Tribe, *supra* note 53, at 27.

58. *See, e.g.,* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

over childbirth can be motivated by interests other than those satisfied by mere return of the woman's body to its nonpregnant state or by obviation of child-rearing responsibilities.[59] In these cases, the sole immediate purpose for which the abortion is performed is feticide. Where a pregnancy has so far advanced that its termination would produce a live fetus (then child), such a purpose cannot be served.

Significantly, the Supreme Court in its groundbreaking decision in *Roe* circumvented the issue. By adopting viability as the criterion for constitutionally acceptable state regulation undertaken to protect the fetus,[60] the Court established a foundation for prohibiting those abortions most likely to result in live births.[61] But that analysis is merely a foundation: It only permits states to take such protective action; it does not require them to do so.[62] In addition, under *Roe* and the Court's subsequent decisions in *Planned Parenthood v. Danforth,* 428 U.S. 62 (1976), and

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In all of these cases, one issue was whether plaintiff-parents had a cause of action in tort against medical personnel who were allegedly negligent in failing to inform them of a substantial risk that a particular pregnancy might result in the birth of a defective child, where the parents claimed that they would have elected to terminate the pregnancy had they possessed such information. *See also* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978) (negligent genetic testing). *Cf.* Colautti v. Franklin, 439 U.S. 379, 389 & n.8 (1979) (discerning possible conflict between time required to detect some genetic defects and the restriction of abortions where "sufficient reason to believe that the fetus may be viable").

59. *See* Delgado & Keyes, *Parental Preferences and Selective Abortion: A Commentary on Roe v. Wade, Doe v. Bolton, and the Shape of Things to Come,* 1974 WASH. U. L.Q. 203; Note, *State Protection of the Viable Unborn Child After Roe v. Wade: How Little, How Late,* 37 LA. L. REV. 270, 280 (1976); Note, *supra* note 57, at 901-11. *Cf.* note 57 *supra* (satisfaction of motivating interests).

60. 410 U.S. 113, 163-64 (1973).

61. *See* Tribe, *supra* note 53, at 26-29.

The Court's subsequent elaboration of the viability concept in Planned Parenthood v. Danforth, 428 U.S. 52 (1976), is not to the contrary. There, in upholding a Missouri statutory definition of viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems," 428 U.S. at 63, the Court emphasized that a determination of viability "is, and must be, a matter for the judgment of the responsible attending physician," 428 U.S. at 64, and observed that the Missouri definition actually allows greater freedom to those electing abortion than does the definition offered in *Roe,* 428 U.S. at 64. This latter point demonstrates the permissive, as distinguished from mandatory, nature of the timetable set forth in *Roe. See* 410 U.S. 113, 164-65 (1973). *See also* Colautti v. Franklin, 439 U.S. 379 (1979) (statutory requirement that person performing abortion must protect fetal life if, *inter alia,* sufficient reason to believe fetus may be viable is unconstitutionally vague).

62. The Court stated: "For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life *may,* if it *chooses,* regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164-65 (emphasis added).

Colautti v. Franklin, 439 U.S. 379 (1979), viability — the potential ability of the fetus to live outside the mother's womb, albeit with artificial aid[63] — is a factual determination to be predicated not upon a universal or fixed point in gestation, but rather upon individualized, fetus-by-fetus assessments.[64]

The difficulty of applying this rule to particular cases is illustrated by a recent opinion of a three-judge district court in South Carolina enjoining the criminal prosecution of a physician for illegal abortion and murder after he terminated an approximately twenty-five week pregnancy and the fetus, delivered alive, survived for twenty days, *Floyd v. Anders,* 440 F. Supp. 535 (D. S. C. 1977), *vacated and remanded per curiam*, 440 U.S. 445 (1979). The court apparently reasoned that, because the fetus could not survive outside the womb indefinitely, but only for twenty days, it was not viable;[65] thus, it held that the state could not prosecute the physician without violating the constitutional constraints of *Roe* and *Planned Parenthood.*[66]

Whether or not such reasoning is sound,[67] it highlights the difficulty of accurately assessing the viability of any individual fetus before the termination of a pregnancy (and hence the difficulty of determining whether any particular abortion will be likely in fact to advance the cause of population control).[68] To suggest, as Judge Everett does, that New Gotham cannot en-

63. 410 U.S. at 160.

64. *See* 410 U.S. at 160-61; Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976); Colautti v. Franklin, 439 U.S. 379, 388 (1979); Floyd v. Anders, 440 F. Supp. 535, 539 (D. S.C. 1977), *vacated and remanded per curiam*, 440 U.S. 445 (1979).

65. 440 F. Supp. at 538.

66. 440 F. Supp. at 538-39.

67. By focusing on the actual life span of the fetus, once removed from the womb, rather than its potential ability to survive, the opinion implies that viability is a determination that can be made only *after* the termination of the pregnancy in question. *See* 440 F. Supp. at 538. *Roe v. Wade,* however, defined a viable fetus as one "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. In a subsequent opinion, the Court explained that viability, so defined, nonetheless contemplates more than "momentary survival." Colautti v. Franklin, 439 U.S. 379, 387 (1979). *See also* Anders v. Floyd, 440 U.S. 445 (1979) (per curiam), *vacating and remanding* 440 F. Supp. 535 (D.S.C. 1977); Wynn v. Scott, 449 F. Supp. 1302, 1316 (N.D. Ill.), *appeal dismissed for want of jurisdiction sub nom.* Carey v. Wynn, 439 U.S. 8 (1978), *affd.*, 599 F.2d 193 (7th Cir. 1979).

68. Predicting the actual impact of any abortion upon population growth or control would appear to require even more difficult determinations than assessing viability. Presumably a fetus that lives for twenty days following abortion would have a *de minimis* effect on the size of New Gotham's population; such a fetus might, however, properly be classified as viable, according to the Supreme Court definition of that term in *Roe,* 410 U.S. at 160, and notwithstanding the conclusion to the contrary reached in Floyd v. Anders, 440 F. Supp. 535 (D.S.C. 1977), *vacated and remanded per curiam*, 440 U.S. 445 (1979). *See* note 67 *supra.*

courage terminations of advanced pregnancies is to ignore these vagaries inherent in the notion of viability.[69] And, to the extent that any abortion, whenever performed, increases the risk of death to the particular fetus in question,[70] New Gotham's decision to encourage abortions throughout pregnancy rather than during a more limited period of gestation is consistent with the underlying goal of promoting population control to the fullest extent possible.[71] That live births may result, even when the city successfully encourages indigent women to procure abortions, provides an additional reflection of the noncoercive and nonabsolute nature of the governmental action challenged here and of the minimal level of constitutional scrutiny against which we are to measure it.[72]

None of these efforts to respond to Judge Everett's dissent, of course, need be read to say that the action pursued by New Gotham is wise or humane, for we do not decide such cases on those grounds, *see Maher v. Roe,* 432 U.S. 464, 479 (1977). Rather, whatever the apparent infirmities of the city's course, the abortion-funding cases, together with the additional support of other Supreme Court decisions, point ineluctably to its validity.

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69. *See* note 67 *supra. See also* Colautti v. Franklin, 439 U.S. 379, 390-93 (1979).

70. The method of abortion used becomes significant in this analysis. In Planned Parenthood v. Danforth, 428 U.S. 52, 75-79 (1976), the Court discussed a number of different methods of abortion employed after the first trimester. One of those, saline amniocentesis, almost invariably causes fetal death while another, prostaglandin instillation, stimulates premature labor, more likely resulting in a live birth. *See* Colautti v. Franklin, 439 U.S. 379, 399 (1979); Note, *supra* note 59, at 279-80.

71. *See* note 51 *supra.*

72. *See* note 50 *supra* and accompanying text.