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Federal Statutes—Constitutional Law—Medicaid Act Requires States to Fund All Medically Necessary Abortions Subject to Hyde Amendment

*Preterm, Inc. v. Dukakis**

I. Introduction

Since the Supreme Court's decision in *Roe v. Wade*,¹ public funding of abortions has become one of the most volatile abortion issues. Statutory questions have centered around construction of Title XIX of the Social Security Act,² which establishes the Medicaid program. Restriction of abortion funding has also given rise to constitutional challenges of equal protection. The Supreme Court has addressed the public funding of abortions issue on three previous occasions beginning with *Beal v. Doe*.³ The trend of the Court's decisions indicates that because the state has a legitimate interest in protecting the potential life of the fetus,⁴ and because there is no fundamental right to an abortion,⁵ the states are free to deny funding for elective abortions. The question remains, however, whether the state has a right to deny funding for some abortions which are medically necessary.⁶ This was the issue presented to the United States Court of Appeals for the First Circuit in *Preterm, Inc. v. Dukakis*.⁷

II. Statement of the Case

Massachusetts participates in the federal-state cooperative Medicaid program.⁸ In 1978 it passed an appropriations measure which prohibited the expenditure of state funds for any abortions other than those necessary to prevent the death of the mother, or which are "necessary for the proper treatment of

* 591 F.2d 121 (1st Cir.), cert. denied, 99 S. Ct. 2181 (1979).

1 410 U.S. 113 (1973).

2 42 U.S.C. § 1396 (1976).

3 432 U.S. 438 (1977) (whether the Medicaid Act required funding of elective abortions by participating states); *Poelker v. Doe*, 432 U.S. 519 (1977) (mem.) (constitutionality of hospital policy of performing abortions only to prevent grave physiological damage or death to the mother); *Maher v. Roe*, 432 U.S. 464 (1977) (constitutionality of limiting public funds to therapeutic abortions).

4 This interest was first expressed in *Roe v. Wade*, and later was relied upon by the *Beal* majority.

5 *Maher* made clear that *Roe v. Wade* only gave the woman the freedom to choose whether or not to procure an abortion, not the right to have that choice publicly funded. See 432 U.S. at 473-74.

6 The precise definition of a medically necessary abortion is not clear. Perhaps the most commonly accepted one is that set out in *Doe v. Bolton*, 410 U.S. 179 (1973), which defines an abortion as necessary if it is so indicated "in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Id.* at 192.

One district court has said that the *Bolton* standard "is in reality based largely on the spirit of personal choice and freedom that pervades the *Bolton* and *Wade* decisions." *D.R. v. Mitchell*, 456 F. Supp. 609, 622 (D. Utah 1978). If this is true, the distinction may easily be obscured. Indeed, at least one district court has found that an elective abortion can be a necessary medical service. See *Coe v. Hooker*, 406 F. Supp. 1072 (D.N.H. 1976).

7 591 F.2d 121 (1st Cir.), cert. denied, 99 S. Ct. 2181 (1979).

8 Under this program, if the state satisfies the conditions set forth in the Medicaid Act, it is then eligible for federal funds to assist it in providing medical care to qualified recipients.

the victims of forced rape or incest.’⁹ Preterm, Inc.¹⁰ challenged this provision, contending that the Medicaid Act required state funding of all “medically necessary” services, including abortions. The district court agreed with this contention. It limited, however, Preterm’s requested injunction because of provisions of a federal appropriations rider, known as the Hyde Amendment.¹¹ This amendment limits federal funding to those abortions either endangering the life of the mother, resulting from rape or incest, or necessary to prevent severe physical health damage to the mother.¹²

The Court of Appeals for the First Circuit held that all medically necessary *abortions* be funded by the state as a condition of participation in the Medicaid program. It also held, however, that not *all* medically necessary *services* need be funded by the state. Moreover, it agreed with the district court that the Hyde Amendment has substantively altered the Medicaid Act. States participating in the program, therefore, need fund only those abortions for which the Hyde Amendment permits federal funding. The Massachusetts plan, therefore, would be construed so as to be in compliance with this holding. The *Preterm* court then remanded the case for consideration of the constitutionality of the Hyde Amendment.

III. Impact of the Hyde Amendment on the Medicaid Act

A. Appropriations Riders as Substantive Amendments

The plaintiffs in *Preterm* argued that the Hyde Amendment in no way altered the state’s obligations under the Medicaid program. They contended instead that the amendment applied only to the expenditure of federal funds. The consequences of this construction would be that the state alone would then be required to fund those medically necessary abortions not provided for in the Hyde Amendment. Thus, the *Preterm* court had to decide whether the Hyde Amendment did, in fact, amend the Medicaid Act. If it did, the state’s obligations were clear: it must fund only those types of abortions set out in the Hyde Amendment. If the amendment did not apply to the Medicaid Act, then statutory construction of the Act itself, as difficult as it may be, would have to be attempted in order to determine the states’ obligations.

B. Case Law

Repeal by implication of substantive legislation by means of an appropriations measure has traditionally been disfavored by the Supreme Court. In *Tennessee Valley Authority v. Hill*,¹³ the Court refused to construe an appropriations

⁹ 1978 Mass. Acts, ch. 367, § 2.

¹⁰ Preterm, Inc. is a nonprofit corporation providing clinical services, including abortions. It obtained class certification under Fed. R. Civ. P. 23(b)(2), as a class consisting of medical providers who are willing to perform medically necessary abortions for patients who desire them.

¹¹ Pub. L. No. 95-205, § 209, 91 Stat. 1460 (1977) (first enacted in 1977 as a rider to the Health, Education and Welfare appropriations bill).

¹² During the course of this writing, a more recent version of the Hyde Amendment was passed by Congress that allows funding for abortions only when necessary to preserve the life of the mother, or in cases of rape or incest. Pub. L. No. 96-86, § 118, 93 Stat. 656 (1979).

¹³ 437 U.S. 153 (1978).

measure, which in no way referred to the substantive legislation, to have repealed that legislation.¹⁴ The Court reasoned that views of the congressional committee mainly responsible often are not widely known in the whole Congress. Members of Congress may frequently be unaware of the substantive legislation with which the appropriations measure would conflict. Allowing this type of repeal by implication through an appropriations measure, said the Court, would "lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation."¹⁵

The *Preterm* majority, however, viewed another Supreme Court case, *United States v. Dickerson*,¹⁶ to be analogous to the present situation. In *Dickerson*, an appropriations bill contained the proviso that no funds were to be appropriated for payment of any enlistment allowance for reenlistments after a certain date, regardless of provisions within the substantive legislation. The Supreme Court, refusing to review the proviso as a mere withdrawal of federal funds, held that the enlistment allowance was suspended.¹⁷ The Court relied heavily upon the legislative history of the appropriations proviso, claiming that there was persuasive evidence that Congress intended the proviso to be a suspension.¹⁸

Using the *Dickerson* analysis, the *Preterm* court concluded that the Hyde Amendment was an actual amendment to the Medicaid Act. The court reasoned that policy objectives of the Medicaid Act, as well as legislative history, provided ample support for this conclusion.

C. *Inconsistency with the Medicaid Act*

For the court to have found that the Hyde Amendment did not substantively amend the Medicaid Act, it would have had to determine that the amendment was consistent with the Act.¹⁹ On the other hand, if the amendment were inconsistent with the Act, Congress must have intended to alter the Act.

The court reasoned that the Medicaid program was intended to be a federal-state cooperative program. The federal government meant to share the states' financial burdens so as to enable them to provide adequate medical coverage. It was not meant to add more burdens on the states for which they would be unilaterally responsible. If the Hyde Amendment were viewed simply as a withdrawal of federal funds for abortions, but in no way altering the obligation of the states to provide services, then the cooperation aspect of the

14 In *Hill*, it was argued that appropriations for completion of the Tellico Dam repealed by implication the Endangered Species Act, 16 U.S.C. § 668aa (1976), as construction of the dam threatened to destroy the habitat of the snail darter. There were, however, only brief statements in the committee report, and the appropriations measure did not refer to the substantive legislation.

15 437 U.S. at 190.

16 310 U.S. 554 (1940).

17 *Id.* at 561.

18 *Id.* at 561-62.

19 The court found the Hyde Amendment to be inconsistent with its interpretation of the states' obligations under the Medicaid program. See text accompanying notes 54-63 *infra*. It held that the amendment's inclusion of physical health, but exclusion of mental health, improperly discriminated "based on diagnosis, type of illness, or condition." 42 C.F.R. § 440.230 (1979).

Medicaid program would be frustrated. The *Preterm* court concluded, therefore, that the amendment must be substantive, repealing by implication the Medicaid Act insofar as it requires states to fund all medically necessary abortions.

D. Legislative History of the Hyde Amendment

Because the Hyde Amendment was inconsistent with the policy objectives of the Medicaid Act, the court found it appropriate to discuss the legislative history of the amendment. The high degree of visibility of any matter concerning abortion instilled confidence in the *Preterm* court that the whole Congress was indeed aware of the proposed amendment, and of the various views concerning it. Indeed, if the matter were less visible, the situation might be more like that in *Hill*, and a finding of repeal by implication might then fly in the face of that decision.²⁰

Although the most reliable sources of legislative intent, *i.e.*, conference and committee reports, were wholly absent, floor debate was abundant.²¹ From these debates, the *Preterm* court concluded that the Hyde amendment did in fact alter the states' obligations under the Medicaid Act. The court noted the repeated objections of opponents to the passage of substantive legislation through an appropriations bill.²² It perceived a "universal assumption in debate . . . that if the amendment passed there would be no requirement that states carry on the service."²³ It also emphasized the absence of any contention that the states were unilaterally to fund abortions not provided for in the amendment.²⁴

IV. Constitutionality of the Hyde Amendment

A. *Zbaraz v. Quern*²⁵

A ruling that the Hyde Amendment is unconstitutional changes the effect of the *Preterm* decision. The end result, according to the remainder of the *Preterm* decision, would be a requirement that states participating in the Medicaid program fund all medically necessary abortions.

Zbaraz v. Quern was the first case in which a federal court considered the

20 How much less visibility would liken the situation to that in *Hill* is uncertain. A "middle ground" has not been developed by the Supreme Court. It would appear that as it becomes more likely that there can be no meaningful deliberation on the legislation, it also becomes more likely that repeal by implication will not be allowed.

21 *See, e.g.*, 123 CONG. REC. H6086 (daily ed. June 17, 1977); 123 CONG. REC. H10,826-30 (daily ed. Oct. 12, 1977).

22 *See* 591 F.2d at 129.

23 *Id.* at 130.

24 *Id.* at 130-31.

25 469 F. Supp. 1212 (N.D. Ill. 1979), *rev. granted, juris. post.*, 48 U.S.L.W. 3356 (U.S. Nov. 26, 1979) (Nos. 79-4, 79-5, 79-491).

validity of the Hyde Amendment.²⁶ In *Zbaraz*, the United States district court, on remand from the Court of Appeals for the Seventh Circuit, held the amendment to be unconstitutional because it could find no rational basis for funding childbirth-related expenses, but not services relating to medically necessary abortions. The amendment thus resulted in a violation of the equal protection clause of the fourteenth amendment.

1. Level of Analysis

The district court in *Zbaraz* first applied the traditional two-tier analysis to determine the level of judicial scrutiny to be employed.²⁷ Relying to a large extent on *Maher v. Roe*,²⁸ the court rejected the argument that restricting funds for abortions restricted the effectuation of a woman's decision "whether or not to terminate her pregnancy."²⁹ *Roe v. Wade*, said the court, did not establish a fundamental right to an abortion. Rather, as the Supreme Court had explained in *Maher*, that decision simply protected the woman from unduly burdensome interference with her decision whether to obtain an abortion.³⁰ The woman's indigency, rather than legislation restricting funds, is the cause of the woman's difficulty in obtaining an abortion.³¹ The difference, said the *Zbaraz* court, is one between "direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."³²

Zbaraz involved no discrimination against a suspect class. Thus, strict judicial scrutiny was not necessitated. As *Maher* made clear, an "indigent woman desiring an abortion does not come within the limited category of disadvantaged classes"³³

2. Rational Basis Test Failed

The *Zbaraz* court did not demand a showing of a compelling interest in order to justify the Hyde Amendment. It did not believe, however, that any in-

26 The plaintiffs in *Zbaraz* attacked only the validity of the Illinois state plan, which restricted funding for abortions to those instances in which the abortion is necessary to preserve the life of the mother. The United States Court of Appeals for the Seventh Circuit, however, in *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), following *Preterm*, also included in its remand a mandate to consider the constitutionality of the Hyde Amendment. The same analysis, therefore, was applied to both the Illinois state plan and the Hyde Amendment. 469 F. Supp. at 1215 n.3.

27 469 F. Supp. at 1216. This analysis was articulated in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). This analysis mandates strict judicial scrutiny and a showing by the state of a compelling interest if either the statute discriminates against a suspect class or impinges upon an individual's fundamental right. If the statute does neither of these, then it must only withstand a rational basis test, *i.e.*, the state must rationally further some legitimate state interest.

A relaxation of this traditional approach, however, has been indicated in some recent cases. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

28 432 U.S. 464 (1977).

29 410 U.S. at 153.

30 432 U.S. at 473-74.

31 *Id.* at 474.

32 *Id.* at 475. *Zbaraz* also rejected any analogy to the situation in *Shapiro v. Thompson*, 394 U.S. 618 (1968), in which the Supreme Court struck down statutory provisions which required one year of residency as a condition of eligibility for welfare benefits. The provision was held to be a penalty on the exercise of the right to travel, and therefore required the state to show a compelling interest to justify the legislation. Since in *Zbaraz* there was no fundamental right to an abortion, this penalty analysis did not apply. 469 F. Supp. at 1218.

33 432 U.S. at 470-71.

terest could satisfy even the less stringent rational basis test. State interest in the encouragement of normal childbirth, recognized and protected in *Maher*, was not sufficient where the abortion was deemed to be medically necessary. The court opined that the effect of the Hyde Amendment would be to increase substantially "maternal morbidity and mortality among indigent women."³⁴ The court further declared that 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."³⁵ At the point of viability, however, the interest becomes legitimate,³⁶ and funds can be withheld for abortions other than those necessary to preserve the life of the mother.³⁷

B. Critique

The *Zbaraz* court relied heavily and correctly upon *Maher* to decide that strict judicial scrutiny of the Hyde Amendment was unnecessary. Although a woman has a right to decide that she wants an abortion, the government's refusal to fund such an operation does not interfere with any of her fundamental rights. As one court has stated:

[T]o argue that when the Legislature decided not to pay for elective abortions, that lack of governmental involvement impermissably [*sic*] involved a woman's right to privacy is to turn the concept of privacy upside down and inside out, transmitting it into a right to government participation in one's life rather than a right to be free from such involvement.³⁸

Injection of a broad meaning of "medically necessary" under the standard set out in *Doe v. Bolton*³⁹ does not create a fundamental right. The states' decision remains a funding decision, rather than a direct interference with a protected right.

The *Zbaraz* court suddenly abandoned *Maher's* rationale in answering the further question of whether a legitimate state interest exists. The rationale of *Maher*, however, and even the language in *Beal*, do not so suddenly lose their applicability.

The *Zbaraz* court appears to have substantially deviated from traditional application of the rational basis standard, at least in the modern era. Only if there is no conceivable reason for establishing the classification, or if the

34 469 F. Supp. at 1220.

Although rejecting *Shapiro*, the *Zbaraz* court did rely on *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), which also involved a one-year-residency requirement as a prerequisite to receiving publicly funded nonemergency medical care. The distinction based upon emergency and nonemergency care was found to be untenable, for a person could suffer irreparable injury before the time when he would be in need of emergency care.

It should be noted, however, that the Court in a footnote in *Maher* failed to distinguish *Shapiro* from *Maricopa County*. Reliance on either case in that setting, said the Court, was misplaced. 432 U.S. at 474 n.8.

35 469 F. Supp. at 1221.

36 See text accompanying notes 51-53 *infra*.

37 469 F. Supp. at 1221.

38 *Committee to Defend Reproductive Rights v. Meyers*, 1 Civil 45066 (Cal. May 29, 1978).

39 See note 6 *supra*.

classification is "wholly irrelevant to the achievement of the State's objective,"⁴⁰ does the state fail the rational basis test.⁴¹

It is difficult to ascertain how there can be no state interest sufficient to meet the minimum level rational basis standard when the Supreme Court has repeatedly referred to the "unquestionably strong and legitimate interest in encouraging normal childbirth,"⁴² and the strong interest in protecting the potential life of the fetus.⁴³ The "state's power to encourage actions deemed to be in the public interest is necessarily far broader."⁴⁴ The Supreme Court in *Maher* held that although allocation of welfare funds involves "the most basic economic needs of impoverished human beings,"⁴⁵ an equal protection challenge will fail if the classification furthers a legitimate interest.⁴⁶ "[T]he State interest in encouraging normal childbirth exceeds this minimal requirement."⁴⁷ The state has the additional interest in determining how best to allocate its scarce resources, a determination that has been given wide latitude.⁴⁸

Categorizing an abortion as medically necessary does not diminish the legitimacy of the state interest, at least to the point where the rational basis test is failed. *Poelker v. Doe*,⁴⁹ the third Supreme Court case dealing with public funding of abortions, supports this. In *Poelker*, the Supreme Court upheld, on constitutional grounds, a city hospital policy of refusing to perform abortions unless there was a threat of death or "grave" physical injury to the mother.⁵⁰ This category of abortions obviously excludes some medically necessary abortions. On remand, the United States Court of Appeals for the Eighth Circuit in *Doe v. Poelker*⁵¹ affirmed the lower court opinion which had denied relief to the plaintiffs, without requiring that all medically necessary abortions be performed. Thus, the court of appeals apparently construed the Supreme Court decision in *Poelker* to have approved the policy of excluding some necessary abortions.

The *Zbaraz* court's analysis also fails in that it actually applied a strict judicial scrutiny rather than a rational basis standard. Success or failure in an equal protection challenge depends largely on the initial classification of the legislation, *i.e.*, whether it requires strict judicial scrutiny and a showing of a compelling interest, or merely furtherance of a legitimate interest. When strict judicial scrutiny is required, it is only in rare instances that a compelling interest can successfully be shown.⁵² When only a legitimate interest is required, however, it is only in rare instances that the interest cannot be shown.⁵³

40 *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

41 *See also* *Maher v. Roe*, 432 U.S. 464 (1977); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

42 432 U.S. at 446.

43 432 U.S. at 478.

44 *Id.* at 476.

45 397 U.S. at 485.

46 432 U.S. at 479.

47 *Id.*

48 *See* 397 U.S. at 478.

49 432 U.S. 519 (1977).

50 *Id.* at 520.

51 558 F.2d 1346 (8th Cir. 1977).

52 *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944).

53 *See* notes 40-41 *supra* and accompanying text.

The *Zbaraz* court, in attempting to apply the rational basis standard, confused the requirements of that standard with the requirements of strict judicial scrutiny. It found that no legitimate state interest exists in the fetus, *until the fetus becomes viable*. The Supreme Court in *Roe v. Wade*, however, designated viability as the point at which the state has a *compelling* interest.⁵⁴ It would appear then that *Zbaraz* has required a showing of a compelling interest, rather than a minimal interest, to meet a rational basis standard. If the *Zbaraz* court suggests that there is absolutely no state interest until that interest becomes compelling, then it suggests too much. More sensitivity should have been shown by the court to the legislative body's assessment of the importance of the interest.

It seems clear, then, that the Hyde Amendment withstands constitutional attack. The holding of the *Preterm* decision, therefore, should not fall because of reliance on an unconstitutional amendment. Congress could, nevertheless, repeal that amendment, and refuse to pass a similar one. Or, the Supreme Court may disagree that the amendment substantively amended the Medicaid Act.⁵⁵ It is thus necessary to discuss the states' obligations under the Medicaid Act itself, apart from the Hyde Amendment. The same interests that should have led to a different result in *Zbaraz* should also have led to a different result with regard to the statutory construction of Medicaid, in *Preterm*.

V. Statutory Construction of the Medicaid Act

A. *Funding of All Medically Necessary Services*

The *Preterm* court had first to determine the broader question of whether Medicaid demanded that the state fund any operation that was deemed to be medically necessary. Its analysis began with the words of the appropriations section, which provides:

For the purpose of enabling each State, as far as practicable under the conditions of such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the cost of *necessary medical services* . . . there is hereby authorized to be appropriated⁵⁶

The court declined to construe from this language a substantive requirement to fund all medically necessary services. Rather, it construed the section to specify which individuals were eligible for medical assistance. It also noted that the section of the Act that set out the required contents of a state plan for medical assistance⁵⁷ did not require provision of all medically necessary services. The

⁵⁴ 410 U.S. at 163.

⁵⁵ Three issues that the Supreme Court could decide in the *Zbaraz* appeal are 1) statutory construction of the Medicaid Act itself, and of the states' obligations thereunder; 2) the impact of the Hyde Amendment on the Medicaid Act; and 3) the constitutionality of the Hyde Amendment. Of course, aside from jurisdictional questions which may exist, the Court may decide to decide only one of these issues.

⁵⁶ 42 U.S.C. § 1396 (1976) (emphasis added).

⁵⁷ *Id.* § 1396a (1976).

court believed that the Act contemplated flexibility in the funding requirements imposed upon the states.⁵⁸

The *Preterm* majority utilized the Supreme Court's decision in *Beal v. Doe* to support its contention. The Court in *Beal v. Doe* held that Medicaid required 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]." ⁵⁹

B. *Funding of All Medically Necessary Abortions*

State standards regarding any particular medical procedure must meet the "reasonable standard"⁶⁰ and "consistent with the objectives of the Act"⁶¹ tests of the Supreme Court. The *Preterm* court turned to the regulations promulgated by the Department of Health, Education and Welfare (HEW),⁶² pursuant to the Medicaid Act, to determine if the Massachusetts state plan satisfied the tests. The regulation provides in part:

- (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
- (c) (1) The medical agency may not *arbitrarily* deny or reduce the amount, duration, or scope of a required service . . . to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.⁶³

The court decided that Massachusetts had isolated a particular medical condition—"a medically complicated pregnancy"⁶⁴—and limited funding for that condition to a life and death situation. The plan, therefore, improperly discriminated based on type of illness or condition, and was "unreasonable" and wholly "inconsistent with the objectives of the Act."⁶⁵

C. *Critique*

A different interpretation of the states' obligations under the Medicaid Act would have saved further discussion of the impact and constitutionality of the Hyde Amendment. If the Hyde Amendment falls, the *Preterm* decision also falls, because of its dependency on the amendment. The *Preterm* court could and should have upheld the Massachusetts plan as consistent with the Medicaid Act, completely apart from the Hyde Amendment.

Federal law gives each state wide latitude in dispersion of its available funds.⁶⁶ The preamble of the Medicaid Act provides that federal funds will be appropriated to enable each state, "as far as practicable under the conditions of such State," to provide medical assistance.⁶⁷

58 591 F.2d at 124.

59 432 U.S. at 440-41 (citations omitted).

60 *Id.*

61 *Id.*

62 42 C.F.R. § 440.230 (1979).

63 *Id.* (emphasis added).

64 591 F.2d at 126.

65 *Id.*

66 397 U.S. at 478.

67 42 U.S.C. § 1396 (1976).

The portion of the *Preterm* decision dealing with whether states are required to provide all medically necessary services is logically sound. Passage of the Medicaid Act presupposed a lack of ability of all states to provide adequate medical coverage. It cannot be assumed, however, that the federal-state cooperative program eliminated every state's financial deficiencies thereby enabling them to provide comprehensive coverage.⁶⁸ To mandate funding of all medically necessary operations would reinstate the burden upon the states which the purpose of the Medicaid Act was to alleviate. Such an interpretation would tend to discourage rather than encourage state participation in the Medicaid program. This result would frustrate the intention of the Act.

The portion of the *Preterm* decision that is questionable, however, is the finding that the Massachusetts plan violated the purpose of the Medicaid Act and discriminated based on type of illness or condition. The Supreme Court has construed the Act to confer "broad discretion on the States to adopt standards for determining the extent of medical assistance."⁶⁹ This discretion should encompass the encouragement of legitimate interests of the state. The interests inherent in state restriction of welfare funds for abortion fall within the discretion granted to the states, and within the purpose of the Medicaid Act.

First, an interest in the fetus has been endorsed by the Supreme Court:

[There] is a significant state interest existing throughout the course of the woman's pregnancy. . . . [N]othing in either language or legislative history of Title XIX . . . suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth. Absent such a showing, we will not presume that Congress intended to condition a State's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the cost of nontherapeutic abortions.⁷⁰

This interest remains whether the abortion is deemed to be nontherapeutic, or therapeutic under the *Bolton* standard.⁷¹

Second, the decision not to fund certain abortions remains a decision concerning the disposition of limited welfare funds.⁷² *Quern v. Manley*,⁷³ a Supreme Court case dealing with another title of the Social Security Act governing a federal-state cooperative program, lends support to this fiscal concern. The

68 The Medicaid Act as originally passed contained a "comprehensive coverage clause," which required that states continually broaden the scope of care and services that they provided, with the ultimate goal of comprehensive coverage by 1975. Congress repealed this portion of the Act because of its impracticability. 42 U.S.C. § 1396(b)(e) (1970), repealed by Pub. L. No. 92-603, § 230, 86 Stat. 1410 (1972).

69 432 U.S. at 444.

70 *Id.* at 446 (emphasis added).

71 The Supreme Court in *Beal*, after holding that Pennsylvania's refusal to fund nontherapeutic abortions was not inconsistent with Title XIX, made specific reference in a footnote to the existence of the Hyde Amendment. 432 U.S. at 447 n.14. As the Utah district court in *D.R. v. Mitchell*, 456 F. Supp. 609 (D. Utah 1978), has noted, the "conclusion to be drawn from this unembellished reference may be of great import." *Id.* at 624.

72 It has been suggested that the cost of childbirth-related services is substantially higher than the cost of abortions, and that therefore any fiscal concern in funding childbirth but not necessary medical abortions is unreasonable. *See, e.g., Zbaraz v. Quern*, 469 F. Supp. at 1218. If the cost of a single abortion is compared to the cost of a single childbirth, this may be accurate. When viewed in total context, however, it may be misleading. Easy access to abortion may encourage increased utilization of that procedure as a method of contraception. The result could lead to a costly reliance that in its totality imposes a financial burden upon the states that exceeds the cost of funding childbirth. *See Hardy, Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams*, 18 *ARIZ. L. REV.* 903, 926-27 (1976).

73 436 U.S. 725 (1978).

Court held that Illinois had exercised reasonable discretion in imposing eligibility requirements that were more narrow than those in the federal statute. It agreed that the state had ultimate authority to establish its social service programs within designated funding limits. Otherwise, the result would be an "open-ended program, not susceptible of meaningful fiscal or programmatic control by the State."⁷⁴

The *Preterm* court's conclusion that the Massachusetts plan discriminated on the basis of type of illness or condition, contrary to the HEW regulations, also contains shortcomings. The first is that there is no discrimination based on diagnosis, type of illness, or condition. Pregnancy is the condition, and normal aspects of that condition, as well as some of its complications, are funded. By not funding certain abortions, the state has merely made a choice, albeit a highly consequential one, as to which methods of treating that condition will be supported and encouraged. The regulation only prohibits arbitrary limitations.

Secondly, the *Preterm* court ignored the remainder of the regulation upon which it based its holding. Subsection (c)(2) of that regulation provides: "The agency may place appropriate limits on a service based on medical necessity or on utilization control procedures."⁷⁵ A determination that an abortion is to some degree medically necessary does not mean that that abortion must be paid for by the state. By electing to fund only those abortions necessary to save the life of the mother, the state has made a determination based on both the "medical necessity" and "utilization control procedures" criteria specified in the regulation.⁷⁶ The *Preterm* majority rejected this reasoning because it knew of no other instances where distinctions of medical necessity were based upon life and death.⁷⁷ This same type of argument was presented in *Maher* to the Supreme Court, which responded: "The simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of potential human life."⁷⁸

The *Preterm* court's reasoning also fails by completely disregarding HEW's construction of its own regulations. At least up to the time of the *Preterm* decision, HEW had consistently approved state plans which provided funding for only those abortions that were necessary to preserve the life of the mother, or to prevent long-lasting and severe physical health damage.⁷⁹ Absent a clear showing that HEW's interpretation was incorrect, deference should have been shown to that agency in implementing the Medicaid Act.⁸⁰ In *Dandridge v. Williams*,⁸¹ a case involving the jointly financed Federal Aid to Families with Dependent Children program,⁸² the Supreme Court upheld state-imposed

74 *Id.* at 746.

75 42 C.F.R. § 440.230 (1979).

76 *Id.*

77 591 F.2d at 127.

78 432 U.S. at 480.

79 *See, e.g.*, state medical plans submitted under Title XIX, of Idaho (1978), Kansas (1978), Louisiana (1978), Missouri (1977), New Mexico (1977), North Carolina (1977), Ohio (1977), South Dakota (1977), and Virginia (1978). Intervenor's Memorandum, *McRae v. Califano*, ___ F. Supp. ___ (E.D.N.Y. 1980).

80 *See, e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969).

81 397 U.S. 471 (1970). Maryland, participating in the AFDC program, imposed maximum grant limitations, pursuant to statute. MD. ANN. CODE, art. 88A, § 44A-58 (1979 Repl. Vol.). This regulation was challenged as being in conflict with the Social Security Act.

82 42 U.S.C. §§ 601-644 (1976).

maximum grant limitations. In so doing, the Court made specific note of HEW's repeated approvals of state plans that imposed such limitations.⁸³ Thus, it is clear that the *Preterm* court should have considered HEW's approval of state plans denying funds for some medically necessary abortions in determining whether Massachusetts' plan was contrary to HEW regulations.

VI. Conclusion

The *Preterm* court has attempted a novel approach to a most delicate issue concerning abortion. Unfortunately, that approach has led to an unstable result, with unnecessary dependency on an uncertain Hyde Amendment. States' obligations to fund abortions must, by this approach, be determined by an amendment that likely one day may be changed by Congress, and the next day be ruled unconstitutional by the judiciary. At the root of this instability is a distinction, dubious at best, between "medically necessary" and "elective" abortions.

The real solution lies not in determining whether the Hyde Amendment substantively amended the Medicaid Act, or whether that amendment is constitutional. Rather, the solution lies in a statutory construction of the Medicaid Act that shows more of a sensitivity to the interests of the individual states, whether those interests are fiscally oriented, or oriented toward protection of fetal life. The Supreme Court has initiated this sensitivity in its decisions in *Beal*, *Maher*, and *Poelker*. That process should not be interrupted by a distinction that, if accepted, could render any hopes for the endurance of those state interests entirely illusory.

As the Supreme Court noted in *Beal*: "The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by the Court."⁸⁴ If hardship must be suffered regardless of whether abortions are funded, then preference should be given to the legislative judgment of what is least detrimental to the well-being of society.

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⁸³ 397 U.S. at 481-82.

⁸⁴ 432 U.S. at 447-48 n.15.