EXCLUSIONARY ZONING OF ABORTION FACILITIES

The legal battle over abortion did not end in 1973 with the United States Supreme Court's grant in *Roe v. Wade*[1] of constitutional protection to a woman's decision to have an abortion. *Roe* merely forced the anti-abortion movement to devise other ways to restrict the availability and inflate the cost of abortions.[2] At the local level, legislators often enacted overly restrictive zoning ordinances, relying on the regulations' strong presumption of constitutionality.[3] Thus, even though such zon-

1. 410 U.S. 113 (1973).

2. The various groups that oppose abortion struggle to have *Roe* overturned by either constitutional amendment or reversal by the Supreme Court. Comment, *Controlling Choices through the Back Door: Regulation of Abortion through Regulation of Health Care Benefits*, 54 UMKC L. REV. 291 (1986). These groups are consistently more successful, however, in influencing passage of state and local legislation that curtails the physical availability of abortion clinics.

Anti-abortion groups also lobby for regulations that raise the cost of the procedure and render abortions unavailable to the poor. *Id.* Often these state regulations are blatantly unconstitutional. For example, a Missouri statute decreed that life begins at conception. MO. ANN. STAT. § 1.205.1(1) (Vernon 1986). *Roe* clearly prohibited such a legislative finding and the Missouri statute was summarily declared unconstitutional. Reproductive Health Servs. v. Webster, 655 F. Supp. 1300, 1305 (W.D. Mo. 1987). Also invalidated were regulations requiring doctors to perform costly tests to determine gestational age, weight, and lung maturity when it is uncontradicted that these tests are inconclusive and designed primarily for the health of the fetus. *Id.* at 1312.

The Missouri statute also restricted the use of public facilities in performing, encouraging, or counseling a woman to have an abortion when it is not necessary to save the mother's life. MO. ANN. STAT. § 188.215 (Vernon 1986). The court held that while the state need not extend public funds to provide abortion services or counseling, it cannot stop a hospital or other public facility from extending such services when the patients are able to pay for them. 655 F. Supp. at 1320.

Webster illustrates the strength of anti-abortion groups in state legislatures. The case also shows the willingness of states to regulate indirectly what they cannot regulate directly. On the local level, when a clinic offers abortion services in a neighborhood, pickets and protests are common. Occasionally, the protests escalate to harassment, violence, and even bombing. Zoning is a municipality's principal means to control protesters and indirectly regulate abortions. This Recent Development focuses on the constitutionality of indirect regulation of abortion through zoning and delineates the vague line between the permissible control of location and the impermissible exclusion of a constitutionally protected activity.

3. Municipalities enact zoning ordinances under the broad authority of the police

ing laws may implicate federal constitutional rights, federal courts are unwilling to review zoning decisions as if they were "super zoning boards."[4] When such regulations, however, place more than a *de minimis* burden on the right to seek an abortion,[5] the courts apply strict scrutiny to determine whether the government has a compelling interest in the ordinance.[6] The difficulty lies in the factual determina-

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power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (Court, for the first time, recognized the validity and need for comprehensive zoning under the broad authority of the police power). Separating industrial from residential uses in order to preserve health and safety is a chief justification for zoning laws. *Id.* at 390.

The *Euclid* Court recognized that although an individual interest is unlikely to outweigh the benefits of a proper police power regulation, the possibility exists that a general public interest could outweigh a zoning regulation. In such a case, the Court would enjoin the zoning regulation. *Id.* In *Roe v. Wade*, however, the Court balanced the state's interest in regulating childbirth against a woman's right to privacy during each trimester of pregnancy and held that a woman's right to choose abortion is paramount in the first trimester. Roe v. Wade, 410 U.S. 113, 164-65 (1973). Any state regulation during the first trimester must be for the mother's benefit and health. *Id.* at 163. The rules regarding constitutional analysis, therefore, override traditional zoning rules.

While not altering a zoning board's traditional function, courts are recognizing that zoning does not simply partition a territory into separate uses. Zoning laws reflect certain social choices and accommodations of conflicting social and political ideas that extend far beyond the health and safety rationale of the police power.

For example, local governments have used zoning to exclude low income housing, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977), adult movie theaters ostensibly protected by the first amendment, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and competition that might damage a municipal project, Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir. 1983), *cert. denied*, 461 U.S. 945 (1983).

4. Generally, states provide administrative and judicial remedies through zoning boards of appeal and state courts. Section 1983 provides a federal cause of action for constitutional violations and ordinarily cannot be used to review local zoning decisions. 42 U.S.C. § 1983 (1982). *See* Raskiewicz v. Town of New Boston, 754 F.2d 38, 44 (1st Cir. 1985) (court awarded summary judgment, attorneys' fees, and costs to the defendants when plaintiff's fourteenth amendment due process and equal protection claims were without merit), *cert. denied*, 106 S. Ct. 135 (1985).

5. The right to an abortion is part of a woman's right to privacy. In *Roe v. Wade* the Supreme Court found that although privacy is not explicitly guaranteed in the Constituion, it is "fundamental" or "implicit in the concept of ordered liberty." 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1973)). Regardless of whether fourteenth amendment liberty or the ninth amendment reservation of rights to the people guarantees privacy, the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153.

6. West Side Women's Servs. v. City of Cleveland, 573 F. Supp. 504, 516-17 (N.D. Ohio 1983) (not all distinctions between abortions and other procedures are invalid; lower level of scrutiny appropriate when the state is encouraging only alternatives to abortion); Haskell v. Washington Township, 635 F. Supp. 550 (S.D. Ohio 1986) (ordinance created a separate zoning class for abortion facilities but failed to zone any com-

tion of what zoning laws constitute more than a *de minimis* burden.[7]

Much of the courts' involvement in the abortion rights area after *Roe* began with, and continues to be in, their examination of laws that interfere with the right to seek an abortion. In *Maher v. Roe*[8] the

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mercially available area for their development; this constituted more than a *de minimis* burden).

7. Although pregnant women are clearly the most affected by a denial of abortion facilities, they are empirically the least likely persons to challenge zoning statutes that affect abortion facilities. In fact, doctors or agencies that provide abortions are the primary foes of such zoning statutes. In Singleton v. Wulff, 428 U.S. 106 (1976), the Supreme Court asumed that doctors had standing to challenge a Missouri statute's refusal to use state funds to finance abortions. The Court found that the doctors had a direct *personal* economic interest in the outcome of the suit. The Court was split, however, as to whether the doctors had third-party standing to constitutionally challenge the ordinance on behalf of their patients. *Id.* at 112-13.

The plurality set out what has become the generally accepted test for third-party standing in these cases. *See, e.g., Haskell*, 635 F. Supp. at 555. First, the third party must have a right that is "inextricably bound up with the activity the litigant wishes to pursue." 428 U.S. at 114. In addition, "some genuine obstacle" to the ability of the third party to assert his or her own right must exist. *Id.* at 115-16. In *Singleton* four members of the Court found that patients or doctors are equally effective proponents because of the confidential nature of their relationship. *See also* Doe v. Bolton, 410 U.S. 179, 188-89 (1973) (doctors consulted by pregnant women have standing because of direct threat of personal detriment from prosecution under statute); Griswold v. Connecticut, 381 U.S. 479, 481 (1965) (doctor and family planning counselor have standing to raise constitutional rights of married people with whom they had professional relationship). The *Roe* constitutional protection is based, in part, on an unwillingness to interfere with the doctor's and patient's decision to have an abortion. The Court in *Roe* stated that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." 410 U.S. at 164.

"Genuine obstacles" prevent the patient from asserting her rights. These obstacles include a desire for anonymity and the "imminent mootness" of the claim. 428 U.S. at 116-17. A pregnant woman's claim is imminently moot because her right to an abortion is paramount only in the first trimester. Because litigation usually takes longer than 12 weeks, the claim is moot at the time of trial.

Justice Stevens conceded that to consider "the effect of the statute on the constitutional rights of . . . patients" was appropriate, but stated that this did not necessarily mean that courts could use the above analysis to grant a doctor third-party standing. *Id.* at 121-22.

Justices Powell, Rehnquist, and Stewart and Chief Justice Burger felt that the plurality's chimerical obstacles overstepped precedent. *Id.* at 126. They stated that women could traditionally sue under an assumed name in order to protect their identities and that class actions can avoid the mootness problem. *Id.* The dissenters also objected to third-party standing because the statute in *Singleton* did not interfere with the doctor-patient relationship, as such, but affected only Medicaid's financial arrangement with the patient. *Id.* at 127-29. *But see Haskell*, 635 F. Supp. at 555; Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410, 1413 (N.D. Ohio 1984); West Side Women's Servs. v. City of Cleveland, 573 F. Supp. 504, 510-11 (N.D. Ohio 1983).

8. 432 U.S. 464 (1977).

Court set up a two-tiered standard to determine the validity of such laws.[9] The Court distinguished between "direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[10] Under *Maher* the state may provide counseling and other alternatives to abortion, even when the state policy is to favor normal children over abortion.[11] When no "direct interference" with the fundamental right to an abortion occurs, the Court requires only that the law be rationally related to a legitimate end. If the state policy, however, directly interferes with the right to an abortion, the required demonstration of a compelling interest under strict scrutiny is appropriate.[12]

After *Maher*, lower federal courts were unwilling to apply strict scrutiny to every case that affected a constitutionally protected right. Courts viewed zoning laws as regulations of location and not as genuine interference with the right to an abortion. For example, in *Bossier City Medical Suite v. City of Bossier City*[13] the court upheld a municipal action denying an occupancy license to a medical clinic that wished

9. In *Maher* the patient sued the state in order to compel payment of Medicaid benefits for abortions. The court stated that financial need alone did not make plaintiffs a suspect class. *Id.* at 471. When a suspect class exists, such as race or ethnicity, courts will strictly scrutinize the state interest to determine whether the interest is compelling. When no suspect class or fundamental interest exists, however, courts will invalidate a statute only if it is not rationally related to a legitimate governmental end. *Id.* at 478. This difference is based largely in the burden of proof. When direct interference with a protected right occurs, under *Maher* the burden is then on the state to prove a compelling state interest. If rather than direct interference encouragement of alternatives to abortion occurs, the burden is on the challengers to prove that the statute is irrational with respect to its purpose or governmental goal.

10. *Id.* at 475-76.

11. *Id.* at 474, 477. The court in *Maher* suggested that the state was not required to finance abortions for indigent women any more than it was required to finance private and public schools. *Id.* at 477. A policy favoring childbirth is not per se unconstitutional as long as the government is not erecting barriers to the right to seek an abortion. *Id.* at 474. Use of legislative power to influence a woman's choice is not an improper exercise of state authority, even when the legislation creates no "burden" at all. *See* Thornburgh v. American College of Obstetricians, 106 S. Ct. 2169, 2178 (1986) (statute that required doctors to disclose a wide range of extensive and largely unnecessary information, including a description of the fetus, held unconstitutional because it intimidated women in their free choice). *See also* Margaret S. v. Edwards, 794 F.2d 994 (5th Cir. 1986) (state statute that required doctor to inform patient after the procedure of her right to have the fetus buried or cremated is unconstitutional).

12. *See infra* note 14.

13. 483 F. Supp. 633, 639-40 (W.D. La. 1980).

to perform abortions.[14] A state statute classified abortion as a major operation and the city had zoned the area only for medical offices and minor surgery.[15] The court held that plaintiffs could not simply ignore the zoning laws.[16] Because no evidence of bad faith[17] on the city's part existed, the court applied a lower level of scrutiny, despite the existence of "direct interference" with the right to an abortion under the *Maher* standard.[18]

While some courts, such as the court in *Bossier City*, were unusually deferential to the legislature's finding that the zoning laws did not implicate a fundamental right, later court decisions were not as deferential.[19] In *Deerfield Medical Center v. City of Deerfield Beach*,[20] for example, the court found that the denial of an occupational license under zoning laws is a direct interference with the right to an abortion.[21] The court stated that rather than merely refuse to lift previous restrictions, such laws create new obstacles to the availability of an abortion.[22] The Fifth Circuit Court of Appeals noted that the *Deerfield* court misunderstood the *Maher* test by applying only a rational

14. *Id.* at 640.

15. *Id.* at 642.

16. The zoning classifications were in place when plaintiff purchased the property for his abortion facility. The court was not sympathetic to the fact that he did not inquire into the zoning laws at the time of the purchase. "A commercial enterprise cannot disregard the land use regulations of a valid zoning ordinance merely because its customers may be exercising a fundamental right." *Id.* at 648.

17. The court found that the zoning board acted in good faith despite an "ill-advised state court suit" in which the city alleged that it morally opposed abortion and that no demand existed for the procedure. *Id.* at 650 n.35.

18. One explanation for the *Bossier City* result is that plaintiffs challenged only the local zoning ordinance and not the state statute that classified abortion as a major surgery. *Id.* at 642. As a result, the court accepted the legislative finding that abortion is major surgery. Another possible explanation is that the court found no evidence of bad faith. *Id.* at 639 n.5. Because the zoning ordinance and the state statute were both in place before plaintiffs purchased the property, no evidence of an intent to restrict access to a fundamental right existed. An intent to exclude renders the legislative purpose illegitimate. The act, therefore, would be invalid under either or both tiers of the *Maher* test.

19. *See, e.g.*, Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981); West Side Women's Servs. v. City of Cleveland, 573 F. Supp. 504 (N.D. Ohio 1983).

20. 661 F.2d 328 (5th Cir. 1981). The district court opinion, which was summarized and criticized in the appellate court decision, was not published.

21. *Id.* at 335.

22. *Id.*

relationship test.[23] Under the *Maher* test, strict scrutiny is required when denial of a license directly affects the plaintiff's ability to provide abortion services.[24] In *Deerfield* the ordinance classified the abortion clinic as a conditional use.[25] This classification was a significant burden on the protected rights because it postponed the clinic's availability, chilled other developers, and cut off patient access.[26]

In *West Side Women's Services (WSWS) v. City of Cleveland*[27] the

23. *Id.* at 336. The issue on appeal was whether a preliminary injunction was appropriate. The court focused, then, on the likelihood of success on the merits. *Id.* at 333-34.

24. *Id.* at 334. Strict scrutiny is dependent upon plaintiff's ability to obtain third party standing. Though the medical center's claim constituted a cause of action, the center could assert only an economic loss rather than deprivation of a fundamental right, so the appropriate standard of review was the rational relationship test.

Deerfield and *Singleton* applied a similar analysis. The *Deerfield* court relied on Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (mail order contraceptive business had standing to assert the rights of potential purchasers of contraceptives), and Craig v. Boren, 429 U.S. 190 (1976) (beer vendor had standing to assert the equal protection claims of underage men in a constitutional challenge to a statute that permitted women but not men to drink at age 18), which both demonstrate that a vendor can assert the constitutional rights of his customers. The *Deerfield* analysis, however, also concentrated on the *Singleton* factors: the relationship between the litigant and the third party and the obstacles that prevent the third party from bringing suit.

25. State zoning laws usually allow municipalities, with zoning board approval, to create special exceptions to zoning classifications. These special exceptions are called conditional uses. The zoning statute must set out standards for these exceptions and, generally, the special exception must be compatible with the surrounding zone. For example, a zoning board might designate a certain area for industrial development only. The board would then make a nuclear power plant a conditional use so that the developer would have to negotiate for prior approval from the board. This typical practice gives the zoning board added control over development. *See generally* D. MANDELKER, LAND USE LAW (1982).

26. The court also found that under strict scrutiny analysis the city's justification for the ordinance was not compelling. The mere proximity of an abortion clinic to a residential area and a Catholic church was not a compelling justification for refusing the occupancy license, particularly because the residential area included other local businesses and medical office buildings.

Defendants also argued that the clinic would cause blight and deterioration of property values similar to that observed in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). In *Young* the establishment of adult movie theaters contributed to the crime and moral degeneration of the surrounding area. *Id.* at 55. Deerfield Beach, however, offered no evidence that an abortion clinic would have a similar effect on property values. By its own standards, the city permitted the revocation of licenses only on very specific grounds such as fire hazard, excessive noise, or trash accumulation. The city alleged none of these problems. 661 F.2d at 336-38.

27. 572 F. Supp. 504 (N.D. Ohio 1983). Plaintiff rented a facility zoned for local retail business. Retail businesses included medical offices with five employees or less.

court applied the *Maher*[28] two-tiered test and stated that not all distinctions between abortions and other medical procedures are invalid. The court also stated that courts should use a lower level of scrutiny when the state only encourages alternative methods of childbirth and does not interfere with the protected right to seek an abortion.[29] The court defined the undue burden or direct interference that triggers strict scrutiny as anything greater than a *de minimis* burden.[30] An emergency ordinance prohibiting the licensing of any abortion clinic in the local business district in this case was clearly more than a *de minimis* burden because the clinic could not open without the license.[31] Although strict scrutiny was appropriate, the court invalidated the ordinance under the lowest level of scrutiny.[32]

When zoning restricts access to a constitutional right, evidence of

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When the city discovered plaintiff's development intentions, the city council passed an emergency ordinance prohibiting the licensing of any abortion service within the local business district. *Id.* at 506-07. Evidence showed that the emergency ordinance was in response to public opposition to the abortion clinic and that the city's only express justification was a general health, safety, and welfare incantation. *Id.*

28. The district court in *WSWS* interpreted *Maher* to allow the state to make a value judgment favoring childbirth over abortion. The court decided that the local licensing requirement was such a value judgment and, therefore, applied the rational relationship test. 450 F. Supp. at 798. The court then noted that no fundamental right to perform abortions exists and stated that "[p]laintiffs are not prevented from treating their patients—they are only restricted as to the location of their facilities." *Id.* at 798-99. Although this conclusion would lead to a denial of the preliminary injunction, on the trial of the constitutional issues the district court found that *Roe* protected both the decision to have an abortion and also effectuation of that decision. 573 F. Supp. at 513. The court stated, "[n]ot only may the state not interfere with the physician-patient relationship essential to the woman's decisionmaking process, but the steps it takes to restrict access to abortions to regulate the abortion procedure itself will also be closely scrutinized." *Id.* *See* Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (court recognized the need for a physician to act in his best medical judgment and that the state could not impair that judgment through over-regulation of the doctor's job). Whether the doctor can successfully assert that his right to perform abortions is a fundamental liberty remains unclear.

29. At trial, the court found that the licensing requirement was not merely a value judgment designed to encourage childbirth. Rather, the requirement raised new obstacles and inhibited access to abortions. The court noted, however, that even if the city designed the ordinance to exclude abortions in order to promote family values, the city was unable to demonstrate the necessary rational nexus. Defendants presented no evidence that a woman would carry her child to term simply because a zoning law made it more difficult to find an abortion facility—the mother might travel further to find another facility. 573 F. Supp. at 522.

30. *Id.* at 516.

31. *Id.* at 516-18.

32. Plaintiff, therefore, was entitled to summary judgment. *Id.* at 524. The city had

available alternatives should mitigate the burden on that right.[33] For instance, no significant interference occurs if a city excludes abortion clinics from one area of town, but permits them to operate a few blocks away. A significant burden occurs, however, if the woman is in Shreveport, Louisiana, and the nearest clinic is in Dallas. Thus, if strict scrutiny is appropriate only when more than a *de minimis* burden on the constitutional right exists, the availability of other clinics bears directly on this issue. In *WSWS*, however, the court held that evidence of available clinics is not relevant to determining whether the interference is permissible.[34] Other courts have followed this view and disallowed evidence of geographic availability for purposes of showing the relative burden on plaintiffs' rights.[35]

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failed to present any evidence of a specific purpose for the emergency ordinance or threat to health, safety, and welfare. *Id.* at 521.

The court also found that because the city officials could not provide any justification for the ordinance, a question of fact existed as to whether the officials were acting in good faith. Generally, city government officials are entitled to qualified immunity as long as they act in good faith. *See* Fox Valley Reproductive Health Care Center, Inc. v. Arft, 454 F. Supp. 784, 786 (E.D. Wis. 1978). Under 42 U.S.C. § 1983 (1982), officials may be personally liable for any damages resulting from their actions. The court remanded the case to determine whether the defendants had the proper intent. 573 F. Supp. at 524.

The court also awarded plaintiffs interim attorney's fees. 594 F. Supp. 299, 302 (N.D. Ohio 1984). This award discourages defendants from causing further delay and greater costs in order to force plaintiffs to settle for a lesser amount, and thus equalizes the bargaining power of the parties.

33. For example, when an ordinance regulates the aesthetic values of commercial speech and thereby implicates first amendment rights, the availability of other methods of communication becomes an important factor in determining the extent of the burden on those rights. *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) (city aesthetic regulation banning paper political posters upheld when other media forms were available to convey the same message). The distinction between such ordinances and zoning ordinances impacting access to an abortion is not clear.

34. 573 F. Supp. at 518. "The question is not whether the activity may be engaged in elsewhere, but whether it was constitutional to restrict [access to abortions] in the manner chosen by defendants." *Id.* This implies that regardless of how many abortion clinics are available in a given geographic location, the court would still find such a licensing requirement unconstitutional. This conclusion is consistent with a facial attack on the ordinance as distinguished from an attack on the statute's application to the particular situation. Thus, if the ordinance is invalid on its face, reference to a specific deprivation of right is inappropriate. *See* Family Planning Clinic, Inc. v. City of Cleveland, 594 F. Supp. 1410 (N.D. Ohio 1984) (plaintiff has *just tertii* standing to represent women who would use abortion facilities). Similarly, a plaintiff who launches a facial challenge need not exhaust all administrative remedies before bringing suit. Fox Valley Reproductive Health Care Center, Inc. v. Arft, 454 F. Supp. 784, 787 (E.D. Wis. 1978).

35. 594 F. Supp. at 1416-17.

A total exclusion of a protected right from a geographic market is generally per se unlawful.[36] Courts, however, also invalidate zoning ordinances when a law excludes abortion clinics from just one zone. In *Family Planning Clinic v. City of Cleveland*[37] the court held that the city could not eliminate a "potential clinic alternative" regardless of the location of other clinics.[38] Unlike *Maher*, the City of Cleveland created new obstacles to obtaining an abortion rather than simply refusing to remove old ones.[39] Once the city excludes a clinic from a residence-office district, the court reasoned, the city could later exclude clinics from other districts.[40]

After *Roe v. Wade*, Cleveland amended its zoning ordinance to exclude freestanding abortion clinics[41] from an area designated for medical office buildings and multi-family dwellings.[42] Although Chief Judge Battisti criticized the expansive reading that the Supreme Court and other federal courts gave to abortion as a fundamental right, the court felt bound by precedent to declare this ordinance unconstitutional.[43] In sharp contrast to *Bossier City*,[44] the court invalidated the

36. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (total exclusion of live entertainment from a municipality violates the first amendment).

37. 594 F. Supp. 1410 (N.D. Ohio 1984).

38. *Id.* at 1417. In *Family Planning* a preexisting zoning ordinance permitted development of hospitals and clinics as long as these facilities did not include specific classes of care. These categories included abortions, treatment of contagious diseases, insanity, epileptics, and drug or liquor patients. *Id.* at 1412-14. The city denied the license. *Id.* at 1412.

39. Raising new obstacles to access to abortion is tantamount to a direct interference with the right and as such requires strict scrutiny of the state interest in the ordinance. In *Maher* the court considered the refusal to distribute public funds for abortions for indigent women as preservation of the status quo and not as the creation of new obstacles to access. 432 U.S. at 474-76.

40. 594 F. Supp. at 1417.

41. *Id.* at 1419. A freestanding clinic is not physically connected to a hospital or other medical center.

42. See *supra* note 40. In *Family Planning* the ordinance was poorly drafted and contained wide loopholes. The court stated that a strict reading of the ordinance would permit solo practitioners but not partnerships to perform abortions. In practice, however, the city never issued an abortion license. 594 F. Supp. at 1415. The ordinance was also unconstitutionally vague because the city failed to adequately define "clinic." *Id.* at 1415-16. Without this definition a doctor would not know until he was prosecuted whether or not his office was a "clinic." *Id.*

43. 594 F. Supp. at 1419. Chief Judge Battisti also decided and wrote the district court opinions in *WSWS*. *See* 450 F. Supp. 796 (N.D. Ohio 1978) (preliminary injunction denied) *and* 573 F. Supp. 504 (N.D. Ohio 1983) (plaintiff's motion for partial summary judgment granted).

exclusion despite no evidence of bad faith[45] and despite the fact that the exclusion applied only to a single district.[46] The different outcome in these two cases demonstrates that courts are less tolerant of zoning ordinances that single out abortion clinics as a separate class.[47]

Despite this general lack of tolerance for separate treatment of abortion clinics, the court in *Haskell v. Washington Township*[48] created a potential loophole to this popular view when a doctor filed suit challenging a 1982 zoning resolution that limited abortion facilities to a zone that was not available for development.[49] The resolution also

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44. *See supra* notes 13-19 and accompanying text.

45. Theoretically, bad faith is not a factor under the *Maher* two-tier test. *See supra* notes 9-11 and accompanying text. The *Maher* test questions whether an undue or more than a *de minimis* burden occurs and not whether the purpose of the burden was improper. Similarly, the bad faith of the legislative body in excluding clinics should not be a factor when plaintiffs made a facial challenge to the statute. The statute, if facially unconstitional, is unconstitutional on its own terms and not because of the legislators' intent. As a practical matter, if bad faith exists in the drafting process, courts tend to use strict scrutiny whether or not the law places more than a *de minimis* burden on the protected right. In both *Bossier City* and *Maher* no evidence of an improper legislative purpose existed. In both cases the state was successful under a rational relationship test. *Maher*, 432 U.S. at 478; *Bossier City*, 483 F. Supp. at 650. In *WSWS*, however, the city passed an "emergency ordinance" intending to exclude the proposed abortion clinic. 573 F. Supp. at 507. The court granted summary judgment to the plaintiffs. *Id.* at 524. While evidence of bad faith is relevant to whether the asserted state interest is compelling and to whether the purpose of the ordinance is a legitimate governmental objective, it should have no impact on the threshold question of what standard of scrutiny is appropriate.

46. 594 F. Supp. at 1418. As in *WSWS*, the size of the market and the geographic location of other abortion facilities is not a relevant factor. This factor, however, is not crucial because the city failed to show why abortion clinics should be treated differently from other medical facilities or why such clinics do not belong in a residence-office district. *Id.*

47. The exclusion of all medical clinics is much easier to justify than having to show why an abortion clinic, but not an emergency medical clinic, should be excluded. Here, the city passed the amendment excluding abortion clinics soon after the *Roe* decision. Absent any evidence to the contrary, the court said that the statute was as likely to have the unlawful purpose of restricting access to a constitutional right as it was to have a lawful purpose. Given the lack of any compelling justification, the court declared the denial of plaintiff's license unconstitutional. *Id.* at 1419.

48. 588 F. Supp. 528 (S.D. Ohio 1984) (defendant's motion to dismiss granted); 624 F. Supp. 634 (S.D. Ohio 1985) (plaintiff's motion for partial summary judgment granted).

49. 588 F. Supp. at 529. Dr. Haskell filed suit after a series of harassing incidents. He originally took out a five-year lease in a medical office building. On October 6, a few days after plaintiff executed the lease, the township trustees held a public hearing at which the neighbors' opposition to the clinic's opening became clear. *Id.* at 529-30. On October 18, the trustees began legal proceedings against the owners of the building al-

classified abortion clinics as a controlled use,[50] so that if land in this zone became available, those interested in opening an abortion clinic would have to first get special approval from the Zoning Board of Appeal.

Plaintiff argued that because abortion is a fundamental right, strict scrutiny is appropriate for any law that places more than a *de minimis* burden on a woman's freedom of choice. Once such an impingement is established, the burden of proof shifts to the defendant, who must assert a compelling state interest that justifies the impingement.[51] Plaintiff argued further that because the defense failed to explicitly assert any justification for the resolution, summary judgment was appropriate.[52] Defendant argued in rebuttal that genuine question of fact existed as to whether the ordinance placed more than a *de minimis* burden on the right to an abortion.[53] Deciding that the right to an abortion includes "not only the decision, but also the effectuation of the decision to abort a pregnancy,"[54] the court held that the burden on the plaintiff's right to access was more than *de minimis* because the ordinance completely excluded abortion clinics from the township. The court stated that the zone's limited acreage alone was enough to establish a substantial impact on that right and therefore justify use of the strict scrutiny standard.[55]

Although defendant did not assert any justification for the ordi-

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leging off-street parking problems, despite the fact that the city had previously approved the building's parking plan. The plaintiff abandoned his plan to put the medical center in the building, *id.* at 530, and the suit was dismissed for lack of an injury. The court found that the suit was dismissed for lack of an injury. The court found that the plaintiff abandoned his plans prior to passage of the resolution and had failed to allege any present intent to open a clinic. *Id.* at 531. Dr. Haskell later purchased two lots on which to build the clinic to demonstrate his intent to open the facility. 635 F. Supp. at 551.

The area zoned for abortions was unavailable because a cement plant completely occupied the zone's 3.3 acres. *Id.* at 558. The district court found that this effectively banned abortions in Washington Township. 588 F. Supp. at 530.

50. For definition of controlled use, see *supra* note 25.

51. 635 F. Supp. at 558.

52. *Id.* at 556.

53. *Id.* The city also argued that a 1986 amendment to the resolution rendered plaintiff's claim moot. The court dismissed this argument in a single paragraph, stating that even if the 1986 resolution was constitutional, plaintiff was entitled to sue under 42 U.S.C. § 1983 to recover for injuries incurred between 1982 and 1986. *Id.* at 562. In any event, the court also invalidated the 1986 resolution for vagueness. *Id.* at 561-62.

54. *Id.* at 556 (quoting *WSWS*, 573 F. Supp. at 513).

55. *Id.* at 558. Because the court found strict scrutiny appropriate given the limited

nance, the court gleaned three legislative purposes from depositions taken of township trustees.[56] These purposes were (1) a policy to uphold life over death;[57] (2) a desire to insulate elected officials and the abortion zoning decision from political controversy by transferring the zoning decisions to the Zoning Board of Appeal, which is an appointed rather than an elected body;[58] (3) a need to control the influx of patients from outside the township.[59]

After discounting the first two justifications, the court[60] held that local governments have a compelling interest in controlling traffic, congestion, and noise through zoning.[61] But in an unusual analysis, the court applied an extra balancing test and held that the compelling interest in traffic control did not outweigh the fundamental right to an abortion.[62] The court, therefore, granted partial summary judgment and held that the resolution was unconstitutional.[63]

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nature of the zone, the court did not reach the issue of whether classifying abortion services as a conditional use is, by itself, more than a *de minimis* burden.

56. *Id.* at 559.

57. *Id.* This argument is more sophisticated than it appears. Under *Maher*, the state is permitted to exercise a policy of favoring childbirth over abortion as long as the policy does not erect new obstacles to access to the fundamental rights. 432 U.S. at 474. In this case the city clearly imposed new obstacles when the 1982 resolution classified abortion services in an unavailable zone. Prior to the resolution, the zoning laws did not distinguish between abortion and other medical facilities. The resolution forced doctors to seek separate zoning classifications and to split their practice between abortions and all other medical treatments. 635 F. Supp. at 559. The court treated this burden on the doctors in offering abortion services as a burden on the fundamental right itself.

58. 635 F. Supp. at 559-60. If the township trustees made the decision to include abortion facilities in a blanket business zone, then voters could overrule that decision by referendum. Given the public opposition to the clinic, such a referendum was likely even if contrary to Supreme Court policy. The trustees were also preserving their own jobs by avoiding a patently unpopular decision. When the plaintiff publicized his decision to open a facility, the trustees decided to make abortion clinics a controlled use under the Zoning Board of Appeal's jurisdiction. The inference is that the 1982 resolution was a response to plaintiff's announcement and that any public benefit justification was illusory and less than compelling. *Id.* at 559-61.

59. *Id.* at 560. Generally, in B-1 zones, the business catered to a neighborhood clientele, and in B-2 zones, the customers were community-wide. A B-3 zone included anything that drew a clientele from outside of the community. The court assumed that the only rationale for these classifications was the increased traffic, noise, and parking problems associated with a larger drawing business. *Id.* at 560-61.

60. *See supra* notes 57-59 and accompanying text.

61. 635 F. Supp. at 560.

62. *Id.*

63. *Id.* at 560-61.

The court's analysis of the right to seek an abortion is confusing in that the court adhered to established constitutional doctrine in its choice of tests, but utilized an unprecedented version of the test's application. The court's use of strict scrutiny under the facts of this case was both appropriate and consistent with the widely accepted view that total exclusion of a protected business is per se unlawful.[64] While courts will generally defer to the local zoning board if the exclusion is rational and does not infringe on some constitutional right, the total exclusion of a fundamental right clearly exceeds the protective threshold of the *de minimis* burden test.

The court's version of strict scrutiny analysis, however, is without precedent. Under standard strict scrutiny analysis, regulations that place a substantial burden on the abortion decision "must be justified by a compelling state interest, and will be deemed invalid if the proferred justifications are not substantial enough to justify the burden imposed."[65] The court in *Haskell* used a slightly different two-step approach: (1) whether the proferred justification is compelling in the abstract; and (2) if so, whether the compelling municipal interest outweighs the nature and the degree of the burden.[66] The *Haskell* court assumed that traffic, noise, and parking problems were compelling municipal interests,[67] but determined that they did not outweigh the interest in protecting a fundamental right.[68] This is a balancing test, not strict scrutiny. Strict scrutiny is a set of rigid presumptions designed to avoid the pitfalls of balancing tests that provide trial judges with no decisional framework except their own judgment. One of the purposes of higher scrutiny is to remove this discretion in order to ensure the uniform protection of fundamental rights. Thus, if a court finds that a

64. Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (total exclusion of live entertainment is a first amendment violation).

65. *WSWS*, 573 F. Supp. at 517.

66. 635 F. Supp. at 557-61.

67. *Id.* at 560. Little precedent exists for this assumption. *See* Davenport v. City of Alexandria, 683 F.2d 853 (4th Cir. 1892) (smooth flow of traffic is a compelling safety interest supporting the city's ban of a bagpiper from performing on public sidewalks when performances actually interfered with the traffic flow). *See also* Hickory Firefighters Ass'n v. City of Hickory, 656 F.2d 917 (4th Cir. 1981) (city's interest in preserving access to public buildings and maintaining vehicular and pedestrian traffic flow is sufficiently compelling to allow restrictions on the first amendment by a picketing ordinance).

68. 635 F. Supp. at 560. The *Haskell* court's reliance on *WSWS* is misplaced. The *WSWS* court did not mention the balancing of state and private interests. *See* 573 F. Supp. at 517.

compelling state interest exists, the challenged statute is presumed constitutional. Although this analytical difference was not crucial to the outcome of *Haskell*, it may change the verdict in other cases in which the burden imposed on the abortion decision is not so egregious.[69]

A related issue upon which the courts have not yet ruled is whether local governments may zone businesses that involve controversial but protected fundamental rights when the government's intent is to legitimately control location rather than totally exclude the business. Many courts assume that such regulations are constitutionally valid, though some tension exists between views like those expressed in *Bossier City*[70] and *Haskell*. The court in *Bossier City* assumed that no fundamental right to perform abortions exists and that doctors seeking to open clinics are subject to zoning laws.[71] Under this view, legitimate zoning regulation of even protected businesses is in the public interest. Zoning laws do not prevent doctors from treating their patients; the laws merely regulate the location of the facility.[72]

In *Haskell* the court found the city's classification of abortion facilities as a controlled use unconstitutional. Because developers were now forced to request a rezoning, the court reasoned that the township had imposed a substantial burden on the right to obtain an abortion.[73] The opinion, however, is not clear as to whether this burden is always unconstitutional or whether it is only unconstitutional on the facts of this case because the city failed to assert any compelling justifications. Although the controlled use designation in *Haskell* requires special

69. The phrase "balancing test" in *Haskell* may have been poorly chosen and just semantically different from actual strict scrutiny analysis. In individual rights cases, the trial judge determines whether the state interest is more important than the individual rights. By labeling certain individual interests as "fundamental" and certain state interests as "compelling," courts imply that both of these interests are very important. But because no individual right is absolute, the state always wins in a standoff between compelling state and fundamental individual interests. The word "compelling" in this context means that the state interest is overriding. Thus, the balancing test is incorporated into the determination of whether the state interest is compelling. Further balancing, as in *Haskell*, is therefore unnecessary.

70. *See supra* notes 13-19 and accompanying text.

71. 483 F. Supp. at 648. *See also WSWS*, 450 F. Supp. at 798 (reversed on other grounds).

72. 450 F. Supp. at 799.

73. 635 F. Supp. at 560. The city argued that the plaintiff never applied for rezoning after purchasing the property. The court, however, responded that "the process of rezoning in itself imposes a substantial burden on those who desire to provide abortion services." *Id.*

permission from a zoning board of appeals in order to establish an abortion facility,[74] this would not be per se unconstitutional under the *Bossier City* court's rationale.

Thus, courts have not provided a clear resolution to the issue of whether a city may impose reasonable zoning restrictions that have an incidental effect on a woman's protected right to seek an abortion. In other areas involving the zoning of constitutionally protected businesses, such as the zoning of adult movie theaters and book stores,[75] courts have taken the position that these businesses are subject to the zoning laws even though the laws place some burden on protected rights.[76] In *Playtime Theatres v. City of Renton*[77] a city ordinance that zoned pornographic book stores because of their secondary effects[78] was not unconstitutional for placing some burden on the businesses.[79] Thus, in the abortion clinic context, the zoning of abortion clinics, be-

74. 635 F. Supp. 556-60. The language in *Haskell* is very broad. The opinion is not clear as to whether the 1982 ordinance is unconstitutional because (1) evidence of harassment existed; (2) the ordinance imposed a controlled use requirement; (3) the B-3 zone contained no available acreage; (4) the city did not provide any justification for its actions; or (5) some combination of the above. *Id.*

75. Young v. American Mini Theatres, Inc., 427 U.S. 50, 62 (1976) (merely subjecting protected material to zoning and other licensing requirements is not sufficient reason for invalidating the law); Felix v. Young, 536 F.2d 1126 (6th Cir. 1976) (the zoning of adult theatres was subject only to the rational relationship test when the state passed an ordinance under its liquor regulatory power).

76. *See, e.g.*, Playtime Theatres v. City of Renton, 475 U.S. 41 (1986) (zoning of adult theaters is permissible to avoid blight and declining property values). The district court in *Haskell* distinguished *City of Renton* because *City of Renton* applied only to obscene materials that have limited first amendment protection. This is consistent with the general notion that the nature of the right asserted determines the standard of review. *See* Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981).

77. 475 U.S. 41 (1986) (dispersal zoning ordinance stopped adult movie theaters from operating within 1,000 feet of any single or multiple residential district).

78. *Id.* The secondary effect in *City of Renton* was a well documented history of crime, prostitution, drug dealing, sodomy, and deterioration of property values that surrounded adult book stores and movie theaters. *Id.* at 44. *See also* Young v. American Mini Theatres, 427 U.S. 50, 54 (1976) (findings by the Detroit Common Council that some uses of property, if concentrated in limited areas, are injurious to the neighborhood).

79. 475 U.S. at 44-45. The ordinance implicated the first amendment rights of these businesses, but because it did not purport to regulate the speech itself, the court uheld the ordinance. In the abortion context, effective zoning is not an overly broad solution to the blight problem as long as the city permits such proprietors to compete with other businesses for land. A city cannot exclude protected businesses, but must permit them to "fend for themselves in the real estate market, on an equal footing with other prospective purchasers." *Id.*

cause of their "secondary effects," should be constitutionlly permissible. These effects would include excess traffic, noise, and possibly demonstrations and picketing.[80] While the secondary effects of a clinic are not as obvious or well-documented as the blight described in *Playtime Theatres*, traffic and demonstrations can damage property values. The protection of property values is a legitimate reason for zoning.[81]

The special zoning of businesses that involve controversial but constitutionally protected rights can be a tool for harassment and abuse. Zoning laws designed to regulate business locations are, however, important and legitimate means of protecting public health and safety. Fundamental rights, on the other hand, need strong protection against possible abuse, but these protections should not be so inflexible as to inhibit genuine regulation of secondary effects.

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80. 635 F. Supp. at 560. By upholding traffic and safety as a compelling justification for the ordinance, the court in *Haskell* admits that the zoning board has an interest in pursuing legitimate zoning goals. The secondary effects doctrine, however, makes more sense intellectually than classifying business and trade as compelling interests. The traffic involving an abortion clinic is normally not any greater than that of any other medical office facility. A few additional cars do not warrant the adjective "compelling."

81. 475 U.S. at 45.