Rhetorical Criticism of Supreme Court Opinions: The Opinions in Beal v. Doe

by

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Abstract

The United States Supreme Court is unquestionably one of the most powerful institutions in the nation. Its decisions, to hear or not hear cases as well as its rulings, have the potential to determine how the various governments spend billions of dollars, which police practices are legal, and whether lives will be spared or ended. A significant decision of the Court in 1973 gave women the ability to legally obtain abortions. In 1977, the Court was asked to decide if the state and federal governments were required to pay for abortions for welfare recipients. The Opinion of the Court in 1977 has since become a controversial and significant pronouncement.

What are the rhetorical elements in Supreme Court decision-making? What is involved in formulating and writing an opinion, and in what ways may rhetorical critics evaluate such opinions? This thesis attempts to articulate rhetorical standards for analyzing Supreme Court opinions and offers as an example a rhetorical criticism of the abortion funding decision.

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Chapter I

The Abortion Funding Decisions

No current domestic social issue creates greater hostility than abortion. In this country, the right to terminate before childbirth creates social tension and moral cleavages perhaps paralleled only by the anti-slavery movement.[1] Not surprisingly, the rhetoric of the issue is both inflammatory and void of compromise. In 1973, the Supreme Court sparked the abundance of utterance when it made historic rulings which guaranteed that women could terminate freely within the first trimester of their pregnancies.[2] Four years later, the same tribunal renewed the controversy when it declared in three separate cases, Beal v. Doe, Maher v. Roe, and Poelker v. Doe, that public funds and public hospitals could be denied to women who

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[1] Frank Susman, "Roe v. Wade and Doe v. Bolton Revisited in 1976 and 1977--Reviewed?; Revived?; Revested?; Reversed? or Revoked?" Saint Louis University Law Journal Vol. 22, 1978, p. 581.

[2] Roe v. Wade 410 U.S. 113, 35 L.Ed.2d 147, S.Ct. 705 (1973). Hereafter referred to as Wade. All page citations are to United States Reports; and Doe v. Bolton 410 U.S. 179, 35 L.Ed.2d 201, 93 S.Ct. 739 (1973). Hereafter referred to as Bolton. All page citations are to United States Reports.

choose to abort.[3] One of these decisions, Beal v. Doe, is the focus of this study. The significance of Beal and the separate attention it merits emerge from examination and analysis of the major issues in the three decisions.

Several commentators provide succinct statements which weave the cases together. One writes:

> In Beal, the Court stated that Title XIX of the Social Security Act does not require states that participate in the Medicaid program to fund nontherapeutic abortions. In Maher, a state's refusing to provide payment for elective abortions, while providing funds for childbirth, was found to be nonviolative of the equal protection clause of the fourteenth amend-amendment. In Poelker, the Court also addressed the equal protection issue, stating that a public hospital's policy of providing medical services for childbirth but not for elective abortions was constitutional.[4]

Other critics separate the cases on the same basis; Beal is a statutory decision, while Maher and Poelker are grounded in the Constitution.[5] Frank Susman claims that Beal is

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[3] Beal v. Doe, 432 U.S. 438, 53 L.Ed.2d 464, 97 S.Ct. 2366 (1977). Hereafter referred to as Beal. All page citations are to the Lawyers Edition; Maher v. Roe, 432 U.S. 464, 53 L.Ed.2d 585, 97 S.Ct. 2376 (1977); and, Poelker v. Doe, 432 U.S. 519, 53 L.Ed.2d 528, 97 S.Ct. 2391 (1977).

[4] Angela Benzo Norman, "Beal v. Doe, Maher v. Roe, and Non-therapeutic Abortions: The States Do Not Have to Pay the Bill," Loyola University Law Journal (Chicago), Vol. 9, No. 1, Fall 1977, pp. 288-289.

[5] See also, Constance Leistiko, "State Funding of Nontherapeutic Abortion Medicaid Plans Equal Protection Right to Choose an Abortion," Akron Law Review, Vol. 11, No. 2, Fall 1977, p. 234; and, Kathleen D. Stingle, "Denial of Funds for Nontherapeutic Abortions," Connecticut Law Review, Vol. 28, No. 2, 1978 pp. 488-489.

"decided solely upon the grounds of the statutory construction. . . ."[6] The same assessment was reached by Trial magazine: "Beal v. Doe, then, arrived before the Supreme Court carrying only the statutory question."[7] Michael Lalli points out that only after it rejected the statutory claim, was the Court "obligated to reach the constitutional issue. . . ."[8] Historically, the Supreme Court has preferred to resolve welfare controversies on statutory rather than constitutional grounds.[9] In so doing, the Court first tests social policy disputes by the language of the law itself. If the Court overrules on that basis, it avoids the problem of overturning congressional intent on the grounds that the statute violates the Constitution. Hence, the Court could resolve a dispute over congressional actions without appearing to flex power over a theoretically co-equal branch.

If the Supreme Court had wanted to overturn funding regulations, it could have done so on statutory grounds in Beal. As I shall show later, the Court could have justified such a decision. In Beal the Court ruled that abortion was

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6 Susman, p. 584.

7 "Supreme Court," Trial, August 1977, p. 14.

8 Michael A. Lalli, "The Effect of Recent Medicaid Decisions on a Constitutional Right: Abortions only for the Rich?," Fordham Urban Law Journal, Vol. 6, No. 3, Spring 1978, p. 698.

9 Wyman v. Rothstein, 398 U.S. 278 (1970).

not medically necessary. Had it stated, instead, that the condition of pregnancy necessitates medical treatment, then the states would be required to fund whatever procedure the doctor and patient might choose.[10] Beal is the initial breaking point for all three decisions. Nancy Gall-Clayton points out this relationship: "Though Poelker follows rationally from Maher and Maher from Beal, by only the most attenuated reasoning can one explain Beal in light of its forebears."[11] Furthermore, it must be remembered that upholding Beal and ruling against the regulations restricting funding would have guaranteed Medicaid money for abortions. Even if the Court did not find a constitutional mandate to finance early terminations, it could have ruled that, under Title XIX, the states must pay for abortions if they enter the Medicaid program. This decision, apart from Maher, could have kept alive the flow of funds for Medicaid-funded abortions.

Since the written opinions of the majority and minority articulate the alternatives to as well as the reasons for their choices, a close analysis of the Beal opinions should

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10 Eric C. Okerson, "Constitutional Law--Abortion--No Requirement to Provide Medicaid Funds for Nontherapeutic Abortions Under Title XIX of the Social Security Act of 1965 or the Fourteenth Amendment," Tulane Law Review, Vol. 52, No. 1, December 1977, p. 184, pp. 186-187.

11 Nancy Gall-Clayton, "Beal, Maher and Poelker: The End of an Era?" Journal of Family Law, Vol. 17, No. 1, 1978-1979, p. 51.

reveal the bases upon which a significant Supreme Court decision has been made. It will also reveal the reasons it must be vigorously questioned. In order to justify the preceding claim, this study will examine, first, the factors underlying Supreme Court opinion writing, second, the context of the abortion controversy, and third, the text of Beal and bases for questioning that decision.

Chapter II

Supreme Court Opinion Writing

Because of the complex interactions and secret deliberations inherent in Supreme Court proceedings, the essential tools in understanding that Court's behavior are its opinions. Although Supreme Court decisions have a tremendous impact on our lives, the processes that lead up to them, as well as the opinions which proclaim them, are poorly understood. Joseph Tussman believes that these processes of the Court are perhaps more important than the outcome of its decisions. He says that the Supreme Court is "important for what it does. But it is even more important for what it thinks and says as it does it."[12] In this sense, the Court has an educational as well as judicial function. Yet, it is this important aspect of the Court which is so difficult to discern.

Herbert Jacob points to the primary obstacle to understanding Supreme Court decisions: the highly secretive nature of the Court makes it extremely difficult to discover its internal processes. Conferences are closed to

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12 Joseph Tussman, The Supreme Court on Racial Discrimination (New York: Oxford University Press, 1963), p. ix.

outsiders, no records are kept of deliberations, and bargaining that occurs during the drafting of opinions is revealed only years after the actual decisions.[13] Because there are few other indices, Supreme Court behavior is often judged by votes, yet "even those indicators are incomplete."[14] An excellent example of the risk of relying on votes to determine Court decisionmaking is found in Roe v. Wade. Traditionally, when the Chief Justice is in the majority, he assigns the individual who writes the majority opinion. In this case the Court struck down existing abortion statutes 7-2, with Rehnquist and White dissenting. However, Nina Totenberg, writing for the Washington Post, "reported that Burger originally dissented, but when he attempted to assign the opinion from the minority, Douglas became so upset that Burger changed his vote so he could assign the opinion according to the normal opinion assignment rules."[15]

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13 Herbert Jacob, Justice in America, Third Edition (Boston: Little, Brown and Company, 1978), p. 220.

14 Jacob, p. 228.

15 quoted in William R. Thomas, The Burger Court and Civil Liberties (Burswick, Ohio: King's Court Communcations, Inc., 1976), p. 148.

Importance of Opinions

The Supreme Court deliberates in private; we cannot see how its decisions are arrived at. We can only look at what happens before and after a decision is announced. For this reason, Supreme Court opinions are extremely important to an understanding of that institution. Robert Leflar, a former Justice of the Arkansas Supreme Court, contends that "opinions are the principal vehicle for judicial communication."[16] But the importance of opinions is not only that they signal important pronouncements, but also that they are the products of judicial review. Leflar says that opinions are the "public voice of appellate courts" as well as being "what courts do, not just what they say. They are the substance of judicial action. . . ."[17]

Opinions are the core of judicial review, and Supreme Court Justices, like all rhetoricians, are dependent upon symbolic processes. Harold Lasswell, professor of law and political science at Yale, says that legal progress and practice are bounded by innovations "in the study of signs and symbols." He recognizes the dependence of law on

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16 Robert A. Leflar, "Some Observations Concerning Judicial Opinions," Columbia Law Review, Vol. 61, No. 5, May 1961, p. 812.

17 Leflar, p. 819.

language, saying that "language is perhaps the most obvious feature of the legal process."[18] Justice Charles Whittaker spoke of the problems encountered in comprehending legal ambiguities when he suggested that "we ought to be able to agree that words--though not ends in themselves--are our only tools and means of communicating thoughts and ideas."[19]

Opinions and Symbols

Legal writing is similar to other rhetorical acts because its language reveals the deeper meanings implicit in all symbol use. When a court decision uses the terms "with all deliberate speed," something very meaningful is being expressed, and that expression is not synonymous with phrases such as "whenever it is feasible." Quite simply, a court's choice of labels is very important. To a large extent, labelling by the Supreme Court indicates how that body perceives the issues and the the role of the Court. Ellen A. Peters, an Associate Justice of the Connecticut Supreme Court says: "Depression is inherently more worrisome than sadness; due and deliberate speed is inherently more deliberate than due. Language as label is

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[18] Harold D. Lasswell, "The Value Analysis of Legal Discourse," Western Reserve Law Review, March 1958, p. 188.

[19] Charles Whittaker, "A Confusion of Tongues," American Bar Association Journal, Vol. 51, 1965, pp. 27-28.

an important aspect of law as language."[20]

Symbolic processes surround all aspects of judicial review. Judges not only must choose their words carefully, but also they must look to unstated meanings and principles underlying the law which are discovered in the symbols of courts, constitutions, and public agencies. Specifically, Allan Axelrod, professor of law at Rutgers, points out that the judge must follow the commands of the lawmaker. The adjudicator must achieve the purposes of another, but must "infer those purposes from the symbols in which they are expressed and predict what behavior on his part will create a world to his master's liking."[21] The judge is charged with interpreting the law and then applying it consistently. To attempt this, she or he will look at the symbolic activity of the legislature to determine the relevant unstated meanings and the principles underlying the law. This will inevitably require value judgments, for while the public may believe that judicial interpretation is suppressed in favor of applying strict legal principles, almost any decision can potentially be justified by ignoring certain tenets and invoking a body of law which leads to the desired

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20 Ellen A. Peters, "Reality and the Language of the Law," Yale Law Journal, Vol. 90, 1981, p. 1195.

21 Allan Axelrod, "Law and the Humanities: Notes from the Underground," Rutgers Law Review, Vol. 29, No. 2, Winter 1976, p. 231.

conclusion.[22] Jacob decided, after years of research, that what judges "must do is make a decision on the basis of their personal preference or of what they personally consider to be in the public interest."[23] This is not to say that judges ignore the wishes of lawmakers and rule on personal whims; rather, all decisions, even the "easy" ones, express a judge's value preferences. A decision to rule in a manner consistent with all prior cases indicates a preference for adherence to previous legal reasoning on the point in question. Attorney Moses Lasky said: "The longer I am at the bar, the more it seems to me that every rule or principle of law ultimately rests on some short conception of good or bad, more assumed than demonstrable."[24] These conceptions of "public interest," "good," and "bad" exist in every decision a judge makes, and they are revealed in the language of opinions. The role of the judiciary is to interpret the symbols of the legislature, and within the confines of these mandates, the individual judge exercises discretion and judgment of values which is then revealed in his or her language.

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22 Moses Lasky, "Observing Appellate Opinions from Below the Bench," California Law Review, Vol. 49, No. 5, December 1961, p. 834.

23 Jacob, p. 101.

24 Moses Lasky, "A Return to the Observatory Below the Bench," Southwestern Law Journal, Vol. 19, No. 4, December 1965, pp. 685-686.

In several respects, judicial opinions are similar to other forms of rhetoric. The critic can easily justify a commentary based on how effectively words and symbols are used, what deeper meanings are revealed in the language chosen, and how well the style suits and conveys the substantive message. There are, however, ways in which Supreme Court writings are dissimilar to other rhetorical acts. The most striking difference is the process by which opinions are written.

The Writing Process

Until John Marshall became Chief Justice, the Supreme Court followed the English custom of having each Justice give his views on the case. Marshall established the practice of announcing the opinion agreed to by a majority of the Court. Only since 1939 have dissenting and concurring opinions been a usual occurrence.[25] The customary procedure today is to have the majority opinion assigned by the Chief Justice when he is in the majority and the senior Associate Justice when he is not. Lawrence Baum explains that the assignment of the writer is extremely important:

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25 R. Dean Moorhead, "Concurring and Dissenting Opinions," American Bar Association Journal, Vol. 38, October 1952, p. 821.

> First of all, the selection of the opinion writer may determine whether the initial majority stands up and what its ultimate size will be, since different justices may produce opinions with different effects on their colleagues. More directly, the policy proclaimed by the Court may depend in large part on who writes the opinion--if the selected writer can maintain the support of at least four colleagues for the the opinion. In addition, the assignment power allows the chief to reward and punish colleagues and thus provides an extra degree of leverage over them.[26]

The Justice who is assigned an opinion usually begins by writing a draft of the opinion which is then circulated among the other Justices "who may either agree with its contents, suggest changes as the price of their support, or disagree altogether."[27] The opinion becomes a focus of negotiation. As the opinion is being written, there is an awareness that it must maintain the support of the original majority of Justices. At the same time, the assigned writer may wish to garner the votes of as many additional justices as possible. To this end, the writer "may be willing to change arguments or the ways in which they are expressed in order to satisfy other justices and thus enlist their support."[28] The draft is circulated and revised because no opinion is certain until it is announced. Justices may

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[26] Lawrence Baum, The Supreme Court (Washington, D.C.: Congressional Quarterly Press, 1981), p. 138.

[27] Harold J. Spaeth, Supreme Court Policy Making (W. H. Freeman and Company: San Francisco, 1979), p. 27.

[28] Baum, p. 109.

change votes up to the last minute. Often the opinion will reflect these bargains and compromises by omitting or adding phrases and pages.[29] Baum says that the final version of an opinion "sometimes is fundamentally different from its first draft, even when the official author is the same."[30] If a Justice disagrees with or wishes to add to a decision, he or she may do so by writing a dissenting or concurring opinion. The bargaining process, the additions and deletions of others, and the possibility of additional condemning or confounding opinions make Supreme Court opinions different from other communicative events. Critical assessments of Supreme Court opinions must recognize that opinions are often compromised for the sake of consensus and come out of a process which allows many individuals to influence the final drafts.

Emphasis on Reason Giving

A less striking, but still significant, feature of Court writings is the emphasis on reason giving. By requiring that a judge provide reasons in an opinion, it is hoped that personal decision-making biases will be minimized in favor of a more objective approach. David Shapiro, a professor of law at Harvard, talks about the task of

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29 Leflar, p. 818.

30 Baum, p. 134.

explaining a decision: "At the very least, a judge should be expected to present a defensible, coherent explanation in support of his [sic] conclusions. . . ."[31] Tussman states it even more forcefully: "The court must give reasons for what it does. It must display its wisdom."[32] Of course, there is a difference between reasons per se and good reasons. David O'Brien introduces some normative standards for legal reasoning when he says that "the judge must justify his or her decision in terms of impartial, consistent and neutral application of legal principles." This means that "the demands of judicial craftsmanship require that judges treat like cases alike. . . ."[33] Law professor Christopher Stone concurs, saying that "the significance of the law's 'logical style' overwhelms almost everything else we do." Furthermore, "justice requires that like cases be treated alike; analogies have to be sorted into those that fit and those that do not; metaphors have to be kept within the bounds of judicious constraint."[34] Shapiro also points out that it is very important that people are able to observe

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31 David L. Shapiro, "Mr. Justice Rehnquist: A Preliminary View," Harvard Law Review, Vol. 90, No. 2, December 1976, p. 329.

32 Tussman, p. ix.

33 David M. O'Brien, "Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law," Judicature, Vol. 64, December-January 1981, p. 287.

34 Christopher D. Stone, "From a Language Perspective," Yale Law Journal, Vol. 90, 1981, p. 1165.

how the conclusion is arrived at. If the result cannot be reconciled, there will be distrust of and disrespect for the judiciary.[35] In these ways, precedents can serve as important stabilizers. They can guide the judge toward an understanding of how others viewed a similar situation and provide principles on which to justify the verdict. However, precedents do not provide a logical formula which is beyond dispute. In law, as in rhetoric, logic can give the appearance of objective application when the links to the given case do not support the connection which is claimed.[36] David Grey, a professor of communication at Stanford, rejects the idea of a strict, deductive, decision-making process in law. Instead, he says, judges normally follow an analytical pattern which relies on rationality and logic as they attempt to reason from case to case. "Here, the concept of precedent involves documenting the first case, making it the rule of law and then applying it to the second case."[37] This chain of reasoning and evidence is extremely important to legal opinions. The process of writing stems from a belief that something more than a verdict is required; what is needed is the explication of how the conclusion was reached. Grey says that "Legal

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35 Shapiro, p. 329.

36 David L. Grey, "The Supreme Court As A Communicator," Houston Law Review, Vol. 5, No. 3, January 1968, p. 414.

37 Grey, p. 414.

writing . . . is committed to the philosophy of thoroughness in research and detailed building up and tearing down . . . of precedent."[38]

Richard Weisberg, a professor of law at Columbia, contends that legal style refers to the inseparable blend of form and substance. He says that "style inevitably contributes to, and often controls, the present and future meaning of appellate opinions. . . ."[39] According to this view, style involves the correct presentation of an opinion. He draws upon principles enunciated by Justice Benjamin Cardozo and says that style exists solely to serve the function of an opinion. Good style is ornamentation which contributes to the understandability and correct reasoning of a decision. The critic should expect to see the progression of reasons and, further, be able to question the fittingness of logical demonstrations and the correctness of the use of precedents. Correct reasoning is essential to an opinion, and its absence can be the sole justification for a critical judgment that an opinion is bad. In addition to the features unique to Supreme Court opinions as a whole, there are several ways in which majority and dissenting opinions are dissimilar not only to other communicative acts but also to each other.

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[38] Grey, p. 419.

[39] Richard H. Weisberg, "Law, Literature and Cardozo's Judicial Poetics," Cardozo Law Review, Vol. 1, 1979, p. 309.

Functions of Opinions

Majority opinions have three primary functions. First, writing a decision forces a judge to think through her or his reasoning process. Grey says that "the writing of an opinion seeks to ensure thoughtful review of the issues."[40] Leflar agrees, saying that this is a function which is "recognized both by detached students of the judicial process and by opinion writers themselves. . . ."[41] Because appellate courts hear very important cases, it is desirable that they minimize the possibility of incorrectly applying the law by scribing their chains of reasoning. "Where a judge need write no opinion, his [sic] judgment may be faulty. Forced to reason his way step by step and set down these steps in black and white, he is compelled to put salt on the tail of his reasoning to keep it from fluttering away."[42] By minimizing the potential for errors in reasoning, opinions enhance the image of judicial review and guard against arbitrary judgments.

The opinion of the Court also has the important task of clearly stating the law. This means initially making a

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40 Grey, p. 416.

41 Leflar, p. 810.

42 Lasky, California, p. 838.

decision in the case at hand and setting out the reasoning and possible application to other cases. Alan Barth says that clarity is the most important stylistic feature of a majority opinion:

> When a justice writes an opinion for the Court, his [sic] business is to state as clearly and compellingly as possible the grounds and the rationale of the Court's decision in order to give the judges of inferior courts, and the bar in general, a definitive understanding of the law's reach and import. The more simply he can do this, the better for those who must interpret the law for litigants and clients. . . . Majority opinions, therefore, tend to be bare-boned versions of a consensus, prosaically defining and expanding the law.[43]

Stylistic flourishes may seem important to the opinion writer, but they can obstruct the function of the writing. The author(s) can sometimes work in aesthetic touches, "but beauty depends on taste, and some like it sour. Besides, the end is not beauty."[44] The immediate goal is to explain to the parties involved the disposition of their case, while the long-term goal is to develop principles of law and public policy. Roscoe Pound concurs, saying that the opinion has "the wider function of furnishing a starting point for judicial reasoning in analogous cases. . . ."[45]

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[43] Alan Barth, Prophets With Honor (Alfred A. Knopf: New York, 1974), p. 4.

[44] David Mellinkoff, The Language of the Law (Little, Brown and Company: Boston, 1963), p. 441.

[45] Roscoe Pound, "Cacoethes Dissentiendi: The Heated Judicial Dissent," American Bar Association Journal, Vol. 39, September 1953, p. 795.

Essentially, the opinion gives legalists an expectation regarding legal principles; it allows lawyers to predict further formulations of the law.[46]

A final purpose of majority opinions is to enhance the legitimate powers of the Court and facilitate acceptance of its decisions. Jacob contends that, "Without published opinions, appellate courts could not make policy, for they would have no medium through which to inform the public about their actions."[47] Professor Harold Spaeth views opinions as "the core of the Justices' policy-making power."[48] The opinion provides a record of the Court's pronouncements. It is a proclamation to the legislature, the public, and the inferior courts of the reasoning and conclusions of the Court of last resort.

The Various Audiences

Majority opinions are written for several audiences. Justice James Hopkins believes that the audiences for opinions vary, depending on the nature of the case. In issues of public policy, "the audience includes the legislature, public officials, the news media, and the

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46 Leflar, p. 811.

47 Jacob, p. 232.

48 Spaeth, p. 200.

community."[49] Of these groups, the community would seem to be the least important in the minds of the Justices. Professor Walker Gibson conducted a survey of twenty-five appellate judges. He asked, "To whom (or for whom) do you write your opinions?" The survey found that they write first for posterity, second for the bar, third for future judges, and fourth for the legislature.[50] The Supreme Court often expresses the position that it must act according to the law--regardless of public opinion. The Justices are thought to ignore their public relations in order to appear disinterested in the cases which come before them. Grey states that, "In contrast to Congressmen [sic] who may think in terms of news headlines, the Justices seem to ignore much of what will be written about their opinions."[51] Based on his interviews with Supreme Court justices and others, Grey concludes that "most judges do not expect to be read much by laymen [sic], and, therefore do not think in terms of a lay audience when writing."[52] Instead, the primary audience for majority opinions "is the group of Justices who might go along with . . ." the writer's decision.[53]

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49 James D. Hopkins, "Notes on Style in Judicial Opinions," Trial Judges' Journal, Vol. 8, No. 3, July 1969, p. 49.

50 quoted in Leflar, p. 813.

51 Grey, p. 411.

52 Grey, p. 419.

53 Grey, p. 417.

While it may be true that Justices are primarily concerned with obtaining a majority, it is difficult to believe that they are unconcerned with public acceptance of their decisions. United States Circuit Court of Appeals Judge Harry T. Edwards says that "most judges do not decide cases in pursuit of public acclaim; nevertheless, knowing full well that judicial decisions are released for public ingestion, judges surely do seek to produce thoughtful, rational, and fully justified opinions."[54] Baum speaks specifically of the Supreme Court when he says that "justices know that the impact of their decisions depends on acceptance of individual decisions and of the Court's authority as an institution by the mass public."[55] He believes that the substance of the decision in Brown v. Board of Education was affected by the concern for public acceptance:

> The Court chose to establish an indefinite timetable for school desegregation in the South rather than demanding quick action. This choice was based in part on a calculation that flexibility by the Court would help to obtain southern acceptance of the general principle of desegregation.[56]

While it is clear from Edwards and Baum that the Court

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[54] Harry T. Edwards, "A Judge's View on Justice, Bureaucracy, and Legal Method," Michigan Law Review, Vol. 80, December 1981, p. 268.

[55] Baum, p. 119.

[56] Baum, p. 119.

considers public opinion, it is unclear how much this affects the writing of an opinion. Although, the Supreme Court is concerned with the results of its decisions, the public is not necessarily going to react to the particular language of a decision as much as it will respond to the operationalization of the opinion. Specific wording may be influenced less by public reaction to a decision and more by a concern for how legalists will interpret the rhetoric.

Opinions have several audiences, depending upon the stage of the writing. Before a decision is announced, a Justice's primary objective is to get a majority so that he or she has a decision. After that point, it becomes important to convey the message to the bar, the legislature, and, finally, the community. And while Justices may claim to ignore public opinion, it should be remembered that their legal role requires that they take a public position of impartiality and disinterest in popular reactions.

These criteria define various ways of examining Supreme Court writings. For many people, legal terminology and conventions create barriers to understanding court proceedings. While it is a given that the Supreme Court must speak in legalistic terms, it is also true that this institution can only be effective when its positions are understood by the people who are, and will be, affected by its decisions. Given the purposes of a majority opinion, a critic is on solid ground when questioning the reasoning, clarity, precision, and reasonableness of a decision. We

can expect an opinion to specify the criteria and reasoning for its conclusions. We can demand precise use of language and precedent cases. We can require accurate use of information and responses to the competing claims of the advocates. Also, a critic can analyze a Justice's ability to write for the various audiences of the Supreme Court in order to determine how well the rhetoric is adapted to its receivers.

Minority Opinions

If a Justice does not agree with the majority opinion, she or he may write a separate concurring or dissenting opinion, depending on how that Justice votes. Strategically, the dissenter usually waits for the opinion of the Court to be completed before writing the dissent. This allows for a more effective rebuttal because the Justice has already seen the case for the other side.[57] While dissents may stem from strong feelings and emotions, the Court has a tradition that condemnations of the majority be stated in terms that show respect.[58] There are no inviolate rules, only conventions which most Justices attempt to uphold. At the same time, minority opinions are

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57 Spaeth, pp. 28-29.

58 Barth, p. 6.

less constrained. The opinion of the Court must be clear and restrained; by contrast the dissent can embody passages "of great force, eloquence, and ardor."[59] Dissents allow judges to look beyond the case at hand and address the larger implications of a decision. These opinions are products of individuals and are written for a variety of reasons. They appeal to various audiences, depending upon the purposes of the Justice.

Some dissents are written to convey a Justice's individual views. They have an expressive function, as they enable a judge to relieve her or his conscience. Rather than silently assent to a position of which they disapprove, Justices have an opportunity to express their convictions.[60] The audience in this situation is not the members of the Court, for their votes are lost. Rather, this sort of opinion is written to contemporaries off the Court.[61] Other dissents are written to one's colleagues on the bench. In this situation, a Justice may temper his or her remarks in exchange for a majority opinion which is restricted or limited in scope.[62] Simply knowing that other Justices may look for errors and ambiguities will influence the author of the majority opinion to craft the argument more carefully

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59 Barth, p. xii.

60 Moorhead, p. 822.

61 Barth, p. 3.

62 Jacob, p. 223.

than she or he would otherwise.[63] A dissent forces the majority to write good opinions or risk public discontent and scorn. In this sense, dissents improve the entire judicial process. Tussman says that "the tradition of dissenting opinions makes publicly apparent the conflicting strains within the court, develops counterarguments of great power, and pushes the court into greater depth of analysis--to everyone's profit."[64] Sometimes dissents are written specifically for the purpose of shaping future law. A well-reasoned dissent can determine the direction of new law when circumstances or Court personnel change.[65] Lawyers, for instance, often take these opinions as clues about how to argue future cases. One example of a dissenting opinion becoming future law is Justice Black's argument in Betts v. Brady. Black argued that indigent defendants in criminal cases should be given free attorney assistance. Twenty-one years later, the Supreme Court reversed Betts in Gideon v. Wainwright. Ironically, Black wrote the majority opinion guaranteeing the right to an attorney for indigent criminal defendants.[66] Ronald Dworkin gives the example of DeFunis

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63 Moorhead, p. 823.

64 Tussman, p. ix.

65 Pound, p. 795.

66 Baum, p. 109.

v. Odegaard.[67] Although the Supreme Court held that the case was moot, Justice Douglas wrote an opinion claiming the Court should have upheld DeFunis's claim of discrimination in admission to a law school even though the school admitted him before the Court heard the case. As a result of the dissent, many schools have changed their practices "in anticipation of a later Court decision in which the opinion prevails."[68] In other instances, dissents have been direct appeals to Congress, the President, the bar, and the public "to change the opinion of the majority."[69]

Compared to majority opinions, dissenting opinions are highly flexible. They can be attempts to criticize, cajole, and condemn. While Justices have more freedom in writing them, they must disagree in a responsible manner. Hence, critics can analyze the clarity and reasoning of these opinions and demand that they meet many of the same requirements as majority opinions. However, as there is no set audience for a dissenter, criticism based on poor adaptation must make a strong case regarding the target audience.

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67 DeFunis v. Odegaard, 94 S.Ct. 1704 (1974).

68 Ronald Dworkin, Taking Rights Seriously (Harvard University Press: Cambridge, 1978), pp. 224-225.

69 Grey, p. 418.

Chapter III

The Abortion Funding Controversy

Numerous forces contribute to the abortion funding dispute, and they are significant because they constrain opinion writers, thereby shaping the rhetorical choices available to them. Several potential audiences for Supreme Court opinions have been identified, and Justices must write with an eye to the needs and expectations of those audiences. Whether a Court opinion will stand or fall ultimately depends on the perceptions of future Supreme Courts (who may overturn), the various legislatures (who may change the statutes in question), and the attentive public (who may potentially influence any of these other agents). In these ways, the Supreme Court is often constrained in its decisions by public opinion, legislative action, and judicial precedent; yet, at other times, the Court not only mirrors society but also shapes society. It can, for example, change popular attitudes about blacks and women, overturn laws governing criminal procedures, and create new precedents governing free speech.[70] Thus, it can be said that the Supreme Court interacts with public opinion,

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[70] Barth, p. 9.

legislative action, and judicial precedent in a complex fashion. More importantly, even if one cannot link these three factors as direct causal connections to the particular wording of an opinion, prevailing attitudes, actions, and court cases are important benchmarks by which a rhetorical critic may assess how well an opinion is adapted to its audiences.

Walter Murphy and Joseph Tanenhaus conducted a sophisticated analysis of public opinion and the Supreme Court. Their preliminary report indicates that the Court is accorded diffuse support which "dips far beneath the Court's attentive public into the more articulate layers of the less knowledgeable."[71] This dispersion of social support allows the Court a measure of latitude when taking public opinion into account. Since every decision will probably be applauded by some and criticized by others, there is no compulsion to attempt to appeal to popular sentiment. Nonetheless, the institution must maintain its credibility despite the inevitable differences of opinion. The Court does this, in part, by appearing to be apolitical. Even if Justices disagree, there is no problem if the populace perceives a conscientious basis for the dissent. Charles Evans Hughes wrote in 1928 that:

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71 Walter F. Murphy and Joseph Tanenhaus, "Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes," Law and Society Review, Vol. 2, May 1968, p. 373.

> what must ultimately sustain the Court is public confidence in the character and independence of the judges. They are not there simply to decide cases, but to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.[72]

The Justices may reflect the mood of society, they may attempt to change it, and they may disagree with each other. As long as they appear to be conscientious and independent, they can either ignore other social factors or mirror them completely.

Since the Court has no power of enforcement, compliance with its decisions is dependent on the response of various state legislatures and the two houses of Congress. Historically, Congress has taken advantage of the Court's impotence to "weaken or completely blunt the impact of judicial decisions."[73] Even when there is compliance, it is often uncertain and slow. Jacob attempted to discover why compliance varies and isolated two factors: the clarity and the division of the decision. He found greater compliance when the decrees provide clear specifications and when the Justices take a similar stance on the issues.[74] Although

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[72] Charles Evans Hughes, The Supreme Court of the United States (New York: Columbia University Press, 1928), pp. 67-68.

[73] John R. Schmidhauser and Larry L. Berg, The Supreme Court and Congress (New York: The Free Press, 1972), p. 7.

[74] Jacob, p. 230.

the Supreme Court can strike down any law in this country, it must do so unambiguously in order to ensure compliance with its decisions.

Courts get their authority from legislatures and public sentiments. One condition for "a positive flow of supports" is that "the courts must operate in a judicial manner."[75] As Felix Frankfurter put it, "The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them."[76] Thus, action within the judicial system is an important determinant of legitimacy outside the system. Justice Frankfurter explains that judges are constrained by the need to be rational: "Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable."[77] Justices must clearly articulate their criteria without relying on emotion, and they do this most effectively when they appear to ground their decisions in stare decisis. Stare decisis is the authority of the past,

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75 Sheldon Goldman and Thomas P. Jahnige, The Federal Judicial System: Readings in Process and Behavior (New York: Holt, Rinehart and Winston, 1968), p. 76.

76 In, Public Utilities Commission v. Pollock, 343 U.S. 466-467 (1959).

77 In, American Federation of Labor v. American Sash and Door Co., 335 U.S. 538 (1949).

the reliance on or adherence to previously decided cases. It is vital to the image of the judiciary, as Justice Edward White explains:

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.[78]

Judges have the highest respect for precedent. Precedents legitimize decisions by making them applications of prior legal concepts, rather than novel constructions based upon individual preferences.[79] It is through the skillful use of precedent that an opinion can gain public acceptance and legislative compliance.

Social, legislative, and judicial factors influenced the opinion in Beal. My claim is not that one can trace them as directly causal factors leading to the decision, but rather that each of them contributes to the difficulties of the opinion writers. The extent to which each factor contributes to an opinion is not ascertainable because that could only be known by examining how the individual opinion

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[78] In, Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429, 652 (1895), dissenting opinion.

[79] Barth, p. 14.

writers interpret the forces bearing upon them. Nonetheless, these factors may be examined in order to show the direction in which a constraint operated. We cannot know what goes on inside the mind of a judge, but it may be possible to say that judges who were sensitive to these various forces would be more likely to decide in a given way. Furthermore, it is essential to examine the impacts of the Beal decision as this allows a critic to assess the reasoning of that opinion. Analysis of the impact of Beal will help confirm or deny the reasonableness of the opinion writers' claims.

The Public Debate

Nellie J. Gray, president of March for Life, Inc., once remarked, "There's no middle ground on abortion. You can't have a little bit of abortion."[80] Indeed, abortion, like pregnancy, represents an all or nothing physical choice. Emotionally, it often represents the same mental exclusivity. On one extreme is the passionate plea to save the innocent fetus from a premeditated murder. On the other, a cry for freedom from the slavery of unwanted tissue.[81]

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80 "Another Storm Brewing Over Abortion," U.S. News and World Report, July 24, 1978, p. 63.

81 Roger Shinn, "Paying for Abortions: Is the Court Wrong?" Christianity and Crisis, September 19, 1977, p. 203.

Those who oppose abortion began a strong lobbying effort in 1973 as a result of the Supreme Court decision in Roe v. Wade affirming the right to terminate early. One of the most consistent goals among the diverse groups who decry abortion is congressional passage of a Human Life Amendment. This proposal would guarantee constitutional protection for all fetuses beginning at the moment of fertilization.[82] While these groups stand together on the issue, they do so for a variety of reasons and in numerous ways. Some "Right-to-Lifers" do not want women to gain control over their reproductive systems. Others view pregnancy as punishment for sexual promiscuity, and many oppose abortion for religious reasons. Various subgroups adopt a combination of these views.[83] Anti-abortion lobbyists have staged protests at the grass roots level by picketing abortion clinics and marching in Washington, D.C. They managed to muster enough support to put a referendum on an Oregon ballot that called for a vote on public finance of early terminations.[84] Cardinal Humberto Medeiros issued a letter to Catholics before a congressional primary in Massachusetts. He urged them to "save our children, born and unborn. Those who make abortions possible by law--namely legislators and

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82 Lisa Cronin Wohl, "Backstage With the Antiabortion Forces," Ms., February 1978, p. 47.

83 Deborah Baldwin, "Abortion: The Liberals Have Abandoned the Poor," Progressive, September 1980, p. 30.

84 "Another Storm Brewing Over Abortion," p. 63.

those who promote, defend and elect these same lawmakers--cannot separate themselves totally from that guilt which accompanies this horrendous crime and deadly sin."[85]

At the national level, the anti-abortion movement has been in evidence, typified by the efforts of the "religious" or "new" right. This group is also a collection of subgroups, and it focuses primarily on influencing elections. Judie Brown, spokesperson for a coalition of conservative and religious groups known as the National Right to Life Committee, expresses the views of her group: "Members of Congress who choose to ignore the pro-life attitudes among the majority of people in this country will be reminded of their action at the polls."[86]

The right to life groups have claimed victories in several past elections, and they vow to intensify the struggle.[87] In stark opposition to these forces are organizations who support the right of women freely to choose early termination. However these groups were not very active between 1973 and 1977 because they saw no need for lobbying. After the 1973 Court decisions, abortions were perceived as legal, and the pro-choice groups had no

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85 "Pulpits and Politics, 1980," Church and State, November 1980, p. 9.

86 "Fight Over Abortions--Heating Up Again," U.S. News and World Report, December 19, 1977, p. 68.

87 Paul Weyrich, "Right to Fight," Commonweal, October 9, 1981, p. 556.

reason to vocalize. Carol Werner, legislative director of the National Abortion Rights Action League, stated as late as 1978: "There's a broad base of support for abortion in this country. But our supporters are simply not active."[88] Even within the National Organization of Women there is noticeable reticence. In 1980, abortion rights played "second fiddle to the ERA."[89] The group was reluctant to let abortion stand in the way of gaining broad-based support for the ERA.

Primarily because the 1973 abortion rulings were favorable, the pro-choice forces were, in comparison to the right to life groups, silent. Supreme Court Justices who were aware of the political activity at that time would have seen a highly visible anti-abortion force that was virtually unopposed publicly.

While various pro-life organizations waged a one-sided battle condemning the Supreme Court's 1973 decisions, public opinion on the issue was difficult to gauge. Mary Segers looked at a variety of opinion polls and found anywhere from sixty-seven percent of the public accepting free choice by women in one poll, to fifty-four percent in another survey saying they should only be allowed in certain circumstances.[90]

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88 "Another Storm Brewing Over Abortion," p. 63.

89 Baldwin, p. 31.

90 Mary C. Segers, "Abortion and the Supreme Court: Some are More Equal Than Others," Hastings Center Report, August 1977, p. 6.

Her overall assessment is that "the search for a numerical majority on the issue of restricting abortion is something like a search for the Holy Grail. It all depends on which poll you read."[91] For the most part, public opinion was not decidedly in either camp, and this uncertainty was encouraging to the right-to-lifers who wished to change the status quo.

With the 1977 Court decisions, the abortion debate intensified. The pro-abortionists saw their rights slipping away, while the anti-abortionists detected a partial, yet important, victory. The lines of conflict were drawn clearly. Opponents of funding "contend that abortion is murder and that, by providing federal or state subsidies for such action, the government becomes directly involved in the taking of a human life. Proponents of Medicaid payments maintain that the views of those who believe that abortion is immoral should not be thrust upon those who believe otherwise."[92] Not surprisingly, the opponents heralded the Court opinions with a tidal wave of "jubilation."[93] Within religious circles--especially evangelicals and Catholics--the decisions were joyously received. These groups remain committed to a Human Life Amendment, and the Court opinion

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91 Segers, p. 6.

92 Norman, p. 288.

93 "Supreme Court," p. 14.

"led to promises of renewed efforts in the next Congress to push through a constitutional amendment banning abortion itself."[94]

The proponents of free choice were profoundly dissatisfied with Beal and Maher. The National Abortion Rights Action League began establishing a political fund designed to elect like-minded congressional candidates. Several other groups, including the American Civil Liberties Union, began the complicated process of challenging the decisions in court.[95] The Planned Parenthood Federation of America established a special fund to provide free abortions to women who were unable to obtain governmental assistance.[96] To call the 1977 rulings a spark to a pro-abortion drive would be an understatement. This was the end of hesitation and a signal for even greater militancy in the future; it was a strong indication that prevailing views on abortion at the time prior to Beal were unrepresentative of the entire population. Pro-choice forces may have been viewed as non-existent when, actually, their views were dormant.

As was true earlier in the abortion debate, public opinion was difficult to gauge. An ABC News-Harris Survey

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94 Stan Hastey, "Religion and the Courts," Church and State, September 1980, p. 16.

95 "Another Storm Brewing Over Abortion," p. 63.

96 "Fight Over Abortions--Heating Up Again," p. 68.

in 1979 showed public support of the 1973 decisions by a sixty percent to thirty-seven percent margin.[97] When the question related to public funding, pollsters found different views. A CBS poll in 1978 showed that only forty-four percent of Democrats and thirty-seven percent of Republicans favored publicly funded abortions.[98] An earlier CBS-New York Times survey revealed that only thirty-eight percent of those interviewed favored government aid for abortion while sixty-four percent thought the government should pick up the tab for childbirth.[99] These results are helpful to an understanding of the social context surrounding abortion; they will also become important when viewing the legislative response to the Supreme Court decisions.

Impact on Women

One of the most important social factors to be considered in this controversy is the impact of free and legal abortions on women. The Wade decision of 1973 was quite significant in this regard. As measured by government estimates, the annual number of abortions in the United

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97 "Abortion Poll," Church and State, May 1979, p. 22.

98 Albert Menendez, "Church, State and the 1980 Presidential Race," Church and State, January 1980, p. 7.

99 Richard A. McCormick, "Paying for Abortions: Is the Court Wrong?" Christianity and Crisis, September 19, 1977, p. 205.

States jumped from 744,600 before Wade, to 1.5 million after Wade. More than a million teenagers become pregnant each year, and thirty-eight percent of them abort.[100] Comparing live births to abortions, the Center for Disease Control found that roughly one out of every four pregnancies in 1976 was terminated early.[101] In 1977, the average cost of an abortion, excluding travel and employment expenses, ranged from $125 to $250.[102] Of the total yearly number of abortions (ranging from 1.1 to 1.5 million), over 300,000 were paid for by Medicaid.[103] Thus, the numerical significance of Wade amounted to a doubling of the number of recorded abortions, with a significant number funded by the federal and state governments.

Numbers do not tell the entire story, for the impact of Wade was widespread. Before abortion became legal for any reason in the first trimester, most women had two simple options--bear an unwanted child or seek an illegal procedure. If an individual chose to carry pregnancy to full term, there were several potential problems. First, because legal abortions carry fewer risks of complications,

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100 Walter Isaacson, "The Battle Over Abortion," Time, April 6, 1981, p. 21.

101 Susman, p. 581.

102 "Fight Over Abortions--Heating Up Again," p. 68.

103 "Just for the Rich," The Economist, June 25, 1977, p. 47.

women were subjecting themselves to a greater chance of death or injury. Christopher Tietze and Sarah Lewit did an extensive analysis of death rates between 1966 and 1976. They found that the death rate for legal abortions performed in the first twelve weeks of pregnancy is "far lower" than it is for full pregnancies. They observed: "The abortion death rate increases with the duration of pregnancy. . . . For all age groups the death rate for first-trimester abortion is substantially lower than the rate for childbirth."[104] Other writers have observed that: "Since abortions have been safe and legal, the death rate is down to five times less than that for live births."[105]

A second problem with compulsory pregnancy is that it creates severe mental stress on mothers. These unwanted children are often born to poor women who cannot afford to travel to a state or county where abortions are legal. The children can symbolize, every day, the despair and hopelessness of the mother's existence. This can create a "terrible cycle of unwanted children, child battering, crime, and hopelessness in the slums. . . ."[106] Another writer suggests that, "for those women who are forced to bear unwanted children, emotional and psychological effects

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104 Christopher Tietze and Sarah Lewit, "Legal Abortion," Scientific American, January 1977, pp. 26-27.

105 Wohl, p. 48.

106 Lance Morrow, "An Essay on the Unfairness of Life," Horizon, December 1977, p. 37.

upon the mother and child are inevitable."[107] A task force report to the Department of Health, Education and Welfare found that, for many women, the only alternatives to abortion are suicide and madness.[108]

Those women who chose the alternative of illegal abortion also placed themselves at risk of death and injury. The tendency to choose this alternative was very strong: "Ultimately, the question is not between the abortion and no abortion but between legal abortion and illegal abortion."[109] Dr. Kenneth Edelin, convicted of manslaughter for performing an abortion, had this to say: "Women will go to any length, will risk their lives, to get abortions."[110] Women risk their lives when they undergo an illegal procedure. The legalization of abortion corresponded with a significant drop in death rates from complications. After 1973, "patient deaths dropped to scarcely one-fifth their prior level."[111] "Back alley" or illegal abortions carry substantial health risks.

Admittedly, these statistics do not account for fetal "deaths." One could analyze the issue by attempting to

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107 Norman, p. 311.

108 "Fight Over Abortions--Heating Up Again," p. 68.

109 Morrow, p. 37.

110 as quoted in Morrow, p. 37.

111 "Abortion Increasing Worldwide," Science News, March 13, 1976, p. 168.

balance maternal harms from decreased abortion accessibility with harms to the unborn's potential or actual life, decreases in society's level of respect for the quality of life, loss of national productivity, or any of a number of other evils attributed to legalized abortions. The arguments could be extended to account for harm to the unborn, but such arguments make the assumption that fetuses are human beings, and have rights which outweigh those of the mother. That assumption is clearly beyond the scope of this paper. Since the Supreme Court declared in Wade that the woman's rights outweigh the state's interest in protecting the fetus during the first trimester, as will be shown later in this paper, it is appropriate to presume that the relevant consideration is maternal, not fetal, harm. If the Supreme Court wished to remain entirely consistent with Wade, then it would presume that women have the option to choose abortion, but the question of who would fund remained to be resolved. Given the importance of abortions to the health and well-being of many women, justices who were concerned with this social force would be inclined to support pro-choice. There is little evidence to support a view that the Beal majority is particularly sensitive to the difficulties of woman who choose to terminate early. Therefore, the Supreme Court decisions in 1977 may uphold the principle of legalized abortions while frustrating the efforts of poor women to exercise the option guaranteed in 1973.

The majority decision in Beal did not directly cause any women to delay or forego abortions, because the decision gives the states discretion in choosing to fund abortion. However, the state response to the removal of compulsory funding was predictable, making many poor women the indirect victims of the Court's decision. Many states have cut Medicaid funds for abortion, and there is already some confirmation of the effects of that denial. In Arkansas, the yearly number of abortions paid for by the state has dropped from five hundred to five; South Carolina has gone from fourteen hundred to fourteen; and Texas has dropped from over thirteen thousand to fifty-one.[112] Under New Jersey law, funds are available for abortions only if the mother's life is in danger. Abortions there have decreased from nine hundred to twenty-five per month. California has reduced its reimbursements by ninety-five percent.[113] Of course, these figures show a decline in public funds; many women are still getting abortions. Some are offered reduced charges at clinics, while others are getting cheaper procedures from unlicensed practitioners. The rest are continuing with a full term pregnancy.[114]

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112 "Another Storm Brewing Over Abortion," p. 63.

113 Charles Juster, "Availability of Medicaid Funded Abortions," Washington and Lee Law Review, Vol. 37, 1980, p. 451.

114 "Another Storm Brewing Over Abortion," p. 63.

The Department of HEW estimated in 1974 that elimination of funds for elective abortions could cause approximately one hundred and twenty-five to two hundred and fifty women to die from self-induced abortions. Another twenty-five thousand women would not die, but could have serious complications.[115] Dr. Diana Petitti and Dr. William Cates undertook a more complex formulation. They argued that denial of public monies could lead to increased death from childbirth, or excess deaths from non-legal services, or additional mortality as women delay the procedure in order to seek alternative funding. The study found that, "If difficulty in obtaining funds for abortion resulted in an average delay of only two weeks for each legal abortion . . . it would have increased the death-to-case rate for women eventually having abortions with public funds by nearly sixty percent, and raised the overall national abortion death-to-case rate by twenty-one percent."[116] Their overall conclusion assumed both best case and worst case scenarios: "if publicly funded abortions were restricted, we have calculated that from five to ninety excess deaths would result for women of childbearing age in the United States depending on the distribution of the above

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115 Norman, p. 311.

116 Diana B. Petitti and Willard Cates, Jr., "Restricting Medicaid Funds for Abortions: Projections of Excess Mortality for Women of Childbearing Age," American Journal of Public Health, Vol. 67, No. 9, September 1977, pp. 860-861.

options chosen by pregnant women whose public funding has been denied."[117] It is important to remember that these are annual figures. These deaths could be expected every year that funding was restricted. Also, this analysis excludes the mental stress and poverty associated with unwanted children. Furthermore, the calculation ignores the additional social cost of government-paid childbirth, extra family members on welfare, and follow-up treatment for botched abortions.

Government Legislation

Beal, the ruling that states may fund abortions if they choose to, places the funding decision solely in the hands of state and federal legislatures. The refusal to fund most abortions has been documented, and it is important to trace the legislative history and policymakers' responses to abortion to understand additional forces involved in the funding issue.

Under common law, abortions were legal until, in the nineteenth century, states began prohibiting the procedure.[118] Prior to 1973, thirty-one states prohibited

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117 Ibid., p. 861.

118 Patricia A. Butler, "The Right to Medicaid Payment for Abortion," Hastings Law Journal, Vol. 28, March 1977, p. 931.

abortions except when the woman's life was at stake; fourteen other states had a general prohibition, but made exceptions in a wider variety of circumstances: jeopardy to a woman's mental health, potential for fetal deformity, conception as a result of rape or incest; and the remaining states were noted for having even more liberal statutes.[119] These various state schemes remained in effect until 1973 when they were effectively voided by Wade and Bolton. However, even after these two decisions, abortions were not freely available. Several states acted to require parental consent in cases involving minors and the husband's consent in cases involving married women. Most Catholic hospitals do not perform abortions, and many other hospitals "are reluctant to allow abortions or even set up the necessary facilities."[120] A study by the Alan Guttmacher Institute found that between 400,000 and 1 million women were denied abortions they sought in 1974.[121]

In order to provide medical assistance to needy individuals, Congress in 1970 enacted Title XIX of the Social Security Act,[122] establishing the Medical Assistance Program [Medicaid]. The program provides a system of

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119 Susman, p. 581.

120 Tietze and Lewit, p. 22.

121 George H. Kieffer, Bioethics (Reading, Ma.: Addison-Wesley Publishing Company, 1979), p. 161.

122 42 U.S.C. *1396 et seq. (1970), as amended by Act of August 9, 1975, Public Law 94-437, *402(a), 90 Stat. 1409.

reimbursement for health care costs, but does not directly secure or guarantee a physician's services or medical facilities.[123] State participation in the program is optional, but if a state elects to join, then it is subject to statutory requirements.[124] The state must provide care in five general categories,[125] but not necessarily all types of

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[123] 42 U.S.C. *1396 states: "For the purpose of enabling each State, as far as practicable under the conditions in each State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted and approved by the Secretary of Health, Education, and Welfare, State plans for medical assistance."

[124] 42 U.S.C. *1396a(a)(1) requires that a State medical assistance plan "provide that it shall be in effect in all political subdivisions of the State, and if administered by them, be mandatory upon them."

[125] The five categories of care are enumerated in *1396d(a)(1970 ed. and Supp. V):

"(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

"(2) outpatient hospital services;

"(3) other laboratory and X-ray services;

"(4)(A) skilled nursing facility services (other than services in an institution for tuberculosis or mental diseases) for individuals 21 years of age or older (B) effective July 1, 1969, such early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment, and other

treatment within those categories.[126] Standards also require that definitions of eligibility and scope of coverage must be consistent with the objective of providing necessary medical services in a manner upholding the best interests of the recipient. A State medical assistance plan must "provide such safeguards as may be necessary to assure that eligibility for care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipient."[127] In 1972, the statute was amended to include family planning services, although it did not specifically mention abortion.[128]

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measures to correct or ameliorate defects and chronic conditions discovered thereby, as may be provided in regulations of the Secretary; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of childbearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies;

"(5) physicians' services furnished by a physician (as defined in section 1395x(r)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere."

126 Rowland L. Young, "Supreme Court Report," American Bar Association Journal, Vol. 63, September 1977, p. 1261. 42 U.S.C. *1396a(a)(17) requires State plans to "include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which are consistent with the objectives of this subchapter. . . ."

127 42 U.S.C. *1396a(a)(19)(1970).

128 Act of October 30, 1972, Public Law No. 92-603, *299E, 86 Stat. 1462.

A major legislative action dealing with Medicaid abortions took place at the federal level. In 1976, while Beal, Maher, and Poelker were pending before the Court, Congress, over a Presidential veto, passed the Hyde Amendment to the Department of HEW and the Department of Labor appropriations bill for 1977.[129] This rider to the appropriations measure eliminated federal payments for abortion, except when carrying the fetus to full term threatened the life of the mother.[130] While Beal allows withholding of funds for some abortions, it required participating states to pay if the abortion was necessary to the physical or mental well-being of the mother. Hyde goes beyond this by precluding funds for all abortions which are not life-threatening to the woman.[131] Thus, for women dependent on federal money for abortions, the Hyde Amendment reduces the ability to abort to that freedom which existed for all women before 1973. Effectively, these individuals would gain nothing from the Court rulings in Wade and Bolton. One observer claims that, "the Hyde Amendment, as it is known, is intended to offer up poor women as a sacrifice to the right-to-life movement. . . . It is simply a symbolic

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129 Act of September 30, 1976, Public Law No. 94-439, 90 Stat. 1418.

130 Lalli, p. 690.

131 Joan Meyerhoefer Roddy, "The Hyde Amendment: An Analysis of Its State Progeny," University of Dayton Law Review, Vol. 5, No. 2, Summer 1980, p. 314.

gesture, which Congress hopes will pacify the right-to-life movement at least through the next election."[132] Of course, the amendment only applied to appropriations in 1977.[133] After the 1977 decisions were announced, Congress restricted 1978 appropriations "for all abortions except those where the life of the mother is endangered, and in the cases of rape, incest or medical necessity."[134] Most states have followed the federal lead by limiting their funds. Abortions under Medicaid are fully funded in only fifteen states.[135] Thus, both state and federal legislatures have historically restricted the ability to abort. When courts have ruled against them, they have grudgingly complied; when the judiciary decreased the legislative obligation, lawmakers took advantage of the opportunity to decrease funds.

Prior Judicial Activity

In addition to social and legislative factors, Supreme Court decisions are affected by prior judicial activity. The abortion issue was initially addressed by the Supreme

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132 Michael Kinsley, "Danse Macabre," New Republic, November 19, 1977, p. 13.

133 Butler, p. 977.

134 Norman, p. 310.

135 "Another Storm Brewing Over Abortion," p. 63.

Court with its decisions in 1973 in Roe v. Wade and Doe v. Bolton. These cases first enabled women legally to obtain abortions. While not addressing the funding issue, these decisions are important to an understanding of Beal because they allow abortions within the first three and six months of pregnancy. In Wade, the petitioner challenged Texas statutes which made it a crime to abort, unless the woman's life was at stake.[136] The Court held that the ability to obtain an abortion was encompassed within the constitutionally protected right to privacy.[137] Further, this extension of a right was deemed "fundamental," and the Court required that a state demonstrate a compelling state interest before interfering with the abortion decision. The Court recognized a state interest in protecting the mother's health and the potential life of the fetus, but held that these interests were not compelling during the first trimester of pregnancy.[138] During the first trimester, the medical decision of the woman's physician is to be the controlling factor.[139] During the second trimester the state's interest in the woman's health becomes predominant over her freedom of choice. Only in the third trimester does the state's interest reach a "compelling point," at

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136 Texas Penal Code Ann. arts. 1191-1194 and 1196.

137 Wade, 153.

138 Wade, 162-165.

139 Wade, 163-164.

which time the state may protect the potential human life.[140]

In the companion case of Bolton, an indigent woman was denied an abortion because she failed to meet the State of Georgia's requirement that a panel of physicians certify that continued pregnancy would be life-threatening.[141] The Supreme Court ruled that the statute was in violation of the fourteenth amendment--the same grounds as were used in Wade.[142] The Court held that the certification procedure did not further a compelling state interest and restricted the choice made between patient and physician.[143] These cases, taken together, were interpreted by lower courts "to mean that a state could not favor a woman's election to carry a pregnancy to term over a decision to terminate the pregnancy."[144] What these decisions did not do was settle the extent to which a state must provide equal access to abortions, not just equal opportunity to them.

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140 Wade, 164-166.

141 Georgia Code Ann. **26-1201-1203 (1971), reprinted in Wade, 202-205.

142 Bolton, 199.

143 Bolton, 198-199.

144 Dennis J. Horan and Thomas J. Marzen, "The Moral Interest of the State in Abortion Funding: A Comment on Beal, Maher, and Poelker," Saint Louis University Law Journal, Vol. 22, No. 4, 1978, pp. 572-573.

After Wade and Bolton, a number of federal cases were heard in lower and appellate courts to determine if a state must provide Medicaid funds for abortions. Obviously, these lower court rulings are not legally binding upon the Supreme Court: these cases are not "precedents" in a strict sense. Nonetheless, they illustrate how other courts have decided similar cases and provide foundations upon which the Beal court could have constructed its opinion. The lower court opinions also provide alternative views that a critic may use when assessing the Beal decision.

Several cases considered the statutory question of whether compliance with Title XIX required state funding, others decided the constitutional issue of whether a state's decision to withhold money for abortions violated the fourteenth amendment, and a few considered both. The first important decision relating to Medicaid funding was Klein v. Nassau County Medical Center.[145] In 1972, a federal district court predated both Wade and Bolton when considering the case of an indigent woman who challenged a New York welfare policy that denied coverage for non-therapeutic abortions. The three-judge panel considered the statutory question, and held that Title XIX required states

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145 Klein v. Nassau County Medical Center, 347 F.Supp. 496 (E.D.N.Y.) (1972) (three-judge panel), vacated (in light of Wade and Bolton, 412 U.S. 925, 37 L.Ed.2d 151, 93 S.Ct.2747 (1973), on remand, 409 F.Supp. 731, (E.D.N.Y.) (1976) (three judge panel), vacated sub. nom. Toia v. Klein, 97 S.Ct. 2962 (1972).

to provide necessary medical treatment for pregnancy. Abortion was considered a necessary treatment just like full-term deliveries; thus, it must be funded.[146] Further, the court ruled that providing assistance to women who carry to full term but not for those who choose to abort constituted an arbitrary classification that violated constitutional guarantees of equal protection.[147] Klein became the earliest case to rule on constitutional grounds that Medicaid required payments for abortions.[148] Although the decision was vacated and remanded by the Supreme Court in light of Wade and Bolton, numerous courts have followed this reasoning to invalidate "restrictive Medicaid statutes on constitutional grounds."[149]

In Doe v. Wohlgemuth a three-judge panel rejected the argument that Medicaid requires payment for abortion.[150] The district court found, however, that abortions were a necessary medical procedure and that limitations of funding were unconstitutional by discriminating "between indigent women who choose to carry their pregnancies to birth, and indigent women who choose to terminate their pregnancies by

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146 Klein, 347 F.Supp., 500.

147 Klein, 347 F.Supp., 500-501.

148 Gall-Clayton, p. 56.

149 Okerson, p. 184.

150 Doe v. Wohlgemuth, 376 F.Supp. 173 (W.D.Pa.) (1974), modified sub. nom. Doe v. Beal, 523 F.2d 611 (3d Cir.) (1975), certiorari granted, 96 S.Ct. 3220 (1976).

abortion."[151] In determining abortion to be medically necessary, the court cited Wade, saying that the procedure, "may prevent specific and direct harm which is medically diagnosable, may protect the woman's future mental and physical health, and may prevent the distress associated with the unwanted pregnancy and child."[152] This decision is critical because it is the earliest version of Beal. When the Third Circuit reconsidered this case it was titled Doe v. Beal.[153]

In the case of Doe v. Rose,[154] the district court considered the constitutional problem posed by discriminating against the class of indigent women who prefer abortion. The court invalidated a Utah policy which only funded abortions in the event of a threat to the mother's life or impairment of her physical health.[155] On appeal, the Tenth Circuit affirmed, saying that money was not a sufficiently compelling state interest justifying restriction when fundamental rights were at stake.[156]

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151 Wohlgemuth, 376 F.Supp., 191.

152 Wohlgemuth, 376 F.Supp., 190, citing Wade, 153.

153 Doe v. Beal, 523 F.2d 611 (3d Cir.) (1975), certiorari granted, 96 S.Ct. 3220 (1976).

154 Doe v. Rose, 380 F.Supp. (D. Utah) (1973), affirmed, 499 F.2d 1112, 1117 (10th Cir.) (1974). Hereafter referred to as Rose.

155 Rose, 380 F.Supp. 781-782.

156 Rose, 499 F.2d 1117.

Another case which ruled on the constitutional issue was Wulff v. Singleton.[157] In the original complaint, two physicians who performed abortions for Medicaid recipients challenged a Missouri statute prohibiting funds for elective abortions. The district court originally dismissed the case on the grounds that the doctors did not have standing to sue on behalf of their patients. Accordingly, because of this procedural problem, the constitutional question was not raised. The appellate court overruled, granting the physicians standing; the court then determined that there was no need to remand to the district court because the case was clear and could be decided at that time.[158] It then ruled that the Missouri statue was "obviously unconstitutional . . , a clear violation the Equal Protection Clause."[159]

The Supreme Court heard the case on appeal and affirmed the finding that the doctors had standing to assert the rights of their patients.[160] However, the Court remanded the case to the original court because the appellate Court had erred. The constitutional argument was irrelevant because the appellate court, after overruling the procedural

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157 Wulff v. Singleton, 508 F.2d 1211 (8th Cir.) (1975), revising, Wulff v. State Board of Registration for Healing Arts, 380 F.Supp. 1137 (E.D.Mo.) (1974), reversed and remanded, 428 U.S. 106 (1976). Hereafter referred to as Singleton.

158 Singleton, 508 F.2d 1215.

159 Singleton, 508 F.2d 1215-1216.

160 Singleton, 428 U.S. 106.

ıssue, should have remanded the case to the dıstrıct court for ıt to decıde the statute's constıtutıonalıty.[161] By the tıme the case came before the dıstrıct court ıt was dısmıssed ın lıght of Beal and Maher.[162]

A case ınvolvıng the Tıtle XIX statute came before the Sıxth Cırcuıt Court of Appeals.[163] In Roe v. Ferguson, appellants challenged an Ohıo statute prohıbıtıng state funds for abortıon unless the procedure was needed to preserve the mother's health or lıfe. They argued that the statute was ınconsıstent wıth Tıtle XIX.[164] The court held that sınce Tıtle XIX dıd not mentıon abortıon, ıt was "dıfficult to construe the sılence of Congress ın Tıtle XIX as an endorsement of the vıew that nontherapeutıc abortıons are ıncluded ın the 'necessary medıcal servıces' to be furnıshed."[165] The court was reluctant to ınfer Congressıonal ıntent and denıed the claım; the court remanded the case to the dıstrıct court so that ıt could decıde ıf the state regulatıon vıolated the Constıtutıon.[166]

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161 Sıngleton, 428 U.S. 119-121.

162 Gall-Clayton, p. 75.

163 Roe v. Ferguson, 515 F.2d 279 (6th Cır.) (1975). Hereafter referred to as Ferguson.

164 Ferguson, 280.

165 Ferguson, 283.

166 Ferguson, 283-284.

Ferguson denied that Congress intended Title XIX to require the states to fund abortion. This reasoning, and the reasoning in 1975 in Roe v. Norton,[167] formed the basis of the Supreme Court decision in Beal. Norton is the early version of the Maher case. In Norton, the court held that Title XIX neither forbids nor requires payment of elective abortion. It argued that the statute did not indicate congressional intent to fund early terminations. Further, the court relied on an interpretation of the statute by HEW which supported the view that Congress expressed no mandate within the Medicaid statutes.[168] Again, the appellate court remanded to the district court so that the constitutional question could be discussed. The district court found no compelling state interest to outweigh the woman's right to privacy and ruled against the regulation in question.[169]

As these decisions demonstrate, since Wade and Bolton in 1973, courts have generally sustained, under due process or equal protection principles, the argument that abortions must be funded by Title XIX if childbirth and prenatal care are financed. In those few cases claiming a non-constitutional basis for a requirement of abortion payment under Medicaid, the courts have been reluctant to infer that

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167 Roe v. Norton, 408 F.Supp. 660, 664 (D.Conn.) (1975), rev'd sub. nom. Maher.

168 Roe v. Norton, 552 F.2d 928 (2d Cir.) (1975), rev'd sub. nom. Maher.

169 Roe v. Norton, 408 F.Supp. 660, 664.

Congress intended coverage under the law. The absence of any statement by Congress concerning abortion funds has been widely interpreted to mean that no preference or compulsion has been expressed by the national legislature. On that basis, courts have allowed states discretion in determining resource allocation policies where no constitutional conflict is noted. While this analysis is not exhaustive, it suggests the forces which constrain or facilitate the opinion writers in Beal as well as the impact of that decision.

Chapter IV

Criticism of Beal v. Doe

Supreme Court opinions may be examined in a number of ways and by various criteria. Critics may, for example, analyze how an opinion fulfills its purposes, how well the rhetoric is adapted to the Court's various audiences, or the ways in which the writing style contributes to an understanding of the decision. Beal v. Doe may, of course, be viewed primarily by the above standards, but the decision is far more significant as an example of how language usage creates important conceptualizations of situations and ultimately is the basis for the rationale of a decision. This chapter will indirectly examine the purposes, audiences, and writing styles of the two Beal opinions, but the emphasis will be first, to demonstrate how the majority opinion functioned rhetorically, and second, to challenge the reasoning in that opinion.

Rhetorical Analysis

In Beal v. Doe, the majority opinion by Justice Powell joined by Chief Justice Burger and Justices Stewart, White,

Rehnquist, and Stevens and the dissent by Brennan, joined by Marshall and Blackmun, are concerned with the statutory question of whether states violate Title XIX (which includes Medicaid) when they deny funds for elective abortions. The majority opinion follows an organizational format found frequently in Supreme Court decisions. It begins with the issue in the case, "whether Title XIX of the Social Security Act . . . requires States that participate in the Medical Assistance (Medicaid) program to fund the cost of nontherapeutic abortions."[170] Next, the opinion presents the facts of the case. Under Pennsylvania's Medicaid program, funds for nontherapeutic abortions are available only if the procedure is medically necessary.[171] In a footnote citing the Pennsylvania Bulletin, medical necessity exists when:

> (1) There is documented medical evidence that continuance of the pregnancy may threaten the health of the mother;
> (2) There is documented medical evidence that the infant may be born with incapacitating physical deformity or mental deficiency; or
> (3) There is documented medical evidence that continuance of a pregnancy resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of a patient; and
> (4) Two other physicians chosen because of their recognized professional competency have examined the patient and have concurred in writing; and

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170 Beal, 469.

171 Beal, 470.

(5) The procedure is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals.[172]

The respondents in the case were denied Medicaid assistance for failure to certify properly their medical necessity. "Their complaint alleged that Pennsylvania's requirement of a certificate of medical necessity contravened relevant provisions of Title XIX and denied them equal protection of the laws in violation of the Fourteenth Amendment."[173] The case was first heard in District Court where a three-judge panel ruled that requirements of medical necessity did not violate Title XIX, but that the Pennsylvania requirement was unconstitutional when applied during the first trimester. Thus the statute was upheld, but the constitutional question was resolved in favor of the plaintiffs. On appeal, the third Circuit Court of Appeals reversed the statutory ruling, arguing that the certificate of necessity was prohibited under Title XIX. The constitutional question became irrelevant, since the original plaintiffs could win on either the statutory or constitutional issue. Given the statutory reversal, the Court of Appeals did not pursue the constitutional questions. The Supreme Court granted certiorari in order to

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172 Brief for Petitioners 4, citing 3 Pennsylvania Bulletin 2207, 2209 (September 29, 1973).

173 Beal, 470.

resolve the conflicting decisions.[174] The Supreme Court in Beal is concerned solely with the statutory question since the constitutional issue was not reached by the Court of Appeals. It is important to note that the District Court reached the same ultimate conclusion regarding the statute as did the Supreme Court. The Court of Appeals disagreed with the ruling. Hence, the Supreme Court was in a position to justify either of the opposing views while maintaining that they upheld the rationale of a prior court decision.

The Court begins to unfold its position by arguing that the statutory language of Title XIX does not require funding of all procedures within the general Medicaid categories of care. They note that Medicaid merely requires States to provide care relating to five broad categories. The law does not mention abortions or any specific medical procedure. They assert that "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care."[175] The majority seems to be contending that although participating States must provide at least some services in each of the five categories of care, they need not provide exhaustive coverage within those

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174 Several federal courts have concluded that states are not required under Title XIX to fund elective abortions. See also, Roe v. Norton, 522 F.2d 928 (CA2 1975), and Roe v. Ferguson, 515 F.2d 279 (CA6 1975).

175 Beal, 471.

categories. As proof, the opinion refers to a portion of the Medicaid statute itself. It states that the State plan for medical assistance must include reasonable standards for the extent of care which "are consistent with the objectives . . ." of Title XIX.[176] The majority uses this language to conclude that Title XIX gives States the choice as to which standards they adopt: "This language 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."[177] Furthermore, the Court asserts that the primary objective of Title XIX is to "enable each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services."[178] The claim that this is a "primary objective" is not made by quoting the statute, and the statutory reference that appears at this point does not mention those words.[179]

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176 42 U.S.C. *1396a(a)(1970)ed Supp. V) 42 USCA 1396a(a)(17).

177 Beal, 472.

178 Beal, 472.

179 The Court cites 42 U.S.C. 1396a(10)(c). That section reads: "if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary--" The statute then enumerates several contingencies to be applied in these situations.

There is no evidence offered to show that the objective of allowing States to furnish medical assistance is more fundamental than or is prior to the other objectives of the Act.

Given the Court's claim that the objectives of Title XIX allow "broad state discretion," it then contends that Pennsylvania is only denying a desirable but unnecessary form of care within a category. If Pennsylvania had denied all care within a category, the Court concedes that there would be a statutory problem; yet in this instance, Pennsylvania is not denying a necessary operation:

> Pennsylvania's regulation comports fully with Title XIX's broadly stated primary objective.... Although serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage, it is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary--though perhaps desirable--medical services.[180]

The Court argues that Pennsylvania allows for medically necessary abortions because, "If a physician certifies that an abortion is medically necessary, . . the medical expenses are covered under the Pennsylvania Medicaid program. If, however, the physician concludes that the abortion is not medically necessary, but indicates a willingness to perform the abortion at the patient's request, the expenses are not

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180 Beal, 472.

covered."[181] Arguing that the Pennsylvania regulation leaves the entire matter to the physician's determination of medical necessity, the Court holds that the state plan funds necessary care. Since the State is not required to fund all treatments, and the denial of funding to the plaintiff only prohibited an unnecessary medical service, the Court upheld the legality of Pennsylvania's decision.

The key to understanding the Beal decision is the Court's rhetorical moves on three issues. First, the Court chose to define abortion as an unnecessary medical procedure. If abortions were deemed necessary, then, as the Court concedes above, Pennsylvania would be required to uphold the plaintiff's request. The holding that the only medically necessary abortions are those that are certified by a physician gives strong support to the majority view. Many individuals feel that all abortions are necessary, regardless of what a doctor may find "certifiable." The Court's linguistic choice here is a significant one.

A second critical choice is the Court's determination that the Medicaid statute applies to procedures, treatments, or services, but not to conditions. Although the statute gives States discretion, what is it that they have discretion over? The majority contends that the States may decide which treatments to cover within a category. Had the Court argued that Medicaid gives discretion over conditions,

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181 Beal, 472.

then a State could agree to pay for alleviation of the condition of pregnancy, but it would not be able to specify how the condition is treated. If a State chose not to fund the termination of pregnancies then it would not pay for normal childbirths or abortions; but if states may only choose whether to fund a condition and not the specific treatments for that condition, then a decision to fund pregnancy terminations would require funding of all medical procedures for dealing with the condition. As was mentioned earlier, the statute does not mention procedures of any kind, and the decision of the Court to define Medicaid as a law dealing with treatments is a critical point in its rationale.

The third linguistic choice of the Court is its definition of the objectives of Medicaid. The majority decided that the primary objective of the law is to enable states to furnish necessary medical care, and this is an important link in the argument that states should be given broad discretion. If the Court decided, instead, that the objectives of Medicaid were ease of administration and the patient's best interests, then they would have been forced to consider the economic, physical, and psychological harms of forced pregnancy on poor women, as well as the simplest methods of determining eligibility for a government funded pregnancy termination. It is not clear that the Court could have sustained its position had it been forced to consider these effects.

At first glance, the Beal majority produced a thoughtful, well-reasoned, and articulate opinion. There are at least two ways to read the statute, as evidenced by the two lower court rulings, and the Supreme Court chose one of the two options. The Court opinion is clearly written, and the progression of ideas flows nicely. Precedent cases are mentioned, and the Court claims to be consistent with the spirit of Wade and Bolton. It is readily apparent that the opinion was successfully prepared for the target audience of Supreme Court Justices, since a majority of them affirmed the decision, and the Court correctly inferred Congressional intent, since the Hyde amendment passed in Congress.

The scope of the decision also appears to be reasonable; the opinion is not an explicit denial of governmental financing of abortions, merely a statement that the Supreme Court will not decide the appropriateness of funding. As the Court points out, "We make clear, however, that the federal statute leaves a State free to provide such coverage if it so desires."[182] The Court allows state legislatures to determine how they will allocate their Medicaid funds, and it feels that these political units are the appropriate agencies for the decision. Further support is offered in the majority's claim that Congress never expressed an intention to fund abortions. The Court finds

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182 Beal, 474.

no legislative statements in Title XIX to warrant such an assumption, and it sees presumption working in the opposite direction for two reasons. First, when Congress initially enacted Title XIX, abortions were illegal in most states. Hence, it is unlikely that they intended that the states pay for them. Second, the agency which administers the program, the Department of Health, Education, and Welfare, "takes the position that Title XIX allows--but does not mandate--funding for such abortions."[183] Therefore, the majority finds no tension between the language of Title XIX and Pennsylvania's decision not to fund nontherapeutic abortions.

Criticism of the Majority

Although the majority opinion appears to be a reasonable response to the question before the Court, it has not been universally acclaimed. For example, Brennan's dissenting opinion does not accept the position that because "abortions were illegal in 1965 when Medicaid was enacted, . ." Congress did not intend to fund them. Brennan points out that "Medicaid deals with general categories of medical services, not with specific procedures. . . ."[184] He cites a statement by the Court of Appeals:

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183 Beal, 473.

184 Beal, 477.

> 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 legislation of elective abortion in 1973.[185]

Given that Congress does not mention any specific treatments and given examples of treatments illegal in 1965 that were ultimately funded under Title XIX, it is not entirely clear that Congress intended to exclude abortions from coverage. Based upon the evidence in the two opinions, there is no reason to believe that Congress even considered the issue.

Brennan is equally unpersuaded by the position of HEW that payment was not mandatory. Brennan cites Townsend v. Swank to say that no weight should be given to an agency decision when the controlling statute is inconsistent with that decision.[186] Thus, HEW's opinion is irrelevant. It does not prove the majority argument, it merely endorses it. The relevant question is not what HEW believes about the law but how the Court should interpret the statute.

As Brennan points out, the essential issue is whether the majority reads the law properly. He obviously disagrees

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185 Brennan refers to this source as "the Court of Appeals." The citation appearing at this point is 523 F.2d 611, 622-623 (1975). He is presumably referring to Doe v. Beal.

186 Townsend v. Swank, 404 U.S. 282, 286, 30 L.Ed.2d 448, 92 S. Ct. 502 (1971).

with the Opinion of the Court, but is his judgment superior to that of his opponents? It has been shown that a Supreme Court opinion should provide reasons for its decision. These reasons should be impartial and consistent with the law. Further, use of precedent cases can enhance the perception of the legitimacy of a decision, and precedents should be applied consistently and accurately. Beal rests on three separate linguistic choices, and further analysis of these choices should provide a basis for testing the rationale of the majority.

The majority's first significant rhetorical move is to define abortions as unnecessary. If we look solely at treatments, then we might conclude that many abortions are indeed unnecessary. This is because there are alternative procedures, such as normal childbirth, which deal with pregnancy. Of course some women will still be able to argue that certain abortions are necessary to prevent physical or mental harms associated with childbirth, but the procedure would not merit blanket certification of necessity in all instances. On the surface, the rationale of the majority appears reasonable, yet it is only when one looks at the abortion procedure instead of the pregnancy that the treatment becomes unnecessary. If one focuses on the pregnancy, then a far different conclusion emerges.

It is not uncommon for states, under Medicaid, to pay for medical treatments for injuries resulting from accidents. Even if a patient needed a service that would normally be considered cosmetic and unnecessary, say a "nose job," that treatment would be funded if it was essential to the patient's health. If one says that a particular nose job is an unnecessary medical procedure, it would likely be because the condition of having an unsightly nose is not a condition requiring medical attention. Hence, the appropriateness of a treatment should be predicated upon the importance of the condition. A nose job per se is necessary or unnecessary, not because of the nature of the treatment, but because of the condition it addresses. If the analogy could be extended to pregnancies, then a strong argument against the majority emerges. If we say that abortions are unnecessary medical procedures, then the most reasonable justification for this would be that the condition of pregnancy does not necessitate medical treatment. Thus, abortions are only unnecessary if the focus is on treatments and not conditions. Brennan is on solid ground when he claims that "Pregnancy is unquestionably a condition requiring medical services."[187] Since childbirth and abortion both are procedures for termination of

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187 Beal, 475. See also Roe v. Norton, 380 F.Supp. 726, 729 (1974).

pregnancy,[188] either treatment can alleviate the condition. Although Medicaid does not specifically mention either treatments or conditions, his position is that the statute should be interpreted to deal with conditions and not procedures. Medicaid should be seen to cover conditions because "The Medicaid statutes leave the decision as to choice among pregnancy procedures exclusively with the doctor and his patient and make no provision whatever for intervention by the State in that decision."[189] He cites Section 1396(a)(19) of Title XIX which requires State plans to provide care in a manner maintaining "the best interests of the recipients."[190] Further, he quotes the Senate Finance Committee Report on the Medicaid bill as saying that the "physician is to be the key figure in determining utilization of health services."[191] From this evidence, Brennan concludes that "the very heart of the congressional scheme is that the physician and patient should have complete freedom to choose those medical procedures for a given condition which are best suited to the needs of the patient."[192] His position is summarized by the following:

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188 Beal, 475.

189 Beal, 475.

190 42 U.S.C. *1396a(a)(19).

191 Senate Report No. 404, 89th Congress, 1st Session, 46 (1965).

192 Beal, 475.

> In the face of Title XIX's emphasis upon the joint autonomy of the physician and his [sic] patient in the decision of how to treat the condition of pregnancy, it is beyond comprehension how treatment for therapeutic abortions and live births constitutes "necessary medical services" under Title XIX, but that for elective abortions does not. . . . If the State must pay the costs of therapeutic abortions and of live birth as constituting medically necessary responses to the condition of pregnancy, it must, under the command of Section 1396, also pay the costs of elective abortions; the procedures in each case constitute necessary medical treatment for the condition of pregnancy."[193]

Brennan, arguing that the intent of Congress in the Medicaid statutes requires focus on treatments, further supports his contention with the claim that original Supreme Court abortion decisions support his interpretation of the law. He quotes Roe v. Wade and Doe v. Bolton where those decisions clearly support doctor/patient autonomy. Wade held that the "attending physician, in consultation with his [sic] patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.[194] The Bolton Court ruled that:

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193 Beal, p. 476.

194 Wade, 163.

> 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. All these factors may relate to health. This allows the attending physician the room he [sic] needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[195]

By allowing a state to allocate resources so that one treatment is far more attractive than another, the majority allows a state to intervene in a doctor/patient decision.

The majority's logic strays from the principles set down in Wade and Bolton, while Brennan is more consistent with the prior cases. In Wade, the Court held that there is no distinction between elective and non-elective abortions in the first two trimesters. Furthermore, if a state can decide that a particular abortion is not fundable based on the reasons for it, the decision between doctor and patient is no longer given the privacy protection enunciated in Wade.

Footnote three of the majority opinion addresses its final paragraph to Justice Brennan's argument. The statement acknowledges Brennan's view that the choice of termination procedures lies solely with the doctor and patient. Nonetheless, they argue, Pennsylvania's law is consistent with this requirement, because "its regulations provide for the funding of abortions upon certification of

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195 Bolton, 192.

medical necessity, a determination that the physician is authorized to make on the basis of all relevant factors."[196] In footnote nine, the opinion continues: "The decision whether to fund the costs of abortion thus depends solely on the physician's determination of medical necessity."[197]

Brennan's refutation is quite complex. He points out that, while the doctor is able to determine medical necessity "on the basis of all relevant factors," Pennsylvania's definition of relevance is too narrow, thereby making it impossible to certify necessity in all cases.[198] Brennan points out that this strays from the Court's earlier position in Doe v. Bolton. The counsel's argument, according to Brennan, makes a woman's physical health the only consideration for the physician, while Bolton is concerned with the overall well-being of the woman.[199] Thus, while a physician may choose abortion, it is only medically necessary if the woman's health is in danger. Brennan believes that this distinction does not leave the choice of procedures solely with the physician and patient--the choice is only relevant when physical health is

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196 Beal, 470.

197 Beal, 472.

198 Beal, 476.

199 Beal, 476.

jeopardized.[200] Some women may not be able to prove pre facto that their pregnancy will be life threatening. Others will not be in jeopardy physically, but may suffer psychological threats to their well-being.

The majority opinion appears to strengthen its position with an argument that the State has an interest in promoting childbirth. Roe v. Wade[201] is cited as evidence for this point, and the Court goes on to note that Title XIX nowhere "suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth."[202]

The argument of the majority is problematic. Nowhere in Wade does the Court mention the encouragement of childbirth. It lists three possible reasons for a state interest in regulating abortion: desire to discourage illicit sexual activity, concern for the prior hazards of the abortion procedure, and protection of prenatal life. No mention of the term "childbirth" is discerned.[203] More importantly, the Wade Court is interested in the point at which the State interest becomes compelling enough to justify intervention. The Court stated that it was reasonable for a State to decide a point at which the

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200 Beal, 476.

201 Wade, 162.

202 Beal, 473.

203 Wade, 148-150.

interest was compelling, and that the interest increases as the mother reaches full term.[204] However, in Beal, the Court ignores the reasoning in Wade that the state interest is not compelling until the third trimester.[205] They assume that the State interest in the third trimester is implied in all stages of pregnancy. This finding allows States to implement their moral opposition to abortion under the guise of a "legitimate State interest."

It is evident that the majority's decision to define Medicaid as a law concerned with specific treatments and not conditions is weaker than Brennan's view that the statute leaves the decision of treatments to the patient and doctor. The majority's use of the word "procedure" is novel, since the statute does not use the word. Brennan notes the lack of clarity in the law, and attempts to determine the implied intent of Congress with the evidence which gives the choice of procedures to the patient and physician. The refutation of the majority, Brennan's comments notwithstanding, is concluded with the argument that Pennsylvania leaves the decision solely with the physician. This is an example of a clear misreading of the law. The majority concedes in the beginning of footnote three that the decision to abort must rest with the physician and patient, and then concludes in

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204 Wade, 159, 162-163.

205 Wade, 153, 164.

such a way as to remove the patient from the decision. Furthermore, the precedent cases which Brennan cites are unrefuted, and Bolton clearly states that the involvement of the physician is always to be for the benefit of the patient and never for her disadvantage.

The Court predicates its interpretation on the observation that Title XIX allows States to set their own standards that "are consistent with the objectives" of Title XIX, but they fail to quote the rest of the sentence that states what the objectives include. It has been shown that the third significant rhetorical move was the Beal majority's definition of Medicaid's objectives as allowing States to determine eligibility and be assisted in providing medical care. This view is incorrect. The majority does not quote from the statute when it asserts that this objective is "primary." Instead, the remainder of the sentence from the statute, which only Brennan quotes, states that objectives must "be provided in a manner consistent with simplicity of administration and the best interests of the recipients."[206] Applying these criteria to Medicaid gives additional support to Brennan's position. The easiest administrative decision over pregnancy terminations is to allow the patient to receive any treatment she desires. There would be no need for certification or review, since the patient's doctor would proceed with whichever treatment

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206 *1396a(a)(19).

the patient and physician have decided upon. Pennsylvania's certification procedure is clearly less "simple" than a process which automatically approves any doctor/patient decision. Brennan also points out that the "State cannot contend that it protects its fiscal interests in not funding elective abortions when it incurs far greater expense in paying for the more costly medical services performed in carrying pregnancies to term, and, after birth, paying the increased welfare bill incurred to support the mother and child."[207]

Considering the patient's best interests would also lead to a conclusion favoring funding of abortions. Chapter III has described the harms of compulsory pregnancy, including estimates of excess mortality due to the Beal decision. Brennan finds support for the claim that freely available abortions are in the best interests of the patient in the Wade decision. He points out that the Wade Court concluded that "elective abortions by competent licensed physicians are now 'relatively safe' and the risks to women undergoing abortions by such means 'appear to be as low as or lower than . . . for normal childbirth.'"[208] Brennan condemns the majority conclusions, saying that they "can only result as a practical matter in forcing penniless pregnant women to

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207 Beal, p. 477.

208 Beal, p. 477, quoting Wade, 149.

have children they would not have borne if the State had not weighted the scales to make their choice to have abortions substantially more onerous."[209] He believes that "the Court's construction makes a mockery of the congressional mandate that States provide 'care and services . . . in a manner consistent with . . . the best interests of the recipients.' We should respect the congressional plan by construing Section 1396 as requiring States to pay the costs of 'necessary medical services' rendered in performing elective abortions, chosen by physicians and their women patients who participate in Medicaid as the appropriate treatment for their pregnancies."[210]

The majority opinion in Beal cannot be justified solely on legal grounds. The decision is based on non-legal factors that are not warranted by the cited precedents or other evidence. In this case the Court abuses the controlling principles in Wade and Bolton under the guise of adhering to them. From a legal standpoint, the most relevant criticism of Beal is that the opinion does not adequately justify the reasons for the decision. While it appears to be a logical progression of thought, it is, in reality, an unsubtle violation of precedent disguised by the appearance of rationality. The majority does not respond to the arguments of the dissent and does not justify its own

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209 Beal, pp. 477-8.

210 Beal, p. 478.

conclusions satisfactorily. By not giving sound reasons, the majority opinion is highly inferior to the dissent of Brennan.

It is impossible to determine the extent to which public pressure contributed to the Beal decision. Because of its flaws, one must assume that the decision is not based solely on a strict reading of the law and application of consistent legal principles. Unfortunately, the underlying reasons for the Beal decision may never be known. What can be discerned is that the majority was willing to create novel definitions that allowed them to reach their conclusions; it is also clear that the Court's reliance upon these definitions makes the entire decision hinge on these rhetorical choices. Because of the tenuous link between the majority's definitions and the wording of the Medicaid statute, the Opinion of the Court is weaker than Brennan's dissent. It is impossible to predict future formulations of the law, but it seems that the Beal decision will either be overturned by a future Supreme Court or, on the contrary, used to justify further transformations of the law. In either case, the Beal decision will be memorable. And thousands of poor women may be forced to bear the burdens imposed by six men on the United States Supreme Court.

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