NOTES

Prohibition of Public Funding for Abortion Counseling: Government Violation of Women's Constitutional Right of Privacy

> "Those who do not have the financial resources have [a] constitutional right, but a right without the ability to use it is absolutely worthless."[1]

In 1973 the United States Supreme Court affirmed the right of a woman to decide whether to terminate her pregnancy.[2] This right to abortion arose from the constitutional right of privacy.[3] This Note will argue (1) that a woman's right to abortion includes the right to counseling on the decision and (2) that prohibitions on the use of public funds for abortion counseling are unconstitutional because they violate the woman's right of privacy.

The Court in *Roe v. Wade* addressed consultation for abortion when it stated that "the abortion decision . . . is . . . primarily . . . a medical decision, and basic responsibility for it must rest with the physician."[4] Similarly, in *Doe v. Bolton* the Court agreed that

> the medical judgment [and assistance] 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 [or she] needs to make his [or her] best medical judgment. And it is room that operates for the benefit . . . of the pregnant woman.[5]

Others have asserted that abortion counseling is medically necessary before and after an abortion.[6] Poor women and minor women have addi-

1. Senator Birch Bayh (D.-Ind.), June 29, 1977, *quoted in* THE ALAN GUTTMACHER INSTITUTE, ABORTIONS AND THE POOR: PRIVATE MORALITY, PUBLIC RESPONSIBILITY 9 (1979).
2. Roe v. Wade, 410 U.S. 113, 153 (1973).
3. *Id.*
4. *Id.* at 166.
5. Doe v. Bolton, 410 U.S. 179, 192 (1973).
6. B. SARVIS & H. RODMAN, THE ABORTION CONTROVERSY 55 (1973).

tional needs for abortion counseling. Part I of this Note will discuss the need for the constitutionally important abortion-related service of abortion counseling.

Part II will examine the constitutional right of personal privacy that was the basis for the Court's decision in *Roe* and will argue that *Roe* protects the right to abortion counseling. In *Roe* the Court found the right of privacy in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action.[7] In *Doe* Justice Douglas found the right to consultation basic to the right of privacy: "The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values."[8] He argued that abortion should be treated like any other medical procedure. Only with a compelling interest can the state impose controls over the physician-patient relationship in abortion cases. Otherwise, the state denies the woman her liberty—her right of privacy.[9]

Part III will examine the Court's holding in *Roe* that state interests must become compelling before they can limit the fundamental right of personal privacy. The right of personal privacy is not absolute "and must be considered against important state interests in regulation."[10] The Court in *Roe* weighed the state's interests in (1) the health of the woman and (2) potential life against the fundamental right to abortion. The Court allowed increasing state interference with a woman's abortion decision as the pregnancy progressed.[11]

Part III also will discuss asserted state interests that have allowed public funding restrictions to limit abortions and abortion-related services since *Roe*. For instance, the state interest in favoring childbirth over abortion has persuaded the Court to uphold restrictions on public funding for abortions.[12] Part III then will cite criticism of public funding restrictions on abortion and abortion-related services as infringing on the fundamental right defined in *Roe*[13] and as an impermissible exercise of congressional spending power that "compel[s] the *nonassertion* of abortion rights."[14] These criticisms also apply to restrictions on public funding of abortion counseling.

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7. *Roe*, 410 U.S. at 153.

8. *Doe*, 410 U.S. at 219-20 (Douglas, J., concurring).

9. *Id.* at 220.

10. *Roe*, 410 U.S. at 154.

11. *Id.* at 163.

12. *See* Maher v. Roe, 432 U.S. 464 (1977); *see also* Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983).

13. Note, *Constitutional Law—State Impediments to Abortion Funding*, 34 KANSAS L. REV. 387, 396-97 (1985).

14. Note, Harris v. McRae: *Cutting Back Abortion Rights*, 12 COLUM. HUM. RTS. L. REV. 113, 134 (1980) (emphasis added).

Part IV will argue that any state interest in abortion regulation cannot justify prohibiting the use of public funds for abortion counseling. Indeed, any state interest only supports the need for counseling. The state's interest in the health of the woman "grows in substantiality as the woman approaches term"[15] and becomes compelling "at approximately the end of the first trimester."[16] This important interest in the woman's health can only further support her constitutional need for counseling on her decision whether to have an abortion. Restricting public funding for abortion counseling is an unconstitutional burden on the indigent woman's right to decide.[17]

This Note will conclude that restricting public funding for abortion counseling is a governmental violation of a woman's constitutional right of personal privacy.

I. The Need for Abortion Counseling

Counseling is necessary to the health of the pregnant woman before and after an abortion. Indeed, one physician "considers abortion without counseling unethical and hopes that abortion without counseling will someday be considered malpractice."[18]

The United States Supreme Court in *Roe v. Wade* and *Doe v. Bolton* discussed abortion counseling in conjunction with the actual abortion, implying that consultation is tantamount to abortion itself. The Court emphasized the physical and psychological aspects of abortion that "the woman and her responsible physician *necessarily* will consider in consultation."[19] Harms to the woman with which the Court was concerned included

> [s]pecific and direct harm medically diagnosable even in early pregnancy . . . . Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress . . . associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.[20]

Abortion counseling can provide the pregnant woman with information and help her deal with her feelings "in a variety of areas: subsequent contraceptive use; alternatives to abortion; the reasons for having an abortion; the medical procedures of abortion; and the spiritual and

15. Roe v. Wade, 410 U.S. 113, 162-63 (1973).

16. *Id.* at 163.

17. Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989).

18. B. SARVIS & H. RODMAN, *supra* note 6, at 55.

19. *Roe*, 410 U.S. at 153 (emphasis added).

20. *Id.* at 153.

mental well-being of the woman."[21]

Justice Douglas, concurring in *Doe*, described abortion "as a medical problem."[22] He noted that the state does not control the physician-patient relationship in any other medical procedure.[23] The Court in *Doe* agreed that the decision whether to abort is a medical judgment that should be made in light of physical and psychological health factors for the benefit of the woman.[24]

The United States Supreme Court, in explicitly conjoining abortion itself with abortion counseling by emphasizing the medical aspects of abortion in conjunction with the physician-patient relationship, thus endorsed the need for abortion counseling. Linking the need for abortion counseling to the right to abortion creates a presumption of the need for abortion counseling for any pregnant woman contemplating an abortion. Some pregnant women have additional needs for counseling because of their age or economic status.

A minor woman may have a need for abortion counseling beyond the need to address the medical concerns for her physical and psychological health. A minor woman's parent(s) may not be her best advisers on family planning matters.[25] The effect of leaving the responsibility for abortion counseling to the parent(s) has been compared to the effect of leaving general education ("reading, writing, and arithmetic"[26]) to the parent(s): the minor's knowledge may not be advanced.[27]

Another potential problem for a minor woman seeking abortion counseling outside her home is that she may be unable to pay for reproductive health services.[28] Those most likely to have abortions are young, poor, black unmarried women.[29] If the woman has to ask her parents to pay, she loses confidentiality.[30]

A pregnant woman, regardless of her age, may lack the money to pay for an abortion or abortion-related services. This is not an insignificant problem. "[A] much larger proportion of poor women than of nonpoor women have unwanted pregnancies,"[31] both because poor women want fewer children and because poor women are more likely to

21. B. SARVIS & H. RODMAN, supra note 6, at 101-02.

22. Doe v. Bolton, 410 U.S. 179, 220 (1973) (Douglas, J., concurring).

23. *Id.* Further, the state chooses to fund other medical procedures. *See* Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980).

24. *Id.* at 192 (opinion of the Court).

25. H. RODMAN, S. LEWIS & S. GRIFFITH, THE SEXUAL RIGHTS OF ADOLESCENTS: COMPETENCE, VULNERABILITY, AND PARENTAL CONTROL 129 (1984).

26. *Id.* at 145.

27. *Id.*

28. *Id.* at 152.

29. N.Y. Times, Oct. 6, 1988, at A13, col. 5 (nat'l ed.).

30. H. RODMAN, S. LEWIS & S. GRIFFITH, *supra* note 25, at 152.

31. THE ALAN GUTTMACHER INSTITUTE, *supra* note 1, at 20.

experience contraceptive failure.[32]

The indigent pregnant woman contemplating an abortion faces the physical and psychological harms faced by all pregnant women considering abortion, and more:

> An unwanted child may be disruptive and destructive of the life of any woman, but the impact is felt most by those too poor to ameliorate those effects. If funds for an abortion are unavailable, a poor woman may feel that she is forced to obtain an illegal abortion that poses a serious threat to her health and even her life. . . . If she refuses to take this risk, and undergoes the pain and danger of state-financed pregnancy and childbirth, she may well give up all chance of escaping the cycle of poverty. Absent day-care facilities, she will be forced into full-time childcare for years to come; she will be unable to work so that her family can break out of the welfare system or the lowest income brackets. If she already has children, another infant to feed and clothe may well stretch [her] budget past the breaking point. All chance to control the direction of her own life will have been lost.[33]

The contemplation by a poor pregnant woman of such further harms supports an even greater need for abortion counseling for her than for a nonpoor woman.[34]

II. The Constitutional Right of Personal Privacy Includes the Right to Abortion Counseling

In addition to the need for abortion counseling established in Part I, women have a constitutional right to abortion counseling. This right derives from the same personal right of privacy that forms the basis for the right to abortion itself.

The United States Constitution does not explicitly mention a right of privacy,[35] but the United States Supreme Court "has never held that . . . the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name."[36] "[T]he 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights."[37] In *Roe v. Wade*, the Court held that the "right of privacy [is] founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[38]

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32. *Id.*

33. Beal v. Doe, 432 U.S. 438, 458-59 (1977) (Marshall, J., dissenting).

34. *See supra* note 20 and accompanying text.

35. Roe v. Wade, 410 U.S. 113, 152 (1973).

36. Griswold v. Connecticut, 381 U.S. 479, 486-87 n.1 (1965) (Goldberg, J., concurring).

37. *Roe*, 410 U.S. at 168 (Stewart, J., concurring).

38. *Id.* at 153. The right of personal privacy also has been found in the First, Fourth, Fifth, and Ninth Amendments and in the "penumbras of the Bill of Rights." *Id.* at 152.

The Fourteenth Amendment states, in part, "No State shall . . . deprive any person of . . . liberty . . . without due process of law . . . ."[39] The liberty guaranteed by the Fourteenth Amendment

> denotes [*inter alia*] not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire useful knowledge*, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men [and women].[40]

"[O]nly personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy."[41]

In *Roe v. Wade* the Court held that the right of personal privacy "encompass[es] a woman's decision whether or not to terminate her pregnancy."[42] The Court, in its "last major abortion ruling [before *Webster*],"[43] reaffirmed the constitutional right of personal privacy in the abortion decision:

> [T]he Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.[44]

The privacy "interest in independence in making certain kinds of important decisions,"[45] including an abortion decision, extends to a privacy interest in abortion counseling. "[T]he constitutionally protected abortion decision is one in which the physician is intimately involved."[46] And, "[t]he right of privacy has no more conspicuous place than in the physician-patient relationship . . . ."[47] Thus, a woman has a right to consultation with a physician about her abortion decision, and this right is included in the right of privacy.

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39. U.S. CONST. amend. XIV, § 1.

40. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (emphasis added) (overturning a statute restricting foreign language education).

41. *Roe*, 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

42. *Id.* at 153.

43. N.Y. Times, Jan. 10, 1989, at A1, col. 2 (nat'l ed.).

44. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986) (citations omitted).

45. Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

46. Singleton v. Wulff, 428 U.S. 106, 117 (1976) (opinion of Blackmun, J.) (discussing physician standing to raise a woman's rights).

47. Doe v. Bolton, 410 U.S. 179, 219 (1973) (Douglas, J., concurring).

Since *Roe v. Wade*, the Supreme Court has inextricably linked the implicit right of a woman to consult with a physician about her abortion decision with the right to abortion itself.[48] In *Doe v. Bolton* the Court explicitly sought to protect "[t]he woman's right to receive medical care in accordance with her physician's best judgment."[49] In *Colautti v. Franklin*[50] the Court endorsed *Roe*'s emphasis on "the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out."[51] In *Whalen v. Roe*[52] the Court noted that a patient has a right to receive medical care and, specifically, that a pregnant woman is entitled to rely on her doctor for advice in connection with her decision whether to have an abortion.[53] Most recently, the Eighth Circuit affirmed "that the full vindication of the woman's fundamental right necessarily requires that her physician [be allowed to make his or her best medical judgment]."[54]

A woman's right to consultation with her physician about her abortion decision unquestionably is founded in the fourteenth amendment right of privacy. Justice Douglas, concurring in *Doe*, cited with approval the right " 'to acquire useful knowledge' "[55] discussed in *Meyer v. Nebraska* as a component of liberty. Justice Douglas further stated, "The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values."[56] In *Singleton v. Wulff*[57] Justice Blackmun noted that "the *constitutionally protected* abortion decision is one in which the physician is intimately involved."[58] And the Eighth Circuit sought to protect "infringement of the woman's fourteenth amendment right to choose an abortion after receiving the medical information necessary to exercise the right knowningly and intelligently."[59]

A pregnant woman has a right to abortion counseling equal in constitutional magnitude to the right to abortion itself.

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48. *See supra* notes 19-20 and accompanying text.

49. *Doe*, 410 U.S. at 197.

50. 439 U.S. 379 (1979).

51. *Id.* at 387.

52. 429 U.S. 589 (1977).

53. *Id.* at 604-05 n.33.

54. Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1079 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989).

55. Doe v. Bolton, 410 U.S. 179, 214 (1973) (Douglas, J., concurring) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

56. *Id.* at 219-20.

57. 428 U.S. 106 (1976).

58. *Id.* at 117 (opinion of Blackmun, J.) (emphasis added).

59. *Webster*, 851 F.2d at 1079.

III. Restrictions on the Right to Abortion

A. Right of Privacy in *Roe v. Wade*

The right of personal privacy that includes the abortion decision is not absolute.[60] The right "must be considered against important state interests in regulation."[61] "[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[62]

The United States Supreme Court has imposed a strict standard on interference with the right of personal privacy. "Where certain 'fundamental rights' [like privacy] are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . ."[63] "At some point in pregnancy, [the state] interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[64]

In *Roe v. Wade* the Court identified the state interests in the abortion decision as (1) the state "interest in preserving and protecting the health of the pregnant woman,"[65] and (2) the state "interest in protecting the potentiality of human life."[66] "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' "[67]

The Court found the first state interest in the health of the pregnant woman compelling "at approximately the end of the first trimester."[68] State regulation of abortion to protect the health of the pregnant woman is not necessary before the end of the first trimester because during that period "mortality in abortion may be less than mortality in normal childbirth."[69] After the first trimester, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[70]

> Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospi-

60. Roe v. Wade, 410 U.S. 113, 154 (1973).
61. *Id.*
62. *Id.*
63. *Id.* at 155 (citations omitted).
64. *Id.* at 154.
65. *Id.* at 162.
66. *Id.*
67. *Id.* at 162-63.
68. *Id.* at 163.
69. *Id.*
70. *Id.*

tal status; as to the licensing of the facility; and the like.[71]

Prior to the end of the first trimester, the abortion decision is "free of interference by the State."[72] "[T]he attending physician, in *consultation* with his [or her] patient, is free to determine [whether] the patient's pregnancy should be terminated."[73]

The Court found the second state interest, that in protecting potential human life, compelling at viability.[74] "This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb."[75] From viability on, the state may proscribe abortion "except when it is necessary to preserve the life or health of the mother."[76] Thus, the state may increasingly restrict the right to abortion as the pregnancy progresses, so long as any restrictions are consistent with recognized state interests.[77]

B. Abortion Restrictions not Involving Funding

The compelling state interest recognized in *Roe v. Wade* as necessary to restrict the fundamental right to abortion has left the states with "few means of control over abortion" apart from funding.[78] *Planned Parenthood v. Danforth*[79] held unconstitutional spousal and parental consent requirements before abortion. Adhering to the *Roe* standard, the Court in *Danforth* said, "[S]ince the State cannot regulate or proscribe abortion during the first [trimester] . . . , the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during the same period."[80] As to parental consent, the Court similarly held, "Just as with the requirement of consent from the spouse . . . the State does not have the constitutional authority to give a third party [the parent] an absolute, and possibly arbitrary, veto over the decision of the physician and his [or her] patient to terminate the patient's pregnancy . . . ."[81]

Akron v. Akron Center for Reproductive Health[82] held unconstitutional a hospitalization requirement for second trimester abortions. The Court reaffirmed *Roe*'s holding that "a State's interest in health regulation becomes compelling at approximately the end of the first trimes-

71. *Id.*
72. *Id.*
73. *Id.* (emphasis added).
74. *Id.*
75. *Id.*
76. *Id.* at 163-64.
77. *Id.* at 165.
78. Note, *supra* note 13, at 397.
79. 428 U.S. 52 (1976).
80. *Id.* at 69.
81. *Id.* at 74.
82. 462 U.S. 416 (1983).

ter."[83] But, the Court continued, "[A] compelling state interest in health . . . is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest."[84] Since the hospitalization requirement "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure [, it] therefore unreasonably infringe[d] upon a woman's constitutional right to obtain an abortion."[85]

In *Planned Parenthood v. Danforth* the Court did allow a requirement that the woman give her written consent prior to an abortion.[86] The Court conceded that "*Roe* clearly establish[ed] that the State may not restrict the decision of the patient and her physician regarding abortion during the first [trimester] of pregnancy."[87] But, "[t]he decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences."[88] As the Court "could not say that a requirement imposed by the State that a prior written consent for any surgery would be unconstitutional,"[89] it found such a requirement before an abortion constitutional.[90]

C. Restrictions on Abortion Funding

In contrast to the other abortion cases, the Supreme Court abortion cases involving funding have allowed significant restrictions on abortions. In *Maher v. Roe*[91] the Court held that the Constitution does not require a state that pays for childbirth to pay for nontherapeutic abortions.[92] In *Harris v. McRae*[93] the Court held that denying public funding for medically necessary abortions is not unconstitutional.[94]

1. Maher v. Roe

In *Maher* the Court discussed the district court's reading of *Roe v. Wade* that the fundamental right to abortion required a compelling state interest to justify different treatment of abortion and childbirth.[95] The Court concluded that the regulation at issue did not impinge upon the

83. *Id.* at 434.
84. *Id.*
85. *Id.* at 438-39.
86. Planned Parenthood v. Danforth, 428 U.S. 52, 66-67 (1976).
87. *Id.* at 66.
88. *Id.* at 67.
89. *Id.*
90. *Id.*
91. 432 U.S. 464 (1977).
92. *Id.* at 465-66, 479.
93. 448 U.S. 297 (1980).
94. *Id.* at 326-27.
95. *Maher*, 432 U.S. at 471.

fundamental right defined in *Roe* because, though the regulation may have made childbirth a more attractive alternative, an indigent pregnant woman could still obtain an abortion through private services.[96] The Court saw its opinion in *Maher* as "no retreat from *Roe* or the cases applying it."[97] The Court held, "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."[98]

Justice Brennan, dissenting in *Maher*, disagreed with the majority's holding that the regulation did not impinge upon the fundamental right to abortion recognized in *Roe v. Wade*. He wrote:

> *Roe v. Wade* and cases following it hold that an area of privacy invulnerable to the State's intrusion surrounds the decision of a pregnant woman whether or not to carry her pregnancy to term. The [regulation at issue] clearly impinges upon that area of privacy by bringing financial pressures on indigent women that force them to bear children they would not otherwise have. That is an obvious impairment of the fundamental right established by *Roe v. Wade*.[99]

Justice Brennan noted that the Court had "repeatedly found that infringements of fundamental rights are not limited to outright denials of these rights."[100] "The fact that the [regulation at issue] may not operate as an absolute bar preventing all indigent women from having abortions is not critical. What is critical is that the State has inhibited their fundamental right to make that choice free from state interference."[101] Because the state demonstrated no compelling interest to justify interfering with a woman's choice, Justice Brennan found pregnant women's fundamental right " 'unduly' burdened."[102]

2. Harris v. McRae

In *Harris v. McRae*[103] the Supreme Court rejected the argument that denying public funding for medically necessary abortions affects the significant interest of a pregnant woman in protecting her health during pregnancy, which "lies at the core of the personal constitutional freedom recognized in *Wade*."[104] The Court did acknowledge that

> [b]ecause even the compelling interest of the State in protecting potential life after fetal viability was held to be insufficient to outweigh a woman's decision to protect her life or health, it could be

96. *Id.* at 474.
97. *Id.* at 475.
98. *Id.*
99. *Id.* at 484-85 (Brennan, J., dissenting).
100. *Id.* at 487.
101. *Id.* at 488.
102. *Id.* at 489 (citation omitted).
103. 448 U.S. 297 (1980).
104. *Id.* at 315.

> argued that the freedom of a woman to decide whether to terminate her pregnancy for health reasons does in fact lie at the core of the constitutional liberty identified in *Wade*.[105]

The Court decided, however, that even if a woman's freedom of choice to terminate her pregnancy for health reasons were at the core of *Roe*'s due process liberty, that freedom did not "carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[106] The Court reasoned as it had in *Maher*: The state may not interfere with an indigent woman's constitutional freedom of choice, but the state "need not remove [obstacles to a woman's exercise of her freedom of choice] not of its own creation."[107] The Court left to Congress the determination whether constitutionally protected freedom of choice warrants federal subsidization.[108]

Justice Brennan wrote a strong dissent in *Harris*. He argued that the Court had mischaracterized the nature of the fundamental right defined in *Roe* and misconceived the manner in which restricting funding for medically necessary abortions infringes that right.[109] Since the pregnant woman's right to choose whether to have an abortion must be free of state interference (at least through the first trimester), the state cannot exercise its power and influence to burden her constitutional right.[110]

Justice Brennan further argued that excluding medically necessary abortions from public funding coverage "cannot be justified as a cost-saving device":[111] "[T]he cost of an abortion is only a small fraction of the costs associated with childbirth."[112] By choosing to pay only for childbirth, however, the state "inject[s] coercive financial incentives . . . into a decision that is constitutionally guaranteed to be free from government intrusion [and] deprives the indigent woman of her freedom to choose abortion over maternity, thereby impinging on the due process liberty recognized in *Roe v. Wade*."[113]

Justice Brennan dismissed the Court's argument that the woman's indigency alone, not state action, interferes with her freedom of choice: The *combination* of the woman's poverty and the state's unequal funding of abortion and childbirth interferes with her constitutional right.[114] Since the Court had "never hesitated to invalidate any scheme of granting or withholding financial benefits that incidentally or intentionally

105. *Id.* at 316.
106. *Id.*
107. *Id.*
108. *Id.* at 318.
109. *Id.* at 329 (Brennan, J., dissenting).
110. *Id.* at 330.
111. *Id.* at 331.
112. *Id.* at 355 (Stevens, J., dissenting).
113. *Id.* at 333 (Brennan, J., dissenting).
114. *Id.*

burdens one manner of exercising a constitutionally protected choice,"[115] Justice Brennan found such interference with a fundamental right unconstitutional.[116]

D. Criticism of Restrictions on Abortion Funding

In addition to the forceful dissents in *Maher* and *Harris*, criticism of these cases has included commentary characterizing the decisions as infringing upon a woman's constitutional fundamental right of personal privacy to choose whether to have an abortion. Professor Laurence H. Tribe has addressed the argument that the government does not have an affirmative duty to meet an individual's constitutional rights.[117] He notes that most constitutional rights are (1) individual, (2) alienable, and (3) negative, that is, such rights (1) belong to individuals, (2) can be waived, and (3) "impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another's needs."[118] Funding the constitutional right of abortion would be an example of such an affirmative governmental duty. Professor Tribe notes, however, that some constitutional rights may entail affirmative state protection. Two examples of such rights are the sixth amendment guarantee of "Assistance of Counsel"[119] for criminal defense[120] and the thirteenth amendment[121] prohibition of slavery.[122] Indeed, Professor Tribe finds a "strong parallel between a woman's right not to remain pregnant and every person's inalienable right not to be enslaved."[123] Since the state can choose to fund abortions, its decision not to do so acts to alienate an indigent pregnant woman from her constitutional right.[124] "Such governmental choices . . . require women to sacrifice their liberty . . . ."[125]

Another commentator has argued that both the regulation at issue in *Maher* and the legislation at issue in *Harris* likely are unconstitutional because they cover first trimester abortions.[126] According to *Roe*, first trimester abortions should be free of any state interference.[127] The Court in *Maher* did not require a compelling state interest test because it saw

115. *Id.* at 334 (Brennan, J., dissenting).
116. *Id.* at 334-36.
117. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330 (1985).
118. *Id.*
119. U.S. CONST. amend. VI.
120. Tribe, *supra* note 117, at 334.
121. U.S. CONST. amend. XIII, § 1.
122. Tribe, *supra* note 117, at 335.
123. *Id.* at 337.
124. *Id.* at 336.
125. *Id.* at 337.
126. Note, *supra* note 13, at 406.
127. Roe v. Wade, 410 U.S. 113, 163 (1973).

the regulation at issue as merely favoring childbirth, not interfering with an indigent pregnant woman's right to choose whether to have an abortion.[128] The Court relied on its *Maher* reasoning in *Harris*.[129] This argument emphasizes Justice Brennan's point in his *Harris* dissent that the right to choose an abortion must be free of state interference, at least through the first trimester.[130] Given such an obvious reading and application of *Roe v. Wade*, criticisms of the holdings in *Maher* and *Harris* are apparent, at least for abortions in the first trimester, even without reaching Professor Tribe's affirmative duty thesis.[131] Apart from any showing of a compelling state interest, restrictions on public funding of abortions "*actively* discourage[] abortion."[132] Arguably, such an "affirmative 'obstacle' . . . impinge[s] upon the fundamental right recognized in *Roe v. Wade*."[133]

A critic of *Harris v. McRae* characterizes the opinion as "inconsistent with the substantive due process rationale articulated in *Roe v. Wade*,"[134] both as serving no compelling state interest "other than compelling the nonassertion of a constitutional right,"[135] and as violating the indigent pregnant woman's right of privacy by imposing financial pressures on her.[136] A state interest in efficiently designing a public health care program could not justify the legislation at issue in *Harris*, argues this writer, because the cost of an abortion is much less than the costs associated with childbirth.[137] The only state interest served by the regulation was to prevent indigent pregnant women from having abortions.[138] Such a barrier to abortion clearly violates *Roe v. Wade*.[139]

This critic also addresses whether an "indigent [pregnant] woman's claim to a public dollar [is] necessarily better and stronger than that of numerous other claimants on the treasury."[140] Not all forms of constitutionally protected behavior are entitled to the same amount of subsidization.[141] Nevertheless, when the government establishes a benefit program for pregnant women, and through that program makes abortion

128. *Id.* at 394.
129. *See supra* note 107 and accompanying text.
130. *See supra* note 110 and accompanying text.
131. *See supra* notes 117-125 and accompanying text.
132. Note, *supra* note 13, at 396 (emphasis in original).
133. *Id.* at 396-97 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).
134. Note, *supra* note 14, at 116.
135. *Id.* at 134.
136. *Id.* at 122.
137. *Id.* at 134-35. The legislation at issue in *Harris* did not restrict state funding of childbirth. *See* Harris v. McRae, 448 U.S. 297 (1980).
138. Note, *supra* note 14, at 135.
139. *Id.*
140. *Id.* at 120.
141. *Id.* at 123. "[The] government may not prohibit private education, but it may support its own public schools without thereby obligating itself to subsidize private schools as well." *Id.* at 122-23.

impossible for indigent pregnant women, it violates the constitutional right of personal privacy recognized in *Roe v. Wade*.[142]

E. Summary of Restrictions on the Right to Abortion

In the abortion cases addressing restrictions not related to funding, the United States Supreme Court has upheld as a permissible restriction on abortion only the requirement that the woman give her written consent prior to an abortion.[143] In the abortion funding cases, the Court has allowed significant restrictions on a woman's constitutional right,[144] but these restrictions have been strongly criticized as infringement of the fundamental right of personal privacy recognized in *Roe v. Wade* without the required showing of a compelling state interest.[145]

IV. No Justification Exists for Allowing Restrictions on Public Funding for Abortion Counseling

As discussed in Part II of this Note, the *Roe v. Wade* right to abortion includes the right to abortion counseling. As discussed in Part III, only a compelling state interest can restrict that right. As this Part will demonstrate, every state interest found in abortion cases argues *for counseling*. The criticisms of the Supreme Court decisions allowing restrictions on public funding for abortion itself therefore apply with even greater force to restrictions on public funding of abortion counseling.

The policy reason behind the written consent requirement[146] supports counseling. That reason, as the Court expressed, was a concern that the abortion decision be made "with full knowledge of its nature and consequences."[147] This reason argues equally for the state's interest that a woman receive counseling prior to an abortion.

An even more forceful argument for funding of abortion counseling arises from the *Roe v. Wade* trimester approach. Because first trimester

142. *Id.* at 130. Arguably, according to this analysis, if the state chose not to fund abortion *or* childbirth, it would not violate *Roe*. *Id.* at 125 (agreeing with Maher v. Roe, 432 U.S. 464 (1977) that because abortions that were not medically necessary were treated no differently than other nontherapeutic medical procedures, the regulation at issue was not unconstitutional, thus distinguishing *Maher* from Harris v. McRae, 448 U.S. 297 (1980), and criticizing the Court's use of its *Maher* reasoning in *Harris*). Professor Tribe argues further, though, that because abortion is a constitutional right requiring state funding for indigent pregnant women who choose to have an abortion, the state has an affirmative duty to fund such abortions. *See supra* note 124 and accompanying text.

143. *See supra* notes 86-90 and accompanying text.

144. *See supra* notes 91-98, 103-108 and accompanying text.

145. *See supra* notes 99-102, 109-142 and accompanying text.

146. *See supra* notes 86-90 and accompanying text.

147. Planned Parenthood v. Danforth, 428 U.S. 52, 67 (1976); *see also supra* text accompanying notes 86-90 (further explaining *Danforth*).

abortions are "free of interference by the State,"[148] and because, as discussed in Part II of this Note, the fundamental right to abortion includes a fundamental right to abortion counseling, the state simply cannot restrict abortion counseling in the first trimester.

After the first trimester, the state has a compelling interest in the pregnant woman's health.[149] This interest supports, a fortiori, the need for abortion counseling discussed in Part I. To "regulate the abortion procedure in ways that are *reasonably* related to maternal health"[150] can offer no justification for restricting abortion counseling. Any state interest, especially a compelling state interest in the pregnant woman's health, only supports abortion counseling.

The Court's decisions, like *Maher* and *Harris*, that the state may constitutionally restrict funding for an abortion itself do not support restrictions on public funding for abortion counseling as constitutional: "The Supreme Court has unequivocally stated that states cannot constitutionally impose . . . burdensome obstacles to what is at bottom a right to *decide* whether to terminate a pregnancy."[151] Finally, the criticisms of the Court's abortion funding decisions, arguing that the decisions actually are unconstitutional because they demonstrate no compelling state interest to justify restricting abortion, present even more forceful arguments against the constitutionality of prohibitions of public funding for abortion counseling. Prohibiting public funding for abortion counseling "is an unacceptable infringement of the woman's fourteenth amendment *right to choose* an abortion after receiving the medical information necessary to exercise the right knowingly and intelligently."[152]

The socially and medically necessary abortion-related service of abortion counseling, as discussed in Part I, is a fundamental constitutional right. As discussed in Part II, that right is grounded in the Fourteenth Amendment's personal right of privacy. As discussed in Part III, any restriction on the fundamental rights of abortion or abortion counseling must be justified by a compelling state interest in maternal health after the first trimester. As also discussed in Part III, the Supreme Court decisions allowing abortion funding restrictions have been criticized as not meeting *Roe*'s compelling state interest test. On the contrary, *any* state interest in maternal health argues only *for* abortion counseling. Viewing abortion counseling as the right of a woman to de-

148. Roe v. Wade, 410 U.S. 113, 163 (1973).

149. *Id.*

150. *Id.* at 164 (emphasis added). "The existence of a compelling state interest in health . . . is only the beginning of the inquiry. The state's regulation may be upheld only if it is *reasonably* designed to further that state interest." Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 434 (1983) (emphasis added).

151. Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1080 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989) (emphasis in original).

152. *Id.* at 1079 (emphasis added).

cide whether to terminate her pregnancy disallows any burden on this right. The criticisms of the abortion funding cases offer further support that restricting public funding of abortion counseling is governmental violation of a woman's constitutional right of privacy.

Conclusion

Janet Benshoof, director of Reproductive Freedom Project of the American Civil Liberties Union, has said, " '[The right to abortion] is the only constitutional right that the Government has ever asked to have taken away.' "[153] "For years, anti-abortion groups have chipped away at Roe v. Wade, working to cut off state financing of abortions for poor women . . . ."[154]

If *Roe v. Wade* were overturned, each state could restrict abortion as it chose.[155] The president of the Fund for the Feminist Majority, Eleanor Smeal, has predicted that " 'every state will become a civil war battleground' on the abortion issue if the Court overrules Roe v. Wade . . . ."[156] Janet Benshoof is confident, however, that "the Court will be very reluctant to tamper with so fundamental a right as privacy . . . ."[157]

Before the Court decided *Webster*, *The New York Times*, anticipating a Court ruling on the constitutionality of prohibiting public funding for abortion counseling, stated that "banning Federal funds to clinics that offer abortion counseling [would result in the suffering of] four million mostly poor women who rely on federally supported family planning clinics . . . ."[158] As this Note has demonstrated, the right to abortion counseling is constitutionally protected. No justification exists for restricting this right by governmental restriction of public funding for abortion counseling.

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153. N.Y. Times, Jan. 22, 1989, at 17, col. 2 (quoting Janet Benshoof).
154. *Id.*, Nov. 27, 1988, § 4 (The Week in Review), at 9, col. 2.
155. *Id.* at col. 1.
156. *Id.*, Jan. 10, 1989, at A9, col. 6 (nat'l ed.) (quoting Eleanor Smeal).
157. *Id.* (quoting Janet Benshoof).
158. Editorial, *id.*, Dec. 23, 1988, at A18, col. 1 (nat'l ed.).

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