39/ct undiluted Conn. law that excludes
elective abortions from medical care provided
indigent. As CA 2's rule in that Tilly A
does not require such funding, the Court. 2
was reached in this case.
39/ct reasoned that once a state provider
medical service for other pregnancy-related
problems it cannot - under E/1 clause -
exclude abortions. It found no state
interest - compelling or otherwise - that is
served by exclusion. Cheaper to admit
than to take a patient to term.
Walsh (Absit A/6 of Conn)

A third-rate argument of no help whatever. Another example of inadequacy of representation sent up here.

**New Katz (for Rehn)**

Responding to J. Stewart, New Katz said this was a D/P rather than an E/P case.

The D/P is that liberty interest cannot be denied without D/P, & here there was a denial of D/P by treating electoral elections differently.

Obviously New Katz is confusing D/P & E/P – badly.

And J. Stewart noted if there is a substantial right to an electoral abortion state must pay for it under New Katz argument – regardless of whether state pays for live birth. But, also as Stewart noted, there are 13th Amend. Rights but state is not obligated to finance exercise thereof.
Netz-Kraft (cont.)
75-1440. Necker v. Roe (Constitutional Issue) (Notes for 11/14/77 Conference)

Q: The state (Conn.), under Medicaid, provides "medically indicated" services to indigent pregnant women, including delivery & pre-natal care. It denies free medical services for non-therapeutic abortions. Does this so burden the choice — the right — to abort as to violate the Court's right to abortion?

Analysis: (1) Roe, finding a fundamental right of privacy unqualified, affirm a "absolute" right to abortion — until med. advice — beyond 1st Trimester. Compelling state interest applied.

(2) As Roe recognized, state has a leg. interest in potential life of fetus — an interest increasing with the period. (absolute deprivation of free choice — criminal liability)

(3) The refusal to fund does indeed burden the exercise of the right. But failure to provide funds to enable citizens to exercise rights has not heretofore been unconstitutional — e.g., right to travel, right to associate, speech, etc.

It is argued, however, that E/P is denied when child birth is funded & abortion not. But there is no purpose to deny rights. Purpose is benign — to aid indigents who need med. services not to penalize those who want medical services for an elective procedure. (Purpose in Buckley v. Valeo in limiting speech was benign.)
Some of deprivation - milieus - is not act of state. Rather, in result of natural inequality - private economic system.

Relaxing
To invalidate, we must rely on:
1. Roe v. Wade - compelling interest language
2. Right to Travel cases - the "penalty" theory. (diluted by Sonota)

All of these go to outer limits of our Court. jews. it have been criticized

State interest justifies classification. Benign
Compelling interest not required - no prohibition & criminal penalty as in Roe.

For Congress
The Chief Justice

Reversed

Doctor's certificate in
valid & binding.

Dampier is relevant.
The limitations have burdensad
right of unwanted indigent
have large families.

Can't carry Roe
V. Jan.

Stevens, J.

Revers

Roe un supported.
Substantial E/P analysis
must support funding.
Eg. right to send children
to private schools.

E/P analysis in Roe.
Roe did recognize a
state interest.

But Roe is excessive.
Overbalancing right to
abortion. Probably yes.

But policy considerations
are important. Can't
trust legislature to
fund. Yet we can't
assume legis. will fail
to act respons.

Roe not an E/P case.

Brennan, J.

Affirm

Easy case. Roe
burden on a fundamental
right is clearly
unconstitutional.

Might as well over
rule Roe & Doe.

Stewart, J.

Reversed, joint nod.

After discussion, Pate
voted to Revers. Excessive.
No duty to under Const.
to subsidize.

But E/P claim is
very close & difficult.
Doctor does have large
burden in determining
large. But they can
decide involve these
considerations. Cheaper
to provide abortion &
prevent welfare rolls
being increased. None
of normal interest is
involved. The state's
interest in protecting life
our abortion is enough.
Stake does pay whenever
doctor individually medically
necessary.
Revar
We have never gone this far.
No Const. obligation
Classification is rational.

Powell, J. Revenue
See my Notes.

Affirm
Agree with W.J.B.
Doe & Roe control.

Blackmun, J. Affirm
As to written consent.
Planned Parenthood controls.
I should reverse in this.
As to Court Issue, agree
with W.J.B.
After vote, stated we
have overruled Roe.

Rehnquist, J. Revenue
Agree with me.
6 to 3. Amend right
is part of fundamental
yet in Roe v. Woppeg
we denied funding.
TO: Tyler Baker 
FROM: Lewis F. Powell, Jr.

DATE: March 7, 1977

MEMORANDUM

I continue to have difficulty with the structure of our opinion. Possibly, this is because of a lack of familiarity comparable to yours. Yet, as a comparatively "fresh reader", the present structure does not seem to "hang together" in a logical sequence.

At Conference, those who agreed with the framework in which I discussed the case (and I remember particularly Stewart and Stevens), viewed it as follows:

Although, as you emphasize, both the District Court and appellees seem to homogenize substantive due process and equal protection, they find a burdening of a constitutional right requiring application of the compelling state interest standard. If one agrees with this test, it would perhaps be difficult to support the vote of the Conference. This would be true whether the case be viewed as implicating substantive due process rights or as violating equal protection. We concluded that there is no substance to the due process claim, that the case does present an equal protection claim, and this must be analyzed under the rational basis test.
I now come to your draft, having the foregoing general approach in mind.

Part I:
Except for editorial changes - mostly matters of taste - this is fine.

Part II:
This is divided into three subparts - A, B and C. The first of these states that the "threshold question" is the standard of review. After stating that this is the initial question whether the case be viewed as due process or equal protection, you move immediately to Roe v. Wade. Under either due process or equal protection analysis, you say - correctly - that understanding of the "nature and scope of the right recognized in Roe is critical".

The draft then discusses Roe (pp. 8 and 9).

Subpart B distinguishes, quite effectively, the Texas law in Roe from the Connecticut regulation. The draft also points out that other cases (Danforth) also are different.

On page 13, the draft makes the important point that there is a basic difference between state interference with a protected activity and state encouragement of an alternative activity, citing Meyer. The last paragraph on page 15 concludes, apparently with respect to substantive due process, that the
compelling state interest test is not appropriate.

Part C commences with the view that "it is equally clear that strict scrutiny would be inappropriate under equal protection principles" citing Rodriguez. You conclude (p. 17) that the fundamental right analysis of Rodriguez is inapplicable here.

I would have thought that Part II having commenced (p. 7) with the question as to the standard of review, would have come to an end upon concluding that the compelling interest test is not applicable. I return to this point below. But before doing so, I make these comments about my initial impression of Part II. I find it a little bit confusing to start out by saying the threshold inquiry is the standard of review. I think I would have commenced by confronting Roe, as the case relied upon by the DC and appellees as establishing the "right to an abortion", characterizing it as fundamental and thereby establishing the standard of review. Your analysis of the nature and scope of the right recognized in Roe is excellent. When this is shown not to have been enlarged by Danforth and then distinguished - as you do admirably - from the Connecticut regulation, we can then conclude that the review standard of Roe is inapplicable whether the case be viewed as due process of equal protection.

In light of these comments, do you think Part II might be refocused just a bit to place the initial emphasis directly
on Roe and its contrast with the Connecticut statute before concluding that the Roe standard is inapplicable?

Returning now to page 17, as indicated above, I would have expected you at this point to commence a new part (Part III) in which we apply the rational basis test to an equal protection issue. Before commencing the application of the test, should we not make clear that we view this as an equal protection case? A majority of us at Conference thought the substantive due process contention is almost frivolous. The nonfrivolous is whether classifying women who wish to terminate pregnancy by abortion differently from women who wish to terminate it by childbirth meets the rational basis test? The answer depends, in conventional equal protection terminology, upon whether the classification is rationally related to one or more legitimate state interests. No one knows better than you the terminology of equal protection, and how it is applied. Yet, I must say that the present draft does not come through very clearly in this respect.

Without any clear indication that we view this as an equal protection case, or that we are moving to apply the rational basis standard, the draft (p. 18) moves first into a discussion of Dandridge; then (a second subhead C, p. 19), into distinguishing Shapiro and Maricopa (p. 19-21). All three of these are equal protection cases, and yet I find it confusing to discuss them
back to back. *Dendridge* was straight "rational basis", and is highly relevant to this case because it involved welfare provisions as you say. But *Shapiro* and *Maricopa* are, in a sense, equal protection "sports". Classifications were involved, and the Court found that the classification of those who had moved into the state recently constituted an invidious discrimination against their fundamental right to travel. Or, as you correctly put it, the classification *penalized* that right. I am not sure that these two cases *fit* in at this particular point in the opinion as well as they would somewhere else.

After a rather abrupt ending of the discussion of the three cases above mentioned, the draft moves to Part III which addresses the District Court's contention that a state must adopt a position of neutrality between abortion and childbirth. It seems to me that the "neutrality" point is one to be mentioned in a section applying the rational basis test to the classification. If the state interests are legitimate and sufficiently furthered by the means selected, the state need not remain neutral. The argument that the state should remain neutral is simply another way of saying that pregnant should not be divided into two classes for the purpose of disposing of the fetus.

I have the impression that the draft does not sufficiently emphasize, anywhere, the affirmative interest of the state in
protecting the fetus and encouraging mothers to carry it to term. You do argue this on page 23, but in the framework of a neutrality discussion rather than in a section applying the rational basis test to the classification. I may say here, that I like your use of Roe in emphasizing that even that opinion recognized the legitimate state interest in the fetus. Also, in this portion of the opinion, I would repeat that a state classification properly may further a policy or value choice by the state, so long as it does not infringe on a constitutional right.

The final two or three pages speak to the point that funding abortions is a policy decision for the legislature. This should be a separate part, and perhaps you and I both need to do some further work on it.

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Having worked as hard as you have on this difficult case, I know it is a bit discouraging to have these sort of comments that will require some revision. I emphasize that I do not have a negative feeling about the content, and it may well be that my own perception as to the organization of the opinion is not as good as yours. I am inclined, however, to think I am right and to believe at least some revisions are worth attempting. Possibly a fairly detailed outline might afford a guide, but I leave this entirely to you.

L.F.P., Jr.
MEMORANDUM

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FROM: Lewis F. Powell, Jr.

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L.F.P., Jr.
MEMORANDUM

TO: Tyler Baker
FROM: Lewis F. Powell, Jr.

DATE: March 11, 1977

Maher

I have reviewed with some care your draft of 3/10/77 of Part II, the most critical section of our opinion. I think we are making genuine progress with this sensitive opinion, in which almost every word must be used with care.

I have, as usual, made some personal editorial changes. These include Rider A, on page 4, which is essentially a personal choice as to words and phrases.

My reaction to pages 7-18 of the draft are somewhat more substantive. My primary concern is that perhaps we are "laboring" the threshold issue of the appropriate standard of analysis. With this thought in mind, I have attempted to condense pages 7-12. See my Rider A, page 7. I do not think I have omitted anything essential to our analysis, but - of course - would like your checking me on this.

I am inclined to think that subpart (4) (p. 12-14) is unnecessary, certainly as a part of the opinion identifying the appropriate standard. I assume you will rely on Dandridge in part III when discussing the rational basis standard. In that part, perhaps a note could dispose of the "wealth classification" issue in a sentence or two.
For different reasons, I am inclined to think that part C (p. 14-18) is inappropriate to a discussion of the relevant standard of analysis. At least seems to be misplaced. Possibly it may be included more appropriately in Part II-A where Roe is discussed and distinguished. You have an excellent point in using Meyer. At the moment, I am simply uncertain as to where it best fits into our opinion. My present thinking is that Part II ends appropriately and strongly with the disposition of Shapiro and Maricopa County, and the conclusion that the compelling state interest test is not applicable.

In any event, I think you have Part II, as I have edited it, substantially on target. Perhaps you could reserve final decision as to where to use Meyer until you have drafted Part III.

L.P., Jr.
TO: Tyler Baker
FROM: Lewis F. Powell, Jr.

Maher

I have taken a fresh look at the SG's memorandum in Beal, 75-554. Although that memo deals with the Pennsylvania Medicaid program, I believe in relevant respects it is analogous.

In addition to arguing that there was no incompatibility with the federal statute, the SG stated:

"A state's determination to offer Medicaid coverage for abortions only when such treatment is medically indicated is reasonable and is neither inconsistent with the objectives of Title 19 nor in violation of the Fourteenth Amendment."

In addressing the "compelling state interest argument", the SG said:

"Respondents contend, however, that the limitation invidiously discriminates between 'those who continue their pregnancies to birth and those who seek to terminate their pregnancies by abortion,' (Br. in Opp. 6) and thus can be justified, if at all, only if it promotes 'a compelling state interest' (ibid.). But the distinction Pennsylvania draws between abortion and childbirth, by requiring a certification by the attending physician in the former case and not in the latter, is not invidious; it merely reflects the fact that whereas medical treatment at childbirth is generally considered to be necessary, in some circumstances a physician might determine that an abortion would not be an appropriate medical treatment."
"Presumably it was for this reason that this Court, in recognizing a qualified right to abortion, emphasized the critical importance of the attending physician's role by holding that during the first trimester 'the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.' Roe v. Wade, supra, 410 U.S., at 164. See also Doe v. Bolton, supra, 410 U.S. at 192. Thus, Pennsylvania has acted responsibly as well as constitutionally by inter­posing a physician between the medicaid patient and the decision to abort.

"Moreover, the fact that a woman has a qualified right to an abortion does not imply a correlative constitutional right to free treatment. Individuals presumably have a 'right' to undergo many recognized medical procedures by a licensed physician, but the Equal Protection Clause does not affirmatively require a state to cover the costs incurred by indigents in undergoing such procedures."

While I would not rely, in any primary sense, on the difference between what is medically necessary and what is not so necessary, there is merit to the point that "medical treatment at childbirth is generally considered to be necessary". This is at least an argument in support of the rationality of the state's distinction. We should make clear, in using this point, that where medically necessary the abortion is funded.

L.F.P., Jr.
MEMORANDUM

TO: Tyler Baker  DATE: March 16, 1977
FROM: Lewis F. Powell, Jr.

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L.F.P., Jr.
MEMORANDUM

TO: Tyler Baker
FROM: Lewis F. Powell, Jr.

DATE: March 16, 1977

Let me try on you, Tyler, some "hornbook" type of simplistic analysis.

In the context of this case, a pregnant woman has two fundamental rights: (i) to abort during the first trimester, or (ii) to carry the fetus to term and childbirth. But the fact that these are fundamental rights does not mean that the state must pay for either or both. Indeed, a pregnant woman has no right - fundamental or otherwise - to have the state pay for an abortion or for childbirth. Thus, the only ultimate question in this case is whether if the state elects to pay for one it also must pay for the other.

Putting this in more conventional equal protection terms, we have here a classification - solely for the purpose of receiving welfare benefits - of pregnant women who wish to abort as contrasted with pregnant women who wish to bear children. Neither of these classes is "suspect" within the meaning of that term in any prior decision. But the fundamental right issue still lingers, and here we reach the problem that has attracted so much of our attention to date - as to precisely the nature of the right recognized in Roe.
Is it really necessary to engage, as we have, in what many will think is semantic analysis for the purpose of identifying the "right"? What would be the effect if we accept the shorthand terminology of "constitutional right to have an abortion"? Since even appellees have conceded that there is no constitutional right to free abortions, all we are really talking about is whether the classification - by reflecting a state preference for childbirth - invalidly burdens the right to an abortion. Since, as we point out, the state imposes no burden whatever on that right, why do we worry about the state's decision to encourage normal childbirth by Medicaid benefits.

If the state had elected to provide no Medicaid benefits for abortion or childbirth, it could be argued - as it was, in effect, in Rodriguez and other "wealth classification" - that the state burdens the constitutional right of indigent women to abort. Their right would be no less burdened, as contrasted with non-indigent women, than it is in this case.

In sum, if this analysis makes sense, we would end up with a simple social security or welfare type case in which the question is whether a state had legitimate interests for favoring one class of beneficiaries over another. In this connection, can we not make greater use of Skinner v. Oklahoma? I have in mind the quote (your footnote 1-E) as the importance of procreation "for the very existence and survival of the race."
It is difficult to think of a more compelling state interest, even if that test were applicable.*

L.F.P., Jr.

*Tyler, there was a news story within the past two or three days pointing out the slackening of the birth rate, indicating that less than two children per marriage are now being born - an obvious threat, if sustained, to "survival of the race." Ask the library to locate this story for us. It could have been in Sunday's Washington Post.
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March 22, 1977

Dear Betty:

Would you please request the Library of Congress to prepare a memorandum showing, year-by-year for the last ten years, the fertility rate (defined, I believe, as the total number of children borne by each woman aged 15 to 44) for the United States and for the state of Connecticut.

See attached story from the Post of February 11.

Sincerely,

Mrs. Betty Clowers

1fp/8s