selves and provide access to medical services in accordance with the decision. Slip op. at 184.[106] Dr. Wood viewed the withholding of funds for abortion, in the context of a comprehensive medical service program, as a "gross entanglement of institutional government into the moral and religious values of the people of this country" (Wood, T.3278-80), and described the riders as placing a "stigma, not only on poor women, but on all citizens." (T.3222.)

c. Dissent Within the Denominations

The district court properly found that there is no unanimity within any of the denominations. Slip op. at 166-67. The intra-religious differences, like the inter-religious ones, however, are theological and ultimate in dimension.

Among Baptists, for example, the organization "Baptists for Life" shares the Catholic view that from conception the fetus is an innocent, actual human being and that abortion is, therefore, tantamount to murder. (Pl. Exh. 139/T.3216, A.316.) Dr. Wood testified that all the Baptist publications and statements he had ever read opposing legal abortion articulated their opposition in very religious terms citing Scripture and religious principles.[107] (A.241-42.)

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[106] The Southern Baptist Convention recently rejected one resolution describing the fetus as "an innocent human being" and another opposing permissive abortion legislation. Slip op. at 189-90. While registering its disapproval of abortion, the body reaffirmed its position on the "limited role of government in dealing with matters related to abortion." (Pl. Exh. 134 and 135/T.3193.) Dr. Wood characterized this as an affirmation of freedom of conscience, irrespective of moral condonation or condemnation of abortion. Slip op. at 188-90. (Wood, T.3201-03.)

[107] He provided several letters as examples, one which declares opposition to a constitutional amendment to be "totally contrary

The defendant-intervenors' witness, Paul Ramsey, also a United Methodist theologian, held a much stricter view on the acceptability of abortion than that explained as mainstream by Dean Wogaman. Slip op. at 198-99. (Ramsey, T.2362.) The fundamentalist Protestant or Scriptural literalist approach also generally condemns abortion.[108] (Pl. Exh. 456/R.233, A.327.)

Perhaps the greatest division exists within the most active anti-abortion denomination, the Roman Catholic Church. Several Catholic ethicists have asserted the conscientious nature of the abortion decision. (Pl. Exh. 36/T.2016, A.307.) The very existence of a small national organization called "Catholics For a Free Choice" (Pl. Exh. 320/R. 233) and church statements themselves further evidence dissent among Catholics.[109]

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to the teaching of God's Word and also . . . the truth of Bible-believing Christianity"; and another which exhorts that no one who has studied the evidence of fetal development and "meanwhile studied the Bible, cried out to God and called for Prayer Meeting" can speak in favor of abortion. (Pl. Exh. 138/T.3213-14, A.318; Pl. Exh. 137/T.3213-14, A.317.)

[108] The Right to Life Society of Greenville, Mississippi urges "true Bible believers must stand on the principle that abortion is unrighteous, ungodly, selfish, sinful, wrong and destructive to the will of God in his plan for the human race." (Pl. Exh. 457/R.233, A.319.)

[109] (Def.-Int. Exh. E/T. 2100-02) (Pl. Exh. 39/T.2024). A recent poll indicates that 50% of Catholics approve of "abortion on demand". Slip op. at 168. Reliance on polls in this area may be deceptive, however. Much depends on the wording of questions, e.g., whether they call forth views on the substantive morality of abortion or on the role of the state, and on how people are characterized religiously. For example, the polls cited by the district court which indicated no substantial difference between Catholics and Protestants on the question of abortion ignore critically important denominational differences in theological approach, e.g., between mainstream and fundamentalist Protestants within these sweeping categories.

Thus, internal division further demonstrates rather than obscures the religious nature of the abortion controversy. The differing positions are viewed as dictates of conscience, although they appear incomprehensible and even appalling to their adversaries. Belief that requiring a woman to "give birth. . ., without regard to any and all circumstances . . . would reduce her personhood to that of an animal and constitute a gross violation of our Christian faith" [110] and that "abortion may in some instances be the most loving act possible." [111] are conscientious positions as deeply cherished and deeply felt as the belief that abortion is murder. The question is whether the law will protect the conscience of some or the conscience of all.

10. The Legislative History of the Hyde Amendments Demonstrates the Theological Division and the Congressional Purpose To Prefer the Anti-Abortion Belief.

a. The Sequence of Hyde Amendments Reflects an Effort to Enact the Religious Doctrine That Condemns Abortion.

The district court described the irreconcilable division in the legislative process that produced the Hyde Amendment:

> The long sequence of amendments marks the effort to reach a compromise of what could not be the subject of a principled compromise result but could only become a register of the point at which the struggle of principle was arrested. Slip op. at 268.

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[110] Pl. Exh. 379/R.233. "Abortion and the First Amendment: A United Methodist Position", Policy Statement of the Board of Church and Society, Kansas East Conference of the United Methodist Church.

[111] Pl. Exh. 36/T.2016, A.307, "A Call to Concern."

When first approved by the House, the Hyde Amendment was an absolute prohibition on abortion funding, fully reflecting the underlying religious doctrine that the fetus is human life and abortion impermissible, except when indirect.[112] Annex to slip op. at 8 (hereinafter, Annex). The Senate rejected it overwhelmingly. Annex at 24; Cong. Rec. S10806-07. The Conference Report, which became the FY 77 Rider, provided a life-endangering exception, a formulation of the life-for-life principle, which is doctrinally acceptable to most of the anti-abortion faiths and politically acceptable to "right-to-life" advocates.[113] Annex at 76, 83. The Report explained the intent not to affect indirect abortion and treatment such as D.E.S., for rape and incest victims. *Id.* These treatments are also approved by the anti-abortion faiths. *Supra* at section 9(a)(1).

The struggle over abortion funding escalated in June 1977, when the FY 78 Rider had to be negotiated in light of this Court's decision in *Maher v. Roe*. The Conference Committee deadlocked over House refusal

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[112] The doctrinal distinction between direct and indirect abortion was first made when the House cast a second vote insisting on its disagreement with the Senate. Mr. Hyde argued that the Amendment included an exception for life endangerment, because abortions performed in those situations are not deemed abortions. Annex at 30. (H8633-34, August 10, 1976). Examples noted were that it would not prevent removal of an ectopic pregnancy, the treatment of cancer by radiation or hysterectomy notwithstanding the incidental loss of fetal life. Annex at 35. Hyde also argued that it would not prevent D.E.S. treatment for rape victims and the use of the IUD. Annex at 30.

[113] *See* Pl. Exh. 392, 424/R. 233; Lodged, Vol. IV, Nos. 10, 11 (hereinafter indicated L. IV), which explains the political acceptability of a life exception.

to move from life-endangering[114] and Senate insistence upon enlarging the exceptions. Finally, the congressional leadership hammered out the compromise which included, in addition to life-endangerment, very narrow relief for cases of physical health damage, and rape and incest victims. Annex at 284-89.

The annual battles illustrate that the struggle is over principle rather than practical consequences. Despite only a handful of certifications under the physical health, rape and incest exceptions (see § C(3) *supra*), the House sponsors nevertheless continually tried to eliminate all but the life exception. Annex at 292, 294-95. Thus, the Hyde Amendment embodies the doctrine of the anti-abortion faiths with only those exceptions that doctrine permits or that its proponents cannot avoid.

b. The Legislative Debates Illustrate That the Hyde Amendment Was a Product of Religious Belief and Pressures Against Abortion.

The district court found:

> What can be said is that an organized effort of institutional religion to influence the vote on the

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[114] Only a life-endangering exception was clearly acceptable to Hyde, the Catholic Church and its lobbying arm, the Committee for a Human Life Amendment (CHLA), and the CHLA lobbyist, who was viewed as having a decisive impact on the principal House conferees. Annex at 91-2; Pl. Exh. 45 Werner, T.2417;Pl. Exh. 305B, 305C/R.233 L. IV-20; Werner, T. 2432; slip op. at 268. After a proposal to fund in cases of grave physical health damage was almost accepted by the House conferees (Pl. Exh. 46/Werner T.2449, Proposal T) L. IV-18, the Committee adjourned. By the next morning the House conferees had returned to their life-for-life stance. (Pl. Exh. 46/Werner, T.2444). The Committee never met again.

> enactments in question on religious grounds was made, that it cannot be said that the efforts did not influence a decisive number of votes through a combination of religious belief and principle on the part of some with a fear of political reprisal on the part of others, and that the narrow votes in both houses are open to the inference that in one or the other way the religious factor was decisive of the issue for enough legislators to affect the outcome of the voting. Slip op. at 271.

In analyzing the legislative history, the district court relied extensively on the framework provided by plaintiffs-appellees' witness, Dr. Gillian Lindt, a sociologist of religion who chairs Columbia University's Department of Religion. Dr. Lindt focused on four indicia of religiosity: the purpose of the legislation; whether its sponsors sought to legitimate it, implicitly or explicitly, by religious references; whether religious belief and denominational support is used to explain positions; and, finally, whether the debate is particularly divisive in character. (Lindt, A.254.)[115] Analysis of the Hyde Amendments under all four criteria reveals the intense religiosity of their purpose. The district court found:

> The language of the debates, the arguments made, revolve around the pro-life assertion that the fetus is a human life from its beginning, and that,

[115] To avoid repetition we draw primarily on the legislative debates on the FY 78 Rider. The district court found the content of the debates did not change from one year to the next. Slip op. at 266. Unless otherwise noted, the citations which follow are to 123 Cong. Rec. (daily ed.); the dates are abbreviated and "remarks by" and titles omitted.

> therefore, abortion is either never permissible, or is permissible only in the narrowest circumstances. Slip op. at 273.

Indeed, every Representative and Senator who spoke in favor of the Riders espoused this view.[116]

The debates reveal that the proponents' view of the fetus as human life is religiously based (Lindt, A.248-49.). The district court observed the "[r]eligious motivation and allegiance to religiously perceived principle on the part of many legislators, on both sides of the issue . . . ." Slip op. at 270.

On the most obvious level, advocates of the Hyde Amendment described the fetus as being in relation to God and as having a soul.[117] Proponents repeatedly

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[116] In the House, for example: "Abortion . . . is the calculated killing of . . . [a] human being . . . that is not a potential human life; it is a human life with potential." (H6084)(Hyde). Also in the House, "[T]he Amendment . . . will prevent the use of tax funds . . . to destroy human life." (H6085, 6/17/77) (Bauman).

Mr. Dornon equated abortion with the "killing of innocent life and the execution in mothers' wombs of 14 million American citizens." (H6087, 6/17). Mr. O'Brien said: "Whether the unborn child is rich or poor, it is a human life and deserves a chance to live." (H6090, 6/17). Mr. Edwards describes abortion as "snuffing out the life of an unborn child" (H6090, 6/17); and Mr. Volkmer, as "the death of unborn children." (H6090, 6/17). Mr. Russo equated a funding cutoff with "sav[ing] lives" (H6097, 6/17). Mr. Conte described abortion as "someone else's right to kill human life." (H10134, 9/27).

In the Senate: Senator Helms describes the embryo as a "tiny human being . . . waiting to be born" and as "an innocent human life." (S11036, 11042, 6/29). Mr. Domenici referred repeatedly to "unborn children" and the value of human life. (S11037, 6/29). Mr. Stennis described the fetus as "an innocent, inconvenient human being." (S11039, 6/29).

[117] Mr. Hyde argues against compromise: "[W]e ought not to allocate to ourselves the role of Almighty God" (H10969, 10/13),

characterized the fetus as innocent and abortion as a slaughter of innocents. (*See* Lindt, A.247-48.)[118] The district court observed that:

> The repeated use during the debates of 'human life' terminology extended at times to referring to the immortal soul of the fetus, to invoking Herod's slaughter of the innocent, and to emphasizing that the fetus is 'defenseless,' is 'innocent.' Much of this language is seen in the Roman Catholic literature already referred to, and it implies humanity in the fetus—for only rational beings can be 'innocent' in moral terms. Slip op. at 275.[119]

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invoking the memorial to the Jews killed in the Holocaust: "He who saves one soul, saves humanity" (H6084, 6/17). Dr. Lindt explained that "in the context of an impassioned plea for saving the lives of fetuses . . . the equation is with the fetuses being saved . . . because they too, have souls" (T.4623-24; *see also* T.4620. Mr. Dornon speaks of the fetuses' destiny as "God willed" (H6087, 6/17), and warns against inclusion even of a life-endangering exception: "God will not be mocked. We cannot continue to kill millions of innocent preborn children each year. Human beings with an immortal soul and their entire genetic code in place." (H12173, 11/3).

[118] Mr. Hyde constantly refers to abortion as "the slaughter of innocent, inconvenient unborn children" (H6083, 6/17) and the calculated killing of innocent, inconvenient human beings (H6094, 6/17, H10969, 10/13, H10834, 10/12, H10830, 10/12). Mr. Bauman (H6085, 6/17) and Mr. Dornon (H12173, 11/3), among the most frequent proponents of the Hyde position, frequently reiterate this theme.

The "slaughter of the innocents" theme permeated the speeches of the key proponents in the Senate as well. Mr. Stennis describes abortion as "the calculated killing" and the "unnecessary slaughter of innocent unborn children" (S11039, 6/29); Mr. Helms, the "deliberate termination of innocent human life" (S11036, 6/29); and Mr. Bartlett reminds his colleagues that "unborn children [are] . . . the most innocent among us." (S13673, 8/4).

[119] *See* Lindt, A.254.

Dr. Lindt testified that the religious nature of the issue was also demonstrated by the intensity of the negative value attributed to abortion.[120]

Notwithstanding frequent invocation by Hyde proponents of the scientific evidence of fetal development, the district court found the issue religious:

> There was no absence, on either side of the debate, of a sufficient knowledge of human physiology; there were no mistaken notions about the physical nature of the fetus. Indeed, it was the pro-life forces which called on the discoveries of modern science to confirm if not establish the validity of their position. Nevertheless, the insistence that fetal life has the inviolability accorded by all to the life of born human beings is not genuinely argued; it is adamantly asserted and forms the basis for much essentially religious language. Slip op. at 273.[121]

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[120] *See* slip op. at 165. The speeches constantly reiterate this value-laden perception of the abortion procedure. Defendant Hyde refers to the "abortion-chamber" (H10834, 10/12), "Slaughter" (H6083, 6/17), "calculated killing" (H6082, 6/17), "exterminate" (H10835, 10/12), the transformation of the medical profession into "executioners-for-hire" (H10133, 9/27; H10969, 10/13). Mr. Bauman refers to abortion as "murder" (H6095, 6/17; H12172, 11/3), "slaughter" (H10969, 10/13). Mr. Dornon talks of the execution of American citizens (H6087, 6/17). Mr. Bauman characterized abortions as "[T]he final solution to borrow a phrase from not too recent history." (H6095, 6/17).

In the Senate there were references to abortion as a "heinous crime" by Mr. Garn (S11035, 6/29); and as a "moral crime" by Mr. Hatch (S11038, 6/29).

[121] The district court noted as well that "much other argument . . . in the debates was free of religious reference, whether or not the debators were motivated by their religious convictions." Slip op. at 275. Dr. Lindt noted that the debates

The court noted the debators' citations to various church teachings to legitimate their positions,[122] as well as "frequent avowals . . . of religious affiliations . . . [and] upbringing" in the context of "[t]he charge that the pro-life members were seeking to impose their 'morality' or their religious views on . . . poor women and the counter-charge that the pro-choice members were preparing to require taxpayers to whom abortion was morally abhorrent to subsidize it . . . ." Slip op. at 276.[123] (*See* Lindt, T.4279; A.253.)

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must be read holistically and that seemingly secular assertions in one place are informed by religious references in another. (Lindt A.251.)

[122] Mr. Bauman identifies the leaders of the "right to life movement" as "Catholic, Protestant and Jewish" (H10831, 10/12). Mr. Percy stresses the support of religious organizations for the right to abortion, saying: "Those are organizations every bit as concerned with human life and morality as any church any of us might belong to" (S11032, 6/29).

[123] Mr. Rudd says funding discriminates against those opposed to abortion "on religious conviction or otherwise" (H6088, 6/17). Mr. Milford says: "I believe we are asking too much of those who are so morally opposed to this issue, by taking their tax money to fund the very act that violates their religious convictions" (H6097, 6/17). Mr. Stanton said "certain inalienable rights that come from God and not from man" (H6095, 6/17). Mr. Taylor adverted to raising his adopted daughter in a "Christian home" (H6089, 6/17). In the Senate, Mr. Hatch urges support for the Hyde Amendment because abortion is a "moral crime" and something about which "people feel deeply and religiously" (S11038-39, 7/29). Some voting pro-choice indicated their personal convictions against abortion: Mr. Bayh states that he came to a personal decision that the fetus is life but that "people have a right to differ on this" (S11043, 6/29). The court noted that Roman Catholic legislators who supported anything other than the narrow life-endangerment standard found the debates particularly trying. Slip op. at 268-69. Also, Mr. Kennedy: "I am opposed to abortion on demand. This opposition is based on deep moral and religious beliefs" (S11053, 6/29). Mr.

The district court observed that:

> [t]he pro-choice debators . . . frequently emphasized their respect for the pro-life members' views and, in so doing, manifested an evidently informed belief that the pro-life views were essentially religious.[124]
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> * * * * *
>
> The pro-choice members argued that the abortion decision was a matter of individual conscience.[125]
>
> And there was a recognition that in the minds of some members their religious beliefs did not really leave them a free vote.[126] Slip op. at 276-77.

Moynihan: "In my view, decisions about birth and abortion are moral and religious decisions, which must be left to each individual or family to make" (S11056, 6/29).

[124] "If your religious convictions tell you abortion is wrong, honor them." (H6089, 6/17) (Rose). Mr. Weiss describes the Hyde Amendment as "stand[ing] in moral judgment of . . . poor women" (H6093, 6/17).

In the Senate, Mr. Percy describes the anti-abortion pickets as "deeply convinced that they have a direct source to the truth . . . and that God is on their side." (S11033, S11045, 6/29). Mr. McGovern says it "impose[s] one moral viewpoint" (S11040, 6/29).

[125] Mr. Milford, although voting to restrict funds because of religious belief, acknowledged that the decision to abort should be decided by the woman "after counsel with her own conscience." (H6096-6097, 6/17). Mr. Allen urges "compassion" and asks whether the proponents of Hyde realize the "cruelty its literal enforcement would visit upon the poor, the sick" (H6090, H6093, 6/17). "We are not Almighty God and we really cannot decide so lightly issues that lead to the agonies and suffering of other people," concluding, "I ask for mercy . . ."(H12171, 11/3)(Fenwick). Mr. Bayh states: "[Abortion] is perhaps the most deeply felt philosophical, religious and moral issue I have ever confronted" (S18582, 11/3); *See* Lindt, A.256).

[126] Mr. Bauman stated: ". . . how can any of us explain backing down and voting against this important principle of life" (H10831,

The lower court found that the pressures of a religiously mobilized single-issue constituency played a pivotal role in the debate:

> The debates reflect the members' awareness for the magnitude of the right-to-life political effort of the single-issue voting with which many were faced and which, inferentially, favored some members' electoral chances. Slip op. at 165.
>
> The members were plainly aware, were made aware, of the pressures exerted upon them by their sense of their constituencies' views on the issues and of the religious setting in which the views were entertained and expressed. Slip Op. at 277.[127]

Finally, the extraordinarily fierce emotionalism, divisiveness and inability to compromise, reflected in the Hyde debates are other indicators of the religious nature of the issue at hand. The district court found:

10/12); Mr. Mahon quotes the old hymn "Take your troubles to the Lord and leave them there," and states: "I just want my colleagues to vote their own consciences . . . I [would not] twist an arm or say an unkind word or otherwise try to pressure anyone." (H12771, 12/7). "I believe firmly that every man must render an accounting not only for every idle word but also for every idle silence" (H12773, 12/7) (Hyde). During debate on a similar funding restriction, Mr. Conte says, "I feel justified in supporting these provisions as a legitimate compromise, [b]ut . . . in good conscience, I cannot go much further" (H10836, 10/12).

[127] "I cannot possibly cast a vote on the abortion issue without making a large number of people in my district very angry . . . It's a no win situation." (H6096, 6/12) (Milford); The vote is one which "place[s] my head on the election 'chopping block' " (H6097, 6/17) (Meyner). It is "fraught with a great deal of political liability but the heat is not going to get any less . . . "(Bayh, S18583, 11/3).

> The debates were often bitterly controversial, even inflamed. The members returned to the debate again and again with expressed reluctance but with unabated resolution. The members recognized that the debates were often emotion-charged, and much of the argument, even read in the black and white of the Congressional Record, is deeply felt, personal in tone, and consciously moralistic—because the speaker sees no escape from the moral issue or from its importance. Slip op. at 277.[128]

The difficulty of compromise stemmed from the intensity and religiosity of the belief at issue.[129] (Lindt, A.252.) In the end, the resolution was satisfactory to no one but represented "only what could be negotiated across an unbridgeable gulf of principle." Slip op. at 165.

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[128] "Abortion is the most divisive basic issue I have run across in my experience" (S11030, 6/29) (Packwood). Mr. Mitchell recognizes "the passionate nature of the opposition to abortion" (H6094, 6/17); Mr. Flood: "It is an emotional problem. That is why we are here ranting and raving one way or another . . . " (H6096, 6/17); Mr. O'Brien characterizes it as "fiercely emotional" (H6090, 6/17). Mr. Obey says, "An issue like this tears my guts out." (H12171, 11/3).

[129] "It is pretty hard to compromise between people who believe strongly on one side and people who believe strongly on the other side" (S19439, 12/7) (Magnuson); "[T]here are an awful lot of us who will fight right down to the wire because of those beliefs" (S11039, 6/29) (Hatch). "[T]here is not a political question but . . . a matter of principle . . . that cannot be compromised. It is basically a principle of life" (H12491, 11/29) (Volkmer). Mr. Giaimo, speaking against the riders, "We cannot compromise a fundamental principle." (H10836, 10/12). Mr. Flood counselled against compromise: "I call upon you, who have been so sound and so faithful to your traditions and your beliefs, to again be that way. This is the House, thank God, and vote against this motion" (H12174, 11/3).

11. The Opposition to Abortion Which Produced the Hyde Amendments is Pervasively Religious in Character.

The district court considered extensive evidence on the purposes, character, organization and activities of the anti-abortion drive. This evidence, relevant to the analysis of legislative purpose under both the Fifth and First Amendments, demonstrates that the systematic hierarchical mobilization by the Roman Catholic Church had made it the backbone of the so-called "right-to-life" movement. Beyond that, and more importantly, the evidence demonstrates the religious nature of the popular movement itself. Its themes, symbolism, and advocacy are intrinsically religious; its cause is associated with God and religion; and its constituency comes principally from religious groups which share the faith commitment.

Appellees want to make crystal clear that the educational, pastoral and political activities of religious and other institutions discussed here are fully protected by the First Amendment's guarantees of free expression, petition and free exercise of religion. We do not contend that any of these activities are unconstitutional nor do we seek to restrain them. First Amendment freedoms cannot, however, insulate from scrutiny the religious background of legislation challenged under the Establishment Clause.

a. The Roman Catholic Church Has Spearheaded An Extensive Political Mobilization To Enact Their Religious Doctrine Against Abortion Into Civil Law.

The district court recognized the pivotal role of the church in the mobilization which produced the Hyde Amendments:

> In this period, the record indicates, only the Roman Catholic Church, among the institutional religions, has sought to secure the enactment of legislation that would forbid abortion, has organized educational and lobbying efforts to that end and has acted to mobilize popular support for the legislative goals. Slip op. at 280.

Since 1973, the Roman Catholic hierarchy has worked to overturn *Roe v. Wade*. Slip op. at 200.[130] In 1975 the National Council of Catholic Bishops (NCCB) promulgated the Pastoral Plan for Pro-Life Activities (hereinafter, Plan), a complete blueprint for political as well as pastoral mobilization "to bring civil law into consonance with Catholic teaching." Slip op. at 208.[131]

The Plan is unprecedented in the life of the Catholic Church in the United States (Smith, T.2142-45). Its objective is to amend the Constitution and stop public funding of abortions because a "just system of law cannot be in conflict with the law of God." (Pl. Exh. 39, p. 7). It calls for activation of official and lay structures and for the establishment of a nationwide network of parish, diocesan, and state pro-life committees to promote educational and political activity under the coordination of the NCCB's Pro-Life Activities

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[130] Abortion Hearings I, pp. 153-253.

[131] Smith, T.2140-41; Pl. Exh. 39/T.2019: L.IV-9. The district court details the elements of the Plan. Slip op. at 201-16. It found that the Plan and "The Declaration on Abortion . . . of course embody explicitly religious teaching: the Declaration 'entails a grave obligation for Christian consciences;' the Pastoral Plan speaks of 'the grave sin of abortion' as does the Declaration." Slip op. at 228.

Committee. Slip op. at 205-6.[132] Its 12-point political program is largely directed to "convinc[ing] all elected officials and potential candidates that 'the abortion issue' will not go away and that their position on it will be subject to continuing scrutiny." Pl. Exh. 39, p.12: L.IV-9. The district court found:

> There is no question that, to a very considerable extent, Roman Catholic clergymen have encouraged their parishioners to participate actively in the political effort to have a right to life amendment passed and to support the Hyde Amendment.[133]
>
> A great deal of documentary evidence is in the record showing numerous parish and diocesan publications, and some national publications, urging political action, giving information on voting records on the abortion issue of state and federal legislators, emphasizing the special importance of the abortion issue because of its connection with life values, intimating and, occasionally, advocat-

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[132] In addition, the Plan declares it "absolutely necessary" to develop in each Congressional district a "tightly knit and well-organized pro-life unit [which] can be described as a public interest group or citizens lobby," and which, though not a "church agency", is to maintain close contact with the Diocesan Coordinating Committee and which "will need some financial support." Slip op. at 205-08 (Pl. Exh. 319, at 11-13.)

[133] Appellees did not try to document implementation of the Plan nationwide and the district court quite properly found it ". . . far from clear . . . [h]ow systematically the Pastoral Plan was carried out." Slip op. at 210. The Court did note evidence of implementation in some parts of the country, and "The Clergy Bulletin of the Diocese of Fargo, North Dakota, reflects in the Bishops' instructions to the Clergy, a fairly complete implementation of the program." Slip op. at 209.

ing single issue voting, and perhaps less frequently, cautioning against voting on a single issue where many issues are involved. Slip op. at 209-10.[134]

Roman Catholic clergy and laity are not alone in the pro-life movement, . . . but the evidence requires the conclusion that it is they who have vitalized the movement, given it organization and direction, and used ecclesiastical channels of communication in its support. *Id.* at 231.

That the efforts of the Roman Catholic clergy and laity have produced the Hyde-Conte Amendment of 1976 and its successors cannot be found as a fact, but it is more likely than not that those efforts have been a factor that cannot be eliminated from the chain of causation. In any event, the pro-life effort, of which the organized Roman Catholic effort has been the most active component, has made use of the political process, and played a significant part in bringing about Congressional legislation on the subject. Slip op. at 281.

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[134] Several exhibits from the Catholic press show frequent attention to the abortion issue on the national, diocesan, and parish levels. For example, *Our Sunday Visitor* is an official national weekly magazine. In 1977, it carried over 100 items dealing with the abortion issue; 87 were news articles or signed commentaries and 15 were editorials (Pl. Exh. 451/R. 233). The *Pilot*, published by the Archdiocese of Boston, had 47 items on abortion in 11 issues, eight on the front page. Fifteen articles attacked Governor Dukakis' veto of the state Medicaid cut-off. (Pl. Exh. 452/R.233). *See also* Pl. Exh. 335 A and B, 338, 340 A-C, 341 A, D and E, 351 A, F-K, and Pl. Exh. 450/R.233: L. IV-30, 31, 34, 35, 36, 37, 38, 39).

Parish bulletins also mobilized the constituency. Bulletins from different parts of the country—including Maryland, Pennsylvania,

b. The Record Demonstrates The Religious Themes and The Absence of a Secular Interest or Constituency in the So-Called Secular "Right-to-Life" Movement.

The fact that the Roman Church and others play a central role in the "right-to-life" movement is not alone decisive of its religiosity. It is more significant that the supposedly secular "right-to-life" groups are in fact sectarian and have no distinct secular component. The record demonstrates the religious nature of the "right-to-life" effort in two major respects: (1) the themes, symbols and advocacy of these groups are religious and (2) the constituency is drawn primarily from identifiably religious communities.

The district court found:

> The right-to-life movement, although not confined to Roman Catholics and Roman Catholic clergymen, does use religious language, invokes religious motivations, and enlists prayer as an aid. Slip op. at 228.

As in the congressional debates, the themes that predominate in "right-to-life" literature echo and elaborate upon the central teaching of the anti-abortion faiths that the fetus is a person:

> The literature of those opposing abortion speaks of embryos and fetuses as human beings, children,

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Illinois, Wisconsin, Missouri and Minnesota—were submitted and the district court found that "at times [they] included some material on the abortion issue and not infrequently included a good deal of that material . . ." Slip op. at 211. Pl. Exh. 60/T.2735:L.IV-30, Pl. Exh. 78/T.2897:L.IV-31, Pl. Exh. 307A & B/R.233:L.IV-34, Pl. Exh. 309A/R.233:L.IV-35, Pl. Exh. 343A.-C.:L.IV-36, Pl. Exh. 369A,B./R.233:L.IV-37,38, Pl. Exh. 371/R.233:L-39.

> unborn children, the innocent unborn, and it personifies them. Abortion is characterized as murder. Slip op. at 229.

The literature refers to the fetus, explicitly or implicitly, as having a soul, pleading to be saved.[135] The religious theme is also implicit in constant references to the "innocence of the unborn" and Herod's slaughter of the Innocents. Slip op. at 229-30.[136] The district court found that the anti-abortion movement is pervaded by religious symbolism[137] and "kept alive . . . by

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[135] The New York State Right to Life Committee (NYSRTLC) calls its raffle "Save a Baby" (Pl. Exh. 429, 431/R.233) and refers to the fetus as "our little ones" (*Id.*). Henry Hyde describes "the soul of the unborn child" as a "little bit of infinity" (Pl. Exh. 462/R.233; A.312); The Human Life Amendment Group's flier "Abortion is Murder" cites the Old and New Testament to prove this point (Pl. Exh. 347/R.233; A.309). NYSRTLC newsletters speak of "our 'little ones' who can now only speak to their Creator" (Pl. Exh. 431, p. 2/R.233) and "the denied ones" (Pl. Exh. 432/R. 233 L. IV-27); a retired Bishop, chaplain of the Knights of Columbus, speaks of the "tiny, unsilenced, haunting voice of the murdered unborn child." Slip op. at 229, Pl. Exh. 348/R.233: L.IV-26.

[136] *See also* Pl. Exhs. 424, p. 4, 429, 431, p. 2, 348, p. 2-3/R.233. Taxpayers urging opposing Medicaid funding refer to "Precious Holy Innocents of today's world." (Pl. Exh. 368/R.233.) Illinois Citizens Concerned For Life refers to the "innocent lives of the unborn children," stating "the slaughter of unborn must be stopped." (Pl. Exh. 345B) *See also* Pl. Exhs. 345A; 363, p. 2: L.IV-24; 368; 469E.

[137] Pictures of the 1978 "March for Life" show rosaries in the hands of various marchers and draped over the "Stop Abortion" banner. Other marchers carry signs, "Pray the Rosary," "The Lord Giveth and the Lord Taketh Away," and "Jeremiah 1:5, Before I Formed You In The Womb I Knew You." (Pl. Exh. 456A/R.233, A.328; *see also,* Pl. Exh. 424/R.233.)

Some Knights of Columbus banners and a statue of the Virgin Mary are prominently carried, and the March for Life leaflet refers to the red roses, widely used by the anti-abortion move-

the practice of having prayers said and services conducted in direct relation to the pro-life activity."[138]

The anti-abortion effort describes itself as a crusade carrying forth God's work, on a mission against the devil.[139] The 1978 "March for Life" leaflet declares "[W]e continue to wage the necessary, just and peaceful war against the evil of abortion and all other evils which have come in its wake . . . [P]ro-lifers continue the battles so that good can triumph over evil."[140]

Henry Hyde's comments before the supposedly secular Maryland State Right to Life Convention banquet highlight the pervasive religious identification and fervor of the anti-abortion movement.

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ment, as "symbols of short life and martyrdom." (Pl. Exh. 308/R.233, A.326).

[138] Slip op. at 228-31 (Pl. Exhs. 305A; 305B, L. IV-19; 454; 340 B,C; 420/R.233, A.321; 308/R.233; 68/T.2554; Pl. Ex. 438/R.233).

[139] A large, red, white and blue billboard in St. Louis proclaims, "God is Pro Life," (Pl. Exh. 312A/R.233, A.311.) A banner at the 1978 March for Life reads, "Lutherans for God, Country and Human Life Amendment" (Pl. Exh. 456B/R.233, A.327.) The NYSRTCL newsletters and mailings refer to God's blessings, the "work [to] which we have all been called," activists as "indispensable to a movement that is truly God-inspired," and the annual RTL convention as "[j]oy in doing God's work for the denied ones . . . ." (Pl. Exhs. 429/R.233, A.322; 435/R.233; 432/R.233; 453/R.233, A.329; 400/R.233; Pl. Exh. 420/R.233, A.321.)

[140] Pl. Exh. 308/R.233, A.326, Slip op. at 229. Those who support the "sin" of abortion are sternly warned "God can send devastating storms, floods, epidemics, pestilences" (Pl. Exh. 348 at 4/R.233); and that "on judgment day, you will be held accountable." (Pl. Exh. 368/R.233, A.315.) An early effort to generate parish activism argued that "Catholics and Protestants . . . [should] reset this nation upon the theocentric foundation laid down by the Protestant Founding Fathers" (Pl. Exh. 363/R.233: L. IV-24).

> When . . . the final judgment [comes], you are there alone standing before God and a terror will rip your soul like nothing you can imagine. I really think that those in the pro-life movement will not be alone. I think there'll be a chorus of voices that have never been heard in this world but are heard very beautifully and very loudly in the next world and I think they will plead for everyone who has been in this movement and they will say to God, "Spare him, because he loved us." And God will look at us and say not, "Did you succeed?" but "Did you try?" (Pl. Exh. 462, p. 10/R.233, A.313).

The record reveals that basic religious themes pervade all anti-abortion literature.[141] The record does not, on the other hand, indicate any secular constituency mobilized against abortion.

The district court found that the "right-to-life" movement is not exclusively Roman Catholic: the "union of effort with . . . other denominations is based on shared religious conviction." Slip op. at 232. Indeed, appeals for support beyond the Catholic community generally emphasize the desirability of activating other religious groups.[142] Clear secular concerns such as ma-

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[141] The content of the appeal differs depending on the religious community to which it is addressed. Thus, where the constituency is primarily Catholic, the approach tends to be more philosophical. Where the constituency is fundamentalist, reliance on scripture is common. For example, the Greenville, Mississippi Right-to-Life newsletter opens with an editorial entitled "Why Bible-Believers Oppose Abortion" which lists 10 biblical verses and concludes "the true Bible-believer must stand on the principle that abortion is unrighteous, ungodly, selfish, sinful, wrong and destructive to the word of God in His plan for the human race." (Pl. Exh. 457, R.233, A.319).

[142] In the midst of the debate over the FY 78 Hyde Amendment, the Committee for a Human Life Amendment alerted its network

ternal health or even life are uniformly disregarded except insofar as politically expedient. As in the Congressional debates, biological information is frequently cited in the popular literature, but is consistently entangled with religious references. Slip op. at 228. The record demonstrates overwhelmingly that the "right-to-life" conviction that the fetus is a human life from the moment of conception is religiously derived and religiously legitimized and that the movement, in all its aspects, is religious.

12. The Fabric of Our Society is Increasingly Threatened by the Religious Mobilization Against Abortion.

To the framers of the First Amendment, religious struggles for state power—whether to advance wealth or to enforce faith—were among the greatest dangers to basic liberty and the survival of a robust but tolerant pluralistic society. The record reveals that the religious mobilization to eliminate the religious and conscientious liberty protected by *Roe v. Wade* is producing the very sectarian strife and political fragmentation against which the First Amendment was designed to stand guard.

With respect to the religious division over abortion, the district court found:

> What ultimately emerges from the facts . . . is that the major religions whose views were presented all regard abortion as presenting religiously framed questions of moral right, moral duty and

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to seek support in terms of signatures, clergy visits, and prayer vigils from "pro-life" ministers, priests, and rabbis (Pl. Exh. 305A,B /R.233; L.IV-19). *See also* Pl. Exh. 364/R.233: L.IV-14; Pl. Exh. 28/R.233: L.IV-28.

> conscience, that they are in disagreement on the appropriate rules of conduct but in agreement that abortion is a morally grave undertaking in any circumstances, and that their sharpest disagreement concerns the role of civil government. Slip op. at 280.

The record shows that the mobilization against abortion rights has invoked deep concern for the future of ecumenism. On both sides of the controversy, abortion is seen as the "chief issue," an "albatross" for Christians.[143] (Pl. Exh. 351G/R.233), and the "one issue of greatest division today." (Wogaman, T.1997).

The anti-abortion mobilization is widely seen as an effort to impose one segment of religious morality. Despite the normal reluctance to risk ecumenical accord, many denominations[144] and prominent theolo-

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[143] The sectarian discord generated by the effort to enact the Hyde Amendments was calmed by the original injunction in this case:

> [W]hen the Hyde Amendment was first . . . proposed and adopted [t]here was a gathering storm of . . . controversy . . . a conflict among religious groups . . . which was noted in the newspapers at the time as a danger, a risk. [T]hen when . . . this Court enjoined the . . . Hyde Amendment, that put the conflict aside . . . for a period of time . . . . It was more generally understood that the dialogue would go on about the religious question . . . among scholars and people in the religious sphere and the public sphere. (Wogaman, T.2001-02).

[144] The Religious Coalition for Abortion Rights (RCAR), comprised of 27 national religious organizations, was formed to oppose the activities of "a vocal minority [that] would . . . nullify the Supreme Court decisions . . . [and impose] [o]ne theological view . . . on Americans of all faiths." Slip op. at 232-33 (Pl. Exh. 320/R.233: L.IV-2). In 1974, the American Baptist Churches decried "the present national effort of the National Conference of Catholic Bishops in the U.S.A. to coerce the conscience and per-

gians[145] have publicly decried this effort. The Church mobilization has also drawn strong criticism from within the Church for imposing a particular moral view, threatening pluralism, substituting coercion for persuasion, and generating single-issue politics. Slip op. at 216-23 (Pl. Exh. 300, 486b).[146]

Communication is not always so restrained, as disputation gives way to invective. The same accusations that pervade the legislative debates are polarizing the religious community.[147]

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sonal freedom of our citizens through the power of public law in matters of human reproduction." (Pl. Exh. 133/Wood, T.3194; *see also* Pl. Exh. 135/Wood, T.3196).

[145] When the FY 78 rider was being debated in Congress, over 200 Protestant, Jewish and Catholic ethicists signed a Call to Concern protesting "the heavy involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into laws." Slip op. at 234-35 (Pl. Exh. 36/T.2016, A.307: L. IV-1.) Acknowledging the right of all to seek laws consonant with their own religious beliefs, the Call nonetheless considered the Catholic Church's institutional activities inappropriate on this issue because curtailment of abortion rights "would violate . . . deeply held religious convictions." (*Id.* A. at 308.)

[146] The Lutheran Church-Missouri Synod recognizes that laws which reflect the "religious credo" of a minority have no title to public authority. Slip op. at 178.

[147] *E.g.*, a Roman Catholic Archbishop calls pro-choice supporters necrophilic and equates abortion with the Nazi Holocaust (Pl. Exh. 319/R.233: L.IV-41); the *Wanderer*, a Catholic weekly, comments that abortion is worse. Outraged rabbis, joined by other religious leaders, score these affronts to their morality and to the memory of six million Jews as "demagoguery" and "obscene." Slip op. at 233-34. (Pl. Exh. 490.) Rev. Wood compared abortion with the "open debate" on parochial school funding: "When we talk about political divisiveness on the part of religion . . . we haven't seen yet in the history of this country, what we would have if, indeed, the Right to Life Movement is able to enact its position into law through abridging the First Amendment . . . It will be

A movement which assumes God-given authority to stop abortion "murders" inspires not merely violent epithets but violent acts against abortion clinics as well. Slip op. at 235-36.[148] Although the individuals responsible for these attacks have not been identified, "the issue is one which lends itself to extremes of expression and to easy incitement to anger and violence." Slip op. at 237-38.[149]

The district court found that the anti-abortion mobilization is creating political divisiveness along religious lines. The court said:

> The abortion issue has become an important part of the electoral and legislative processes since 1973. The evidence does not, of its nature cannot, demonstrate that the abortion issue has begun to dominate politics. Equally it cannot be said that the abortion issue has not decided any elections. Practical reason gives assurance that it must have done so, that the forces to produce that result

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divisive in a way we have never imagined in the past." (T.3225-26.)

[148] On Ash Wednesday, 1977, the Planned Parenthood Clinic in St. Paul, Minnesota, suffered extensive damage from arson. Slip op. at 235. Attempted firebombing and vandalism has been reported in Omaha, Cleveland, Columbus, Cincinnati, Akron and Burlington, Vermont. Slip op. at 236. (Pl. Exhs. 395, 396, 402, 404.)

[149] Plaintiffs ask this Court to take judicial notice of the fact that, subsequent to the trial in this case, on the afternoon of February 15, 1979, when scores of people were in the Bill Baird Center, an abortion clinic in Hempstead, New York, the Center was destroyed by fire. New York *Times*, February 16, 1979, at B1:6. The arsonist, who stated his opposition to legal abortion, was later acquitted by reason of insanity. New York *Times*, October 31, 1979, at B2:5.

> have been often deployed, and that they could not have failed uniformly. Slip op. at 264-65.
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> [T]he issue is seen as alive with considerations of specifically religious morality . . . . Slip op. at 265.
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> [S]ingle-issue voting [is] almost inevitably encouraged by the bitterly controversial abortion issue. . . . Slip op. at 266.

The tendency of religious issues to assume single-issue importance to the exclusion of other issues in the political arena is more apparent with regard to the abortion issue than with any other in our time.[150]

Minnesota, where the mobilization began even before *Roe v. Wade*, illustrates the direction and impact of the Church and right-to-life efforts on the political process. Slip op. at 247-64. As a result, abortion had become by 1976 the overarching and, in many cases, the sole issue upon which the political process within the Democratic party divided.[151] The political situation

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[150] The Pastoral Plan is understood by many to encourage single-issue voting and it has had that effect despite disclaimers of absolute singlemindedness from the hierarchy. Slip op. at 210, 217-23.

[151] Parishioners were mobilized to vote "pro-life" through the scheduling of special masses on the day of the electoral caucuses. The statewide diocesan paper, the *Catholic Bulletin*, repeatedly stressed the singular importance of the abortion issue, published polls of the candidates' abortion positions, carried pre-election advertisements which in some cases emphasized candidates' anti-abortion stance; churchgoers were leafleted with fliers stressing the "Catholic" and "Christian" duty to vote pro-life, regardless of

in Minnesota today is "much worse," and has "overtones of a holy war" which were not present even in the divisive conflict over the Vietnam war where religiosity was not involved. Slip op. at 246 (Peek, A.235.)

Single-issue divisiveness is perhaps best illustrated by the annual debates over the Labor-HEW riders themselves, where abortion is often the only matter requiring a Conference Committee and ultimately the most difficult question to resolve.[152] The annual struggle over Labor-HEW appropriations is replicated whenever a bill comes up which remotely affects abortion.[153] In the equally heated debates over abortion coverage in the Pregnancy Discrimination Act, Representative Clay underscored the dangerous religious nature of the anti-abortion pressure on the Congress:

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party affiliation; and the Church provided intensive organizational and financial support to Minnesota Citizens Concerned for Life. The Peek campaign in 1972, detailed in the district court's opinion, illustrates the chilling effect of church intervention on Catholic supporters and the vilification that the abortion issue inspires. Slip op. at 242-47 (Peek, A.233.)

[152] The tendency of the abortion issue to assume single issue importance is also illustrated by the fact that in 1976, during the Presidential campaign and the debates on the FY 77 rider, NCCB representatives visited Governor Carter and President Ford. They confined their public remarks to the candidates' positions on a constitutional amendment. Despite the NCCB's later statement of nonpartisanship, "the effect of which is necessarily a matter of conjecture," slip op. at 242, the press "saw both candidates as trimming their sails to meet the seeming NCCB wind." *Id.* The candidates were reported as opposing federal funding for abortion and the Hyde debates themselves reflected keen awareness of the pressures created. Annex at 67, 69. Although one can never prove a causal connection, it is notable that the Amendment succeeded in 1976 where it had failed the prior year.

[153] Funding riders generally tracking the Hyde provisions have been tacked on to virtually every appropriations bill which con-

> This amendment is history repeating itself. It is a concept of the Holy Wars all over again, the heathen must be conquered and converted. This amendment says in effect that we must impose our code of morality, indeed our religious views, on those who would exercise their right to freedom of religion . . . . It has indeed become the albatross for all legislation, regardless of the merit of the legislation being proposed. (Pl. Exh. 302 at 25-6.)

Under our Constitution, no court has power to take religion, and the divisiveness it entrains, out of politics—nor should it. It has the power, and indeed the duty, however, to invalidate religious legislation which destroys freedom of conscience and renders scapegoats those most vulnerable, so long as efforts to amend the Constitution have failed.

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tains funds for abortion. Because of its report supporting *Roe v. Wade*, a rider precludes the Civil Rights Commission from even "apraising . . . studying and collecting information about laws and policies . . . with respect to abortion." (Pl. Exh. 296a/R.233.) Slip op. at 38-41.

SUMMARY OF THE ARGUMENT

I

The district court held that the Social Security Act requires that states provide all medically necessary services, including medically necessary abortions. That holding is undisputed by the Defendants. See Brief of Appellants in *Williams v. Zbaraz*, pp. 43-4, n.23. The district court further held that the Hyde Amendments modify the mandate of the underlying statute. Plaintiffs-Appellees ask that the holding of the district court on the effect of the Hyde Amendment be reversed and rely upon the Brief submitted by Appellants in *Williams v. Zbaraz*.

II

The affirmative exclusion of payment for medically necessary abortions from a program that otherwise prohibits exclusion of medically necessary services on the basis of diagnosis raises constitutional issues very different from those decided in *Maher v. Roe*, 432 U.S. 464 (1977). The Hyde restrictions burden interests of women and physicians that were not present or asserted in *Maher*. The Hyde restrictions burden the ability of the woman and her physician to act to protect her life and health, while the policy approved in *Maher* respected those interests by providing funding where there was a medical need for abortion. This Court's decisions affirm the central importance of the individual's interest in the protection of life and health, both in the abortion context and generally. *Roe v. Wade*, 410 U.S. 113 (1973); *Colautti v. Franklin*,

439 U.S. 379 (1979); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The Hyde restrictions also burden interests of religious and conscientious freedom not presented or considered in *Maher*. The degree of the burden imposed upon women and their physicians is much greater than that involved in *Maher*, where only elective, nontherapeutic services were denied. The trial court found that the effect of the Hyde restriction has been to deny funding to women whose pregnancies pose a threat to health and to life. Exclusion of funding for medically necessary services makes it impossible for physicians to practice medicine in accordance with minimal professional standards. Congress has not simply refused to extend a benefit, but rather has taken affirmative action to destroy the statutory entitlement and impose a burden upon one, sex-specific group of people otherwise entitled to medically necessary services under Medicaid. *Nashville Gas v. Satty*, 434 U.S. 136 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1973); *Bellotti v. Baird*, 428 U.S. 132, 147, 149-50 (1976); *Zablocki v. Redhail*, 437 U.S. 374 (1978). In *Maher* the Court found that the policy denying payment for elective abortions furthered a legitimate state interest in "encouraging normal childbirth." 432 U.S. 374. The trial court found that where medically necessary abortions are denied, normal childbirth is impossible. No other legitimate interests are advanced in support of the exclusionary classification.

The district court here found that the actual purpose of the Hyde legislation was to prevent abortions, to protect fetal life. The denial of payment precisely for the purpose of burdening and denying the freedom of women and physicians to choose medically necessary

abortions is unconstitutional. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1972); *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975); *Board of Engineers v. Flores de Otero*, 426 U.S. 572, 605 (1978).

III

The Hyde exclusion creates a classification distinguishing women with health threatening pregnancies from all other Medicaid eligible people in need of medical services. The district court found that the classification violates the equal protection component of the Fifth Amendment. All the factors that distinguish this case from *Maher* dictate that this classification be subject to more than a minimal level of scrutiny. Even under the most deferential standard of review, the classification is unconstitutional because it is not reasonably related to any legitimate government interest.

IV

The district court decision should be affirmed on the ground that the due process guarantee of fundamental fairness protects individuals from arbitrary governmental action demanding the sacrifice of life, health and privacy. *Zablocki v. Redhail*; *Carey v. Population Services International*, 431 U.S. 678 (1977).

V

The district court found that the Hyde Amendment is so "uncertain of meaning" that physicians "cannot divine what medical standard it implies." Slip op. at

322-23. The trial court held that the vagueness of the standard further confirms the Hyde Amendment's failure to meet minimal due process standards. We ask this Court to affirm this holding.

Statutes regulating abortion must give physicians the latitude necessary to make medical judgments. *United States v. Vuitch*, 402 U.S. 62 (1971); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Colautti v. Franklin*, 439 U.S. 379 (1979). The Hyde standard chills the exercise of medical judgment because doctors are unable to understand or apply it, and because they have been threatened with investigation and prosecution for failing to apply it correctly. The result has been that Medicaid has been denied even to that very limited group of women with life-threatening conditions for which entitlement theoretically exists.

VI

The district court held that the Hyde exclusion impermissably burdens the liberty of conscience and conscientious action of women whose religious convictions counsel consideration of abortion, and therefore violates the First Amendment Free Exercise Clause and the Fifth Amendment. This judgment should be affirmed. The evidence shows that the abortion decision is a matter of paramount concern in all major religions. The free exercise guarantee of the First Amendment protects the individual's right to act in accordance with religious or conscientious belief. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *United States v. Seeger*, 380 U.S. 163 (1965).

Withdrawal of Medicaid entitlement for medically necessary abortions substantially interferes with a poor woman's religious decision whether to bear a child. Religious liberty may not be infringed by the denial of benefits or privileges. Public benefits may not be offered on conditions that inhibit or deter the exercise of First Amendment rights. *Sherbert v. Verner*; *Elrod v. Burns*, 427 U.S. 347 (1976).

VII

The district court found that the Hyde restriction does not violate the First Amendment's prohibition against establishment of religion. This holding should be reversed. The legislative history shows that the restriction represents the enactment, into civil law, of a religious belief that the fetus is a human being from the moment of conception. *Epperson v. Arkansas*, 393 U.S. 97 (1969). While all religions regard the abortion decision as a matter of fundamental religious concern, beliefs about the nature of the fetus and the abortion decision are sharply divided.

The Hyde Amendment has a primary effect of advancing one religious belief and placing the "power, prestige and financial support" of the government behind the view that the fetus is a human being. *Engel v. Vitale*, 370 U.S. 428, 431 (1962); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). It serves no secular purpose. Struggle over the Hyde restriction has produced a destructive entanglement of government and religion. *Engel v. Vitale*; *Lemon v. Kurtzman*, 301 U.S. 602 (1971).

ARGUMENT

I.

TITLE XIX OF THE SOCIAL SECURITY ACT REQUIRES STATES TO FUND MEDICALLY NECESSARY PHYSICIAN AND HOSPITAL SERVICES, INCLUDING ABORTION SERVICES, AND PROHIBITS EXCLUSIONS BASED ON DIAGNOSIS.

The United States recognizes that, apart from the Hyde Rider, the Social Security Act requires states to fund all medically necessary physician and hospital services, and prohibits exclusions based on diagnosis. *Brief for the United States, Williams v. Zbaraz,* Nos. 79-4, 79-5 and 79-491, p. 43 n. 23. The Act specifically prohibits governmental interference with physician discretion in determining medical necessity and prescribes the exclusive, professionally controlled, mechanisms for professional review of the necessity of medical services. The requirements of the Act are canvassed in the Brief of the Appellees. *Williams v. Zbaraz, supra* at 71-129. *See: McRae v. Harris,* slip op. at 16-20, 294-96. Nine federal district courts, four circuit courts, and two state supreme courts haved found that the Social Security Act mandates funding for medically necessary services and prohibits exclusions based on diagnosis.[154] The Hyde Amendment does not relieve states of their duty under the Social Security Act to cover all medically necessary abortions. See Brief of Appellees, *Williams v. Zbaraz, supra* at 130.

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[154] *Supra*, note 23 and *D.R. v. Mitchell*, 78-1675 (10th Cir., March 10, 1980).

II.

THE HYDE RIDERS' AFFIRMATIVE EXCLUSION OF MEDICALLY NECESSARY ABORTIONS FROM A PROGRAM PROVIDING OTHERWISE COMPREHENSIVE ENTITLEMENT TO MEDICALLY NECESSARY SERVICES RAISES CONSTITUTIONAL ISSUES CRITICALLY DIFFERENT FROM THOSE RESOLVED IN MAHER V. ROE.

The Court below found that:

> The Medicaid legislation expresses the concern of the nation and state with health, and with providing health care for the . . . needy. *Roe* v. *Wade* and *Doe* v. *Bolton* defined the pregnant woman's fundamental right of decision largely in terms of the medically warranted abortion as a protected alternative to childbirth . . . . On the other hand, *Beal*, *Maher*, and *Poelker* read as cases in which there was no health care need for an abortion. . . .
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> The concern of Medicaid is with the problem pregnancy that, as such, requires medical treatment. . . . To overrule the medical judgment, central as medical judgment is to the entire Medicaid system, and withdraw medical care at that point because the medically recommended course prefers the health of the pregnant woman over the fetal life is an unduly burdensome interference with the pregnant woman's freedom to decide to terminate her pregnancy when appropriate concern for her health makes that course medically necessary. Slip op. at 310-12.

The Hyde restriction is fundamentally different from the policy approved in *Maher v. Roe*, 432 U.S. 464 (1977). There the state respected the interest of the woman and her physician in protecting her health; here that interest is ignored. There the policy affected women who sought only elective abortions; here the impact of the restriction falls on pregnant women whose health makes abortion medically necessary. There the state sought to serve a legitimate interest of "encouraging normal childbirth," 432 U.S. 474; here normal childbirth is impossible and no other legitimate interest is advanced. Indeed, the evidence clearly demonstrates that the actual purpose of the Hyde restriction is to prevent the exercise of constitutional rights.

While both cases involved Medicaid funding for abortions, the funding schemes differ in both form and effect. The Connecticut policy challenged in *Maher* provided Medicaid payments for all abortions certified by a physician as medically necessary,[155] and the *Maher* plaintiffs therefore sought to have abortions treated more favorably than other services provided under Medicaid. Plaintiffs here ask only that abortions be treated the same as all other medical procedures under

[155] In its argument to the Supreme Court, Connecticut said:

> [Medicaid] is a program designed to provide medical services which are necessary for the recipient's health. Abortion, just as a tonsillectomy, a hysterectomy or other medical service, is paid for under the program if it is medically necessary for the patient's health. . . . A state regulation which attempted to *exclude* from coverage under Medicaid an abortion wich *was* medically necessary for the patient's health might well run afoul of the equal protection clause as invidious discrimination. That is not the case here. Connnecticut makes no invidious discrimination against abortion under its Medicaid program. *Maher v. Roe*, *Brief of the Appellant*, p. 12 (emphasis in original).

a Social Security Act which requires that Medicaid programs pay for all medically necessary services. In other words, the *Maher* policy was passive; it simply did not extend the scope of Medicaid to include payment for elective services, not required by federal law to be included within Medicaid. *See: Beal v. Doe*, 432 U.S. 438, n. 3. By contrast, in enacting the Hyde Amendments, Congress affirmatively withdrew funding to which plaintiffs would otherwise be legally entitled. Congress, in the Hyde Amendment, singles out abortions and denies women with high risk pregnancies medically necessary services provided to all other poor people in comparable need.

The Hyde prohibition thus does not merely fail to extend a benefit not otherwise available, but it imposes a substantial burden that no other group need suffer. *C.f. Nashville Gas v. Satty*, 434 U.S. 136 (1977). Moreover, in affirmatively reaching out to destroy entitlement to essential medical services, the Hyde restrictions deliberately sacrifice the most basic life and liberty interests of vulnerable citizens. Hence the unconstitutionality of the Hyde exclusions does not rest on an abstract notion of a right to funded abortions, but rather on the fact that funding for medically necessary abortions, like that for all other medically necessary procedures is otherwise guaranteed by the statutory scheme and its exclusion serves no legitimate purpose.

As the Court of Appeals for the Eighth Circuit recently noted, *Maher* "laid down no *per se* rule," legitimizing restrictions on abortion funding however impermissible the purpose or devastating the impact of those restrictions. *Reproductive Health Services v.*

Freeman, No. 79-1275, slip op. at 19-20 (8th Cir. 1980). Rather, "the ultimate test of whether constitutionally protected interests are being impinged upon is not simply the form that the state interference takes but the effect." *Id.* The Hyde restriction differs from the policy approved in *Maher* in terms of the nature of the rights affected, the harshness of the burden created, the classification drawn, and the government interests asserted. These differences, discussed in this section, amply support the conclusions of Sections III and IV *infra*, that the Hyde restriction violates the due process and equal protection guarantees of the Fifth Amendment.

A. The Hyde Restrictions Impinge Upon Important Interests of Patients and Physicians.

The Hyde restrictions burden three interests of women and physicians which were not asserted in *Maher*, and which this Court has recognized as constitutionally significant: first, the interest in protecting life and health in the abortion context; second, a more general individual interest in protection of life and health; and third, the individual freedom of conscience and religious choice. The policy upheld in *Maher*, which provided for all medically necessary services, respected the interest of a woman and her physician in protecting her life and health. The exclusion created by the Hyde Amendments emphatically does not.

In *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), this Court recognized an overriding interest in the health of pregnant women, from which *Maher* did not retreat. 432 U.S. at 475. *Wade* also recognized a state interest in the potential life of the fetus. However, even after

viability is reached, when the state's interest in the protection of potential life becomes compelling, the pregnant woman's health is still of overriding importance. As the Court said in *Wade*, 410 U.S. at 165, and reaffirmed in *Maher*, 432 U.S. at 472, if an abortion is "necessary, in appropriate medical judgment, for the preservation of the life or *health* of the woman, even after viability, a state may not prohibit it." (emphasis added) *See: Colautti v. Franklin*, 439 U.S. 379 (1979).

The woman's health and the physician's role in protecting it are a central theme of this Court's abortion decisions since *Wade*. *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Wade*, repeatedly emphasized "the patient's [medical] needs and . . . the physician's right to practice." 410 U.S. at 199 and *passim*. The *Bolton* Court also stressed that "the medical judgment may be exercised in the light of all factors— physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." 410 U.S. at 192. This leeway, said the Court, "allows the attending physician the room he needs to make his best medical judgment . . . room that operates for the benefit . . . of the pregnant woman." *Id.*

This Court has continued to emphasize the importance of the woman's health in the abortion context. *Connecticut v. Menillo*, 432 U.S. 9 (1975), held that in order to protect women's health, states could constitutionally criminalize abortions performed by nonphysicians at any time during pregnancy. *Id.* at 11. *Planned Parenthood v. Danforth,* 428 U.S. 52 (1976) and *Bellotti v. Baird,* 99 S. Ct. 3035 (1979), confirm the supremacy of the health and choice interests of the woman

and physician over concededly legitimate concerns of the state in encouraging husbands and parents to participate in abortion decisions. *Colautti v. Franklin*, reaffirms that "the abortion decision in all its aspects is inherently and primarily, a medical decision," 439 U.S. 379, 387, holding that Pennsylvania's protection of the potentially viable fetus unduly burdened the interest in protecting the woman's life and health.

Danforth, *Colautti* and *Bellotti* all involve legitimate state interests.[156] But this Court has held that even these interests may not be furthered in ways which unduly burden the freedom of the woman and her physician to protect her health. Here, by contrast, no legitimate interests are furthered by the Hyde Amendments' denial of payment for medically necessary abortions. *Infra* pp. 128 *et seq.* If the government may not serve legitimate interests in ways that unduly burden and demand sacrifice of women's life and health, *a fortiori* the state may not impose such burdens and demand such sacrifice when no legitimate public purpose is served.

Every member of this Court, even those who would not agree that a woman has a fundamental right to abortion, has recognized that basic due process princi-

[156] Indeed the interests which the state sought to promote in these cases are often undermined by the Hyde restriction. Teenagers are denied medically necessary abortions, even where the pregnant child, the physician and the parents concur that abortion is the apropriate and necessary response to pregnancy. Poor women are denied abortions, even when their husbands and children support the decision of the woman and her physician that a health threatening pregnancy should not be continued. *See: Carey v. Population Services International,* 431 U.S. 678 (1976), particularly the concurrence of Mr. Justice Powell.

ples demand that the woman's interest in preserving her life and health be accorded greater importance than the asserted interest in fetal life. Mr. Justice White, writing for himself and Justice Rehnquist in *Wade* and *Bolton*, carefully directed his dissent to recognition of the right to abortion for reasons other than preservation of women's "life *or health*". 410 U.S. at 221. In a separate dissent in *Wade*, Justice Rehnquist found that, even under the minimal rationality test applicable to economic and social legislation set forth in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955), abortion could not be completely prohibited. 410 U.S. at 173.

In *Maher*, Connecticut expressed "a value judgment favoring childbirth over abortion," 432 U.S. at 474, but this did not extinguish the health interest in the *Wade* balance. Funding was provided for all "medically necessary" abortions at all stages of pregnancy. To the extent that the private abortion decision had a medical dimension, the state stood ready to bear the medical costs for it.

Quite apart from the abortion context, this Court has recognized the essential importance of the individual interest in preserving life and health. In *Memorial Hospital v. Maricopa*, 415 U.S. 250 (1974), the Court characterized medical care as a "basic necessity of life," 415 U.S. 259, and struck down a policy denying nonemergency medical care to new residents, even though emergency services were made available. Legitimate state interests may not be pursued by means which impose a significant detriment upon individual health. *Carey v. Population Services International,* 431 U.S. 678, 716 (1977) (Stevens, J. concurring.)

The right to act to protect personal life and health has deep constitutional roots. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), upheld a mandatory vaccination law on the ground that the state's interest in protecting public health was so strong as to override traditional rights of parents to determine the medical treatment appropriate for their children. Yet, notwithstanding the great weight of the public health concern, the Court made clear that the state could not compel an individual to be vaccinated:

> If it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination by reason of his then condition, would seriously impair his health, or probably cause his death. *Id.* at 39[157]

Finally, the interest which plaintiffs here assert in relation to medically necessary abortions is different than the interests considered in *Maher* because the evidence presented in the Court below established that the theological doctrine of mainstream Protestant and Jewish traditions teach that where pregnancy threatens a woman's physical or mental health, the woman and her physician are obligated to make a conscientious choice whether to continue the pregnancy or end it through abortion. *See* Facts, *supra,* §9. This theological evidence was not presented or considered in *Maher*.

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[157] *See also: Estelle v. Gamble*, 429 U.S. 97 (1975). Mr. Justice Stevens states "denial of medical care is surely not part of the punishment which civilized nations may impose for crime." n. 13. Although he was dissenting on other grounds, there is no indication that the majority disagreed on this point.

B. The Hyde Restriction Places Enormous Burdens Upon Poor Women and Their Physicians.

In evaluating the constitutional fairness and reason of legislation touching upon individual rights and freedom, the Court considers the degree of the burden imposed. For example, a one year durational residency requirement imposes an unconstitutional burden on the right to vote and travel, *Dunn v. Blumstein*, 405 U.S. 330 (1972), but a 50-day residency requirement is constitutionally permissible, *Marston v. Lewis,* 410 U.S. 679 (1973). The sole distinction lies in the degree of the burden. Similarly in *Califano v. Jobst,* 434 U.S. 47 (1977), the Court upheld a policy having an incidental effect upon freedom to marry, but in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court invalidated a policy creating a more significant burden on that freedom. The impact of the Hyde Amendment is much greater than the effects found permissible in *Maher*.

The record shows four effects of the Hyde restriction, none of which were at issue in *Maher*. First, the Hyde restrictions have virtually eliminated federal funding for abortions, and have had the effect of denying federal funds even in the very limited category of life-threatening situations in which Congress intended that funds would be paid. *Supra* p. 22.

Second, the Hyde restriction has forced some women to carry health threatening pregnancies to term, with consequent aggravation of often precarious conditions. That was emphatically not the impact of *Maher*, where only elective, nontherapeutic abortions were involved. Some women have had no choice but to bear children that their physicians have every reason to believe will

be deformed. Some will suffer life long disability and face an earlier death. For others, particularly teenagers, future reproductive capacity has been destroyed. *Supra*, p. 47.

A third effect of the Hyde restriction has been to force women to deprive children of subsistance in order to obtain medically necessary legal abortions, or to obtain less espensive illegal abortions, or to perform abortions on themselves, at great risk to their life and health. *Supra*, p. 62. While these effects are an important part of the reality of the impact of the Hyde Restrictions, no one argues that the Congressional action can be justified in relation to a purpose of encouraging illegal or self-abortion or providing incentives for women to use their scarce food and rent money to purchase legal, necessary abortions. Where, as here, the evidence is that legislative action, in fact, fails to effectuate a constitutionally permissible purpose, those facts bear upon the question of constitutionality. *See e.g. Bellotti v. Baird,* 428 U.S. 132, 147, 179-80 (1976); *Carey v. Population Services International,* 431 U.S. 678 (White, J. concurring); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (White J. concurring); *Zablocki v. Redhail,* 434 U.S. 374 (1978).

The fourth impact of the exclusion of medically necessary abortions is to make it impossible for physicians to practice medicine in accordance with minimal professional standards. For the cancer patient for whom contraceptive pills are contraindicated, the physician must somehow decide whether it is preferable for the patient to run the very real risks of birth control pills or the risks of a health threatening pregnancy which cannot be terminated. *Supra,* p. 61, n.89. For the psy-

chotic patient who, in order to preserve her sanity, requires drugs that may damage the fetus, the physician must somehow choose between real and substantial risks to the woman or to the fetus. The Hyde Amendment thus impermissibly forces doctors to weigh the health of the pregnant woman against the welfare of the fetus. This Court, in *Colautti v. Franklin*, observed that obligating physicians to "trade off" the potentially competing interests of a pregnant woman and a fetus "presents serious ethical and constitutional difficulties."439 U.S. at 400.

Severe burdens and penalties are imposed upon women and physicians by the withdrawal of Medicaid entitlement. These burdens and penalties are not constitutionally irrelevant simply because they are imposed in the context of a program providing benefits to the poor. While it is established that the mere fact that a classification denies essential services to the poor does not *ipso facto* call for closer constitutional scrutiny, it is equally clear that such classifications are not immunized from constitutional constraints. *See Califano v. Wescott*, 99 S. Ct. 2655 (1979), *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

Maher reaffirms that a "state-created obstacle need not be absolute to be impermissible," 432 U.S. at 473, and that the constitutionality of a policy limiting access to abortion "will depend [in part] upon its degree" (quoting *Bellotti v. Baird,* 428 U.S. 132, 149-50 [1976]). *Maher* also confirms that the pregnant woman is constitutionally protected "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 432 U.S. at 473-74. The Tenth

Circuit Court of Appeals states, in striking down a restriction on Medicaid funds for abortion:

> There is no direct interference in the case before us in the sense of a criminal prohibition, but the state should not be able to make a value judgment to fund necessary medical procedures in all instances except when an abortion is the procedure found necessary. All distinctions between abortions and other procedures are, of course, not prohibited, but the one before us is a distinction applied to a particular condition or diagnosis, and not to all others. This is a distinction which has no relation to health care for which the funds are to be expended. It is difficult to see how this can be placed in a category of a "value judgment" by the state. *D.R. v. Mitchell,* No. 78-1675, slip op. at 7 (March 10, 1980).

See also Reproductive Health Services v. Freeman, supra.

C. The Nature of the Group Burdened by the Riders Suggests the Need for Careful Constitutional Consideration.

Often at the very heart of the constitutional limitations which due process and equal protection guarantees place upon legislative action is the recognition that some groups are:

> saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

The class affected here is, women who are poor, dependent upon welfare, and subject to health risks.

The Eighth Circuit, in a recent opinion which held exclusion of payments for medically necessary abortions unconstitutional, observed:

> [T]his is an area in which sensitive judicial review is particularly appropriate. The minority disadvantaged by Missouri's Medicaid exclusion is sex-specific and financially destitute. . . . These factors suggest "a special condition which tends seriously to curtail the operation of those political proceses ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products*, 304 U.S. 144, 152-53 n. 4. . . . Any strong deference to the legislative process seems especially inapt where the minority asserts not only the fundamental interest in deciding whether to bear a child, which was the case in *Maher,* but the additional interest in preserving one's own health. *Reproductive Health Services v. Freeman, supra,* slip op. at 29-30.

Congressional action singling out medically necessary abortions and denying Medicaid entitlement for this one medically necessary service raises issues similar to those considered in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Mr. Justice Stewart, writing for the Court in *LaFleur* said:

> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive mater-

> nity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man" . . . the Due Process Clause . . . requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. 414 U.S. at 640.

See also Turner v. Department of Employment Security, 423 U.S. 44 (1975) extending *LaFleur* to the protection of unemployment compensation.

Similarly in *Nashville Gas,* the Court unanimously condemned a policy requiring pregnant employees to take leaves of absence and to sacrifice accumulated seniority benefits. Mr. Justice Rehnquist, writing for the majority, said:

> [P]etitioner has not merely refused . . . to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the scheme of existence," 429 U.S. at 139 n. 17. But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of the different role. 434 U.S. at 142.

Similarly, here, while the refusal to expand Medicaid to include elective services needed only by women is

permissible under *Maher*, the denial of Medicaid for this single medically necessary service constitutes a penalty. The Congress has not "refused to extend to women a benefit" for elective non-therapeutic services that "men cannot and do not receive." Rather, by taking affirmative action to destroy entitlement for this one medically necessary service, Congress has "imposed on women a substantial burden that men need not suffer." [158]

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[158] This case presents issues very different than those considered by this Court in *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric v. Gilbert*, 429 U.S. 125 (1976). There the Court relied upon the fact that "*normal* pregnancy is an objectively identifiable physical condition with unique characteristics," 417 U.S. 496 n.20, which "is often a voluntarily undertaken and desired condition." 429 U.S. at 136. Pregnancy calling for a medically necessary abortion is, by definition, neither voluntary nor desired.

In *Aiello*, the Court found that the exclusion of benefits for normal childbirth was justified by California's legitimate interests in

> maintaining the self-supporting nature of its insurance program . . . distributing the available resources in such a way as to keep benefit payments at an adequate level from disabilities that are covered . . . [and] maintaining the contribution rate at a level that will not unduly burden participating employees. 417 U.S. 496.

Obviously these justifications are not applicable here. In *Califano v. Westcott*, 99 S. Ct. 2655, 2663 (1979), a unanimous Court held that even in the welfare context, "Congress may not legislate 'one step at a time' when that step is drawn along the line of gender. . . ." The invalidity of the Hyde restriction is even plainer since exclusion of a single necessary service from an otherwise comprehensive program to meet medical need is, for the women affected, more like a step down an elevator shaft than the incremental sort of step invoked by the traditional language. The fiscal realities render inappropriate any deference to legislative allocative discretion. *See* p. 130, n.161, *infra*.

An official policy denying funds for medically necessary abortions has an obvious, sex-specific impact. A sex-blind analysis of the issue embodies a special irony. Historically the law sanctioned restraints on women's rights, responsibilities and opportunities, by exaggerating the burdens and incapacities attending women's role as mother.[159] Now by adopting an affirmative policy that denies poor women the means to control reproduction, Congress imposes burdens which would make the stereotype a self-fulfilling prophecy for poor women.

D. No Legitimate Purpose is Served by the Hyde Restriction.

The final factor that must be considered in determining whether legislative action violates the constitutional guarantees of due process and equal protection is the public purpose the legislation is designed to service or the purposes that may, as a hypothetical matter, be served by it.

Maher holds that because the state has a legitimate interest in encouraging normal childbirth and protecting potential life, it is not constitutionally compelled to extend Medicaid funding to include elective abortions. 432 U.S. at 474. In the district court, HEW relied upon *Maher*, and characterized the Hyde restriction as furthering an "interest in encouraging childbirth;"[160]

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[159] *See Muller v. Oregon,* 208 U.S. 412 (1908); *Goesart v. Cleary,* 335 U.S. 464 (1948); *Hoyt v. Florida,* 368 U.S. 57 (1961). *Compare, for example, Reed v. Reed,* 404 U.S. 71 (1971); *Craig v. Boren,* 429 U.S. 190 (1976).

[160] *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction,* Aug. 2, 1977, R.64, p. 9. This earlier memo was adopted by and appended to *Defendant's Post Trial Memorandum of Points and Authorities,* Nov. 10, 1978, R.165, pp. 54-55.

before this Court in *Zbaraz,* HEW asserts that the Hyde restrictions reflect "the desire to encourage normal childbirth . . . ." Brief of the United States, p. 55.

The distinction is critical: only an interest in "normal" childbirth will suffice as a matter of law. Yet the medical evidence demonstrates, in exacting detail, that the denial of medically necessary abortions does not further an assumed governmental interest in encouraging normal childbirth. *Supra* pp. 13-50. Just as the Court consistently limited the decisions in *Beal* and *Maher* to "elective" or "non-therapeutic" abortions, the Court was also careful to characterize the state's legitimate interest in the limited terms of "encouraging *normal* childbirth." This limitation, built into the interest there asserted by the state, is consistent with minimal rationality and mandated if the state is to avoid the basic irrationality of denying payments where the result is to impair, perhaps irrevocably, a woman's health. *Beal* and *Maher* give no license to preferring childbirth at any cost, yet that is precisely what the Hyde exclusions in fact do.

The district court in *McRae v. Harris* read "*Beal*, *Maher*, and *Poelker* as cases in which there was no health care need for abortion." Slip op. at 311. The district court further found that in the course of treating a patient eligible for Medicaid, a physician will often make an

> appropriate medical judgment, for the preservation of the life or health of the mother," *Roe v. Wade*, 410 U.S. at 165, that abortion is medically necessary . . . . To deny the appropriate medical assistance to the patient in need of medical assist-

> ance and remit her to a less appropriate medical course and abandonment of her fundamental right of choice, or else to resignation of Medicaid benefits, is not called for by *Maher v. Roe* and is forbidden by the principle it reaffirms. Slip op. at 312.

The government purposes served by the Hyde restrictions are hence critically different from those considered in *Maher*. In *Maher* and *Beal* state Medicaid officials, in the wake of *Roe v. Wade*, responded to the changed legal status of abortion by providing funding for abortion on the same basis as other Medicaid services, i.e., where the services were medically necessary. 432 U.S. 438, 445 n. 9 (1977). Here, by contrast, Congress acts affirmatively to eliminate Medicaid entitlement to medically necessary services. As Judge Dooling found, "the impact of the Hyde amendments is not to influence the pregnant woman toward normal childbirth, for that is not medically possible, but to frustrate her making, in consultation with her physician and for medical reasons," the choice whether to abort or to have a child. Slip op. at 311.

HEW now asserts a new interest in support of the Hyde restriction, "the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant." Brief of the United States, p. 55. Given the fiscal realities,[161] it is certainly not the interests of taxpayers, *qua* taxpayers, that supports the

[161] Mr. Justice Stevens correctly observed, in denying the state's application for a stay in *Williams v. Zbaraz*, that "it is less expensive for the State to pay the entire cost of abortion than it is for it to pay only its share of the costs associated with a full term pregnancy." 99 S.Ct. 2095, 2098 (1979).

government's affirmative action eliminating plaintiffs' Medicaid entitlement to medically necessary services. *Ex hypothesis*, whenever Congress acts it is because a majority of people, or as in this case, a highly mobilized minority, support the action taken.[162] But this "jusitification amounts to little more than an assertion that discrimination may be justified by a desire to discriminate." *Board of Engineers v. Flores de Otero*, 426 U.S. 572, 605 (1976). The premise of our constitution is that the power of the majority is limited, and that the Judicial branch has the sometimes difficult responsibility of protecting constitutional rights against the excesses of majoritarian expedience. *Marbury v. Madison*, 1 Cranch 137 (1803).

The government's assertion of the "moral interests" of taxpayers presumably refers to the fact that some people believe that human life begins at conception, and hence desire to prevent abortion as a form of infanticide.[163] The Hyde restrictions are justified as a

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[162] For opinion surveys on attitudes toward abortion see slip op. at 33, 37, 166-68 and fn. 91.

[163] Other taxpayers may disapprove of sexual activity among the poor and believe that poor women should be forced to bear the consequences of sexual relations. This Court said in *Roe v. Wade*, "no court or commentator has taken the argument [that abortion may be denied as a means of discouraging sexual activity] seriously." 410 U.S. at 148. In *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972), the Court explained "It would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child as punishment for fornication."

The Amendments deny funds to the married and the unmarried alike, and hence it cannot be argued that they are designed to discourage extramarital sexual activity. If the purpose of the Amendments is to discourage sexual activity solely on the part of poor women, including those who are married, their constitutional invalidity is self-evident. These interests do not become stronger because they are asserted in the name of taxpayers.

form of symbolic statement. The statement is not that some taxpayers believe that abortion is wrong, but rather that abortion is so clearly wrong that Congress can insist that poor women conform their conduct to these moral views by destroying existing Medicaid entitlement.[164]

The government's assertion that the Hyde Amendments serve a purpose of accomodating the moral beiefs of some taxpayers is very close to its asserted purpose of protecting the fetus. This very issue was at the heart of *Roe v. Wade*. The Court found that the state, "by adopting one theory of life," may not "override the rights of the pregnant woman that are at stake." 410 U.S. at 162.

This Court made plain in *Wade*, 410 U.S. at 165, and reaffirmed in *Maher*, 432 U.S. at 472, that even at "the stage subsequent to viability, the state in promoting its interest in the potentiality of human life," may not create regulations which deny women abortions "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." The Court has carefully and firmly delineated these limits to governmental authority to protect potential human life. The Riders cannot be justified by this interest since they do not allow payments for abortions necessary to preserve the health of the woman at any stage

[164] To allow funding for medically necessary abortions, on the same terms as all other medically necessary services, does not imply governmental approval for abortion any more than governmental approval of people living in sin can be implied from the fact that the Constitution requires that otherwise qualified individuals be allowed to receive welfare whether or not they are married. *See e.g., New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973), striking a state law limiting welfare for both parents and children when the parents were unmarried.

of her pregnancy. If the government cannot demand that the woman's health be sacrificed or jeopardized to further the compelling interest of protecting potential life *after* the point of viability, it follows *a fortiori* that the government cannot rest upon its interst in protecting potential life at earlier stages of pregnancy.

As we demonstrate more fully, Facts, *supra,* § 9, abortion raises profound moral and religious questions. Yet one need not conclude that abortion is an aspect of religious choice protected by the First Amendment to assert that where, as here, moral and religious opinion is strong and sharply divided, the moral objections of some taxpayers do not justify affirmative governmental action denying entitlement to services essential to protect individual health. The asserted rationale sweeps too broadly.[165] The fact that the government asserts this as a justification for Congressional action denying Medicaid entitlement indicates recognition of the absurdity of the assertion that the government seeks to encourage "normal" childbirth by denying necessary medical services.

Obviously the Constitution affords wide latitude to those "charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. . . ." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). As the Court there noted, "conflicting claims of morality and intelligence" are raised by every choice whether to allocate funds to meet the undeniably brutal need of families who stay together or are deprived of a parent, families who work or those unable to do so, the young, the old, the dis-

[165] For example many citizens opposed miscegenation on strong moral and religious grounds. *See Loving v. Virginia*, 388 U.S. 1 (1967).

abled.[166] However, *this is not such a case.*[167] Abortion presents the only situation in our history, in which poor people ask that they be afforded a less costly benefit, and the government insists that they may only have one that is far more costly both in terms of the public fiscal cost and in terms of the sacrifice demanded of women's life and health.

E. The Actual Purpose of the Hyde Restriction is to Penalize the Exercise of Constitutional Rights.

After detailed and careful examination of the legislative history, the lower court found that:

> The debates make clear that the amendment was intended to prevent abortions, not shift their cost to others, and rested on the premise that the human fetus was a human life that should not be ended. Slip op. at 21.[168]

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[166] *See e.g., Jefferson v. Hackney,* 406 U.S. 535 (1972); *Wyman v. Rothstein,* 398 U.S. 275 (1970); *Idaho Department of Employment v. Smith,* 434 U.S. 100 (1977); *Richardson v. Belcher,* 404 U.S. 78 (1971). The political branches have been afforded similar discretion in making the tax judgments that are often necessarily arbitrary. *Kahn v. Shevin*, 416 U.S. 351 (1974).

[167] Apart from fiscal constraints, "administrative convenience" provides the most common justification for allegedly discriminatory classifications in government benefits programs. All the evidence is that the Hyde standards, because they are foreign and incomprehensible to physicians, do not solve but rather *create* problems for Medicaid administrators. Facts, *supra,* § 6. Administrative convenience would dictate that abortion be treated like all other medical services and financed when, in the physician's judgment, it is medically necessary.

[168] This Court has held that, in these circumstances, "the mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975); *U.S. Department of Agriculture v. Moreno*, 413 U.S. at 534.

The denial of payments is precisely for the *purpose* of depriving women and their physicans of the constitutional freedom to choose medically necessary abortions. "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' *United States v. Jackson,* 390 U.S. 570, 581 (1968)." *Shapiro v. Thompson,* 394 U.S. 618, 631 (1969).

This Court has consistently held that:

> if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

In *Moreno* the federal statutory provision denied food stamps to people who lived in households containing individuals who were not related by blood or marriage. The legislative history indicated that the actual purpose of the restriction was to deny food stamp benefits to "hippies" and "hippy communes."

The constitutional invalidity of the Hyde restrictions is more blatant than the claim accepted in *Moreno*, since the restriction there would have had an incidental effect that is legitimate, *i.e.*, saving public funds. Here the incidental effects are: required sacrifice of women's life and health, as well as increased public expenditures, and vast complication of Medicaid administration and medical practice. Further, here there is a firm constitutional base for the right to choose

abortion, while there the constitutional right of unrelated people to establish a household is, at best, uncertain.[169] *See also, Weinberger v. Salfi,* 422 U.S. 749, 772 (1975); *Board of Engineers v. Flores de Otero,* 426 U.S. at 605 (1976).

Because the Hyde restrictions are enacted, year after year, as riders to appropriations measures, the Congressional committees with responsibility for Medicaid have never considered the relation between the Hyde exclusion and the general statutory mandate of funding for all medically necessary services. This Court has observed that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Village of Arlington Heights v. Metropolitan Housing Development,* 429 U.S. 252, 267 (1977). *See also, Whalen v. Roe,* 429 U.S. 589 (1977) in which this Court upheld a New York drug statute partly on the basis that it was "manifestly the product of an orderly and rational legislative decision." *Id.* at 597.

The stark reality is that the Hyde restriction serves no legitimate governmental interest, seriously undermines the Medicaid program's core purpose of promoting the health of poor people, and mandates the sacrifice of the lives and health of poor women, by denying entitlement to a medically necessary service.

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[169] *Contrast Moore v. City of East Cleveland,* 431 U.S. 494 (1977) with *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

III.

THE HYDE EXCLUSION CREATES A CLASSIFICATION THAT VIOLATES THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION OF THE LAW.

The Hyde exclusion imposes enormous burdens on the fundamental interests of a particularly vulnerable group and hence must be justified by important governmental interests. The right to choose whether to have an abortion or to bear a child is unquestionably fundamental. *Roe v. Wade*, 410 U.S. 147, 152-53 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. at 640 (1974); *Zablocki v. Redhail*, 434 U.S. at 386 (1978). *Maher* recognizes that the right to choose abortion is fundamental, and affirms that the decision "signals no retreat from *Roe* or the cases applying it." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

All of the factors that distinguish this case from *Maher* also dictate that the discriminatory classification created by the Hyde exclusions be judged by a standard more rigorous than that applied in *Maher*. When "statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).[170] Even in cases involving no suspect classification or fundamental constitutionally protected right, this Court has required that:

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[170] See also *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Powell concurring).

> In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 725 (1973) (Rehnquist, J.); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)(Black, J.); *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969); *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall dissenting).[171]

Consideration of each factor points to the constitutional infirmity of the discriminatory classification.

Furthermore, the classification is not reasonably related to any legitimate government purpose. In *Maher*, where the state did no more than refuse to expand Medicaid coverage to include elective abortion services for which there would otherwise be no statutory entitlement, this Court required that the state policy be "rationally related" to a "constitutionally permissible" purpose. 432 U.S. at 478. The Court demanded that a "reasonable basis" for the state's "strong and legitimate interest in encouraging normal childbirth." *Id.* at 478. Even in that very different context, this Court reaffirmed that once the government "decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is sub-

[171] In *Vlandis v. Kline*, 412 U.S. 441, 458 (1973), Mr. Justice White observed, "it is clear that we employ not just one, or two but, as my Brother Marshall has so ably demonstrated, a 'spectrum of standards' in reviewing discrimination allegedly violative of the Equal Protection Clause," quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98-99 (1973).

ject to constitutional limitations." *Id.* at 469-70. It is long settled that even where no fundamental rights or suspect classifications are involved, legislative classifications must be reasonably related to some legitimate purpose. *Carrington v. Rash*, 380 U.S. 89 (1965); *James v. Strange*, 407 U.S. 128 (1972); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Cleveland Board of Education v. LaFleur, supra*, 414 U.S. at 653, n.2 (1974) (Powell, J., concurring in the result on grounds that even a non-suspect classification "must at least rationally serve some legitimate articulated or obvious state interest.")

IV.

THE HYDE EXCLUSION PENALIZES VULNERABLE CITIZENS, FAILS TO MEET MINIMAL STANDARDS OF FUNDAMENTAL FAIRNESS AND HENCE DENIES DUE PROCESS OF LAW.

Mr. Justice Harlan once described the liberty protected by the Due Process Clause as a:

> rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. *Poe v. Ullman*, 367 U.S. 497, 543 (1961). See also *Roe v. Wade*, 410 U.S. 113, 169 (Stewart, J., concurring).

It is settled that the "liberty" protected by the Due Process Clause of the Fifth Amendment embraces more

than those freedoms expressly enumerated in the Bill of Rights. See *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Zablocki v. Redhail*, *supra*; and *Cleveland Board of Education v. LaFleur*, *supra*. It is also settled that Due Process protects the right of the individual "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The constitutional protection of life and liberty shields the individual from arbitrary governmental action demanding sacrifice of life or health, *supra*, pp. 116-20, though it must be conceded that there are few cases considering the question because the government so rarely demands sacrifice of individual life and health, apart from situations of paramount national defense.

The Hyde restriction has resulted in the sacrifice of the right to choose whether to bear a child where pregnancy is medically contraindicated. It demands that poor pregnant women disregard their own wishes, the needs of their families, the advice of their physicians, and place their health and life in jeopardy. The denial of entitlement for medically necessary abortions forces women either to continue health-threatening pregnancies, to bear the substantial risks of illegal or self-abortions or to use meagre funds to procure legal abortions. The precise purpose of the restriction is to impose a burden upon a sex specific group for the exercise of a fundamental right. This does not meet minimal constitutional standards of fundamental fairness.

The liberty protected by the Due Process clause prohibits the accomplishment of even legitimate government goals by means which unnecessarily expose individuals to danger. Mr. Justice Stevens' simple analogy in *Carey v. Population Services International,* 431 U.S. 678 (1977) is applicable here. Even though he found that the state objective of deterring sexual conduct among teenagers was legitimate, the method chosen to accomplish that goal—proscribing contraceptives—was illegitimate because it imposed a significant detriment on the minors' health.

> Although the state may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.
>
> Even as a regulation of behavior, such a statute would be defective. Assuming that the State could impose a uniform sanction upon young persons who risk self-inflicted harm by operating motorcycles, or by engaging in sexual activity, surely that sanction could not take the form of deliberately injuring the cyclist or infecting the promiscuous child. If such punishment may not be administered deliberately, after trial and a finding of guilt, it manifestly cannot be imposed by a legislature, indiscriminately and at random. This kind of govern-

> ment-mandated harm, is, in my judgment, appropriately characterized as a deprivation of liberty without due process of law. 431 U.S. at 715-16.

In *Zablocki v. Redhail*, at 394-395, Mr. Justice Stewart held that it violates due process to require poor people who seek to marry first to prove that they have met their support obligations to existing children. "To deny these people permission to marry penalizes them for failing to do that which they cannot do." *Id.* at 394. See also *Nashville Gas v. Satty*, and *Cleveland Board of Education v. LaFleur*. Similarly here, to affirmatively deny poor women funds for medically necessary abortions penalizes them for failure to do what is impossible. None of the named plaintiffs can aid the government in its asserted purpose of producing "normal" children. They cannot make themselves whole or healthy. The government, in denying their entitlement to medically necessary services, harshly penalizes them for their misfortune.

V.

THE HYDE AMENDMENT IS IMPERMISSIBLY VAGUE IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS.

The trial court held:

> The strangeness to medical thinking of "life endangerment" as the factor decisive of the use of a medical procedure is shown by the medical evidence, and is an added element relevant to the application of the rationality test. The meagre

> statistics on abortion since the Hyde Amendment bear out the view emerging from the medical evidence: the life endangerment test is so uncertain of meaning in terms of medical content that it operates to restrict the use of abortion procedure in Medicaid to the narrowest classes of cases, to crisis intervention. It seems to function to exclude many more cases than can be supposed to have been intended for exclusion because of the physicians' inability to divine what medical standards it implies. Slip op. at 322-323.

The Hyde Amendment "life endangering" standard is so vague that doctors are chilled from authorizing even those abortions that were intended to qualify for reimbursement, because of the realistic threat of federal investigation with criminal or civil sanctions for those certifications later administratively deemed unwarrantedly broad interpretations of the restriction. To avoid these sanctions, doctors cautiously interpret the ambiguous Hyde standard narrowly, with the result, as the trial court found, that Medicaid abortions are limited to the "narrowest classes of cases, to crisis intervention." Thus, the vagueness of the Hyde standard chills exercise of the fundamental right to abortion even in situations where Congress would consider Medicaid reimbursement necessary and appropriate. No governmental interest is furthered by that result.

The trial court found, upon ample and largely undisputed evidence, that "life endangering" is not a standard that doctors routinely use, and they do not know what it means. Slip op. at 91. The standard is vague on its face and as applied. For instance, how certain must the danger to life be? 90%? 75%? How imminent must

the danger be? Is a statistical increase in the *risk* of life endangerment sufficient, and if so, how substantial must that increase be? Is a woman's life endangered within the meaning of Hyde if the danger, though clear, could theoretically be controlled by costly alternatives, such as full-time hospital bed rest, which are not available to poor women? Or, is a reasonable likelihood that the woman's life would be shortened enough? In enacting an exception for severe and long-lasting physical health damage to the 1978 and 1979 Riders, Congress obviously did not intend that such adverse effects were within the meaning of life endangerment. Annex to slip op. at 236, 237.

Congress and HEW have not further defined the Hyde standard, and have issued no regulations that would answer these questions or clarify the ambiguities inherent in the standard. 42 C.F.R. § 50.304 (1978); *see* 43 Fed. Reg. 4570, 4574 (1978). Thus doctors must answer these questions for themselves, creating realistic risks of arbitrary and unequal application of the law, and of possible criminal sanctions if doctors guess wrong.[172]

The Medicaid program contains a comprehensive scheme of federal criminal sanctions for Medicaid fraud and abuse, 42 U.S.C. § 1396, enforceable against

[172] The highly polarized abortion debate is conducive to ideologically motivated, discriminatory prosecutions of doctors who perform abortions. The recent literature unfortunately abounds with incidents of attempts to use the criminal prosecution of doctors as a technique to inhibit abortion, even in the Medicaid context. Cf. *Orr v. Nebraska Department of Public Welfare*, No. 80-031 (D.Neb. Jan. 25, 1980) (Preliminary injunction against civil action or criminal prosecution of abortion provider based upon claims for Medicaid reimbursement). *Floyd v. Anders*, 440 F.Supp. 535 (D.S.C. 1977) (three-judge-court), *remanded*, 440 U.S. 445, March

both physicians and their patients.[173] In addition, the federal government requires states to pursue investigations and prosecutions of Medicaid fraud as a condition of participation in the Medicaid program. 42 C.F.R. § 455.12 *et seq.* (1979).[174]

HEW has made clear to physicians that it is reasonable for them to fear prosecutions for "fraudulent" cer-

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5, 1979 (*per curiam*); *Commonwealth v. Edelin*, 359 N.E. 2d 4 (Mass. 1976); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972) (directed verdict for defendant); *Dr. Pablo Quiroga v. Medical Practice Board, et al.*, No. 77-20461-AA (Cir. Ct. for Cty. of Ingham, Mich., filed 1977). See also *Women's Right, Physician's Judgment: Commonwealth v. Edelin and a Physician's Criminal Liability for Fetal Manslaughter*, 4 Women's Rights Law Reporter 97 (1978).

[173] Under the federal statute, the making of a false statement by a physician or a recipient in an application for payment is a felony, punishable by imprisonment up to five years, or a fine of up to $25,000, or both, even if the Medicaid payment is never made. 42 U.S.C. § 1396h (a). The same section makes it a misdemeanor for a doctor to make an application which contains a false statement by a person other than the doctor. A physician convicted of an offense related to the provision of Medicaid services is automatically suspended from Medicaid practice by the Secretary for whatever period the Secretary "deems is appropriate". 42 U.S.C. § 1395. The Medicaid statute also contains a blanket prohibition of payment if the Secretary determines the provider has "knowingly and willfully made or caused to be made any false statement or representation of a material fact for use in an application for payment." 42 U.S.C § 1395.

[174] Under this regulation, state criminal penalties for fraud may be imposed on doctors. Although the Medicaid regulations place primary responsibility for discovering and prosecuting fraud on the state, the federal government retains the right to initiate federal prosecutions under Title XIX, (*see* fn. 173 *supra*), or under other titles of the U.S. Code, e.g.: 18 U.S.C. § 286 (conspiracy to obtain payment from the U.S. government on a false claim); § 287 (presenting a false claim); 18 U.S.C. § 1001 (concealment of a material fact or making a false statement to the government).

tifications under this ambiguous Hyde standard.[175] And HEW and Congress have repeatedly warned doctors that their Medicaid abortion certifications will be subjected to more rigorous scrutiny than any other Medicaid procedures. The 1977 Hyde Amendment specifically required that "the Secretary shall establish procedures to ensure that the provisions of this section are rigorously enforced." [176]

Of course a physician cannot be required to run the risk of a penalty for a "fraudulent" certification that a patient's life would be endangered if pregnancy were carried to term. Medicaid doctors are not required to serve their poor patients; they can inform patients that, notwithstanding the fact that the pregnancy poses health risks, they cannot provide the needed

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[175] In response to a plaintiff's inquiry concerning HEW's plans to monitor for fraud, the U.S. Attorney responded that ". . . we envision investigations of individual cases upon either direct or circumstantial evidence of fraud . . . circumstantial evidence would probably consist of the performance by a physician . . . of a significantly higher rate of certified abortions as compared to a 'normal' rate to be established on the basis of regional or nationwide experience under the Hyde Amendment." (Pl. Exh. 12/T. 933). Permitting a statistical inference of fraud is highly misleading since many abortions are done by specialist physicians and clinics (Teitze, T. 935); in many areas most abortions are performed at specific hospitals, e.g. the University of Michigan hospital (Eliot, T. 404); physicians who serve a high risk population, e.g. poor teenagers, will legitimately encounter higher than "average" numbers of life endangering pregnancies (Hofmann, T. 1282-89).

[176] The Secretary's comments on the January 26, 1978 implementing regulations concluded:

> It must be noted that any person who knowingly submits a falsified claim for Federal funds, or who aids or abets the submission of a falsified claim, may be subject to prosecution under section 1909 (a) of the Social Security Act or another applicable provision of the law. 43 Fed. Reg. 4832, 4842 (1978).

medical service unless sure of payment. This raises serious legal and ethical problems for the doctor. Or the doctor may perform the abortion free, an option not available to physicians who perform abortions only in hospitals, or whose patients need hospital abortions. Two plaintiff doctors testified that their hospitals would not approve admissions unless payment was assured by Medicaid or the patient. (Hodgson, T.49; Bingham, T.487-88.) Moreover, many Medicaid women will need second trimester abortions, usually performed only in a hospital. Slip op. at 76. (Romney, A.221-22.) The option of denying services which the patient seeks, and which the doctor believes are necessary, was also open to Doctors Franklin and Vuitch in *United States v. Vuitch*, 402 U.S. 62 (1971), and *Colautti v. Franklin*, 439 U.S. 379 (1979). This Court made no suggestion that the vagueness claims in their cases could be avoided on the ground that they could simply refuse to treat their patients. Given these facts, the trial court's conclusion that the "life endangering" standard is void for vagueness is not only consistent with, but compelled by, previous decisions of this Court. It is settled that statutes which abridge fundamental rights must be framed narrowly, and with precision; that they must provide fair notice of what they permit and proscribe; and that they must provide sufficient guidance to enforcement officials to prevent excessive discretion or abritrary and discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 170 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Harris*, 47 U. S. 612, (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U.S. 385

(1926). The Hyde standard is impermissibly vague under each of these tests.

In *United States v. Vuitch*, 402 U.S. 62 (1971) this Court upheld the District of Columbia criminal abortion statute which prohibited abortion unless "necessary for the preservation of the mother's life or health," by construing the statute to avoid the constitutional problem of vagueness. Adopting a lower court's construction of the same statute to permit abortions "for mental health reasons whether or not the patient had a previous history of mental defect," this Court observed:

> Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered. 402 U.S. at 72.

Similarly, in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) this Court held Missouri's definition of viability not impermissibly vague, but only because it allowed doctors the flexibility to exercise medical judgment:

> . . . we recognized in *Roe* that viability was a matter of medical judgment, skill and technical

> ability, and we *preserved the flexibility* of the term. Section 2(2) does the same. *Id.* at 64 (emphasis added).

In a concurring opinion, Justice Stewart, joined by Justice Powell, noted:

> While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. There is thus little chance that a physician's professional decision to perform an abortion will be "chilled." *Id.* at 89.

In contrast, the evidence in *McRae* establishes, as the trial court found, that physicians' judgments have in fact been chilled by the vagueness of the Hyde standards, and the realistic possibility of criminal prosecution of doctors who erroneously conclude that a pregnancy is life endangering.

Colautti v. Franklin, 439 U.S. 379 (1979) also emphasized the uncertainties inherent in medical decision making, and the corresponding need for regulatory statutes to give doctors sufficient breadth to exercise their best medical judgments. Distinguishing *Vuitch* and *Bolton*, which upheld statutes against a vagueness challenge, this Court noted:

> The contested provisions in those cases had been interpreted to allow the physician to make his determination in light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician. Instead it condi-

tions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.[177] *Id.* at 394.

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[177] Prior to 1973 several courts struck down abortion statutes on vagueness grounds. In *Roe v. Wade*, 314 F. Supp. 1217 (D. Tex. 1970), *aff'd on other grounds*, 410 U.S. 113 (1973), the three-judge court which held invalid a Texas law prohibiting abortions except "for the purpose of saving the life of the mother," observed the statute's "grave and manifold uncertainties":

> How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an unascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? . . . Is it sufficient if having a child will shorten the life of the woman by a number of years? (Emphasis in the original.) *Id.* at 1223.

In addition, the California Supreme Court invalidated that state's criminal abortion statute, which excepted from penalty only those abortions "necessary to preserve" the life "of the pregnant woman." *People v. Belous*, 71 Cal. 2d 954, 80 Cal. Reptr. 354, 458 P. 2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970). The Court stressed the inherent ambiguity in the language and the various interpretations of it offered by the doctors.

Identical language was also struck down in Illinois in *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971). The Court there found that the:

> practical effect is to make abortion unavailable to women unless there is a reasonable certainty that death will result from a continuation of pregnancy. *Id.* at 1389.

VI.

THE HYDE ADMENDMENTS ARE INVALID UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Congress recognized the necessary interrelationship between choice of medical service and religious and conscientious belief when it established the Medicaid program. Excepting an overriding public health justification, as in the case of contagious disease, 42 U.S.C. § 1396f prohibits compelling any form of medical service against a person's religious beliefs.

This provision protects a Jehovah's Witness' refusal to accept a blood transfusion and the concomitant necessity to fund alternative medical care. They protect the strictly observant Catholic's right to refuse artificial birth control as well as her right not to consider abortion. Until enactment of the Hyde Amendments, they protected equally the right of poor women to have a medically necessary abortion in accordance with the dictates of their faith and conscience.

The Hyde Amendments thus destroy not only the guarantee of comprehensive medical care for the poor, but also the universal guarantee of liberty of conscience. They condition entitlement to necessary health care on abandonment of religious and conscientious convictions that abortion is appropriate. Moreover, the free exercise of conscience is unqualifiedly guaranteed to those whose moral convictions preclude even entertaining the possibility of abortion. The riders thus deprive the program of the neutrality which was its goal

and which is constitutionally required by the Free Exercise Clause of the First Amendment. The preservation and maximization of religious liberty can only be accomplished by restoring the funding for medically necessary abortions excised by the riders.

In *Maher v. Roe*, this Court took pains to point out that different and more exacting standards govern the allocation of benefits where religious liberty guaranteed by the First Amendment is at stake. 432 U.S. at 474 n. 8. *Maher* did not consider the religious freedom dimensions of the abortion decision. Here, by contrast, the question was fully explored.

A. The Right to Make and Effectuate a Conscientious Decision about Abortion is Protected by the Free Exercise Clause of the First Amendment.

The right to make and effectuate a conscientious decision about abortion is encompassed within the First Amendment's concept of the free exercise of religion. As the district court properly recognized, the protection of the First Amendment embraces the exercise of religiously-formed conscience on a matter of such ultimate dimension. Slip op. at 326-28. The court wrote:

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by

> the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation. Slip op. at 328.

Although abortion is not a religious rite or ritual, it ranks as a paramount concern in all major religious traditions. For those of the anti-abortion faiths, abortion is a grave sin, interrupting God's creation and analogous to murder. In the pro-choice faiths, consideration of questions of the preservation of the health and well-being of existing life and of responsible parenthood likewise rank among the highest obligation of human beings toward one another and toward God.

The district court correctly recognized that the teachings of the pro-choice faiths "in the mainstream of the country's religious beliefs, and conduct conforming to them, exact the legislative tolerance that the First Amendment assures. *Wisconsin v. Yoder*." Slip op. at 327. The Free Exercise Clause protects not only the right to believe (or disbelieve), *Torcaso v. Watkins*, 367 U.S. 488 (1961), but also the right to practice one's beliefs, *i.e.*, to act in accordance with them. *McDaniel v. Paty*, 435 U.S. 618 (1978). The practice of religion encompasses apparently mundane activities or decisions about daily life which are "rooted in religious belief" rather than personal preference. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

Significantly, the claim of conscientious objection to military service provided the opportunity for recognizing that the concept of religion embraces religiously grounded conscientious decision. "[F]reedom of conscience itself implies respect for an innate conviction of paramount duty." *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, J., dissenting).[177]

United States v. Seeger recognized as religious,[178] that belief "which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for exemption . . . ." 380 U.S. at 176.

Like conscientious objection to military service, the abortion decision demands the protection of the Free Exercise Clause. Pregnancy ineluctably requires imme-

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[177] Judge Hand's formulation in *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943), is frequently cited:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow men and to his universe. . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. . . . [Conscientious objection] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

[178] Though *Seeger* involved statutory interpretation of the conscientious objector exemption rather than a constitutional holding, the expansive interpretation was influenced by the concern for avoiding preferential treatment of the traditional believer as compared to the non-traditional one. *United States v. Seeger*, 380 U.S. at 176; *see*: *Welsh v. United States*, 398 U.S. 333 (1970) (Harlan J., concurring). In *Gillette v. United States*, 401 U.S. 437 (1971), the selective objector claim, found to be outside the statutory exemption, nonetheless triggered scrutiny under both the Free Exercise and Establishment Clauses.

diate, direct, intimate and profound confrontation with questions of life and death. The response may be immediate and instinctive or the result of a long, soul-searching process.[179] For some women, the fetus is inviolable, and conscience precludes consideration of abortion even at tremendous risk to life and health. For others, pregnancy requires balancing the potential of human life against questions of survival, purpose, lifelong responsibility, and ultimately the meaning of human existence and fulfillment. For these women, conscience may dictate the necessity of terminating an unwanted and health-threatening pregnancy.

The district court properly recognized that governmental action which interferes, directly or indirectly, in this religious and conscientious decisionmaking process—either by requiring abortion or coercing childbearing—violates the Free Exercise Clause. Slip op. at 328.

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[179] In *United States v. Seeger*, this Court looked to contemporary definitions of religion which are particularly applicable to the matter of abortion. For example, a Vatican II draft declaration of the Church's relations with non-Christians states:

> Men expect from the various religions answers to the riddles of human condition. What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment and retribution after death? 380 U.S. at 182.

Among those quoted who describe internally as well as externally derived belief was Dr. Paul Tillich who writes of God as the source of the affirmation of meaning within meaninglessness, 380 U.S. at 187, and explains:

> And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God. . . . Tillich, The Shaking of the Foundations 57 (1948) (emphasis supplied).

B. The Hyde Amendments Impermissibly Burden the Free Exercise of Those Whose Religious and Conscientious Convictions Counsel Consideration of Abortion.

Because this case arises in the context of an existing structure of Medicaid entitlement, it presents only the issue of whether the government may "exact. . . surrender of. . . religious scruples," as a condition of access to that program. *Sherbert v. Verner*. 374 U.S. 398, 412 (1963) (Douglas, J., concurring). If the government had not undertaken to guarantee comprehensive medically necessary services to the poor, the absence of funding for medically necessary abortions would not raise First Amendment questions. The impermissible and discriminatory impact on free exercise arises because the government has undertaken to provide for the medical needs of indigent pregnant women and withdrawn one service, abortion, from the spectrum of services funded.

Unlike *Sherbert*, this case does not involve a claim that special treatment is constitutionally required to accommodate religious practice. *cf. Sherbert v. Verner*, 374 U.S. at 422 (Harlan, J., dissenting). Congress has already acted to guarantee "an atmosphere of hospitality and accommodation to individual belief and disbelief," *Sherbert v. Verner*, 374 U.S. at 415-16 (Stewart, J., concurring), by protecting religious liberty against coercion stemming from the provision of health services under the Medicaid program. Plaintiffs therefore do not seek exemption from restrictions generally applied to Medicaid recipients, but ask only that they be afforded the right, specifically guaranteed all others, to choose in accordance with the dictates of their conscience the medically appropriate treatment.

1. The Hyde Amendments Severely Burden Religious and Conscientious Determinations Regarding Childbearing.

Following this Court's indication in *Maher*, 432 U.S. at 474 n. 8, that restrictions on welfare benefits which burden free exercise draw special scrutiny, the district court properly concluded that the withdrawal of funding for medically necessary abortions impermissibly coerces childbirth in situations "undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. at 218; slip op. at 326-28.[180] *Maher* adverted to the principle firmly established in *Sherbert v. Verner*, that even a facially neutral eligibility requirement must give way if it pressures plaintiff to forego abandonment of religious practice:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. 374 U.S. at 404.

To retain their entitlement to health care for pregnancy, Medicaid eligible women must forego their religious and conscientious determination whether to

[180] *See* Facts *supra*, §9(b).

continue a pregnancy and submit to the state's determination that childbearing, even if health-endangering, is the required response to pregnancy.

Once government has voluntarily undertaken to provide public benefits, it cannot place conditions on them that exact surrender of religious scruples. *Sherbert v. Verner*, 374 U.S. at 405. The government may not use denial of a public benefit to achieve what it cannot command directly. *Elrod v. Burns*, 427 U.S. 347, 361 (1976); *Speiser v. Randall*, 357 U.S. 513 (1958). *Sherbert* squarely rejected the contention that the denial of benefits is constitutionally innocuous where it does not involve criminal sanctions and operates indirectly to burden religious exercise. 374 U.S. at 403-04.[181] "[T]o condition the availability of benefits upon . . . [a woman's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert*, 374 U.S. at 406.

The pressures created by the withdrawal of Medicaid funds for abortion under the Hyde Amendments im-

[181] Plaintiffs-appellees have already discussed the inapplicability to this case of the distinction between penalty and deterrent analysis suggested in footnote 8 in *Maher*. Moreover, footnote 8 cannot be read to apply this distinction to impediments to free exercise without undoing the core principle of the First Amendment that rules which directly or indirectly operate as prior restraints or have a deterrent effect on the exercise of expressional freedoms are constitutionally suspect. *See*, e.g., *NAACP v. Alabama*, 357 U.S. 459 (1958); *Speiser v. Randall*, 357 U.S. 513 (1958); *Murdock v. Pennsylvania*, 319 U.S. 105, 112-14 (1943). Indeed, one year before *Maher*, the Court reaffirmed the principle of *Sherbert* that invalidates "conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement of the individual to foresake those rights. *Elrod v. Burns*, 427 U.S. at 358 n. 11 (1976).

pose a greater burden on religious exercise than found in *Sherbert*. At stake in *Sherbert* was up to twenty-two weeks of worship, with the loss of benefits reduceable to a monetary sum. At stake here is an irrevocable decision with life-long and life-threatening implications. Many women will be discouraged from conscientious decision or completely precluded from acting in accordance with the tenets of their faith.

To resist the Hyde Amendments' pressure by submitting to illegal abortion or delaying long enough to scrape together the funds for a legal one, poor women are severely taxed, not simply in monetary terms, but more importantly in terms of risk to their health and lives. Denial of funding thus creates a far greater burden on religious exercise than police power regulations that operate not to preclude religious practice but rather make it "more expensive." *See*: *Braunfeld v. Brown*, 366 U.S. 599 (1961).

In the area of the free exercise of religion, the Court has traditionally evidenced particular concern that otherwise unobjectionable governmental action can unduly burden the rights of the poor. *Sherbert v. Verner*; *Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944). In *Murdock v. Pennsylvania*, the Court precluded application of a license tax to colporteurs because it restrains in advance the consititutional liberties of press and religion and inevitably tends to suppress their exercise particularly . . . for "all those who do not have a full purse." 310 U.S. 105 at 112. In the context of an essential public assistance program, forcing a woman to choose between foregoing her religious precepts or her entitlement to necessary health care can become a new device for the suppression of

religious liberty. *See: Murdock v. Pennsylvania*, 319 U.S. at 115.

2. The Hyde Amendments Discriminatorily Burden Women For Whom Abortion Is a Decision of Conscience.

The burdening or religious freedom by the excision of funding for medically necessary abortion is aggravated by religious discrimination. Medicaid-eligible women who adhere to the anti-abortion faiths suffer no impediment in the exercise of conscience. Those of the pro-choice persuasion are hindered or precluded, however, in the exercise of their religious and conscientious scruples. The Hyde Amendments have destroyed the Medicaid program's orginally neutral accommodation of religious and conscientious decisions concerning medical care in general and childbearing in particular.

This case thus involves the "constitutionally imposed 'government obligation of neutrality' originating in the Establishment and Freedom of Religion clauses of the First Amendment" distinguished in *Maher*, 432 U.S. 474 n. 8.(quoting *Sherbert v. Verner*, 374 U.S. at 409). Neutrality forbids governmental exclusion of "the members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) (emphasis in original). Even viewing the Hyde Amendment as a neutral, secular restriction, the religious discrimination it effects is subject to constitutional scrutiny. The free exercise clause "prohibits misuse of secular governmental programs 'to impede the observance of one or all religions or to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect.' *Braunfeld v. Brown*, 366 U.S. at 607." *Gillette v. United States*, 401 U.S. at 462 (1971).

Indeed, discriminatory allocations of public benefits or "privileges" are most strictly scrutinized under the First Amendment. This principle was established in the early speech cases involving access to public property. Thus, even before this Court recognized the First Amendment right to use the public parks and streets, it held discriminatory provision of access unconstitutional. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951). The requirement of neutrality is strict where the free exercise of religion is at issue. *See: Walz v. Tax Commission,* 397 U.S. 664 (1970).

Noting that emergency labor laws exempted those who were "conscientiously opposed to Sunday work," *Sherbert* found the "unconstitutionality of the disqualification . . . compounded by . . . religious discrimination. . . ." 374 U.S. at 406. Likewise, the burden on conscientious decisionmaking is compounded here because the Hyde Amendments destroy the neutrality central to the original statutory scheme and required by the First Amendment. Equal treatment of the woman whose conscience dictates abortion rather than childbirth requires that the riders be invalidated. *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).[182]

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[182] Forty-two states recognize the right to refuse participation in abortion. Alaska Stat. § 18.16.010(a) (Supp. 1979); Ariz. Stat. Ann. § 36-2151 (1974); Ark. Stat. Ann. § 41-2560 (1948, 1977); Cal. Health and Safety Code §§ 25955—25955.3 (West Supp. 1979); Colo. Rev. Stat. § 18-6-104 (1978); Del. Code Ann. tit.24, § 1791 (1975); Ga. Code Ann. § 26-1202(e) (1978); Haw. Rev. Stat. § 453-16(d) (1976); Idaho Code § 18-612 (1979); Ill. Rev. Stat. ch. 91 § 201 (1973); Ill. Ann. Stat. ch. 38, § 81-16, -33 (Smith-Hurd 1977); Iowa Code Ann. § 146.1-.2 (West Supp. 1979); Kan. Stat. §§ 65-443 to -444 (Supp. 1979); Ky. Rev. Stat. ch. 311. 800—.810

C. The Hyde Amendment Must Be Invalidated Because There Is No Substantial Purpose Justifying the Discriminatory Burden On The Abortion Decision.

Whether viewed as a burden on the free exercise of religion or as a violation of religious neutrality, the Hyde Amendments must be subject to strict scrutiny. In *McDaniel v. Paty*, the Court reaffirmed the standard

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(1972, 1977); La. Rev. Stat. Ann. tit. 40, §§ 1299.31-.34 (West Supp. 1979); Me. Rev. Stat. Ann. tit. 22, § 1592 (Supp. 1979); Md. Code Ann. art. 43, § 556E (Supp. 1979); Mass. Ann. Laws ch. 112 § 121 (Michie/Law Co-op Supp. 1980); Mich. Comp. Law Ann. §§ 333.20182—.20184 (1978); Minn. Stat. Ann. §§ 145.414, .42, .925 (West Supp. 1979); Mo. Ann. Stat. ch. 197.032 (Vernon Supp. 1980); Mont. Rev. Codes Ann. tit. 94-5-620 (1977); Neb. Rev. Stat. §§ 28-4,156 to 160 (1975); Nev. Rev. Stat. § 632.475 (1977); N.J. Stat. Ann. tit. 2A:65A-1 to 2 (West Supp. 1979); N.M. Stat. Ann. § 30-5-2 (1978); N.Y. Civ. Rights Law § 79-i (McKinney 1976); N.C. Gen. Stat. § 14-45.1(f) (Supp. 1979); N.D. Cent. Code § 14-02.1-03(3) (Supp. 1979); Ohio Rev. Code Ann. § 4731.91 (Page 1977); Okla. Stat. Ann. tit. 63, § 1-741 (West Supp. 1979); Or. Rev. Stat. § 435.485 (1977); Pa. Cons. Stat. Ann. tit. 43 § 955.2 (Purdon Supp. 1979); R.I. Gen. Laws § 23-17-11 (1979); S.C. Code § 44-41-50 (1976); S.D. Cod. Laws § 34-23A-12 to -14 (1977); Tenn. Code Ann. § 39-304 to -305 (1975); Rev. Tex. Civil Stat. Ann. art 4512.7 (Vernon Supp. 1979); Utah Code Ann. § 76-7-306 (1978); Va. Code § 18.2-75 (1975); Wash. Rev. Code Ann. § 9.020.080 (1977); Wisc. Stat. Ann. § 140.42 (West 1974); and Wyo. Stat. Ann. § 35-6-106.

Federal law precludes conditioning the receipt of federal funds on the provision of abortion services. 42 U.S.C. §§ 300a-7-8, and several cases have recognized a right in private hospitals to refuse them. *Wolfe v. Schroering*, 541 F.2d 523, 527 (6th Cir. 1976); *Cf.*: *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974); *Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77 (4th Cir. 1975) *cert. denied*, 424 U.S. 948 (1976) (denominational hospital may refuse sterilization). In the Title VII context, the I.R.S. was required to accommodate an employee whose conscience precluded him from carrying out work which would result in the provision of abortion services. *Haring v. Blumenthal*, 471. F.2d 1172 (D.D.C. 1979).

of review applied in *Sherbert* and *Yoder* that disqualifications or penalties based on religiously grounded conduct can be sustained "only [by] those interests of the highest order and those not otherwise served." 435 U.S. at 628. Furthermore, the state interests in regulation must be based upon "some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403; *see, e.g., Reynolds v. United States*, 98 U.S. 145 (1878); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The court below correctly applied these standards in invalidating the Hyde Amendment's withdrawal of abortion funding from the Medicaid program.

Here there is no interest,[183] let alone one of paramount importance, which overrides plaintiffs-appellees' free exercise claim, *see Yoder v. Wisconsin*; *compare Gillette v. Unites States*, since they seek only to have reimbursement to do an act which, like worship in *Sherbert*, is completely legal and constitutionally protected.

While bare legislative desire to deter the exercise of a fundamental right is not legitimate in any context, *supra*, Section II-E, it is doubly impermissible in the context of the First Amendment. This Court has repeatedly made clear that mere disapproval of the content of conscientious exercise is an impermissible basis for restraint. *See, e.g., Fowler v. Rhode Island,* 345

[183] Supra, pp. 128-136. In particular, the lower court found "There is no national commitment to unwanted children. Existing law encourages family planning, it does not foster unwanted pregnancy and unwanted childbirth. That is very particularly true with respect to teenage women, and, especially, women seventeen years of age and under." Slip op. at 166.

U.S. at 69-70; *Niemotko v. Maryland*, 340 U.S. at 272-73; *Murdock v. Pennsylvnia*, 319 U.S. at 116. That the riders are predicated on a moral valuation of fetal life not as potential but as actual human life is clear. Slip op. at 21. Even if this were not a religious judgment, *infra* Section VII, it is one which this Court correctly viewed as beyond the competence of the state in *Roe v. Wade*, 410 U.S. at 162. Moreover, under the Free Exercise Clause, the state cannot restrict abortion simply because it prefers the moral valuation of fetal and existing human life shared by the anti-choice forces to that held by those who consider abortion, in certain circumstances, to be a moral necessity or an affirmative act of faith. To be legitimate, the legislative purpose must serve some important and concrete public interest independent of disapprobation of the conscientious position. *See e.g., Gillette v. United States,* 401 U.S. at 437.[184]

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[184] Describing the taxpayer's interest in withdrawing funding for abortion as "conscientious" adds no weight to the state interest asserted. Taxpayers have no First Amendment right to withhold tax payments because of deeply held religious or moral opposition: "The fact that some persons may object on religious grounds to some of the things that the Government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax." *Autenreith v. Gullen*, 418 F.2d 586, 588 (9th Cir.), *cert. denied* 397 U.S. 1036 (1969). Indeed, even the Roman Catholic Church does not claim a free exercise right to withhold taxes for abortion, *supra* p. 71. Although Congress is not without power to legislate based on conscientious convictions that are widely shared, the district court properly recognized that a difference of opinion on a matter of conscience cannot override the conscientious claim of the individual whose practice is directly affected. Slip op. at 328. Thus, the attenuated claim of the taxpayer cannot outweigh the claim of indigent pregnant women to necessary medical services in accordance with their religiously-based conscientious decision. *Compare, e.g., United States v. Seeger*, 380 U.S. 163.

The riders serve no such interest. They are directed not to conduct within the regulatory power of the state, but rather to the suppression of dissident belief. As an effort to coerce conformity to the anti-abortion viewpoint, the riders are beyond the power of the state. As the Court recognized in *West Virginia State Board of Education v. Barnette*:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime and *particular plans for saving souls*. . . . Those who begin the coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
>
> . . . .
>
> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or *force citizens to confess by word or act their faith therein.*

319 U.S. 624, 641-42 (emphasis added).

Judge Dooling simply restated the teachings of *Barnette* and *Roe v. Wade* when he wrote that "the

irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious non-participation." Slip op. at 328.

For all these reasons, the Hyde Amendments must be invalidated as an impermissible and discriminatory interference with the religious and conscientious rights of poor women.

VII.

THE HYDE AMENDMENTS VIOLATE THE FIRST AMENDMENT'S PROHIBITION ON LAWS RESPECTING AN ESTABLISHMENT OF RELIGION.

The undisputed purpose of the Hyde Amendments is to restrict abortion as much as possible, on the belief that abortion, at any stage of gestation, is taking human life, tantamount to murder.

The Hyde Amendments have no preamble stating that they are designed to prevent the sin of abortion and bring civil law into conformity with God's law. Nor did the law, invalidated in *Epperson v. Arkansas*, 393 U.S. 97 (1969), prohibiting the teaching of evolution in the public school, explicitly state its religious purpose. Here, as in *Epperson*, this Court must look beyond the face of the statute. *Id.* at 108-09. The legislative history of the Hyde Amendments and their historical and social context make unmistakeable their religiosity.

This case is heir to *Epperson* in several respects. There, in response to attempts to liberalize the school

curriculum, "Scopes" laws were enacted withdrawing from the curriculum one subject abhorrent to a powerful religious constituency. Here, in response to the liberalization of abortion laws, the Hyde Amendments have been enacted withdrawing, from a broad medical assistance program, one medical service abhorrent to a powerful religious minority.

As in *Epperson*, the Hyde Amendments enact a distinctly religious belief in response to intense pressure from a religiously based and motivated constituency. The riders likewise reflect distinctively regious fervor. The fundamentalist movement behind the "Scopes" laws viewed its enemies as "blasphemers" and "anti-Christian."[185] Today, the so-called "right-to-life" movement views supporters of the abortion right as "murderers" and "anti-Christians." Religious mobilization and epithet unquestionably enjoy the full protection of the First Amendment. Here, however, as in *Epperson*, they must be examined as indicators of the impermissibly religious nature of the resulting legislation.

There is one important difference from *Epperson*. By the time *Epperson* was decided, the religious mobilization and fervor that had brought the "Scopes" law into existence had long since subsided.[186] The law had become a relic and the political tensions which arise whenever the religion clauses are in issue had been alleviated. By contrast, the growing divisiveness over the abortion issue is presently tearing this country

[185] *Epperson*, 393 U.S. at 107-08 n. 15,16.

[186] What had been viewed as non-sectarian in 1928 was recognized as sectarian 40 years later. Compare *Epperson* with *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

apart and "strains. . . [the] political system to the breaking point." *Walz v. Tax Commission of the City of New York*, 379 U.S. 664, 694 (1970) (Harlan, J. concurring).

This Court has formulated a tripartite test to determine whether or not a law establishes religion: "to pass muster under the Establishment Clause the law in question first must reflect a clearly secular purpose . . . second . . . have a primary effect that neither advances not inhibits religion . . . and third . . . avoid excessive government entanglement with religion. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973). Although the district court's extensive findings of fact fully substantiate the Establishment Clause claim, *see* Facts, *supra,* §§9, 10, 11, 12, the court failed properly to apply the principles settled in this Court. Application of these criteria to the Hyde Amendments dictate their invalidation under the First Amendment.

A. The Hyde Amendments Have No Clear Secular Purpose.

In Establishment Clause analysis, the Court deals with the actual purpose of legislation, not with hypothetical ones.[187] Given the inevitable, subtle and sometimes dangerous intertwining of secular and religious considerations, the operative purpose may not be just arguably secular; it must be clearly so.[188]

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[187] *See: School District of Abington v. Schempp*, 374 U.S. 203, 222-23 (1963); *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968); *McGowan v. Maryland*, 366 U.S. 420, 431-45 (1961); *McDaniel v. Paty*, 435 U.S. 618, n. 9. (Brennan, J. concurring).

[188] See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 7 (1947); *Walz v. Tax Commission of City of New York*, 397 U.S.

Where, as in the parochial school aid context, religious and secular purposes can easily be distinguished analytically, this Court's concern is to assure that they can be disentangled in practice. This case, however, presents a threshold question of whether legislation that promotes the belief that the human fetus is a human life is impermissibly religious.[189] Whether a particular belief is religious requires consideration of empirical fact in light of the purpose of the First Amendment. The question here is, therefore, whether the belief that a fetus is human life is, in the historical and social context of our time, religious in character, and whether enactment of this belief in the form of the Hyde Amendment threatens intolerance, oppression and sectarian divisiveness against which the Establishment Clause stands guard.

The decisions of this Court instruct that the determination whether a given belief is impermissibly religious requires consideration of a number of factors. These are whether the belief is presently rooted in distinctively religious teaching, whether it is nonetheless a belief which is widely shared, whether the con-

664, 672 (1970) (Brennan, J., concurring). In most cases, the secular purpose was specifically set forth in legislative findings or in a preamble to the statute. *See*, e.g., *Board of Education v. Allen*, 392 U.S. 236, 239 n. 2 (1968); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *Lemon v. Kurtzman*, 403 U.S. 602, 607, 609 (1971); *Committee* for Public Education v. Nyquist, 413 U.S. 756, 763-66 (1973); *Meek v. Pittenger*, 421 U.S. 349, 352 n. 2 (1975); *Wolman v. Walter*, 433 U.S. 229 n. 5 (1977).

[189] There is no question that a law which sponsors, advances or imposes religion violates the Establishment Clause every bit as much as one which provides material assistance to religious institutions. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School District of Abington v. Schempp* 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961).

stituency and advocacy for the law are identifiably religious in character or reflect distinct secular concerns, and whether institutional religion plays a predominant role in the effort to enact the particular belief into law. No single factor makes a law impermissibly religious.[190] *Epperson v. Arkansas*, 393 U.S. at 97; *School District of Abington v. Schempp*, 374 U.S. at 203; *Engel v. Vitale*, 370 U.S. at 431; *McGowan v. Maryland*, 366 U.S. at 420.

The district court found that the Hyde Amendments were enacted to prevent as many abortions as possible. They seek to implement the belief that actual, full and inviolable human life begins at conception. Slip op. at 273-74.[191] This belief is distinctly religious in our society. The riders' proponents contend, however, that the belief that human life begins at conception reflects secular as well as religious morality. Slip op. at 32.

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[190] In particular, although the dominance of institutional religion in the effort to enact a particular law is a relevant factor in Establishment Clause analysis, it is never alone sufficient to render a law impermissible.

[191] There is no contention here that the Hyde Amendments were enacted to advance distinctly secular concerns to encourage normal childbirth, or protect potential human life. No one even argued that the riders would save money. Indeed, fiscal conservatism was abandoned where legislators saw "human life" at stake. Similarly, no one seriously argued that the riders served any health interest. Indeed, organizations and programs concerned about maternal and child health opposed the abortion riders. For example, the statements from the American Medical Association and the American College of Obstretricians and Gynecologists are reported at Cong. Rec. S13671 (8/4/77). Recommendations of the American Academy of Child Psychology Pl. Exh. 169; A. 286; HEW, Initiative to Address Adolescent Pregnancy and Related Issues (Schuck Report), Pl. Exh. 244, (*See* Facts, *supra*, § 5f.)

It is clear that the view that abortion is tantamount to murder is "rooted firmly . . . in belief in God's will, in God as the author of life and in God's concern with humankind." Slip op. at 239. It is, as the district court found, "beside the point that reasonable men, without any knowledge of God or of his existence, would evolve the same principles by right reasoning alone" because "the moral principle, once determined by right reasoning is recognized as the will of God." Slip op. at 239-40. Scientific evidence is seen merely to confirm, not establish, the belief that the fetus is a human life from conception. Thus, the obligation to oppose abortion, despite reference to rational analysis or biological learning, is "seen nonetheless as religiously imposed." Slip op. at 229; *see* also, slip op. at 175-78.

Because they enact the belief that the fetus is an actual human life from conception, the Hyde Amendments are "beyond legitimate legislative concern." They intrude into "the specific but comprehensive area of human conduct: man's belief or disbelief in the verity of some transcendental idea . . ." *McGowan v. Maryland*, 366 U.S. at 466 (1961) (Frankfurter, J., concurring); *School District of Abington v. Schempp*, 374 U.S. at 244-45 (Brennan, J., concurring); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the state for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." *Wolman v. Walter*, 433 U.S. at 264 (Stevens, J. concurring and dissenting, quoting Clarence Darrow, Tr. of Oral Arg. at 7, *Scopes v. State*.

The "Scopes" law struck down in *Epperson* enacted a preference for the theory of divine creation of the world; the Hyde Amendments, premised on belief that human life begins at fertilization, are likewise based on a particular religious view of the divine creation of humanity.

The fact that a rule of law coincides with a religious tenet does not alone render it impermissible. When originally religious values are widely accepted by social consensus and where they serve the ends of civil governance (such as injunctions against murder or the benefits of a day of rest) they become a part of the secular fabric of society. *School District of Abington v. Schempp*, 374 U.S. at 264 (Brennan, J., concurring); *McGowan v. Maryland*, 366 U.S. at 445.

In *McGowan v. Maryland*, the Court upheld Sunday closing laws because they no longer reflected their originally religious purpose and had accrued independent *secular* purposes and a clearly independent secular constituency over time. The opinions recognize that society's contemporary concern with the physical and mental well-being of the workforce made a day off mandatory and that the predominant secular support for the law emphasized the importance of a universal day of rest to permit families to be together. 366 U.S. at 431-35, 470-505 (Frankfurter, J., concurring). Thus, the laws reflected a "widely felt present day need" and a "tradition which has persisted despite the disappearance of the original reasons or the decline in the part played by religious institutions in the social structure." *Id.* at 497, 504.

In *McGowan*, however, history revealed the secularization of the originally religious laws. Here, the con-

verse is true. Laws restricting abortion which historically served a panoply of secular concerns,[192] are today the product of a single, religious concern for the life of the fetus.

The belief in fetal personhood is primarily and overwhelmingly identified with one segment of religious teaching[193] and is emphatically rejected by the major Jewish and Protestant denominations "in the mainstream of the country's religious beliefs." Slip op. at 327. This division among religious faiths, on a matter which is so rooted in religious concepts, deprives the law of any claim to a secular, moral concern such as underlies the universally shared condemnation of murder.[194] This division is particularly significant as well because it breeds the sectarian strife which the no-establishment clause is designed to avoid (*infra*, section VII, B, C).

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[192] *See: Roe v. Wade*, 410 U.S. at 148-50, and sources cited therein. Mr. Justice Blackmun, writing for the Court, identifies three justifications supporting the criminal abortion laws of the nineteenth century: Victorian social concern to discourage illicit sexual conduct; protection of the pregnant women from then extremely hazardous medical procedures; and finally, in a distinctly tertiary role, protection of "prenatal life." *See also:* Mohr, *Abortion in America,* (1978); Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (1976).

[193] *See e.g.,* school aid cases where the Court looked to the degree to which a particular law provided benefits primarily to religious schools rather than to non-sectarian private schools. *Committee for Public Education v. Nyquist. See, Walz v. Tax Commission,* 397 U.S. 664, 687-89 (Brennan, J., concurring).

[194] Even if a religious belief is shared by a majority, *e.g.*, *Epperson v. Arkansas*, or a particular practice is popularly viewed as non-sectarian, *Engel v. Vitale*, it can nonetheless be impermissibly religious under the Establishment Clause.

No cacophony of distinct secular institutional voices and concerns is heard in the forces that are pressing the view that the fetus is actual human life from the moment of conception. As the district court found, the anti-abortion churches, most significantly the Roman Catholic Church, are the major and practically exclusive institutional voices supporting these restrictions.

Even where there is substantial support for a law from non-ecclesiastical leaders and institutions, the Court looks to see whether the rationales put forward nonetheless have a significant religious component, even if non-sectarian. *School District of Abington v. Schempp*, 374 U.S. at 203, 270, 271 (Brennan, J., concurring.)[195] *See Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 228 (1948) (Frankfurter, J., concurring).

Here, the absence of clearly secular advocacy in the "right to life" movement for the abortion restrictions is decisive. Its constituency, support and orientation are largely religious and, more importantly, it asserts no independent secular justification for the evils of abortion. Where legislation rooted in sectarian religious beliefs not widely shared is claimed to serve a secular purpose, and is supported in the legislature and in the society at large by a predominantly and pervasively

[195] There the contentions of leading public educators that bible reading would advance "spiritual enlightenment" and the "principles of virtue , morality, patriotism, and good order—love and reverence for God—charity and good will to men" reaffirmed its inherently religious character. *Schempp*, 374 U.S. at 224, 270-71, 279-80 (Brennan, J., concurring). *McGowan* also makes clear that the fact that a religious institution supports a particular law is offset if the reasons put forward by the religious spokespeople are also secular. 366 U.S. at 478, n.28 (Frankfurter, J. concurring).

religious constituency, the claim of secular purpose must fail.[196]

Epperson provides singular guidance. In *Epperson*, the Court had to discover why something was singled out for exclusion from an otherwise unrestricted program. The Court invalidated the statute prohibiting the teaching of evolution because it was "a product of the upsurge of fundamentalist, sectarian conviction" that the theory of evolution "denied the divine creation of man." 393 U.S. at 98, 108. In so doing, the Court noted the intrinsically religious character of public adovcacy for the law.[197]

Here, as in *Epperson*, the law does not fully and perfectly embody the religious teaching.[198] In the

[196] The question here is not to discover the individual motivation of the legislators, but rather the character of the belief in society at large, of which the legislative debates are an important reflection. Thus the concern that motivational analysis based on legislators' statements alone, lacks permanence and reliability in constitutional decisionmaking is not involved here. The statements of legislators cannot be divorced from the character of an issue in its present context. *Compare United States v. O'Brien* 391 U.S. 370 (1968).

[197] *Epperson* noted the following advertisement as typical of the public appeal which was used in the campaign to secure adoption of the statute:

> The Bible or Atheism, Which?
>
> All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of thier children? *The Arkansas Gazette,* Little Rock, November 4, 1928, p. 12, cols. 4-5

393 U.S. at 108, n.16.

[198] The *Epperson* majority noted Clarence Darrow's comment that the statute "did not insist on the fundamentalist theory in all

school prayer cases, the Court also rejected the notion that compromised religion is no religion at all. Thus, in *Engel*, the Court invalidated an opening prayer drafted by the Regents which had been concededly drained of sectarian content. 370 U.S. at 423, 430, 436.

The arguments of the Congressional proponents of the riders and the literature of the "right-to-life" movement, whether they emanate from churches, non-sectarian groups or private individuals, reflect the same fervor and echo the same themes. *See* Facts *supra* § 11. That the Hyde Amendments reflect a compromised version of their goals does not obscure their religiosity.

The district court thus failed to follow the settled instruction of this Court to evaluate a law's purpose in light of present rather than past reality. The district court drew on the past instead of looking to the present, and mistakenly relied on this Court's opinion in *Roe v. Wade* to justify its conclusion that the clear purpose of the Hyde Amendments to prevent abortions is based on "a traditionalist view more . . . than any religious one." Slip op. at 323-24.[199] *Roe v. Wade* prohibits enacting the belief that a human life begins at

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respects" but permitted teaching "that the earth is round and the revolution on its axis brings the day and night, in spite of all opposition." 393 U.S. at 102, n. 9.

[199] Laws enacting the anti-abortion view that the fetus is a human life are not insulated from invalidation under the Establishment Clause because they are allied, as the district court felt, with a traditionalist morality. The clear teaching of establishment cases is that even secular moral values cannot be advanced through religious means. *Committee for Public Education v. Nyquist*, 413 U.S. at 783, n. 18, citing *School District of Abington v. Schempp*, 374 U.S. at 278-81 (Brennan, J., concurring).

conception regardless of its religious character. Moreover, *Wade* intimates that the concern for the fetus as an actual human life—which is distinct from an interest in potential life—is too religiously determined to support valid civil enactments. 410 U.S. at 159. The record in this case and the extensive findings of the district court bring the full religious character of this belief to light.

B. The Hyde Amendment Has a Primary Effect of Advancing One Religious Belief and Inhibiting Opposing Religious and Non-Religious Belief and Practice.

Even where a law has a clear and distinct secular purpose, the Court must determine whether or not it has a primary effect that either advances or inhibits religion. As Justice Powell made clear in *Nyquist*, the effect test presents a separate hurdle because "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between church and state." *Committee for Public Education v. Nyquist*, 413 U.S. at 774. The effect test requires invalidation of laws which, though neutral and secular in intent, "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education.*

The inquiry into religious effect has emerged as the strictest aspect of establishment clause analysis. Impermissible effect need not be direct, as the lower court here assumed. Slip op. at 325. A law, neutral on its face, which has the effect of providing substantial support, directly or indirectly, to religion fails the effect test. *Committee for Public Education v. Nyquist*, 413

U.S. at 767-68, 783. In *Nyquist,* Justice Powell rejected the contention that the Court must decide which effect is *the* primary one and which is secondary. It is sufficient that the law has *a* primary effect—rather than an effect which is remote, indirect and incidental—which advantages religion. 413 U.S. at 783 n. 39.

Here, we are dealing with effects which are substantial rather than remote, indirect or incidental. Legislative enactment of a belief that the fetus is human life from the moment of conception substantially advances religion and inhibits the exercise of religious and conscientious liberty. *See* Facts *supra* §§ 9, 11.

On the symbolic level alone, the establishment clause is violated because the Hyde Amendments place the power, prestige and financial support of government behind the view that the fetus is human life. *Engel v. Vitale*, 370 U.S. at 429-30; *School Board of Abington v. Schempp*, 374 U.S. at 261-63, comparing *Zorach v. Clauson*, 343 U.S. 306 (1952), with *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 203; *Walz v. Tax Commission*, 379 U.S. at 668. The legislative debates make clear that the proponents of the Hyde Amendment were less concerned with the practical impact of the riders than with affirming the "principle of life." *See* Facts *supra* § 10.

The riders are widely viewed as embodying and sponsoring the religious doctrine of denominations which oppose abortion as murder or homicide. At the same time, they disparage the religious, ethical and moral convictions of those who view the abortion decision as a necessary and appropriate moral choice under circumstances which threaten the survival, health and