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Zbaraz v. Quern : Abortion and Medicaid: The Public Funding Dilemma, 12 J. Marshall J. Prac. & Proc. 609 (1979)

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CASENOTES

ZBARAZ V. QUERN
ABORTION AND MEDICAID: THE PUBLIC FUNDING DILEMMA

Pregnancy is a unique medical condition,[1] and the law continues to struggle with the problems presented by its termination. Before the landmark decision in *Roe v. Wade*,[2] abortion[3] was a crime.[4] The Texas statutes at issue in *Wade*[5] were typical of many state statutes on criminal abortion in making an exception where abortion was necessary to save the pregnant woman's life.[6] *Wade* and its companion case, *Doe v. Bolton*,[7] decriminalized abortion.[8] But the issues regarding public funding of now-legal abortions for those who lack the means to pay for themselves remain problematic. "The sensitive and emotional nature of the abortion controversy"[9] now gives rise to litigation regarding an indigent woman's right to a publicly-funded

1. "In contrast to most conditions for which people seek a doctor, pregnancy is usually prediagnosed by the patient." A. F. GUTTMACHER, M.D., PREGNANCY AND BIRTH 30 (1st ed. 1962). Furthermore, pregnancy is a normal (*i.e.*, non-pathological) physiological phenomenon which nevertheless requires medical care. *See* note 17 *infra*.

2. 410 U.S. 113 (1973).

3. "Abortion is the expulsion of the fetus at a period of utero-gestation so early that it has not acquired the power of sustaining an independent life." People v. Heisler, 300 Ill. 98, 100, 132 N.E. 802, 803 (1921).

4. "The crime of abortion is the wilful bringing about of an abortion without justification or excuse." 1 AM. JUR. 2d *Abortion* § 1 (1962).

5. TEX. PENAL CODE ANN. arts. 1191-1194, 1196 (Vernon 1948).

6. Many statutes in defining criminal abortion . . . contain an exception where a miscarriage or abortion is necessary to save the woman's life, or is advised by competent physicians to be necessary for that purpose. Such statutes are usually construed to make nonnecessity to save life a constituent and essential element of the crime. . . .

1 AM. JUR. 2d *Abortion* § 9 (1962).

7. 410 U.S. 179 (1973).

8. *Wade* held that "for the period of pregnancy prior to this 'compelling' point [approximately the end of the first trimester] the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated." 410 U.S. at 163. *Bolton* held that a state could not limit the availability of abortions by imposing such requirements as approval of the hospital staff abortion committee or concurrence of two other physicians in the attending physician's judgment that the procedure was necessary. 410 U.S. 179 (1973).

9. Roe v. Wade, 410 U.S. 113, 116 (1973).

abortion, and the distinctions among abortions that are elective,[10] therapeutic,[11] and necessary for the preservation of life are as meaningful today as they were before *Wade*.

In 1965—when abortion was still a crime—Congress enacted the Medicaid program, Title XIX of the Social Security Act.[12] Medicaid is a state-administered program, funded jointly by the federal and state governments, to provide "necessary medical services"[13] to the indigent.[14] Title XIX requires a state plan to set "reasonable standards" for determining who is eligible to receive Medicaid benefits.[15]

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10. "Elective" is used to mean the same thing as "medically unnecessary" or "nontherapeutic." Maher v. Roe, 432 U.S. 464 (1977).

11. "Therapeutic" is defined as "medically necessary or medically indicated according to the professional medical judgment of a licensed physician in Illinois, exercised in light of all factors affecting a woman's health." Zbaraz v. Quern, 596 F.2d 196, 197 n.3 (7th Cir. 1979).

12. Act of July 30, 1965, Pub. L. No. 89-87, 79 Stat. 343 (codified at 42 U.S.C. §§1396-1396(d) (1970), *as amended* by 42 U.S.C. §§ 1396-1396(d) (Supp. V 1975).

13. Medicaid provides medical care for the "categorically needy" (welfare recipients). 42 U.S.C. §1396a(a)(10)(A) (1970). It also provides for the "medically needy" (those who are ineligible for welfare because they have higher incomes, but whose medical expenses make them medically indigent). 42 U.S.C. §1396a(a)(10)(C) (1970).

A state that chooses to participate in the Medicaid program (only Arizona does not participate) must at least provide care for the categorically needy. 42 U.S.C. § 1396a(a)(10) (1970). The plan must include at least the first five services listed in 42 U.S.C. §1396d(a). These are:

(1) inpatient hospital services;
(2) outpatient hospital services;
(3) other laboratory and X-ray services;
(4) skilled nursing facility services and family planning services;
(5) physician services.

42 U.S.C. §1396a(a)(13)(B) (1970). The state may choose to provide other services from the sixteen enumerated at §1396d(a)(1)-(16). The state may choose to include the medically needy in the medical assistance plan. If it does, they must be provided either the first five items of §1396d or any seven of the sixteen enumerated services. 42 U.S.C. §1396a(a)(13)(C) (1970). If the state plan includes the medically needy, it must provide to the categorically needy the services provided to the medically needy. 42 U.S.C. §1396a(a)(10)(B) (1970).

14. The preamble to §1396 indicates that Title XIX was enacted

> [f]or the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or permanently disabled individuals, whose income and resources are insufficient to meet the costs of *necessary medical services*. . . .

42 U.S.C. §1396 (1970) (emphasis added).

15. A state plan must "include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this title. . . ." 42 U.S.C. §1396a(a)(17) (1970).

Title XIX does not refer to any specific medical procedure,[16] including abortion. So when *Wade* and *Bolton* decriminalized abortion, making it another medical procedure for the treatment of pregnancy,[17] it was not illogical to assume that Medicaid would fund abortions for indigents. In fact, Medicaid funds did become available, even for purely elective abortions, and when such funds were restricted to therapeutic abortions the courts seemed willing to uphold the indigents' right to an elective abortion.[18]

In *Coe v. Hooker*,[19] a federal district court found that a state statute which excluded Medicaid reimbursement for medically unnecessary abortions while it funded all other types of pregnancy care "violated Title XIX's mandate of equality."[20] Nontherapeutic abortions were considered to be "necessary medical services."[21] *Coe* held that abortion is an alternative treatment for the medical condition of pregnancy which a Medicaid recipient may choose and the state "may not unreasonably restrict."[22]

However, a year later, a trio of Supreme Court cases put an end to mandatory public funding of elective abortions. *Beal v. Doe*[23] held that a state's "refusal to extend Medicaid coverage to nontherapeutic abortions is not inconsistent with Title XIX,"[24] although the state could choose to provide such coverage. *Maher v. Roe*[25] held that for purposes of equal protection analysis, denial of welfare to indigents did not create a suspect class

16. "Title XIX does not. . . specify or limit the type or extent of medical assistance which the states must furnish eligible persons." Coe v. Hooker, 406 F. Supp. 1072, 1079 (D.N.H. 1976).

17. "There is no dispute that some medical service is necessary for the treatment of pregnancy." *Id.* at 1080. "Pregnancy is unquestionably a condition requiring medical services." Beal v. Doe, 432 U.S. 438, 449 (1977).

18. *E.g.*, Doe v. Rose, 380 F. Supp. 779 (D. Utah 1973), *aff'd*, 449 F. 2d 1112 (10th Cir. 1974) (holding unconstitutional a state policy of paying only for abortions where the pregnant woman's life or physical health was threatened); Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973) (holding unconstitutional a state statute limiting state Medicaid funds to medically necessary abortions).

19. 406 F. Supp. 1072 (D.N.H. 1976).

20. *Id.* at 1083.

21. "Nontherapeutic abortions are no less necessary than other methods of treatment of pregnancy merely because a woman has the option of carrying her pregnancy to full-term. . . ." *Id.*

22. *Id.* at 1086.

23. 432 U.S. 438 (1977).

24. *Id.* at 447.

25. 432 U.S. 464 (1977). This is the case which prompted the well-known comment from President Carter: "[A]s you know there are many things in life that are not fair, that wealthy people can afford and poor people can't. But I don't believe that the Federal Government should take action to try to make these opportunities exactly equal, particularly when there is a moral factor involved." N.Y. Times, July 13, 1977, at 1, col. 4.

based on wealth,[26] nor did it impinge upon a fundamental right.[27] In short, public funding of elective abortions was not required.[28] In *Poelker v. Doe*,[29] the Court found no constitutional violation in providing publicly-financed hospital services for childbirth without providing such services for elective abortions. The Court held that it is constitutional to express a preference for normal childbirth through such a policy.[30]

The increasing reluctance to publicly fund abortions, judicially manifested in these three decisions, took legislative form the same year in the Hyde Amendment. The Amendment was a rider to the annual Department of Health, Education, and Welfare appropriations bill.[31] The comparable section of the fiscal 1978 bill[32] is somewhat broader, but still provides federal funds for abortions only where the pregnancy endangers the woman's

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26. 432 U.S. 464, 470-71 (1977).

27. *Id.* The Court in *Wade* had held that only a compelling state interest could justify restriction on the constitutionally-protected right to terminate a pregnancy. It found no such interest during the first trimester, but held that the state's interest in the health of the pregnant woman and potential life of the fetus justified second and third trimester regulation. It concluded in *Maher* that state refusal to fund nontherapeutic abortions did not impinge upon the fundamental right recognized in *Wade* because it "places no obstacles . . . in the pregnant woman's path to an abortion." She simply must obtain it privately. *Id.* at 472-74.

28. "*Wade* . . . and . . . *Bolton* . . . simply require that a state not create an absolute barrier to a woman's decision to have an abortion. These precedents do not suggest that the State is constitutionally required to assist her in procuring it." *Id.* at 481 (Burger, C.J., concurring).

29. 432 U.S. 519 (1977).

30. The dissent felt that it was "constitutionally impermissible that indigent women be 'subjected to State coercion to bear children which they do not wish to bear [while] no other women similarly situated are so coerced'." *Id.* at 522 (Brennan, J., dissenting).

Contra, D —— R —— v. Mitchell, 456 F. Supp. 609, 615 (D. Utah 1978):

> Persons in this country have many rights which they may exercise freely in the sense that a government cannot prohibit the exercise of their rights. This does not mean, however, that the government has a corresponding duty to fund the exercise of those rights. Likewise, the state's refusal to pay for the exercise of the right does not limit, penalize or prohibit the exercise of that right in the constitutional sense.

31. Act of Sept. 30, 1976, Pub. L. No. 94-439, §209 (90 Stat. 1418): "None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term."

It has been pointed out that this language

> may be said to be inapt. . . . No funds are "contained" in any Act; funds are contained only in the Treasury. Nor are funds "used" to "perform" abortions; instruments, medications . . . may be used to "perform" abortions and funds are pertinent only to the extent that they are payment for the application. . . .

Doe v. Mathews, 420 F. Supp. 865, 866 (D.N.J. 1976).

32. The version of the bill which was passed in 1978 was unchanged for fiscal year 1979.

life, resulted from rape or incest, or would result in "severe and long-lasting physical health damage to the mother."[33]

The issue raised by the enactment of the Hyde Amendment was whether the states were still obligated by Title XIX to fund non-elective abortions which fell outside the parameters of the Hyde Amendment, and consequently would not be federally reimbursed. Some courts have held that the states' obligation was unchanged,[34] while others have held that if the federal government would not fund these abortions, the states need not do so either.[35]

Illinois dealt with the divergence of opinion regarding state payment by prohibiting the granting of public assistance for abortions except where necessary to preserve life.[36] This was the final step in the genesis of the problem dealt with in *Zbaraz*

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33. Provided, that none of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest have been reported promptly to a law enforcement agency or public health service, or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Act of Dec. 9, 1977, Pub. L. No. 95-205, §101 (91 Stat. 1460).

It is noteworthy that Congressman Hyde did not vote for the 1978 or 1979 "Hyde Amendments," presumably because he objected to the broadening of federal funding beyond abortions for life-endangering pregnancies.

34. "[Title XIX] was not amended or affected by the Hyde Amendment. . . . It has no application to the kinds of items for which a State must pay if it has enacted a Medicaid law." Doe v. Mathews, 420 F. Supp. 865, 869 (D.N.J. 1976).

"[T]he Hyde Amendment appears to be simply a limitation on the federal government's undertaking under Title XIX to reimburse the jurisdictions participating in the Medicaid program." Doe v. Mathews, 422 F. Supp. 141, 143 (D.D.C. 1976).

"A state . . . may have assumed the risk, in setting up its medical assistance program, of in fact paying for a somewhat greater share of the cost of the program than it might have originally anticipated." *Id.* at 146.

35. "The manifest fact is that Section 209 [the Hyde Amendment for fiscal year 1977] is calculated to stop the provision of abortional services from public funds; it is not calculated to shift the burden of providing this medical assistance to the states." McRae v. Mathews, 421 F. Supp. 533, 538 (E.D.N.Y. 1976).

36. P.A. 80-1091, an act to amend §§5-5, 6-1 and 7-1 of "The Illinois Public Aid Code," codified as ILL. REV. STAT. ch. 23, §§5-1, 6-1, 7-1 (Supp. 1977), prohibits

> the granting of financial aid where the purpose of such aid is to obtain an abortion, induced miscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child.

v. Quern.[37] Title XIX was mandating public funding of necessary medical services, generally considered to include therapeutic abortions,[38] while at the same time both the federal[39] and state[40] governments had cut off funding for all but certain narrow categories of therapeutic abortions. Litigation over who would fund medically necessary abortions in cases where the woman's life was not at stake was inevitable.

ZBARAZ V. QUERN

A class action was filed in 1977 under the Civil Rights Act[41] to enjoin enforcement of Illinois P.A. 80-1091.[42] The basis of the suit was that the act denied plaintiffs and the classes they represent[43] rights guaranteed by Title XIX and by the Fourteenth Amendment.[44] Plaintiffs were two doctors who perform medically necessary abortions for indigent women whose lives are not necessarily threatened by pregnancy;[45] the Chicago Welfare Rights Organization, whose members include women dependent on Illinois medical assistance;[46] and Jane Doe, an indigent

37. 596 F.2d 196 (7th Cir. 1979); No. 77 C 4522 (N.D. Ill. Apr. 29, 1979).

38. "Since the medical assistance program is designed to provide *necessary* medical services for the needy, . . . Illinois must provide funds for all therapeutic abortions. . . .[N]ecessary medical services are *more* than services to save a life in peril." Zbaraz v. Quern, No. 77 C 4522, slip op. at 10 (N.D. Ill. May 15, 1978), *vacated* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

39. *See* notes 31-33 *supra*.

40. *See* note 36 *supra*.

41. 42 U.S.C. §1983 (1970).

42. Codified as ILL. REV. STAT. ch. 23, §§5-5, 6-1, 7-1 (Supp. 1977).

43. The district court certified two classes: (1) pregnant women eligible for Illinois medical assistance for whom an abortion is medically necessary but not necessary to save their lives, and (2) Illinois doctors certified to receive reimbursement for necessary medical services who perform therapeutic abortions for women eligible for Illinois medical assistance. Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

44. *Id.* at 197.

45. The Supreme Court has held that physicians performing such services have standing to sue "to assert the rights of women patients as against governmental interference with the abortion decision." Singleton v. Wulff, 428 U.S. 106, 118 (1976). The physicians suffer an injury in fact from the withdrawal of federal funds which is sufficiently concrete to create a case or controversy subject to Article III jurisdiction.

46. The Supreme Court has also held that a pregnant woman has standing to sue.

> [W]hen . . . pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us.
>
> Pregnancy provides a classic justification for a conclusion of

woman requiring a medically necessary abortion although her life was not endangered.[47] The principal defendant was Arthur F. Quern, Director of the Illinois Department of Public Aid.

The district court exercised *Pullman*-type abstention[48] on the theory that P.A. 80-1091 could be construed as consistent with the Social Security Act, and the exercise of federal jurisdiction would therefore be imprudent.[49] Plaintiffs appealed, and the appellate court held that abstention was inappropriate, since "it is unlikely that a state court construction of P.A. 80-1091 would moot in their entirety the statutory and constitutional claims. . . ."[50] It remanded the case for consideration of the question of preliminary relief. The district court then held that Title XIX requires Illinois to provide medical assistance funding for all therapeutic abortions.[51] The court agreed with plaintiffs' contention that Illinois's "failure to cover 'medically necessary' abortions under the Illinois medical assistance programs violates the Social Security Act and implementing regulations."[52] Because the state's funding obligation was held to be unaffected

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nonmootness. It truly could be "capable of repetition yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Roe v. Wade, 410 U.S. 113, 125 (1973).

47. Jane Doe was thirty-eight years old, had had nine previous pregnancies, and had a history of varicose veins and thrombophlebitis. Continuation of her pregnancy would probably have resulted in recurrence of her varicose veins, necessitating surgery to remove them, and would have created a risk of deep vein thrombophlebitis which would impair her circulation and require prolonged hospitalization. "In the opinion of her physician, an abortion was medically necessary for her, though not necessary to preserve her life." Brief for Plaintiffs-Appellees at 10-11, Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

48. Quoting Bellotti v. Baird, 428 U.S. 132, 147 (1976), the court pointed out that *Pullman*-type abstention is appropriate "where an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem."

According to Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 492, 498 (1941), "[t]he essence of the doctrine is that the federal courts should avoid entering into 'a sensitive area of social policy . . . unless no alternative to its adjudication is open'." Zbaraz v. Quern, 572 F.2d 582, 584 (7th Cir. 1978).

49. Zbaraz v. Quern, No. 77 C 4522, slip op. at 2 (N.D. Ill. Apr. 29, 1979).

50. Zbaraz v. Quern, 572 F. 2d 582, 586 (7th Cir. 1978).

51. Citing 42 C.F.R. §449.10(a)(5)(i) [45 C.F.R. §249.10(a)(5)(i)] and White v. Beal, 413 F. Supp. 1141 (E.D. Pa. 1976), the court stated that Title XIX requires that

> the state establish "reasonable standards" for determining the extent to which assistance will be given "consistent with the objectives of [the program]". . . .Illinois may not arbitrarily deny or reduce the amount, duration or scope of services to an otherwise eligible individual solely because of the diagnosis or type of condition.

Zbaraz v. Quern, No. 77 C 4522, slip op. at 9 (N.D. Ill. May 15, 1978), *vacated* Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

52. *Id.* at 8.

by passage of the Hyde Amendment, defendants were permanently enjoined from denying funds for such abortions.[53] Defendants appealed.

THE SEVENTH CIRCUIT DECISION

The plaintiffs did not "object to the refusal to fund purely elective abortions, and challenge[d] the limitation on funding only as to medically necessary abortions."[54] This is noteworthy, since as recently as 1976 the courts were willing to vindicate an indigent woman's right to a publicly-funded *elective* abortion.[55] However, in 1977 *Maher v. Roe* put an end to this policy,[56] and today aid to the indigent has been so restricted that lawsuits to prevent the denial of *therapeutic* abortions are necessary.

Acknowledging the sensitive and controversial nature of the public funding for abortion issue, the court began its opinion with a caveat: "Our line of duty is to construe these laws, neither to condone nor criticize them."[57] It noted that *Roe v. Wade* had invalidated penal laws restricting abortions under the due process clause of the Fourteenth Amendment.[58] The court also acknowledged that the United States Supreme Court has recently reaffirmed the fundamental nature of the right to an abortion in the early stages of pregnancy.[59] The court thus accepted the *right* to an abortion. The problem it dealt with was who must pay for the exercise of that right in the case of an indigent. Could the government in effect prevent some abortions by

53. "Defendant may not pick and choose among medically necessary treatments for medical assistance recipients, but must provide funds for treatment when, in the discretion of the attending physician, such treatment is medically indicated. The definition of medical necessity may not differ when the condition treated is pregnancy." *Id.* at 10-11.

54. Zbaraz v. Quern, 596 F.2d 196, 197 (7th Cir. 1979).

55. *See* notes 17-22 and accompanying text *supra*.

56. *See* notes 25-28 and accompanying text *supra*.

57. Zbaraz v. Quern, 596 F.2d 196, 198 (7th Cir. 1979).

58. *See* note 8 and accompanying text *supra*.

59. "[T]he State's interest in the potential life of the fetus reaches the compelling point at the stage of viability. Hence, prior to viability, the State may not seek to further this interest by directly restricting a woman's decision whether or not to terminate her pregnancy." Colautti v. Franklin, 99 S.Ct. 675, 677 (1979). This case is considered a major victory by the Reproductive Freedom Project of the American Civil Liberties Union Foundation because it reaffirms the constitutional limitations on state restrictions of abortion. However, the prohibition of direct restrictions leaves room for indirect influence such as providing funds for childbirth but not for elective abortions. *See* notes 23-30 and accompanying text *supra*.

Colautti held a Pennsylvania abortion control statute that required a doctor to use an abortion technique most likely to produce a live birth if the fetus "is viable" or "may be viable" to be void for vagueness. It also held impermissibly vague the standard-of-care provision which left uncertain whether the physician's duty to the woman or to the fetus was paramount.

refusing to fund them for women who lack the means to pay for themselves?

Noting that the Hyde Amendment provides funding for two categories of abortions not covered by the Illinois law,[60] the court stated that "Illinois is required to fund abortions falling into these categories under its Medicaid plan and is entitled to the usual federal reimbursement."[61] The extremely narrow Illinois law was thus invalidated. But could the state be further required to pay for a broader scope of abortions than the federal government under the Hyde Amendment? The issue remaining was whether the Hyde Amendment merely prohibited the expenditure of federal funds for those abortions that are medically necessary but not within its three categories, or whether it actually amended Title XIX so that only those three categories of abortions must be provided by a state under Medicaid.[62]

Preterm, Inc. v. Dukakis

The *Zbaraz* opinion relies heavily[63] on *Preterm, Inc. v. Dukakis*,[64] a ruling on a Massachusetts abortion funding law similar to the Illinois law.[65] *Preterm* is the first appellate decision on these issues.[66] The *Preterm* court concluded that "limiting Medicaid assistance to life-threatening abortions[67] 'violate[s] the purposes of the Act and discriminate[s] in a proscribed fashion'," [68] and that Title XIX requires the states to provide medically necessary abortions. It held that the Hyde Amendment "altered" Title XIX to allow participating states to limit abortion funding to the categories specified in the Amend-

60. These are cases of promptly-reported rape or incest, and cases in which the pregnancy would result in severe and long-lasting physical health damage to the woman. Zbaraz v. Quern, 596 F.2d 196, 199 n.7 (7th Cir. 1979).

61. *Id.*

62. *Id.* at 199.

63. The opinion says "we agree" with the *Preterm* decision [*see* note 71 *infra*] four times. *Id.* at 198-199.

64. 591 F.2d 121 (1st Cir. 1979).

65. Two district courts have also recently handed down opinions in similar cases: Frieman v. Walsh, No. 77-4171-CV-C (W.D. Mo. Jan. 26, 1979) (a state is not constitutionally required to fund abortions other than those described in the Hyde Amendment, and is obligated to fund abortions for the needy only insofar as it will receive federal reimbursement); Roe v. Casey, 464 F. Supp. 487 (E.D. Pa. 1978) (state statutes limiting medical assistance payments to abortions necessary to save the life of the woman violate Title XIX by arbitrarily discriminating against medically necessary abortions on the basis of the diagnosis and type of condition involved).

66. Preterm, Inc. v. Dukakis, 591 F.2d 121, 123 n.1. (1st Cir. 1979).

67. This language is inaccurate: it is the pregnancy that is life-threatening, not the abortion.

68. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979).

ment.[69] The *Zbaraz* court adopted this holding to reconcile the Hyde Amendment with Illinois's obligations under Medicaid to fund abortions for the needy. Having decided that the Illinois provisions could be no narrower than the federal, it now held that they need also be no broader.

The analysis that led the *Preterm* court to its conclusion began with an inquiry into what is "medically necessary" under Title XIX. *Beal v. Doe*[70] held that Title XIX "require[s] that state Medicaid plans establish 'reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX]'."[71] *Beal* contains dictum that is relevant to this issue: "[S]erious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage. . . ."[72] Reading this statement together with the HEW regulations[73] on state exclusion of payments,[74] the *Beal* court decided that restricting treatment for the condition of medically complicated pregnancy to life and death situations "crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition."[75]

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69. We hold that the legislative history of the Hyde Amendment is consistent with the cooperative federal-state structure of the Medicaid Act and reveals that the Amendment constituted a substantive policy decision concerning the public funding of abortions which left the states free to fund more abortions than those for which federal funds were made available by the Amendment, but did not require them to do so. The Medicaid Act, to the extent of its repugnancy with the Hyde Amendment, has therefore been altered by the Amendment.

Preterm, Inc. v. Dukakis, 591 F.2d 121, 134 (1st Cir. 1979).

70. 432 U.S. 438 (1977).

71. *Id.* at 441, quoting 42 U.S.C. §1396(a)(17)(Supp. V. 1970).

72. *Id.* at 444.

73. (a) The plan must specify the amount and duration of each service that it provides.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c)(1) The medicaid agency may not deny or reduce the amount, duration, or scope of a required service under §§440.210 (for the categorically needy) and 440.220 (for the medically needy) to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(2) The agency may place appropriate limits on a service based on medical necessity or on utilization control procedures.

42 C.F.R. §440.230 (1978).

74. State exclusion of payments was found to be impermissible because it did not bear a rational relationship to the federal purpose of providing a service to those having the greatest need for it. White v. Beal, 555 F.2d 1146 (3d Cir. 1977) (state regulation granting eyeglasses to those having slight visual impairment because of eye pathology but denying them to those with poorer vision caused by refractive errors was held to be invalid under Medicaid).

75. Preterm, Inc. v. Dukakis, 591 F.2d 121, 126 (1st Cir. 1979).

On the basis of the *Beal* decision, the problem with the Illinois statute at issue in *Zbaraz* was that it restricted state aid to life-threatening pregnancies. The *Zbaraz* court felt this was an impermissible discrimination based on medical condition. What saved the Hyde Amendment from invalidity under this reasoning was its inclusion of the exception "where severe and long-lasting physical[76] health damage to the mother would result if the pregnancy were carried to term. . . ."[77] It does not restrict treatment for medically complicated pregnancy so severely as to discriminate on the basis of medical condition.

Impact of the Hyde Amendment

With the narrowing of the definition of medical necessity for abortion established, the next question was what impact the withdrawal of federal funds by the Hyde Amendment[78] had on the states' obligation under Title XIX. Two possibilities are addressed in *Preterm* and *Zbaraz*: first, the Hyde Amendment limits federal reimbursement for therapeutic abortions outside the Hyde categories, but does not change the states' obligation under Title XIX to fund them;[79] second, "the Hyde Amendment alters Title XIX in such a way as to allow states to limit funding to the categories of abortions specified in that amendment."[80] Both courts "reluctantly"[81] held that the latter interpretation is correct. Since Title XIX prohibited discrimination based on condition,[82] the Hyde Amendment conflicted with its substantive provisions by singling out certain abortions for funding.[83] This conflict was resolved by concluding that "Congress utilized the device of withholding federal funds as the means of making a substantive change in the law."[84]

There is at least a third possible interpretation of the impact of the Hyde Amendment on Title XIX which neither *Zbaraz* nor *Preterm* considered: the Amendment redefines "medically necessary" with regard to abortion to include only those categories it lists, so any abortion not specified in the Amendment is not considered therapeutic. This interpretation can be gleaned from the language in *Roe v. Casey*:

76. Note that "severe and long-lasting" *mental* health damage presumably would not justify a Hyde Amendment abortion.

77. *See* note 33 *supra*.

78. *See* notes 31-33 and accompanying text *supra*.

79. "I would hold that the Hyde Amendment is limited, as it clearly says, to the expenditure of federal funds and that the medically necessary requirements of the Medicaid Act still apply to the states." Preterm, Inc. v. Dukakis, 591 F.2d 121, 138 (1st Cir. 1979) (Bownes, J., dissenting).

80. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979).

81. *See* notes 87-91 and accompanying text *infra*.

82. *See* notes 70-75 and accompanying text *supra*.

83. Zbaraz v. Quern, 596 F.2d 196, 199 (7th Cir. 1979).

84. Preterm, Inc. v. Dukakis, 591 F.2d 121, 129 (1st Cir. 1979).

> [T]he Hyde Amendment . . . is . . . a congressional affirmance of the Supreme Court's decision in *Beal v. Doe*[85] . . . that states need not provide funding for . . . nontherapeutic abortions. The very language of the Hyde Amendment supports this conclusion, for it provides funding . . . where severe and long-lasting physical health damage to the mother would result. . . .[86]

If the states must pay only for therapeutic abortions, and the Hyde Amendment affirms this conclusion, it follows that the categories of abortions defined in the Amendment must be those that are medically necessary for Title XIX purposes.

LEGISLATION BY APPROPRIATION

Having decided that Title XIX had been amended, the *Zbaraz* court was obliged to address the issue of legislation by appropriation, for this is what it held Congress had done.[87] Support for this holding was necessary because the general rule is that "repeals by implication are not favored."[88] The Supreme Court had recently reaffirmed this view,[89] emphasizing its particular disapproval of interpreting an appropriations bill as a substantive modification of an existing law.[90] The Court felt that such an interpretation would produce confusion and disruption of substantive law.[91] According to its own rules,[92] Congress is

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85. 432 U.S. 438 (1977).

86. Roe v. Casey, 464 F. Supp. 487, 502 (E.D. Pa. 1978).

87. In *Preterm*, the court looked to the legislative history of the Hyde Amendment and concluded that Congress intended to substantively change Title XIX by withholding federal funds. It felt that the impact of this action on the states' Medicaid obligation justified such an inquiry in spite of the general rule that construction of a statute which is clear does not require extrinsic aids [*see, e.g.*, Caminetti v. United States, 242 U.S. 470, 485 (1917)].

In *Zbaraz*, however, this sequence was reversed. The court first accepted the holding in *Preterm* that the Hyde Amendment did amend Title XIX, and then examined the legislative history to support its "reluctant" conclusion.

88. Morton v. Mancari, 417 U.S. 535, 549 (1974) [quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936)].

89. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 163 (1978) (the argument that Congress's continuing appropriations for the Tellico Dam repealed by implication the Endangered Species Act was rejected).

90. "[T]he policy applies with even *greater* force when the claimed repeal rests solely on an appropriations act." *Id.* (emphasis in original).

91. We recognize that both substantive enactments and appropriations measures are "acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure.

Id.

92. Senate Standing Rule XVI, §4 (94th Cong. 1975) provides: "No

not to use appropriations measures to amend existing laws, including authorization of expenditures.[93]

In spite of this judicial disapproval of legislation by appropriation, however, it seems to be conceded that Congress can take such action if it wishes.[94] What is required in order to find a substantive change in existing legislation is a clear manifestation of Congressional intent,[95] for "[a]n amendment will not readily be inferred."[96] In the absence of such clear intent, the government's obligation under the existing statute could be found still to exist, in spite of the lack of funding.[97]

The court decided that the lack of clearly-defined state obligations under Medicaid made it "appropriate to consult the legislative history[98] . . . to see what impact its provisions were intended to have on the substantive obligations of the participating states."[99] It concluded, as the *Preterm* court had,[100] that

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amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received."

House Rule XXI, §2 (94th Cong. 1976) provides:

> No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order, except such as being germane to the subject matter of the bill shall retrench expenditures by the reduction of the number and salary of the officers of the United States, by the reduction of the compensation of any person paid out of the Treasury of the United States, or by the reduction of amounts of money covered by the bill.

93. City of Los Angeles v. Adams, 556 F.2d 40, 48 (D.C. Cir. 1977).

94. "Where Congress chooses to do so, however, we are bound to follow Congress' last word on the matter even in an appropriations law." *Id.* at 49.

"Congress may in an appropriation act place limitations upon otherwise permanent law." Eisenberg v. Corning, 179 F.2d 275, 276 (D.C. Cir. 1949).

"There can be no doubt that Congress could suspend or repeal the authorization contained in §9; and it could accomplish its purpose by an amendment to an appropriation bill, or otherwise." United States v. Dickerson, 310 U.S. 554, 555 (1940).

95. New York Airways, Inc. v. United States, 369 F.2d 743, 749 (Ct. Cl. 1966).

96. *Id.*

97. "It is not for the courts to deny the validity of the statutory authorization simply from lack of funding." Friends of the Earth v. Armstrong, 485 F.2d 1, 13 (10th Cir. 1975) (Lewis, C.J., dissenting).

Accord, New York Airways, Inc. v. United States, 369 F.2d 743, 748 (Ct. Cl. 1966) (The right to payment would be enforceable in the Court of Claims).

98. *See* note 87 *supra*.

99. Zbaraz v. Quern, 596 F.2d 196, 200 (7th Cir. 1979).

100. "Congress utilized the device of withholding federal funds as the

Congress intended to "alter the scope"[101] of Medicaid funding for abortions.[102] The court examined the Congressional Record[103] and found the legislators' assumption to be that when federal funds were withdrawn, the states would refuse to pay for abortions for which they would not be reimbursed.[104] Possibly an implicit assumption by those legislators was that an increased state funding burden for abortions would increase popular opposition to abortion. It also found that Congress was aware it was legislating through an appropriations bill,[105] a procedure of which the Supreme Court disapproved.[106]

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means of making a substantive change in the law." Preterm, Inc. v. Dukakis, 591 F.2d 121, 129 (1st Cir. 1979).

101. Zbaraz v. Quern, 596 F.2d 196, 200 (7th Cir. 1979).

102. Perhaps the court chose the word "alter" because it was not entirely comfortable with the holding that Title XIX had been amended.

103. "There are neither conference reports nor committee reports; all we have are the debates and insertions in the Congressional Record." Preterm, Inc. v. Dukakis, 591 F.2d 121, 128 (1st Cir. 1979).

104. Zbaraz v. Quern, 596 F.2d 196, 200 (7th Cir. 1979). The court cites (at 200 n.10) the remarks of thirteen legislators in support of this assumption. As one might expect, however, there were those who took the opposite view:

> I think we ought to be very clear that the result of the compromise (Hyde) amendment is to determine who pays for the abortions that will take place under State law.
>
> . . . .
>
> . . . [W]hat we are talking about is not legislation as to whether or not there would be an abortion but legislation to determine what is the fair burden sharing between the Federal Government and the State Government with regard to payments for abortions which will take place under State law without regard to the bill we have considered.

122 CONG. REC. S16114 (daily ed. Sept. 17, 1976) (remarks of Senator Stevens).

In any case, Illinois soon passed P.A. 80-1091 (*see* notes 36 & 42 *supra*), which was even more restrictive than the FY 1978 & 1979 Hyde Amendments, with the result that no abortions would take place under state law that would not be federally reimbursed. It was this combined cutoff of funds for therapeutic abortions of non-life-threatening pregnancies that resulted in the instant litigation.

105. "I have said many, many times . . . that this does not belong on the HEW bill. It is legislation of the rawest nature on an appropriations — money bill." 123 CONG. REC. S19440 (daily ed. Dec. 7, 1977) (remarks of Senator Magnuson).

106. Yesterday, remarks were made that it is unfortunate to burden an appropriation bill with complex issues, such as busing, abortion and the like. I certainly agree that it is very unfortunate. The problem is that there is no other vehicle that reaches this floor in which these complex issues can be involved. Constitutional amendments which prohibit abortions stay languishing in subcommittee, much less committee, and so the only vehicle where the Members may work their will, unfortunately, is an appropriation bill. I regret that. I certainly would like to prevent, if I could legally, anybody (*sic*) having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the HEW medicaid bill. A life is a life. The life of a

Whether this disapproval was a cause of concern to Congress is unclear, but the *Zbaraz* court was careful to distinguish the circumstances surrounding passage of the Hyde Amendment from those in *Tennessee Valley Authority v. Hill*.[107] This distinction permitted the court to follow the legislation by appropriation theory to its logical result: "Illinois is not required by Title XIX to fund abortions other than those covered by the Hyde Amendment."[108] The district court was ordered to modify its permanent injunction[109] accordingly.[110]

The *Preterm* court also attempted to distinguish *Hill*. It cited *United States v. Dickerson*[111] as a more apposite case in that it specifically referred to the statute amended.[112] *Dickerson* is distinguishable, however, in that the Hyde Amendment does not refer to Title XIX, which weakens the support of this precedent.

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little ghetto kid is just as important as the life of a rich person. And so we proceed in this bill.

123 CONG. REC. H6083 (daily ed. June 17, 1977) (remarks of Congressman Hyde).

107. Two differences were found to exist: (1) Congress was aware of, and accepted, the implications of the Hyde Amendment; and (2) *Hill* involved whether expenditures authorized under one Act could repeal the substantive provisions of an independent Act, whereas here the appropriations measure was geared to the substantive provisions of the affected Act in the form of a limitation on previously-authorized expenditures, rather than an authorization of prohibited expenditures as in *Hill*. Zbaraz v. Quern, 596 F.2d 196, 201 (7th Cir. 1979).

108. *Id.* at 202.

109. *See* notes 51-53 and accompanying text *supra*.

110. After remanding the case to the district court, the appellate court addressed the issue of whether Illinois's withdrawal of funds for Illinois public aid programs was severable from its withdrawal of funds from the state Medicaid program. Since P.A. 80-1091 is narrower than the Hyde Amendment, plaintiffs wanted the portions to be held not severable so the whole statute would be enjoined along with the Medicaid portion.

The Illinois Supreme Court's test for severability of provisions of a law is whether "it can be said that the General Assembly would not have passed the statute with the invalid portion eliminated." People *ex. rel.* Engle v. Kerner, 32 Ill. 2d 212, 221-22, 205 N.E.2d 33, 39 (1965). Because the court found it was not clear that the General Assembly would have imposed standards for the state plan different from those for Medicaid, and because defendant stated that Illinois law represents Illinois's understanding of the purpose of the Hyde Amendment, the law was held to be not severable.

111. 310 U.S. 554 (1940).

112. A discharged enlisted man who re-enlisted was denied an enlistment allowance on the ground that the allowance had been suspended by the following appropriation rider for the Rural Electrification Administration:

> "[N]o part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment" of any enlistment allowance for "re-enlistments made during the fiscal year ending June 30, 1939, notwithstanding the applicable portions of sections 9 and 10" of the Act of June 10, 1922.

Id. at 555.

A consideration not mentioned by the court which might have strengthened its holding is that the Hyde Amendment has been re-enacted each year since 1977. *New York Airways, Inc. v. United States*[113] pointed out that a funding limitation for a single year "suggests that no change in substantive law was intended."[114] Conversely, then, an ongoing annual limitation such as the Hyde Amendment suggests that a substantive change *was* intended.

The court was dealing with a very sensitive issue. Legislation by appropriation is generally disfavored, but Congress is nevertheless held to have such authority if it wishes to exercise it. Looking to the legislative history of an act that is clear on its face is disfavored, but a court is required to find a clear Congressional intent before it can hold existing legislation to have been amended.[115] Finally, a court which finds such an amendment can be accused of violating the doctrine of separation of powers by finding the amendment where none existed.[116] This decision can be supported on the basis of Hyde's legislative history, its annual re-enactment, and legal precedent. However, a fairly strong case can be made against a holding of amendment.

On May 14, 1979, the United States Supreme Court refused to issue a writ of certiorari to review the statutory decision in *Preterm*,[117] "clearing the way for state officials to cut off funding for most abortions."[118] This is of course largely a victory for defendants, whose goal is to reduce public funding of abortions. It therefore appears that the Supreme Court will not review the propriety of *Preterm's* holding of legislation by appropriation, although there is at least a possibility that this case might be heard together with an appeal of the constitutional issues in *Zbaraz* if the plaintiffs in *Preterm* are granted leave to reapply for certiorari.

THE CONSTITUTIONAL ISSUES

Since it felt that "[t]he parties should have a full opportunity to develop their positions and the district court to rule on

113. 369 F.2d 743 (Ct. Cl. 1966).

114. *Id.* at 749.

115. As a general proposition Congress has the power to amend substantive legislation for a particular year by an appropriation act, although such procedure is considered undesirable legislative form and subject to a point of order. An amendment will not readily be inferred. The intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest.

Id.

116. Friends of the Earth v. Armstrong, 485 F.2d 1, 13 (10th Cir. 1973) (Lewis, C.J., dissenting).

117. Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979).

118. Chicago Sun-Times, May 15, 1979, at 17, col. 3.

them,"[119] the Seventh Circuit remanded the case for consideration of the constitutional issues.[120] The specific question to be addressed was whether the Hyde Amendment's limitation of funding to certain categories of medically necessary abortions[121] violated the Fifth Amendment, since "no other category of medically necessary care is subject to such constraints,"[122] and since *Roe v. Wade* has declared abortion to be a fundamental right.[123] There is at least an implication in this direction that the Seventh Circuit felt the Hyde Amendment would be found to be unconstitutional on these grounds.

The basis of this issue is whether the needy woman who is denied a therapeutic abortion because her condition does not fit one of the Hyde Amendment categories is being denied "equal protection of the laws."[124] The question is essentially one of invidious discrimination[125]—is it permissible for Medicaid to pay for some therapeutic abortions and not for others?[126]

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119. Zbaraz v. Quern, 596 F.2d 196, 202 (7th Cir. 1979), [citing Singleton v. Wulff, 428 U.S. 106, 120 (1976)].

120. The district court did not reach the constitutional arguments raised by the parties because it had statutory grounds for its decision.

121. On remand, the district court pointed out that the Seventh Circuit adopted the definition of "therapeutic" in the STATE OF ILLINOIS DEPT. OF PUBLIC AID—MEDICAL ASSISTANCE PROGRAM HANDBOOK FOR PHYSICIANS A-204 (Jan. 1976) (*see* note 11 *supra*) "without addressing the question of whether it was broader than 'medically necessary'."

> Whether the terms "medically necessary" and "therapeutic" are coextensive is a question that is not merely of academic significance. If . . . plaintiffs are advocating a return to the status quo ante, then presumably a decision in their favor would result in the funding of all "therapeutic" abortions. But as we read the complaint, plaintiffs seek funding for "medically necessary" abortions, whether or not that is broad enough to include all "therapeutic" abortions. This reading harmonizes with plaintiffs' theory of the case — that by funding "medically necessary" operations other than abortions, Illinois is denying plaintiffs equal protection of the laws.

Zbaraz v. Quern, No. 77 C 4522, slip op. at 15 n. 4 (N.D. Ill. Apr. 29, 1979).

122. Zbaraz v. Quern, 596 F.2d 196, 202 (7th Cir. 1979).

123. Because abortion is a personal right, it can only be considered "fundamental" because it is included in the guarantee of personal privacy which, although not explicitly mentioned in the Constitution, has been recognized by the Supreme Court in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, and in the penumbras of the Bill of Rights. Roe v. Wade, 410 U.S. 113, 152 (1973).

124. "[A]n 'equal protection' claim, based on the Fourteenth Amendment, . . . applies to the United States through the due process clause of the Fifth Amendment." Doe v. Mathews, 420 F. Supp. 865, 872 (D.N.J. 1976).

125. *Id.* at 872.

126. "Equal protection" means that unjustified discrimination is constitutionally prohibited. With respect to publicly-funded medical care, "when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." Maher v. Roe, 432 U.S. 464, 469-70 (1977). The equal

THE DISTRICT COURT DECISION

On April 29, 1979, the district court held on remand that the Hyde Amendment and P.A. 80-1091 were unconstitutional as applied to medically necessary abortions prior to viability.[127] The United States had been permitted to intervene because the constitutionality of an Act of Congress was at issue,[128] the Seventh Circuit having directed the district court to rule on the constitutionality of the Hyde Amendment as well as of P.A. 80-1091. Acknowledging that plaintiffs had raised other constitutional issues,[129] the court limited its decision to their "principal argument" that "by imposing restrictions on the public funding of medically necessary abortions which are not imposed on other medically necessary operations, P.A. 80-1091 violates their rights to equal protection of the laws. . . ."[130]

The court recognized that the statutes in question erect a "substantial impediment to poor women's obtaining medically necessary abortions." However, the fundamental right recognized in *Roe v. Wade*[131] "is not an affirmative right to an abortion, but is simply a right to make and effectuate the abortion decision . . . free from governmental regulation."[132] Further-

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protection standard involves two tests: compelling interest and rational basis. If legislation impinges upon a fundamental right, or disadvantages a suspect class, a compelling governmental interest is required. Otherwise, a rational basis for the government's action must exist.

127. Zbaraz v. Quern, No. 77 C 4522, slip op. at 13 (N.D. Ill. Apr. 29, 1979).

128. 28 USC §2403 (1976) provides:

> Intervention by United States or a State; constitutional question. (a) In any action, suit or proceeding in a court of the United States to which the United States . . . is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to invervene for presentation of evidence, . . . and for argument on the question of constitutionality. The United States shall . . . have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

129. *See* notes 149-158 and accompanying text *infra*.

130. Zbaraz v. Quern, No. 77 C 4522, slip op. at 5 (N.D. Ill. Apr. 29, 1979). The court referred to the "well-established" framework it used in its equal protection analysis:

> We must decide, first, whether [the statute] operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the [legislative] scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination. . . .

Id. [quoting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)].

131. 410 U.S. 113 (1973).

132. Zbaraz v. Quern, No. 77 C 4522, slip op. at 6 (N.D. Ill. Apr. 29, 1979).

more, *Maher v. Roe* held that a state's refusal to pay for nontherapeutic abortions although it pays the expenses of childbirth "involves no discrimination against a suspect class."[133] Plaintiffs' problems in effectuating the decision to abort resulted from indigency, and not from governmental regulation.[134] Therefore, "since there is no fundamental right to a publicly funded abortion"[135] (because there is no "right" to welfare[136]), and no suspect class involved, strict scrutiny was found to be unnecessary.

However, "since indigent women in medical need of abortions are treated differently than indigent women in medical need of other surgical procedures," the court felt it "must subject the statute to the rational relationship test."[137] Two state interests were considered as rational bases for the legislation, and both were held to be inadequate.

First, allocation of limited public funds was rejected as a justification because the court found that normal childbirth is more expensive than abortion,[138] and if the pregnancy is medically complicated or the child receives public aid after birth, "the cost differential is even greater."[139] Second, the state's interest in protection of a non-viable fetus in a woman for whom an abortion is medically necessary was held not to be legitimate.[140] "[A] pregnant woman's interest in her health so outweighs any possible state interest in the life of a non-viable fetus that, for a woman medically in need of an abortion, the state's interest is not legitimate."[141]

The court felt that the effect of the Hyde Amendment and P.A. 80-1091 would be to increase maternal mortality among indigent pregnant women. The reasons suggested were that most health problems associated with pregnancy are not covered by the Hyde Amendment, and that those which are covered appear

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133. Maher v. Roe, 432 U.S. 464, 470 (1977).

134. Zbaraz v. Quern, No. 77 C 4522, slip op. at 7 (N.D. Ill. Apr. 29, 1979).

135. *Id.* at 8.

136. "The Constitution imposes no obligation on the States to pay . . . any of the medical expenses of indigents." Maher v. Roe, 432 U.S. 464, 469 (1977).

137. Zbaraz v. Quern, No. 77 C 4522, slip op. at 8 (N.D. Ill. Apr. 29, 1979). *See* note 126 *supra.*

138. "[T]he average state payment for an abortion is approximately $145.00, compared to an average cost to the State of $1,372.00 for funding a childbirth." *Id.* at 16 n.8.

139. *Id.* at 9.

140. The court distinguished the Connecticut statute at issue in *Maher*, which funded "medically necessary" abortions. It held that while a state could legitimately prefer childbirth to *elective* abortions, it could not prefer childbirth to *medically necessary* abortions. *Id.* at 10.

141. *Id.* at 12.

later in pregnancy, when abortion is more dangerous.[142] What these health problems are is not specified by the court. With respect to those problems that are not covered by Hyde, the defense would undoubtedly argue that certain of them could be considered *de minimis* in comparison to the state's interest in protection of the fetus. In fact, the court seemed to emphasize the more serious complications that arise later in pregnancy. The court referred to *Memorial Hospital v. Maricopa County*,[143] which struck down on equal protection grounds a state statute requiring one-year's residency as a condition to receiving publicly-funded non-emergency medical care. It held that it was just as "cruel" in this case to "deny needed medical aid to indigent mothers[144] until the point when a doctor is able to certify that the mother's life is endangered or when severe and long-lasting physical health damage appears certain to occur."[145]

Finally, the court concluded that P.A. 80-1091 is constitutional as applied to the abortion of a viable fetus.[146] This decision was mandated by the holding in *Roe v. Wade* that "[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may . . . regulate, and even proscribe, abortion except where it is necessary . . . for the preservation of the life or health of the mother."[147]

Illinois was ordered to fund medically necessary abortions prior to viability. The court refused to order reimbursement of these expenses under Medicaid, since reimbursement had not been requested of the federal government. Defendants sought a stay of the injunction pending appeal from both the district court and the Seventh Circuit. The application was denied by both courts. Defendants then applied to the Supreme Court, which also refused to stay the order, on the ground that immedi-

142. *Id.* at 10-11. These findings were based on affidavits of Dr. Oren Richard Depp and Dr. David Zbaraz.

143. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health. [Serious illnesses], if untreated for a year, may become all but irreversible paths to pain, disability, and even loss of life. The denial of medical care is all the more *cruel* in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.

Id. at 11 [quoting Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974)] (emphasis added by the court).

144. A woman cannot be a mother until she has a child, so referring to a pregnant woman (assuming she has no other children) as a mother implies that her fetus is a human being while still unborn. This usage is consistent with the right-to-life position, but it is anomalous when it comes from a pro-abortionist.

145. Zbaraz v. Quern, No. 77 C 4522, slip op. at 11 (N.D. Ill. Apr. 29, 1979).

146. *Id.* at 12.

147. 410 U.S. at 164-65.

ate irreparable harm in the absence of a stay had not been demonstrated.[148] Illinois is therefore obligated to fund all medically necessary abortions.

ANALYSIS OF ZBARAZ

The First Amendment Issue

The district court did not discuss plaintiffs' allegation that P.A. 80-1091 violated the Establishment and Free Exercise Clauses of the First Amendment.[149] Since this issue will be raised by plaintiffs on appeal,[150] it must be acknowledged. A threshhold question is whether legislation based on religious conviction is prohibited by the Establishment Clause,[151] or whether that clause contemplates only the danger of a church-state. If the former be the case, it will be necessary to determine whether the Hyde Amendment is religion-based.

"Perhaps the single most important legal question in the abortion debate concerns the moment at which the civil right to life vests and becomes a legally protectable interest."[152] The right-to-life groups that oppose public funding of abortions believe that a fetus is a human being from the moment of concep-

148. Williams v. Zbaraz, 47 U.S.L.W. 3772 (1979).

Mr. Justice Stevens found that "a stay is not necessary to preserve the issue for decision by the Court. . . . The question, then, is only whether the District Court's injunction should be observed in the interim. Unless the applicants will suffer irreparable injury, it clearly should be." *Id.* at 3773. He held that irreparable injury would not occur, and denied the applications for a stay.

149. Zbaraz v. Quern, No. 77 C 4522, slip op. at 15 n. 5 (N.D. Ill. Apr. 29, 1979).

150. The April 29, 1979 decision in *Zbaraz* is a federal court decision invalidating an Act of Congress (the Hyde Amendment) in a civil action to which the government was a party. 28 U.S.C. § 1252 permits direct appeal to the United States Supreme Court from such a decision. The only possible ground for refusing to hear the appeal might be that the constitutionality of the Hyde Amendment was raised, not by the parties, but by the Seventh Circuit, which directed the district court to decide the issue. The remarks of Mr. Justice Stevens in his decision on the applications for stay [Williams v. Zbaraz, 47 U.S.L.W. 3772 (1979)] clearly imply that the Supreme Court intends to hear the appeal: "a stay is not necessary to preserve the issue for decision by the Court. . . ." (at 3773); "[w]hether or not the plaintiffs prevail in this Court. . . ." (at 3774).

Plaintiffs have moved for an extension of time to petition for a writ of certiorari when and if the Supreme Court takes jurisdiction of the constitutional issues. If the writ is granted, then the statutory arguments will be heard as well.

151. "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

152. Jonas and Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade—With Commentaries*, 9 J. MAR. J. 551, 583 (1976).

tion.[153] Congress apparently passed the Hyde Amendment because it shared this belief.[154] If humanity at conception could be established as a biological fact, of course, it would cease to be a religious belief and the First Amendment argument would collapse.

The Supreme Court has not directly addressed this question. It decided in *Wade* that "[w]e need not resolve the difficult question of when life begins. When those trained in . . . medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer."[155] In both *Wade* and *Maher* the Court refers to the "*potential* life of the fetus,"[156] in effect evading the issue of whether the fetus is a *present* human life. The Court did decide in *Wade*, however, that a fetus is not a "person" for purposes of the Fourteenth Amendment.[157] The "word . . . has application only postnatally."[158] Thus, while refusing to decide whether a fetus is a "person" *in fact*, the Court has clearly indicated that it is at least not a "person" for purposes of constitutional analysis. The question is therefore left open whether, in the absence of scientific establishment of when life begins, efforts to prevent abortions based on the conviction that a fetus is a human being from the time of conception violate the First Amendment.

The Statutory Issue

The situation that led to these lawsuits was a Title XIX mandate to fund therapeutic abortions, together with a refusal by both the federal and state governments to fund them outside certain narrow categories. Since Title XIX was inconsistent with these combined statutes, it was necessary to alter either the mandate or the refusal to follow it. A decision that the states' obligations under Medicaid were unchanged would have shifted the burden of payment to the states. The *Preterm* court

153. Roe v. Wade, 410 U.S. 113, 150 (1973). This is now the official position of the Roman Catholic Church. *Id.* at 161.

154. Rep. Hyde explained his view as follows:
"Abortion does not merely 'terminate a pregnancy' . . . it is the calculated killing of an innocent inconvenient human being. . . . That is a human life; that is not a potential human life; it is a human life with potential." Neier, *Theology and the Constitution*, 1977 THE NATION 727 n.52.

155. Roe v. Wade, 410 U.S. 113, 159 (1973).

156. *Id.* at 163; Maher v. Roe, 432 U.S. 464, 472 (1977).

157. "[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158.

The Court pointed out that "[i]f this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." *Id.* at 156-57.

158. *Id.* at 157.

felt this burden was too heavy.[159] While there would obviously be some increase in expense to a state, there is no evidence that it would be substantial enough to cripple an entire medical aid plan.

A holding that medical necessity has been redefined[160] by the Hyde Amendment might have been the least distressing to the courts, for it would not change existing legislation or increase the funding responsibilities of the federal or state governments. However, indigent women requiring therapeutic abortions outside the three Hyde categories would be unable to have them if the courts cut off public funds for these abortions. A right to an abortion would be practically meaningless to these women.

The holding that Title XIX was "altered" by the Hyde Amendment also results in rejection of public funding for all but the specified types of abortions. The objection to the disruption of substantive law that legislation by appropriation produces[161] appears to be applicable to *Zbaraz*. If Congress should in the future fail to make the Hyde Amendment a rider to an annual HEW appropriations bill, what would be the result? The amendment of Title XIX is presumably permanent, but an indigent plaintiff could at least argue that in the absence of the appropriations rider which produced it, the "amendment" fails. In an effort to avoid expenditures, the governments—state and federal— could persuasively argue that an express revocation of the Hyde "amendment" of Title XIX is required before public funding of additional therapeutic abortions is required. This is true even though *express* amendment of Title XIX was not held necessary to reduce such funding in the first place.[162]

The holding that Title XIX has been amended by the Hyde Amendment is a pragmatic resolution of the mutually-exclusive nature of the Medicaid requirement for funding on the one hand, and the state and federal refusal to pay for certain abortions on the other.[163] The Seventh Circuit *Zbaraz* case was ar-

159. The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to drop the total cost of providing the service upon the states, runs directly counter to the basic structure of the program, and could seriously cripple a state's attempts to provide other necessary medical services embraced by its plan.
Preterm, Inc. v. Dukakis, 591 F.2d 121, 132 (1st Cir. 1979).

160. *See* notes 85-86 and accompanying text *supra*.

161. *See* notes 87-91 and accompanying text *supra*.

162. *See* note 69 and accompanying text *supra*.

163. *See* notes 38-40 and accompanying text *supra*.

gued before *Preterm* was decided,[164] but not decided until afterward. Apparently, the *Zbaraz* court seized the resolution of the *Preterm* court as a workable solution which places the responsibility for decisions regarding abortion funding with Congress. It says, in effect, "Congress has taken this matter out of our hands." The only question left for the courts was the constitutionality of the Hyde Amendment.

Abortion and Medicaid

Many basic issues regarding abortion remain unresolved. Since *Roe v. Wade* prohibits governmental interference in a private decision to have a privately-funded first-trimester abortion, the tensions of the abortion issue are now focused on the two aspects of the public funding problem: Which abortions should government pay for, and how should the burden be divided between federal and state government? A complete analysis of these issues is beyond the scope of this paper, but an awareness of their existence is necessary to an understanding of the public funding dilemma.

At the heart of the problem is the issue of morality. For those who believe that a human life exists from the moment of conception,[165] abortion is immoral. The constitutional argument, then, is that there is a rational basis for denying public funding for abortions outside the Hyde Amendment categories—a moral basis. The policy of the State of Illinois, as declared by the legislature in 1975, is that "the unborn child is a human being from the time of conception."[166] It is evidently for this reason that Illinois rejected payment for abortions of non-life-threatening pregnancies. The state felt that it could pick and choose among the medical treatments it would provide on a moral basis, because morality is a rational basis. To this the plaintiffs reply that "to view the unborn child as the equivalent of a newborn child, regardless of the implications for the health[167] or privacy of a pregnant woman bearing the child, is

164. *Zbaraz* was argued November 1, 1978 and decided February 13, 1979. *Preterm* was decided January 15, 1979.

165. *See* notes 152-58 and accompanying text *supra*.

166. [T]he General Assembly of the State of Illinois . . . [reaffirms] the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception. . . .

ILL. REV. STAT. ch. 38, § 81-21 (1975).

167. "[L]egal abortion is safer than childbearing." Petitti and Cates, *Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age*, 67 A.J.P.H. 860 (1977).

Mortality rates for women undergoing early abortions, where the

precisely the policy that the Supreme Court found impermissible in *Wade*."[168] For those who do not consider the fetus to be a human being, it is not immoral for a woman to end an unwanted pregnancy by abortion.

Between the extreme positions on the abortion issue — pro-life and pro-abortion — is the position taken by most Americans—pro-choice.[169] The pro-choice position is essentially the holding of *Roe v. Wade* that "by adopting one theory of life," a state may not "override the rights of the pregnant woman that are at stake."[170] Those who support the pro-life position consider pro-choice to be an evasion of the basic moral issue,[171] but at least with respect to a privately-financed abortion, an individual's right to choice appears to be supported by the majority of Americans and by the United States Supreme Court.

It must be remembered, however, that *Zbaraz* is concerned with publicly, not privately, financed abortions. This adds to the problem the further dimension of determining whether the choice is to be made by the person who has the abortion or the person who pays for it. While the opinions of taxpayers are irrelevant with regard to privately-funded abortions, since *Roe v. Wade*[172] held the state may not interfere with a first-trimester abortion, these opinions are relevant when taxpayers are asked to fund abortions for indigents. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity."[173] If the majority opinion in absolute numbers is pro-choice, the majority opinion as reflected by the legislators who passed the Hyde Amendment and P.A. 80-1091 is anti-abortion, at least where the expenditure of public funds is concerned. Any such political considerations are overridden, of course, by the holding that

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procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Roe v. Wade, 410 U.S. 113, 149 (1973).

168. Brief of Plaintiffs-Appellees at 86, Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

169. "According to a recent Harris survey, 73 percent of Americans believe any woman should have the right to choose abortion during the first three months of pregnancy." The Sunday Herald, May 20, 1979, § 2, at 3, col. 4.

170. 410 U.S. at 162.

171. Those who consider abortion to be tantamount to murder point out that society does not offer the choice to murder as an individual decision. The parallel is striking, but the obvious distinction is that murder is a crime, and abortion is not.

172. 410 U.S. 113 (1973).

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

these statutes are unconstitutional, should it be upheld on appeal.

Because *Zbaraz* deals with a funding issue, the economic realities of the situation are relevant. It has been argued that refusal to fund abortions would save public funds, but the obvious fact is that an indigent woman denied an abortion will then give birth at public expense, which costs a great deal more.[174] The defense would argue that this short-term analysis overlooks the possibility that the fetus not aborted may eventually make a contribution to society that is greater than the cost of his or her birth.

Defendants also argue that because abortion was a crime in 1965 when the Medicaid statute was passed,[175] Congress never intended it to cover abortion. Plaintiffs reply that Congress did not exclude abortions then permitted by state law,[176] and that " 'reinforcement' is [not] to be given because some states in 1965 interfered unconstitutionally with women's health."[177] Plaintiffs argue further that such an argument "would freeze care for the poor at the state of the art in 1965."[178] The fallacy in this argument is that abortion is not a medical procedure that has been developed since 1965, it has merely been legalized since then. If a limitation on medically necessary abortions is unconstitutional, it cannot be assumed that Congress in 1965 intended to pass a statute with an inherent unconstitutional element. If the holding of unconstitutionality should be reversed, however, then the question of whether abortion was intended to be included among the medical procedures funded by Medicaid remains viable.

A related question is whether the states were obligated after passage of the Hyde Amendment to fund medically necessary abortions that would no longer be federally reimbursed.[179] The Seventh Circuit found "the assumption [of Congress] was

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174. Saving money would certainly be a legitimate secular purpose, but no one believes the law denying funds for abortion will accomplish that end. Those poor women unable to get abortions will bear children and Congress has provided that Medicaid will reimburse the costs. Childbirth is a great deal more expensive than abortion, but that is only the start. There are the welfare costs for the children of the poor and for the women unable to work because of child care. No, the purpose is not thrift.

Neier, *Theology and the Constitution*, 1977 THE NATION 727.

See also note 139 *supra*.

175. *See* note 12 *supra*.

176. Brief for Plaintiffs-Appellees at 46, Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

177. *Id.* at 45-46.

178. *Id.* at 47.

179. *See* notes 34 & 35 and accompanying text *supra*.

that when federal funds were withdrawn, the states, although free to continue to pay for abortions not falling within the parameters of the Hyde Amendment, would refuse to do so."[180] This assumption is of course not undisputed,[181] but if it be correct, the clear implication is that Congress felt the states were never obligated to fund medically necessary abortions in the first place. For if the states were so obligated, the withdrawal of federal reimbursement would not leave them free to refuse payment.

Finally, "[s]ome would argue that unscrupulous physicians, with the active encouragement of their indigent patients, will transform [the court's] decision [that the Hyde Amendment and P.A. 80-1091 are unconstitutional] into a *de facto* order that the state fund purely elective abortions."[182] The district court felt that the "inherent elasticity of the standard" would not pose a great problem, and that "the percentage of abortions any physician would deem 'medically necessary' may be as low as one fifth" of the cases in which the pregnant woman desires it.[183] The Supreme Court has summed up the essence of this issue: "[D]espite the presence of rascals in the medical profession, as in all others, we trust that most physicians are 'good'. . . ."[184] In a situation where a classification must be made by professional expertise, there seems to be little choice but to trust that the professional judgment will be made responsibly and in good faith.

CONCLUSION

There have now been five federal court decisions on the various issues presented by *Zbaraz v. Quern*. A final decision by the Supreme Court, at least on the constitutional issues, is virtually certain to follow, since direct appeal from a federal court decision invalidating an act of Congress is permitted.[185] The sheer number of the decisions is an indication of the multiplicity and difficulty of the issues regarding how our society is to deal with public funding for termination of unwanted pregnancies.

180. Zbaraz v. Quern, 596 F.2d 196, 200 (7th Cir. 1979). *See also* notes 35 & 104 *supra*.

181. "H.E.W. has consistently interpreted the Hyde Amendment to leave unaffected the state's obligation to fund medically necessary abortions under its Medicaid program, as defined by Title XIX." Brief for Plaintiffs-Appellees at 60, Zbaraz v. Quern, 596 F.2d 196 (7th Cir. 1979).

See also notes 34 & 104 *supra*.

182. Zbaraz v. Quern, No. 77 C 4522, slip op. at 12 (N.D. Ill. Apr. 29, 1979).

183. *Id.* at 13, Affidavit of Dr. Oren Depp, at 7.

184. Doe v. Bolton, 410 U.S. 179, 197 (1973).

185. *See* note 151 *supra*.

Together with many other cases generated by reduction of public funds for abortions,[186] the *Zbaraz* cases have struggled to strike a balance between the pro- and anti-funding positions.

The legal pendulum, within this decade, has swung to each extreme. Abortion is no longer a crime, as it was before *Wade*, but neither are elective abortions paid for by public funds, as they were after *Wade* and before *Maher*. In *Zbaraz*, the extremes of opinion ranged from the state's prohibition of all abortions except those needed to save life,[187] to the latest district court decision that P.A. 80-1091 and the Hyde Amendment are unconstitutional,[188] which leaves Illinois obligated to fund all medically necessary abortions.[189] Until the Supreme Court rules on the constitutional questions, it is uncertain where equilibrium will be achieved.

The Seventh Circuit holding that the Hyde Amendment was a substantive amendment to the Medicaid statute was in essence a victory for the defendants, since it would limit funding to those abortions defined by Hyde.[190] It was a political solution: Medicaid funding for abortion was held to be in the hands of Congress. Any change must be achieved through legislation. Since the issue of legislation by appropriation was not raised by the parties, it is possible to question whether the court was evading the issue by shifting the responsibility to Congress.

In any case, the district court holding on remand that both the state and federal statutes are unconstitutional voids the statutory decision, at least in the interim until the constitutional appeal is heard. If the district court is affirmed, plaintiffs' victory will stand and all medically necessary abortions will continue to be publicly funded in Illinois.

Lynn R. Price

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186. *See generally*, Colautti v. Franklin, 99 S. Ct. 675 (1979); Preterm, Inc. v. Dukakis, 591 F.2d 121 (1st Cir. 1979); Frieman v. Walsh, No. 77-4171-CV-C (W.D. Mo. Jan. 26, 1979).

187. P.A. 80-1091. *See* note 36 and accompanying text *supra*.

188. Zbaraz v. Quern, No. 77 C 4522 (N.D. Ill. Apr. 29, 1979).

189. The Supreme Court refused to grant defendants an order to stay pending appeal. Williams v. Zbaraz, 47 U.S.L.W. 3772 (1979).

190. For those who share Congressman Hyde's views, this holding does not go far enough in restricting funding: "I certainly would like to prevent, if I could legally, anybody (*sic*) having an abortion, a rich woman, a middle-class woman, or a poor woman." 123 CONG. REC. H6083 (daily ed. June 17, 1977) (remarks of Congressman Hyde).