by the fact that 42 U.S.C. §1320c clearly precludes payment for services which are not certifiably "medically necessary." But *Beal* emphasized that States which choose to do so can include "medically *un*necessary" abortions in the scope of their coverage. *Beal* v. *Doe,* 432 U.S. at 447 n. 11. These two legal effects can be understood as consistent only by recognizing that, as the First Circuit noted, there are "two levels of judgment as to medical necessity in the statutory scheme. The first is the macro-decision by the legislature that only certain kinds of medical assistance are deemed sufficiently necessary to come under the coverage of its plan. The second is the micro-decision of the physician, that the condition of his patient warrants the administering of a type of medical assistance which that plan makes available." *Preterm* v. *Dukakis,* 591 F.2d at 125. It is this second "micro-decision" which is subject to PSRO control. In the "micro" sphere, the fairly technical determination by the PSRO whether a given treatment is "medically necessary," in the sense of most efficient, is normally binding on both the physician provider and on the state medicaid agency. But in the "macro" sphere, the State has latitude to fund medically unnecessary items or to refrain from funding some items which might be deemed "medically necessary," provided only that it does so reasonably and consistently with the objectives of the Act.

As the House Committee on Ways and Means stated in its report on the "Medicare-Medicaid Antifraud and Antiabuse Amendments," the pertinent parts of which are now law, "[W]here a . . . PSRO has been found competent by the Secretary to assume specific review responsibilities and is performing such reviews, a determination as to quality or necessity made in connection with such review would constitute the conclusive determination on those is-

sues for purposes of payment. . . . State medicaid agencies would continue to be responsible for other types of reviews and determinations relating to program eligibility, coverage of services, audit, claims payment, fraud and abuse detection, and related activities." H.R. Rep. No. 393, 95th Cong., 1st Sess. 1, 54 (1977).

4. The Implementing Regulation Legitimizes A State Choice to Limit Funding of Abortions

The Secretary of HEW has promulgated regulations which are consistent with the intentions of Congress and the purposes of medicaid.[19]

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[19] Recently, through the device of a footnote in a brief (Brief for the United States, *Williams* v. *Zbaraz*, No. 79-4, p. 43 n.23), the Secretary has apparently changed HEW's longstanding interpretation to maintain that "medically necessary" care falling within "the five mandated" categories must be funded by the States, including "mediately necessary" abortions.

Prior to this change, HEW did not interpret the Title to require that all "medically necessary" procedures be funded. *See Rush* v. *Parham*, 440 F.Supp. 383, 387 (N.D. Ga. 1977), *appeal pending*, and *Virginia Hospital Ass'n* v. *Kenley*, 427 F.Supp. 781, 785-786 (E.D. Pa. 1977). HEW approves state plans which restrict abortion funding in accord with a standard short of "medical necessity." [See Appendices A through N, Affidavits filed with Brief in Behalf of William A. Lynch, M.D., et al., Amici Curiae, in *Pre-term, Inc.* v. *Dukakis*, No. 78-1324. *Parents' Aid Society, Inc.* v. *Sharp*, No. 78-1325, No. 78-1326 (consolidated cases), (1st Cir., brief filed Oct. 1978)]. The approved plans for Kansas (Appx. C), Louisiana (Appx. D), New Mexico (Appx. G), North Carolina (Appx. H) and Virginia (Appx. M) in substance limit payment for medicaid abortions services to life-threatening abortions. The variety of approved plans demonstrates the freedom accorded the States in this regard. It has long been held by this Court that great weight will be given to a *consistent* construction of a statute by the agency

(footnote continued)

HEW's regulation implementing 42 U.S.C. §1396(a)(17) is 42 C.F.R. §440.230 (1979):

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

(footnote continued)

charged with its administration. *Five Per Cent Cases,* 110 U.S. 471, 484-485 (1884).

During its consideration of the Hyde Amendment, Congress relied on HEW's construction of Title XIX as allowing States to restrict abortion funding, and emphasized that it was never the intent of Congress to force the States to fund abortions. *See, e.g.,* statement of Representative Donnelly, 125 Cong. Rec. H. 9885 (daily ed. Oct. 30, 1979). Furthermore, by adopting the Hyde Amendment, the Congress acted to ratify HEW's construction of Title XIX by adopting restrictive standards for federal abortion funding. This is not a case of mere legislative inaction being interpreted as acquiescence in the interpretaion of the agency. *United States* v. *Jackson,* 280 U.S. 183 (1930). Rather, this is a case where Congress has specifically considered the construction under question, has refused to alter that construction, and has ratified it with parallel controls on the federal treasury. Under similar circumstances, where Congress has re-enacted a statute without changes, this Court has held that "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB* v. *Bell-Aerospace,* 416 U.S. at 267, 275 (1974).

Given these circumstances of a consistent administrative construction that has been subsequently ratified by Congress, the Secretary's new order is bereft of the deference given the previous constructions. This Court has consistently given little weight to administrative constructions which have not been uniform or consistent. *Federal Maritime Bd.* v. *Isbrandten Co.,* 356 U.S. 481, 499-500 (1958).

While departmental construction of enabling language is entitled to great deference, such construction "is only one input in the interpretational equation." *Zuber* v. *Allen,* 396 U.S. 168, 193 (1969). This Court must not "abdicate its ultimate responsibility to construe the language employed by Congress." *Id.* at 193, particularly "where

(footnote continued)

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

(c) (1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§440.210 and 440.250 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

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

Three observations should be noted with respect to this regulation. *First,* this regulation conforms to the basic principle of broad state discretion in specifying the extent of medical assistance which the state will provide under its medicaid plan.[20] Discretion is the predicate of the regulation; it is then limited in certain specified ways. To infer limitations on state discretion which are not specified would be to violate the clear intent of the regulation.

(footnote continued)

there are compelling indications that [the administrative construction] is wrong." *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94-95 (1973): *Red Lion Broadcasting* v. *FCC*, 395 U.S. 367, 381 (1969):

> [T]he courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374-375, and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional purpose underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291,

Volkswagenwerk Aktiengesellschaft v. *FMC*, 390 U.S. 261, 272 (1968).

[20] Of course, if a given item of medical assistance (*e.g.*, "medically necessary" abortion) is made available in a particular amount, duration, and scope to any individual or individuals, it must be made equally available to all other individuals similarly situated in terms of eligibility and need. 42 U.S.C. §1396a(a)(10) [1974].

Second, by explicitly recognizing the right of the State to regulate on the basis of criteria relating to "medical necessity," the regulation plainly authorizes the States to make judgments about the *degree* of medical necessity in any given procedure (*e.g.,* that abortions to preserve life are "necessary" whereas "health" abortions are not), a fact which unquestionably forecloses claims that such determinations must be left to the discretion of physicians.

Third, the regulation asserts state agencies "may not deny or reduce the . . . scope of a required service . . . *solely* because of the diagnosis, type of illness, or condition." (Emphasis added.) But a State's choice not to fund "health" abortion is not based *"solely"* on any excluded ground. Indeed, state action based on such interests is not based on "the diagnosis, type of illness or condition" *at all.* It is based on the States' "important and legitimate interests . . . in protecting the potentiality of human life" *Roe* v. *Wade,* 410 U.S. at 162; *Beal* v. *Doe,* 432 U.S. at 445-446. Such action merely refuses to fund one alternative response—one *treatment*[21]—of some complica-

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[21] 42 C.F.R. §440.130(a) (1979) defines "diagnostic services" as "any medical procedures or supplies recommended by a physician or other licensed practioner of the healing arts, within the scope of his practice under state law, to enable him *to identify the existence, nature, or extent of illness, injury, or other health deviation* in a recipient." (Emphasis added.) Diagnosis deals with the nature of the illness, not with the nature of the care with which a physician chooses to treat that illness.

Therefore, a State's choice to restrict funding for abortions not necessary to preserve maternal life, when it funds all alternative treatments and when those treatments fully meet the genuine needs associated with pregnancy complications, as here, does not reduce the "amount, duration and scope . . . because of the diagnosis." It is even more obvious that it does not do so "because of the . . . type of illness or condition."

tions of pregnancy on behalf of an independent valid interest in the fetus.

Thus, neither the Title nor its implementing regulations imply that the State must fund all "medically necessary" procedures. The States might properly regard funding of "medically necessary" abortion as "unreasonable" or "impracticable." They must fund "medical assistance," but only in "part." A restriction upon "medically necessary" abortion funding is not based "solely" upon diagnosis, type of illness or condition. Hence, the States may refuse to fund "medically necessary" abortion under the plain language of Title XIX.

Because a careful analysis of the statute reconfirms the validity of the *Beal* framework for analyzing the Medicaid Title, this Court should reject the lower court's ruling that the Act requires the States to fund all items within the five mandated categories which any physician calls "medically necessary," and it should reaffirm the principle that the Medicaid Title "confers broad discretion on the States to adopt standards for determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Beal* v. *Doe*, 432 U.S. at 444.

B. The Standards Established by the Hyde Amendment Are Reasonable and Consistent with the Objectives of the Act

1. The State's Interest in Fetal Life Is Consistent With the Objectives of the Act

It is striking that, despite the clear and explicit holding of this Court in *Beal* (432 U.S. at 446) that "nothing in either the language or the legislative history of Title XIX . . . suggests that it is unreasonable for a participating State to further [its] unquestionably strong and legitimate

interest in encouraging normal childbirth,"[22] not a single court which held abortion funding limitations to be inconsistent with the Act so much as mentioned this state interest in discussing the statutory validity of the limitations.[23]

An important distinction must be made. If an interest exists which is not inconsistent with the objectives of the Act, it exists regardless of the presence or importance of other countervailing interests or circumstances. Those other considerations may affect the weight that can or ought to be given to an interest, but they cannot affect the intrinsic validity of the interest itself. Nor can they, by their presence, transform an interest which is not inconsistent with the Act's objectives into one which is inconsistent. Thus, if the state's interest in fetal life is consistent with the objectives of the Act in the context of deciding whether or not to fund abortions which are openly denominated as elective, it is no less consistent with those objectives in the context of deciding whether or not to fund abortions which are desired by an indigent woman and which are then under the lower court's ruling "medically necessary."

The central error of the various lower courts which have dealt with the statutory issues has been to assess the abortion funding limitations as if their sole purpose was to pursue short-term fiscal frugality by rationing abortion-

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[22] *See* this Brief at 57 n.14, concerning the sophistic effort to discount "normal childbirth" as an applicable state interest by the lower court in analyzing the constitutional issues.

[23] Many of the courts have discussed the state interest in fetal life in their constitutional analysis, but only *D.R.* v. *Mitchell,* 456 F.Supp. 609 (D. Utah 1978), considers it in the context of statutory analysis. *Mitchell* upheld the abortion limitations.

related care to those in greatest need of it. The cases hold that Hyde Amendment type restrictions are an "unreasonable" means of attaining this end, which they recognize as legitimate within the confines of the Act. *See, e.g., Preterm* v. *Dukakis*, 591 F.2d at 125-127, 126 n.4 (1979).

The willingness of the courts to recognize fiscal frugality as an end makes doubly inappropriate their studied neglect of the interest in fetal life.

Fiscal frugality is of no value to the State in and of itself: the value of money is purely instrumental—dependent upon the importance of that which it might purchase. Thus, when the State anywhere chooses to limit its expenditures for medicaid, it does so based on its conviction that the money saved can better be employed elsewhere—for other programs or to relieve the tax burden. In short, a State determines its budgeting allocation to medicaid by balancing its interests in the health of its indigent citizens against other independent valid state interests. Thus, one cannot concede the propriety of a benefit limitation upon fiscal grounds without accepting the proposition that coverage decisions based upon independent valid state interests, such as in the protection of fetal life, are "consistent with the objectives of the Act."[24]

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[24] To substantiate its conclusion that the Hyde Amendment restrictions are inconsistent with the objectives of the Act the lower court (slip op. at 294) cites 42 U.S.C. §1396a(a)(19) (1974), which requires the state plan to establish safeguards to assure that in the administration of the plan individuals' eligibility is determined, and services are provided, in a manner "consistent with . . . the best interest of the recipients." It is evident on the face of this provision that it relates to the *manner* in which assistance is provided, and not to *what items* of assistance will be provided. In any case, the amorphous phrase "best interest of the recipients" is designed to provide a general objective in drawing up the plan and conceivably a

(footnote continued)

2. The Abortion Funding Limitations Are Reasonable

If the Hyde Amendment restrictions are not "inconsistent with the objectives" of the Act, the remaining question is whether they are "reasonable standards."

"Reasonable" is an amorphous term. If it is equated with the constitutional "rational basis" test, under which the question is whether the legislation is a means which in fact advances a legitimate end,[25] the restrictions are unquestionably reasonable: given that the interest in fetal life is legitimate and consistent with the Act's objectives, the restrictions in fact tend to advance that interest.

(footnote continued)

standard for HEW review, certainly not a license for courts to scrutinize every detail of each plan to arbitrarily declare which elements do, and which do not, accord with the court's own notion of what is in the "best interest" of recipients.

See S. Rep. No. 409, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Congressional and Administrative News, p. 2016-17. The Report makes it clear that Congress contemplated that the provision would apply to the *manner* in which services would be provided, and not that it would create a new substantive requirement relating to the *extent* of services provided under the state plan.

Similarly, 42 U.S.C. §1396a(a)(22)(D) (1974) and its implementing regulation, 42 C.F.R. §440.260 (1979), provide that state plans should include standards to assure that the care given under medicaid is of "high quality." Obviously, this deals with the *quality* of treatment in the items provided, and establishes no new standard to regulate the extent of medical assistance.

[25] In the words of Mr. Justice Stewart writing for the Court in *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971), "If the goals *sought* are legitimate, and the classification adopted is rationally related to the achievement of *these* goals, then the action of Congress is not . . . arbitrary. . . ." (Emphasis added.)

The court below found:

> The evidence supports the inference that an undetermined but substantial percentage of women denied medically necessary abortions under medicaid carry the fetuses to term. . . .

See also Right to Choose v. *Byrne*, 398 A.2d 587, 594 (N.J. Super. 1979) (during the period abortion funding limitations were in effect the number of births to medicaid-eligible women rose by 30%).

But if "reasonable" within the context of a statute means more than "rational" in the context of constitutional analysis—if it means that a reasonable person could conclude that the action was the result of a rational weighing of all the factors involved—the Hyde Amendment restrictions are still "reasonable."

The lower court opinion in this case demonstrates more candidly than most of the other lower court rulings that a "medically necessary" abortion is synonymous with an "elective" abortion. *See* this Brief at 15-18. If the government wishes to vindicate its interest in fetal life at all, it cannot fund all "medically necessary" abortions. How is it to avoid this?

It cannot rely on the physicians who perform abortions, in the same manner as it might, at least in the first instance, rely on them to make judgments concerning what treatment is appropriate in other areas of medical practice. Abortion is a most hotly debated and most polarizing issue. The battle lines are drawn, and abortion-performing physicians are, naturally, among the most committed of the protagonists on one side. The government could reasonably conclude that, in dealing with a group which not only does not share, but is fundamentally hostile to its interest in fetal life, it must establish limitations with particular care. It is important to emphasize that we are not talking here about physician fraud, something which arguably might

be dealt with by means other than the exclusion of an item particularly subject to fraud from coverage.[26] A physician who certified an "elective" abortion for reimbursement under the "medically necessary" standard as set forth by the lower court would not be committing fraud, but would be entirely within his rights. He would simply be acting in accordance with his sense of the woman's "well-being"—in the exceedingly broad sense encompassed by the *Bolton* standard—without taking into account the government's interest, which he may not share, in fetal life. Thus, the government would be forced to pay for the destruction of its own interest.

The government cannot rely on the PSROs. Their review and standard setting is related solely to efficacy and is not designed to take into account valid independent interests such as that in fetal life.

The only means available to the government to advance its interest in fetal life and to avoid paying for elective abortions is to set its own standards for coverage of abortions, providing qualifying language more specific than "medical necessity." In doing so, it must of course balance its interests in fetal life and in maternal health.

The lower court made the following finding of fact:

> The medical testimony was substantially in agreement that by the use of the most advanced present day medical techniques, and with close medical supervision, it was possible for women with life threatening conditions to survive pregnancy and bear children with a comparatively low ratio of maternal mortality; it

[26] *But see Budnicki* v. *Beal,* 450 F.Supp. 546, 557 (1978), which, although it was dealing with an "optional" rather than a "mandated" service, held it to be reasonable for a State faced with abuse with regard to a particular covered item, to terminate coverage of that item (orthopedic shoes).

> was reasonably clear that the testimony rested on the assumption that the pregnant woman was desirous of bearing the child, and was cooperative throughout the pregnancy.

Slip op. at 90-91.

In other words, treatments alternative to abortion are available (except, as the opinion elsewhere makes clear, in crisis situations). The government is willing to pay for "advanced . . . techniques" and "close medical supervision." The only other factor is whether the woman, because she does not want the child, will refuse to cooperate with the treatment. Surely, it is not unreasonable for the government to decide that those who refuse to cooperate with treatment which will meet their needs, and thereby voluntarily harm themselves, need not be provided with other treatment which may diminish the need for cooperation but which will destroy the government's interest in fetal life.

Therefore, in view of the willingness of the government to provide alternative forms of treatment, it is reasonable for the government to consider that its interest in maternal health would not be significantly undermined by restrictions on funding for abortions. In weighing that conclusion together with the certainty that its interest in fetal life would be gravely impaired by funding of vast numbers of "medically necessary" including elective abortions, it was reasonable for the government to adopt abortion funding limitations.

C. Abortion is Unique in a Manner which Permits Special Funding Limits with Regard to It

Even were this Court to overturn *Beal* and determine that the general standard for the inclusion of items within the state plan must be "medical necessity" rather than

"reasonable standards . . . consistent with the objectives" of the Act,[27] the special nature of abortion would permit States to exclude it from the services provided under their plans.

Pregnancy itself is "significantly different from the typical covered disease or disability." *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 136 (1976). Abortion is unique. "The simple answer to the argument that similar requirements are not imposed for other medical procedure is that such procedures do not involve the termination of a potential human life." *Maher* v. *Roe,* 432 U.S. 464, 480 (1977).

As Mr. Justice Stewart wrote for the Court in *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis,* 100 S.Ct. 242, 247 (1979), "Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent." The clear attitude of the Congress of the United States, from the time of the adop-

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[27] Even were the Court to so conclude, it is important to note that the Medicaid Title would still create no general "statutory entitlement" to the medicaid eligible for all "medically necessary" care in any "comprehensive" sense. The Medicaid Title lists 17 broad categories of care within the general definition of "medical assistance" (42 U.S.C. §1396d(a) [1976]), only five of which are "mandated" categories (42 U.S.C. §1396a(a)(13)(B) [1976]); the rest are optional with the States. They include such items as "clinic services" [§1396d(9)(a)]. "prescribed drugs" [§1396d(a)(12)] and "diagnostic . . . services" [§1396d(a)(13)]. Since abortions are frequently performed in abortion clinics, since the cost of pregnancy test (a diagnostic service) is often included in the general abortion fee, and since some forms of abortions are either done through the means of, or with the assistance of, "proscribed drugs," affirmance of the lower court's injunction requiring the funding of all "medically necessary" abortions will often mean that abortions are paid for when other "medically necessary" care within the same categories is not.

tion of the Social Security Act's Medicaid Title up to the present, has been one which disfavors abortion. There has *never* been any indication that the Congress ever intended to force the States to fund abortions. Indeed, the contrary intent has been repeatedly expressed.

Traditionally, there are two conflicting philosophies concerning the role of those engaged in statutory construction. In one view, it is said that the court should seek to carry out the actual will of the legislature. To understand that will, resort should be had to extrinsic sources, such as legislative history and contemporaneous circumstances. *See, e.g.,* Landis, *A Note on "Statutory Interpretation",* 43 Harv. L. Rev. 886 (1930). In the other view, the court should focus on what the statute as written is most likely to convey to members of the general public who are bound by it. Frankfurter, *Some Reflections on the Reading of Statutes;* 47 Col. L. Rev. 527 (1947). Of course, the conflict between these two views is largely a matter of emphasis: no partisan of the former view would advocate ignoring the plain language of the statute; no partisan of the latter view would say that one could not consult contemporaneous usage to determine the meaning of an archaic word. But in determining how much emphasis to place on either view in a given instance, it is well to take account of the policies each serve.

The principal policy supporting the view which deemphasizes reference to extrinsic sources is that those bound by a statute should not have to guess at its meaning, or find its apparent implications altered by information not present in the statute books. It applies with greatest force to criminal statutes.

In the present case, however, the bills are directed primarily to governmental personnel administrators who are specialists in the field. Here, the concerns with regard to

fair warning and reliance are less appropriate than the concern which emphasizes carrying out the will of the legislature.

Title XIX, like all statutes, must "be construed with reference to the circumstances existing at the time of the passage." *United States* v. *Wise*, 370 U.S. 405, 411 (1962).[28] Applying this canon to this case, it is clear that neither the Congress nor the States intended that Title XIX require the States to fund abortion as a condition of participation in this program of "cooperative federalism."

In 1965 when Congress enacted the Title, only two States[29] and the District of Columbia[30] permitted abortion for anything which might conceivably be held to include maternal "health" or "medical necessity." Two States permitted abortion when pregnancy presented a grave threat

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[28] *Accord, Moor* v. *County of Alameda*, 411 U.S. 693, 709 (1973); *United States* v. *Rothberg*, 480 F.2d 534, 535 (2d Cir. 1971), *cert. denied*, 414 U.S. 856 (1973); *Ries* v. *Lynsky*, 452 F.2d 172, 175 (7th Cir. 1971); *Burns* v. *Alcala*, 420 U.S. 575, 580 (1975). *See also Roe* v. *Norton*, 522 F.2d 928, 935 (2nd Cir. 1975); *Roe* v. *Ferguson*, 515 F.2d 279, 293 (6th Cir. 1975); *Doe* v. *Rose*, 499 F.2d 1112, 1114 (10th Cir. 1974); *Beal* v. *Doe*, 432 U.S. 439, 447 (1977). In *Beal*, the Supreme Court stated that its conclusion, based on the plain language of Title XIX, was "reinforced" by the illegality of abortion at the time of the adoption of Title XIX. *Beal* v. *Doe*, 432 U.S. at 447.

[29] Alabama and Oregon. Ala. Code tit. 46-270 (Supp. 1963); Ore. Rev. Stat. §163.060 (1964). *See* George *Current Abortion Laws: Proposals and Movements for Reform*, 17 West. Reserve L. Rev. 45, n. 44 (Dec. 1965). Massachusetts permitted "health" abortion by judicial decision in *Commonwealth* v. *Brunell*, 341 Mass. 675, 677, 171 N.E.2d 850, 852 (1961), though not as *Bolton* defined the term.

[30] D.C. Code Ann. §22-201 (1961) ("necessary for the preservation of the mother's life or health"). See *Current Abortion Laws, supra*, at 376, 376 n.32.

to life or health.[31] In 1965, 46 of the 50 States by statute proscribed abortion altogether or permitted it only to preserve maternal or fetal life; 47 of the 50 States restricted abortion more narrowly than "health" indications would permit.[32]

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[31] Colorado and New Mexico. Colo. Rev. Stat. Ann. §40-2-23 (1964); N.M. Stat. Ann. §40A-5-1, -3 (1964). *See Current Abortion Laws, supra* n.8, at 378, 378 n.44.

[32] States providing no statutory exception: La. Rev. Stat. §14:87 (Supp. 1964); Mass. Gen. Laws Ann. ch. 272, §19 (1956); N.J. Rev. Stat. §2A:87-1 (1953); Pa. Stat. Ann. tit. 18, §4718 (1963).

States providing an exception to preserve maternal life: Alaska Stat. §11.15.060 (1962); Ariz. Rev. Stat. Ann. §13-211 (1956); Ark. Stat. Ann. §41-301 (1964); Cal. Pen. Code §274; Del. Code Ann. tit. 11 §301 (1953); Fla. Stat. Ann. §§782.10, 797.01 (1965); Ga. Code Ann. §§26-1101, -1103 (1953); Hawaii Rev. Laws §§309-3, -4 (1955); Idaho Code Ann. §18-601 (1948); Ill. Ann. Stat. ch. 38, §23-1 (Smith-Hurd 1964); Ind. Ann. Stat. §10-105 (1956); Iowa Code Ann. §701.1 (1950); Kan. Gen. Stat. Ann. §31-410 (Supp. 1963); Ky. Rev. Stat. §436.020 (1959); Me. Rev. Stat. Ann. ch. 17, §51 (1965); Md. Ann. Code art. 27, §3 (1957); Mich. Stat. Ann. §28.204 (1962); Miss. Code Ann. §2223 (1957); Mont. Rev. Codes Ann. §94-401 (1949); Neb. Rev. Stat. §§28-404, -405 (1965); N.H. Rev. Stat. Ann. §585:13 (1955); N.C. Gen. Stat. §14-44 (1953); N.D. Cent. Code §12-25-01 (1943); Ohio Rev. Stat. §2901.16; Okla. Stat. Ann. tit. 21, §861 (Supp. 1964); R.I. Gen. Laws Ann. §11-3-1 (1957); S.D. Code §13.3101 (1939); Tenn. Code Ann. §39-301 (1955); Tex. Pen. Code Ann. art. 1191 (1961); Utah Code Ann. §76.2-1 (1953); Vt. Stat. Ann. tit. 13 §101 (1959); Va. Code Ann. §18.1-62 (1960); W.Va. Code Ann. §5923 (1961); Wis. Stat. Ann. §940.04 (1958); Wyo. Stat. Ann. §6-77 (1959).

States providing preservation of maternal life and unborn child's life exception. Conn. Gen. Stat. Ann. §53-29 (1960); Minn. Stat. Ann. §617.18 (1964); Mo. Ann. Stat. §599.100 (1953); Nev. Rev. Stat. §201.120 (1963); S.C. Code Ann. §16-82 (1962); Wash. Rev. Code §9.02.010 (1956).

See Current Abortion Laws, supra, n.8 at 375-379, nn.21, 22, 23, 24, 31, 43, 44, 45.

Abortion is nowhere mentioned in the Social Security Act. No legislative history exists which would indicate Congress ever intended the Act to mandate abortion funding in any respect, much less because it might be deemed "medically necessary." The congressional failure to enact a version of the Hyde Amendment before 1976, like the congressional failure to exclude coverage of abortion in the 1972 amendments to Title XIX treated in *Beal* (432 U.S. at 446 n.10), "indicate only that Congress intended to allow such coverage, not that such coverage is mandatory. . . ." Hence, the only way that such intent can be imputed to Congress is to hold that Congress intended that the Social Security Act oblige the States to fund illegal procedures. This requires one not only to presume that Congress intended to induce the overwhelming majority of States to contravene their express public policies, but also that these States agreed to aid and abet criminal acts as a condition of their participation in the plan. Either hypothesis is plainly absurd.

Almost unanimous proscription of "health" abortion at the time Title XIX was enacted thus creates a nearly conclusive presumption that mandatory funding of "health" abortion was not and is not within the intent of the Framers of the Title.

In *Beal* v. *Doe*, 432 U.S. at 447 n.12, this Court noted that

> [a]t the time of our 1973 decision in *Roe*, some eight years after the enactment of Title XIX, at least 30 States had statutory prohibitions against nontherapeutic abortions.

Of the "30 States" the Court indicated proscribed "nontherapeutic abortion," 28 by statute proscribed abortion altogether or permitted it only to preserve maternal or un-

born life.[33] Eight years after Title XIX was passed the clear majority of States continued to proscribe abortion for "health."[34]

" 'A fundamental canon of statutory construction is that unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.' *Burns* v. *Alcala,* 420 U.S. 575, 580-581 (1975)." *Perrin* v. *U.S.,* 48 U.S.L.W. 4009, 4011 (1980).

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[33] Twenty-four states by statute permitted abortion, if at all, only to preserve maternal life: Ariz. Rev. Stat. Ann. §13-211 (1956); Idaho Code §18-1505 (Supp. 1971); Ill. Rev. Stat., c. 38, §23-1 (1971); Ind. Code §35-1 (1971); Iowa Code 701.1 (1971); Ky. Rev. Stat. §436.020 (1962); La. Rev. Stat. §14:87 (Supp. 1972), §37:1285 (6) (1954); Mass. Gen. Laws Ann. c. 272, §19 (1970); Mich. Comp. Laws §750.14 (1948); Mont. Rev. Codes Ann. §94-401 (1969); Neb. Rev. Stat. §28-405 (1964); N.H. Rev. Stat. Ann. §585.13 (1955); N.J. Stat. Ann. §24:87-1 (1969) ("without lawful justification"); N.D. Cent. Code §12-25-02 (1960); Ohio Rev. Code Ann. §2901.16 (1953); Okla. Stat. Ann. tit. 21 §861 (1972-1973) Supp.); Pa. Stat. Ann. tit. 18, §4718 (1963); R.I. Gen. Laws Ann. §11-3-1 (1969); Tenn. Code Ann. §39-301 (1956); Utah Code Ann. §76-2-1 (1969); Vt. Stat. Ann. tit. 13 §101 (1958); Wis. Stat. §940.04 (1969); Wyo. Stat. Ann. §6-77 (1957).

Four states permitted abortion only to preserve unborn or maternal life: Conn. Gen. Stat. Rev. §53-29 (1968); Minn. Stat. §617-18 (1971); Mo. Rev. Stat. §559.100 (1969); Nev. Rev. Stat. §200.020 (1967).

See J.A. Knecht *Abortion: Contradictions and Problems,* 1972 U. of Ill. L. F. (No. 1) 179, 179 nn.25, 26 (1972).

[34] Of the remaining 19 states, 11 modeled their statutes upon the Model Penal Code in the manner of the Georgia statute, Ga. Code Ann. §26-1207 (1971), found unconstitutional in *Doe* v. *Bolton.* Knecht, *Abortion: Contradictions and Problems, supra,* n.13, at 180, 180 n.28. Thus, these States also preclude many classes of "health" abortions, if "health" is taken to mean "medically necessary" under the *Bolton* standard.

Webster's Third International Dictionary 1126 (3rd ed. 1976) gives the "ordinary meaning" of "therapeutic abortion":

> abortion induced when pregnancy constitutes a threat to the mother's life.

Of course, the Court's decision in *Roe* in 1973 did not alter the content, terms or intent of the Social Security Act.[35] In fact, if the claim made herein had been raised in 1972, it would have been dismissed as patently frivolous. Yet the intent of the enacting Congress does not change. It is historical fact.

The lower court in *Beal* suggested that there was some broad intent implicit in Title XIX that States must fund all newly available or newly legal medical practices and procedures. This view was rejected by this Court, though adopted by its dissenters:

> It is impossible to believe that in enacting Title XIX Congress intended to freeze the medical services available to recipients at those which were legal in 1965. Congress surely intended Medicaid to pay for drugs not legally marketable under the FDA's regulations in 1965 which are subsequently found to be marketable. We can see no reason why the same analysis should not apply to the Supreme Court's legalization of elective abortion in 1973.

Beal v. *Doe,* 432 U.S. at 453, (Brennan, J. dissenting, quoting *Doe* v. *Beal,* 523 F.2d 611, 622-623 [3rd Cir. 1975]).

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[35] In its recent decision in *National Labor Relations Board* v. *Yeshiva University,* 48 U.S.L.W. 4175, 4177 (1980), this Court cited, as grounds for overturning an administrative agency interpretation, a contemporaneous but mistaken view of congressional constitutional authority which was held by the Congress at the time of passage of the act being construed.

There is an important distinction between abortion and a new drug not yet approved by the FDA (and hence not legally marketable at the time of the adoption of the Medicaid Title) which subsequently becomes legally marketable. Drugs as yet unapproved by the FDA are banned pending an investigation of their safety. The law does not ban particular drugs as such, but rather that class of drugs not yet shown to be safe. By contrast, abortion was banned because of the generally shared intention to protect fetal life. Abortion is not a new procedure which was not specifically within the contemplation of the legislature at the time medicaid was enacted. It is not a procedure for which treatment can be guided by general principles conceived to emanate from the Act. On the contrary, abortion was as well known then as it is now, as the laws in so many of the States prohibiting it attest.

Nor does the subsequent legalization alter the congressional intent not to force the States to fund abortion. Suppose that a State chose to decriminalize marijuana for a variety of social policy reasons, such as the widespread flouting of existing law or diversion of police resources, yet still sought to discourage its use. Suppose, then, that the State amended its state medicaid plan to provide that it would cover the use of marijuana for glaucoma—where the State was satisfied it had a demonstrated medical use—but in no other instances. If an individual physician felt that marijuana would relax his nervous patients or cheer up his depressed ones and was therefore "medically necessary" under the *Bolton* standard, it could not be seriously contended that the state exclusions would be subject to successful challenge solely on such grounds. The same contention must be rejected here.

The unconstitutionality of the laws in force against abortion at the time of the passage of the Medicaid Title does not alter this analysis. Neither *Roe* nor any subsequent

case of this Court has found the interest in fetal life, which was the basis for the anti-abortion laws,[36] to be illegitimate or unconstitutional *in itself*. Rather, this Court has simply held that this interest is not compelling enough to override the constitutional privacy right of women to abort by criminally prohibiting it or placing an "undue burden" on it. The interest is sufficiently strong and legitimate to justify distinctions in funding such as those here at stake.

"Related statutes may sometimes shed light upon a previous enactment." *Andrus* v. *Allard,* 100 S.Ct. 318, 325 (1979). Indeed, it is a basic canon of statutory construction that acts *in pari materia* should be read together. *Kokoszka* v. *Belford,* 417 U.S. 642 (1974), *reh. den.* 419 U.S. 886 (1975).

Whenever Congress has had occasion to address the issue of abortion, it has repeatedly expressed its disfavor of the procedure. The lower court itself noted, "The national policy, to the extent formulated . . . excludes use of abortion as a family planning method, 42 U.S.C. §300a-6. . . . The legislative history demonstrates conscious rejection by the Congress of any provision for therapeutic abortion as a procedure to deal with the array of the principal maternal and fetal health considerations presented during the debates." Slip op. at 293-294.

Pregnancy disability legislation specifically exempted abortions from coverage for medical benefit and disability pay unless an abortion was necessary to save the life of the mother. Civil Rights Act of 1964—Pregnancy Discrimination, Pub. L. No. 95-555, §1(k) (1978) (to be codified in 42 U.S.C. §2000e). Legislation perpetuating the Legal Services Corporation included provisions which restricted the

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[36] Gorby, *The Right to An Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement,* 1979 S. Ill. U. L. J. 1, 15-19, esp. 15 n.82, 16 n.83.

actions of corporation attorneys in abortion cases. Legal Services Corporation Act Amendments of 1977, Pub. L. No. 95-222, §10(b)(1) (to be codified in 42 U.S.C. §2996f). Congress has also repeatedly restricted funds available for abortions. Groups affected by these restrictions include military personnel and their dependents (Department of Defense Appropriation Act, 1979, Pub. L. No. 95-457, §863), medicaid recipients (Department of Health, Education, and Welfare Appropriations Act, 1979, Pub. L. No. 95-480, §210),[37] and residents of the District of Columbia (District of Columbia Appropriations Act, 1979, Pub. L. No. 96-93). The use of Peace Corps funds for abortions has also been prohibited. Foreign Assistance and Related Programs Appropriations Act, 1979, Pub. L. No. 95-481. Such repeated action by Congress clearly demonstrate consistent legislative intent and public policy.

In light of longstanding congressional policy, it would do violence to the unequivocal legislative purpose if this Court were to hold that the Medicaid Title requires States to fund abortions.

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[37] In *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), this Court dealt with the relation between the Endangered Species Act and subsequent appropriations. The Court noted, "One would be hard pressed to find a statutory provision whose terms were any plainer than those in §7 of the Endangered Species Act." *Id.* at 173. By contrast, the appropriations which were seen as inconsistent with §7 were clear expressions not of the full Congress, but only of the Appropriations Committees. *Id.* at 193. Here, however, the Hyde Amendments are very plain, and assuredly well-known by the entire Congress. The underlying statute, by contrast, is silent with respect to abortion. Here, the less definite provision was later clarified by Congress. Such a subsequent pronouncement by an entire legislature can properly be accorded "great" or "significant" weight by a court charged with interpreting the earlier statute. *National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 380-381 (1969); *United States* v. *Stafoff*, 260 U.S. 477, 480 (1923).

Therefore, the district court's holding that Title XIX standing alone requires the States to fund all "medically necessary" abortions is erroneous. It must be reversed.

CONCLUSION

The judgment and opinion of the district court, insofar as they declared the Hyde Amendment unconstitutional, declared that the Medicaid Title would require funding of abortions, and ordered the Secretary of Health, Education, and Welfare to authorize the expenditure of federal matching funds for "medically necessary abortions," must be reversed.

Respectfully submitted,

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