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NEW YORK v. SULLIVAN*: SHHH. . . DON'T SAY THE "A" WORD! ANOTHER OUTCOME-ORIENTED ABORTION DECISION

Since the *Roe v. Wade*¹ decision in 1973, the Supreme Court has recognized a constitutionally protected privacy right to an abortion.² This right, however, is limited by the government's interests in the pregnant woman's health³ and the potential life of the fetus.⁴ Although many critics believe *Roe* should be reversed,⁵ the Supreme

* 889 F.2d 401 (2d Cir. 1989), cert. granted, 110 S. Ct. 2559 (1990).

1. 410 U.S. 113 (1973).

2. *Id.* at 153. In *Roe*, the Supreme Court examined the historical background of government regulation of and societal attitudes toward abortion. *Id.* at 129-52. After this lengthy discussion, the Court noted that it has recognized rights to personal privacy "perhaps as far back as *Union Pac. R. Co. v. Buttsford*, 141 U.S. 250, 251 (1891)." *Roe*, 410 U.S. at 152. The Court then stated that its prior decisions "make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." *Id.* (citation omitted).

Next, the Court noted that this right has been extended to include activities relating to procreation and the family. *Id.* at 152-53. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (state cannot intrude into matters so fundamentally affecting a person as the decision to bear or beget a child); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is a basic civil right of man); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (prohibiting the use of contraceptives unconstitutionally intrudes upon right to marital privacy); *Skinner v. Oklahoma*, 316 U.S. 535, 553-54 (1942) (the right to procreate is a basic liberty). Finally, the Court announced that this right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. Nevertheless, this right is not absolute. *Id.* The state has important and legitimate interests in the health of the pregnant woman and the potential life of the fetus. *Id.* at 162. These state interests in maternal health and the potential life of the fetus become greater throughout the pregnancy. *Id.* at 154.

3. The Court determined that at the end of the first trimester the woman's mortality rate during abortion may exceed the rate during childbirth, *Roe*, 410 U.S. at 153. Thus it was at that time that the state's interest in the health of the woman became compelling. *Id.* Therefore, after the first trimester, the state could regulate the abortion procedure so long as the regulation related to the protection of the woman's health. *Id.*

4. The state's interest in the potential life of the fetus was found to be compelling at the point of viability because the fetus then had the potential capability of meaningful life outside the womb. *Roe*, 410 U.S. at 153. The Court found that viability could occur at 24 weeks, and so after the second trimester the state could completely proscribe abortion, except when it is necessary to preserve the life or health of the woman. *Id.* at 163-64. Prior to the end of the first trimester, the physician, in consultation with the patient, was free to determine, without regulation by the state, whether to terminate the pregnancy of the patient. *Id.* at 163.

5. Many scholars have called for the reconsideration and reversal of *Roe v. Wade*. See generally Bopp, *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe v. Wade?*, 15 J. CONT. L. 131 (1989) (arguing that the *Roe* privacy analysis is moribund); Loewy, *Why Roe v. Wade Should be Overruled*, 67 N.C.L. REV. 939 (1989) (Professor Loewy believes that the *Roe* decision "is Wrong in

Court, with its recent decision in *Webster v. Reproductive Health Services*,⁶ refused to overrule the landmark decision.⁷ The Court did, however, state that the *Roe* holding "is unsound in principle and unworkable in practice."⁸ Nevertheless, *Roe* still stands as the

a way that few, if any, recent decisions of the Supreme Court can match" (emphasis in original)). Others have also criticized the opinion. See, e.g., Reagan, *Abortion and the Conscience of the Nation*, 30 CATH. LAW. 99 (1986) (Former President Reagan positing that "the real issue is whether to affirm and protect the sanctity of all human life, or to embrace a social ethic where some human lives are valued and others are not"). In his heart wrenching essay President Reagan did not mention the death penalty.

6. 109 S. Ct. 3040 (1989).

7. *Id.* at 3058. The Court stated that the facts in *Webster* differed from those in *Roe* and, therefore, "afford . . . no occasion to revisit the holding of *Roe* . . . and we leave it undisturbed, [but] to the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases." In dissent, Justice Blackmun stated that "this disclaimer is totally meaningless. The plurality opinion is filled with winks, and nods, and knowing glances to those who would do away with *Roe* explicitly. . . . The simple truth is that *Roe* would not survive the plurality's analysis, and that the plurality provides no substitute for *Roe*'s protective umbrella." *Id.* at 3067 (Blackmun, J., dissenting).

8. *Webster*, 109 S. Ct. at 3056. The plurality opinion stated that the Court "has not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.'" *Id.* (citation omitted). It then added: "[w]e think the *Roe* trimester framework falls into that category." *Id.* Nevertheless, the Court found that the facts in the case did not allow it to revisit the holding in *Roe*. *Id.* at 3058.

The *Roe* framework, however, was not based on trimesters. It was based on maternal health and viability standards that, in 1973, correlated with trimesters. *Roe*, 410 U.S. at 153. The trimester framework was used because it coincided with the compelling interests in maternal health and potential life. *Id.* at 153. The plurality in *Webster* further argued that the *Roe* framework has resulted in "a web of legal rules . . . resembling a code of regulations rather than a body of constitutional doctrine." *Webster*, 109 S. Ct. at 3057.

More threatening to the *Roe* decision was the plurality's questioning of "why the State's interest in protecting potential human life should come into existence only at the point of viability . . ." *Id.* If the Court decides that a state may have a compelling interest in the potential life throughout the pregnancy, then the Court must eventually decide whether the state's compelling interest in potential life outweighs the woman's right to privacy throughout the pregnancy.

In addressing the statute in *Webster* that required viability tests on any fetus of 20 weeks gestational age, the Court criticized "the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* as the cause of "subsequent cases . . . making constitutional law in this area a virtual Procrustean bed." 109 S. Ct. at 3056. The Court specifically disapproved of *Colautti v. Franklin*, 439 U.S. 379 (1979) and *City of Akron v. Akron Center For Reproductive Health*, 462 U.S. 416 (1983). In these cases the Court struck down regulations that were aimed at protecting the viable fetus because of the added costs they imposed on the woman seeking to obtain an abortion. The *Webster* Court later stated, in *dicta*, that governmental regulation of abortion that would have been prohibited under *Colautti* and *Akron*, may now be permissible. *Id.* at 3058. This would appear logical, for if the compelling interest in the potential life of the fetus outweighs the woman's privacy right, then any added cost to the pregnant woman or the government should be of secondary concern to that of the potential life.

Justice O'Connor, however, appeared to weigh the additional costs imposed by the viability tests against the putative benefits the government reasonably expects to result from the tests. *Webster*, 109 S. Ct. at 3063 (O'Connor, J., concurring). Since the additional costs of the viability tests required by the Missouri statute were margi-

benchmark to the privacy right to an abortion.⁹

In *New York v. Sullivan*,¹⁰ the Second Circuit Court of Appeals addressed the constitutionality of recent federal regulations¹¹ that prohibit federally funded health clinics¹² from engaging in non-di-

nal, and the tests were designed to determine viability, Justice O'Connor upheld the regulation requiring the viability testing of a fetus believed to be at least 20 weeks gestational age. *Id.* at 3062-63. She found the viability testing requirement to be in complete agreement with *Roe* because the test was intended to protect a viable fetus. *Id.* at 3063.

9. In *Webster*, Justice Scalia adamantly argued that the Court should have gone beyond the holding in the case, 109 S. Ct. at 3065 (Scalia, J., concurring), and determined whether *Roe v. Wade* should be used "as the benchmark, or something else." *Id.* at 3064. Scalia was highly critical of Justice O'Connor's decision to avoid confronting a constitutional question where there was no need to. *Id.* Scalia concluded that of the four courses the Court "might have chosen - to reaffirm *Roe*, to overrule it explicitly, to overrule it *sub silentio* or to avoid the question - the last is the least responsible." *Id.* at 3067.

10. 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 110 S. Ct. 2559 (1990).

11. Grants for Family Planning Services, 42 C.F.R. §§ 59.7-.10 (1988). The parts of the regulations most relevant to the discussion are:

59.8(a)(1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

59.8(a)(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the health of mother and unborn child until such time as the referral appointment is kept. . . .

59.8(a)(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

59.9 A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in the section. . . . The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant . . . include (a) The existence of separate accounting records; (b) The degree of separation from facilities . . . in which prohibited activities occur and the extent of such prohibited activities; (c) The existence of separate personnel; (d) The existence to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

59.10(a)(5) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following: (5) Developing or disseminating in any way materials . . . advocating abortion as a method of family planning.

42 C.F.R. §§ 59.8-.10 (1988).

12. The Department of Health and Human Services grants Title X funds pursuant to Title X of the Public Health Service Act. 42 U.S.C. § 300 to 300a-41 (1975). For a discussion of the funding, see *infra* note 95.

rective counseling¹³ and referral¹⁴ of women for abortion. The court addressed the issue of whether the conditions infringed upon a pregnant woman's privacy right to an abortion.¹⁵ The *Sullivan* court concluded that the regulations are a legitimate government decision to not fund the exercise of a woman's right to an abortion and, as such, did not infringe upon that right in any way.¹⁶ In reaching this conclusion, the court misinterpreted the *Webster* holding to be an approval of all government action short of criminalizing abortion.¹⁷ Moreover, in finding that the regulations did not violate any constitutional right, the *Sullivan* court failed to comprehend the nature of the privacy right affected by the regulations.¹⁸

In 1988, the Secretary of the Department of Health and Human Services¹⁹ ("HHS") promulgated regulations pursuant to the authority granted under Title X of the Public Health Service Act.²⁰ In en-

13. The prohibition on counseling includes non-directive counseling such as answering questions that a pregnant woman may have concerning the safety, availability, or consequences of an abortion. See Grants for Family Planning Services, 42 C.F.R. 59.8(b)(5) (1988).

14. The prohibition of referrals includes more than making appointments for the pregnant women to get counseling on abortion. The Title X personnel are not even allowed to note on the referral list which clinics provide abortion services. Grants for Family Planning Services, 42 C.F.R. 59.8 (1988). The regulations go so far as to prohibit personnel at Title X clinics from providing a woman with the yellow pages of the phonebook. See 53 Fed. Reg. 2922, 2942 (1988). For a discussion regarding the provision of the yellow pages see *infra* note 94.

15. *Sullivan*, 889 F.2d at 410-12. The court addressed two other issues. The first was whether the regulations were a permissible construction of section 1008 of Title X. *Id.* at 407-10. For a discussion of the statutory construction see *infra* note 38. See also *Massachusetts v. Secretary of HHS*, 899 F.2d 53, 57-64 (1st Cir. 1990). The second was whether the regulations infringe upon the free speech rights of health care providers or women. *Sullivan*, 889 F.2d at 72-75. The infringement upon the free speech rights is of course relevant to the discussion of the privacy right, since it is the speech restrictions that cause the intrusion into the privacy right.

16. *Sullivan*, 889 F.2d at 412, 414.

17. *Id.* at 411-12. The court stated that since the regulations did not create any "affirmative legal barriers" (emphasis added) to abortion access, *Webster* clearly refutes any claims that there was a violation of the woman's right to privacy. *Id.* Although an "affirmative legal barrier" is not defined in the *Sullivan* court's decision, nor in any Supreme Court precedent, it would appear to be analogous to a criminal statute. For further discussion of the affirmative legal barrier standard, see *infra* note 97 and accompanying text.

18. The *Sullivan* court's reliance on *Maier v. Roe*, 432 U.S. 464 (1972), is misplaced. For a discussion of the court's reliance on this case, see *infra* notes 51-52 and accompanying text. For a criticism of the court's reliance on *Maier*, see *infra* notes 66-71 and accompanying text.

19. The current Secretary of the Department of Health and Human Services (hereinafter "HHS"), Dr. Louis Sullivan, is the named defendant in the case. *Sullivan*, 889 F.2d at 401. Throughout this article the regulations will be referred to as "the *Sullivan* regulations," however, it was under the tenure of former Secretary of HHS, Otis R. Bowen, when the agency promulgated the regulations on February 2, 1988. See Grants for Family Planning Services, 42 C.F.R. §§ 59.7 - 59.10 (1988).

20. The Secretary of the Department of Health and Human Services has the power to distribute Title X grants "in accordance with such regulations as [he] may promulgate." 42 U.S.C. § 300a-4(a) (1975). Section 1008 specifies that none of those

acting Title X, Congress intended to provide family planning services to those in need.²¹ Section 1008 of Title X specifies, however, that "[n]one of the funds appropriated . . . shall be used in programs where abortion is a method of family planning."²² As a reinterpretation of this language,²³ the regulations specify that Title X funded clinics may not even engage in non-directive counseling for abortion, or refer a woman for abortion services.²⁴ Additionally, the regulations require that Title X projects be physically and financially separate from any organization that engages in these prohibited abortion-related activities.²⁵ Furthermore, the regulations define Title X funds to include both grants and matching funds.²⁶ Thus, the regulations also prohibit state and private funds from being spent on the proscribed activities in Title X clinics.²⁷ The regulations, however, do not prohibit personnel or pregnant women from giving or receiving information about abortion outside of Title X programs.²⁸

During 1987-88, HHS granted the State of New York \$6,000,000 of Title X funds for distribution.²⁹ Prior to the promulgation of the regulations, New York and the other plaintiffs engaged in activities

funds appropriated "shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (1970).

21. Family Planning Services and Population Research Act of 1970, Pub.L. No. 91-572, 1970 U.S. CODE CONG. & ADMIN. NEWS 5068. The stated purpose of the statute was "to improve and expand the availability of family planning services and information to all persons desiring such . . ." *Id.*

22. 42 U.S.C. § 300a-6 (1970).

23. All parties involved agree that these regulations "were intended as a departure from prior administrative practice." *Sullivan*, 889 F.2d at 404. Previous regulations prohibited the use of funds to subsidize or perform abortions. See 36 Fed. Reg. 18,465, 18,466 (1971). The previous regulations, however, allowed for "non-directive" counseling concerning abortion, so long as abortion was not advocated. *Sullivan*, 889 F.2d at 405 (citation omitted).

24. Grants for Family Planning Services, 42 C.F.R. § 59.8 (1988). For a discussion of the unconstitutionality of these same regulations, see Note, *The Title X Family Planning Gag Rule: Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401 (1989). See generally, Benshoof, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916 (1988); and *Sullivan*, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); See also Jipping, *Informed Consent to Abortion: A Refinement*, 38 CASE W. RES. 329 (1987-88).

25. Grants for Family Planning, 42 C.F.R. § 59.9 (1988).

26. Section 59.2 of the regulations defines "Title X program funds" to "include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds." Grants for Family Planning Services, 42 C.F.R. § 59.2 (1988) (emphasis added).

27. *Id.* The First Circuit found this to be important in distinguishing its opinion from the Second Circuit's. *Massachusetts v. Secretary of HHS*, 899 F.2d at 71-72.

28. Grants for Family Planning Services, 42 C.F.R. §§ 59.10 (b)(6),(7) (1988).

29. *New York v. Bowen*, 690 F. Supp. 1261, 1263 (S.D.N.Y. 1988), *aff'd mem.*, 863 F.2d 46 (2d Cir. 1988), *cert. denied sub nom.* 109 S. Ct. 3255 (1989), *reh'g denied*, 110 S. Ct. 27 (1989), *aff'd*, 889 F.2d 401 (2d Cir. 1989), *cert. granted*, 110 S. Ct. 2559 (1990).

which Title X previously permitted.³⁰ As a result of the new regulations, New York and its family planning clinics stood to lose Title X funds unless they complied with the new regulations. The plaintiffs brought suit in federal district court³¹ claiming that the regulations infringe upon the privacy rights of women.³² They also claimed that the regulations were an impermissible interpretation of the statute,³³ and that they infringed upon the free speech rights of the personnel at Title X clinics.³⁴ The plaintiffs sought a permanent injunction to enjoin the current Secretary of HHS, Dr. Louis Sullivan, from enforcing the regulations.³⁵

The Southern District Court of New York found that the regulations did not infringe upon any constitutional rights and, consequently, denied the injunction.³⁶ The court concluded that the condition on the receipt of federal funds did not violate the privacy rights of pregnant women who rely on Title X clinics because the regulations only applied to those clinics which chose to accept Title

30. Plaintiffs included the City of New York, the New York City Health & Hospital Corporation, two doctors on behalf of themselves individually, their patients and all those similarly situated, the Medical and Health Research Association of New York City, Inc., Planned Parenthood of Westchester/Rockland, and Health Services of Hudson County, New Jersey. *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989). Numerous *amicus curiae* briefs were also filed for both sides. *Id.* at 403-05.

31. The new regulations have been challenged in three different jurisdictions. *New York v. Bowen*, 690 F. Supp. at 1265 (S.D.N.Y. 1988), *aff'd mem.*, 863 F.2d 46 (2d Cir. 1988), *cert. denied, sub nom.* 109 S. Ct. 3255 (1989), *reh'g denied*, 110 S. Ct. 27 (1989), *aff'd*, 889 F.2d 401 (2d Cir. 1989) *petition for cert. filed*, No. 89-1392, (March 1, 1990); *Planned Parenthood Fed'n of Am. v. Bowen*, 687 F. Supp. 540 (D. Colo. 1988) (making permanent the preliminary injunction granted in *Planned Parenthood Fed'n v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988)); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988), *aff'd Massachusetts v. Secretary of HHS*, No. 88-1279 (1st Cir. March 19, 1990) (LEXIS, Genfed library, App. file).

32. *New York v. Bowen*, 690 F. Supp. at 1265.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1274. The district court's decision relied solely on the fact that the funding is conditional. *See* 690 F. Supp. at 1274. The court stated that "[t]he regulations do not prohibit or compel speech. They grant money to support one view and not another; but that is quite different from infringing on free speech." *Id.* The district court, however, had to stretch precedent in order to reach its conclusion. The court found *FCC v. League of Women Voters*, 468 U.S. 364 (1984) to support its decision. *Bowen*, 690 F. Supp. at 1273. In *League of Women Voters*, however, the Supreme Court struck down a provision of the Public Broadcasting Act of 1967 which forbade any noncommercial educational broadcasting station from receiving grants if the station engaged in editorializing. 468 U.S. at 381, 402. The *Bowen* court still managed to find language in the *League of Women Voters* decision that suited its needs for the proposition that "neither Congress nor any agency is entirely 'without power to regulate' content, timing, and character of speech." *Bowen*, 690 F. Supp. at 1273 (quoting *League of Women Voters*, 468 U.S. at 402). The statute in *League of Women Voters* did not prohibit or compel speech any more than the *Sullivan* regulations do. Nevertheless, the statute in *League of Women Voters* was held unconstitutional, and the *Bowen* court failed to distinguish its facts from that case.

X funds.³⁷

The Second Circuit Court of Appeals granted the plaintiffs' appeal and addressed the issue of whether the regulations unconstitutionally infringed upon a woman's privacy right to an abortion.³⁸ The appellate court affirmed the lower court's decision and denied an injunction against the Secretary of HHS.³⁹ The court found that the regulations did not create any "affirmative legal barriers"⁴⁰ to abortion access⁴¹ and, therefore, did not infringe upon a woman's constitutional right to an abortion.⁴²

The *Sullivan* court began its analysis by recognizing Supreme Court precedent⁴³ holding that government does not have a constitutional obligation to subsidize an activity merely because the activity is constitutionally protected.⁴⁴ In particular, the *Sullivan* court

37. *Bowen*, 690 F. Supp. at 1272-74.

38. *Sullivan*, 889 F.2d at 404. The *Sullivan* court also addressed whether the new regulations are a permissible construction of the statute and whether they infringe upon the free speech rights of personnel at Title X clinics. *Id.* at 407-10. The court found that the regulations "embody a construction of the statute that legitimately effectuates Congressional intent." *Id.* at 407. In its discussion of the statutory construction, the court examined the legislative history and subsequent refunding of Title X, and concluded that "the language and history of Title X are fully consistent with the regulations challenged. . . . Even if less than customary deference is accorded the Secretary in light of prior administrative construction, the regulations before us must be upheld." *Id.* at 407-09.

The plaintiffs also challenged the program integrity regulations (42 C.F.R. § 59.9 (1988)), as frustrating the intent of Congress. The plaintiffs argued that by mandating separate facilities, personnel, and records, the regulations frustrated the intent that "the legislation [should not] interfere with or limit programs conducted in accordance with state or local laws and regulations which are supported by funds other than those authorized under this legislation." CONF. REP. No. 1667, 91st Cong., 2d Sess. 6, reprinted in U.S. CODE CONG. & ADMIN NEWS 5082. The court rejected this argument on the premise that if this argument were applicable, then "non-federal grantors [could] override specific restrictions embodied in federal legislation." *Sullivan*, 889 F.2d at 410. This reasoning is circular. The non-federal grantors would not need to override HHS regulations if the Secretary did not promulgate such restrictions attempting to interfere with the State funds in the first place.

39. *Sullivan*, 889 F.2d at 414.

40. For a discussion of the "affirmative legal barrier" standard, see *infra* note 97.

41. *Sullivan*, 889 F.2d at 411.

42. *Id.* at 411-12.

43. *Harris v. McRae*, 449 U.S. 297 (1980); *Cammarano v. United States*, 358 U.S. 498 (1959) (Douglas, J., concurring).

44. *Sullivan*, 889 F.2d at 410 (citing *Harris v. McRae*, 448 U.S. at 317-18 (1980) and *Cammarano*, 358 U.S. at 515 (1958)); See generally Hirt, *Why the Government is not Required to Subsidize Abortion Counseling and Referral*, 101 HARV. L. REV. 1895 (1988) (the holdings in *Maher* and *Harris* "should insulate from extensive judicial scrutiny decisions concerning the government's funding of activities that facilitate the abortion decision"); but cf. Kreimer, *Allocational Sanctions: The Problems of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) (increased government activity in the economy, education, and welfare provide opportunities for governmental intrusion through the allocation of benefits, and should therefore be examined more closely).

noted the Supreme Court's holding in *Maier v. Roe*,⁴⁵ that government may choose to encourage childbirth over abortion and implement that choice through the funding of medical services.⁴⁶ Next, the *Sullivan* court looked to the *Webster* Court's reaffirmation of prior holdings⁴⁷ that governmental funding decisions concerning abortion are constitutional so long as they do not place any "governmental obstacle" in the path of a woman who chooses to terminate her pregnancy.⁴⁸ The *Sullivan* court reasoned that the prohibition on the performance of abortions in *Webster*, which extended to all public facilities, was "substantially greater in impact" than the *Sullivan* regulations.⁴⁹ The court rejected the contention that prior Supreme Court precedent⁵⁰ which struck down governmental attempts to regulate the flow of information from doctors to patients was applicable to the *Sullivan* regulations.⁵¹ The *Sullivan* court distinguished the previous cases because they involved laws that were enforced regardless of whether public funds were being used,⁵² whereas the *Sullivan* regulations apply only to clinics that accept Title X funds.⁵³ Consequently, the *Sullivan* court concluded that since the regulations "create no 'affirmative legal barriers' to abortion access, and the impact of the regulations was not as great as that in *Webster*, the regulations must be upheld."⁵⁴

The *Sullivan* court's inability to grasp the nature of the woman's privacy right at issue led it to the wrong conclusion. The regulations are an obvious attempt to discourage women from choosing abortion by distorting the physician-patient relationship. First, in addressing the woman's privacy right, the court failed to discuss

45. 432 U.S. 464 (1977).

46. *Sullivan*, 889 F.2d at 410 (citing *Maier*, 432 U.S. at 474).

47. The *Webster* Court reaffirmed the holdings in *Maier* and *Harris v. McRae*, 448 U.S. 297 (1980). See *Webster v. Reproductive Health Services*, 109 S. Ct. at 3051-52.

48. *Sullivan*, 889 F.2d at 411.

49. *Id.* In *Webster*, the statute provided that "[i]t shall be unlawful for any public employee within the scope of his employment to perform or assist an abortion, not necessary to save the life of the mother . . ." MO. ANN. STAT. § 188.210 (Vernon 1986). Another section made it "unlawful for any public facility to be used for the purpose of performing or assisting an abortion not necessary to save the life of the mother . . ." *Id.* § 188.215.

50. In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), the Supreme Court struck down state laws which mandated that certain information designed to discourage abortion be given to the woman before she consent to an abortion. For a discussion of these cases, see *infra* notes 72-78 and accompanying text.

51. *Sullivan*, 889 F.2d at 413.

52. In both *Akron* and *Thornburgh*, the statutes were applicable to all physicians and counselors throughout the jurisdiction without regard to whether they were publicly funded. *Akron*, 462 U.S. at 442, and *Thornburgh*, 476 U.S. at 759-60.

53. *Sullivan*, 889 F.2d at 413.

54. *Id.* at 411-12.

whether the regulations infringe upon the woman's right to decide, in the absence of government intrusion, whether to have an abortion.⁵⁵ Contrary to prior Supreme Court precedent prohibiting such government action,⁵⁶ the regulations unconstitutionally wedge the government's message into the physician-patient dialogue and place an impermissible "straightjacket on the physician's discretion."⁵⁷ Furthermore, the government may not condition the receipt of Title X services on the woman giving up her right to privacy in the discussion with her physician.⁵⁸ By misleading the woman and causing her delays, the regulations result in a governmental obstacle to the

55. In the court's discussion of the woman's privacy right, it failed to mention the right to make the decision in the absence of government coercion. *See id.* at 410-12. The court spoke of the regulations' effect on the woman as if she had already decided to have an abortion. *See id.* at 411 (it "places no governmental obstacle in the path of a woman *who chooses* to terminate her pregnancy" (emphasis added) (citation omitted)).

56. *See generally* *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

57. The government may not compel the physician to provide information to the woman because the decision is the woman's to be made in consultation with the physician and his discretion is therefore necessary. *Thornburgh*, 476 U.S. at 762 (citing *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 67 (1976)). *See also Akron*, 462 U.S. at 442-44 (it is the responsibility of the physician to decide what information should be given to the woman). *But cf.*, *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 65 (1976) (the court can mandate that informed consent be freely given, in the absence of coercion); *Planned Parenthood v. Fitzpatrick*, 401 F.Supp. 554, 587-88 (D.D. Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (upholding statute requiring the physician to give the woman certain information but still allowing physician to provide whatever other information he deemed necessary). Thomas Jipping argues that *Danforth* and *Fitzpatrick* conflict with *Akron* and *Thornburgh*. Jipping, *supra* note 24, at 347-48.

58. *Sullivan*, 889 F.2d at 417 (Kearse, J., dissenting) (citing *Akron*, 462 U.S. at 429-30). The regulations also place unconstitutional restrictions on the free speech rights of the personnel at Title X clinics. *See Massachusetts v. Secretary of HHS*, 899 F.2d 53, 72-75 (1st Cir. 1990). In finding that there was no free speech violation, the *Sullivan* court misread *Regan v. Taxpayers With Representation*, 461 U.S. 540 (1983). *Sullivan*, 889 F.2d at 416 (Kearse, J., dissenting). Although the Supreme Court in *Taxpayers With Representation* stated that a refusal to subsidize the exercise of a fundamental right does not infringe upon that right, it also stated that the government may not manipulate subsidy programs in order to suppress ideas it considers undesirable. *Taxpayers With Representation*, 461 U.S. at 548. The *Sullivan* regulations' mandate of silence concerning the discussion of abortion is a perfect example of a manipulation of a government subsidy program in order to suppress ideas the government does not like. This is obvious on the face of the regulations. If the physician determines that the woman is pregnant, he must refer her for prenatal care. *Grants for Family Planning Services*, 42 C.F.R. § 59.8 (a)(3) (1988). Contrarily, he cannot suggest, mention, or even answer questions about abortion. 42 C.F.R. § 59.8 (1988).

Furthermore, HHS' attempt to escape strict scrutiny by exorcising all speech concerning abortion from the Title X clinic is unsuccessful. In *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), the Supreme Court stated that "First Amendment hostility to content-based regulations extends . . . also to prohibition of public discussion of an entire topic." *Id.* at 537. The regulations are not only content-based, they are also viewpoint-based. *See Sullivan*, 889 F.2d at 416 (Kearse, J., dissenting) (it is plain from the face of the regulations).

exercise of her constitutionally protected privacy right to an abortion.⁵⁹ Therefore, because there is no compelling reason to forbid discussion of this constitutionally protected right, and the regulations could be more narrowly tailored, the regulations are unconstitutional.

First, in examining the privacy right to an abortion, the court failed to distinguish between government action that may affect a woman's decision⁶⁰ and government action that affects a woman's decision-making process.⁶¹ If the government offers money incentives to a woman to encourage her to choose childbirth, the government action may affect her decision whether to have an abortion.⁶² On the other hand, if the government prohibits or compels the physician to provide certain information, the government is intruding upon the woman's decision-making process.⁶³ The latter example is precisely what the *Sullivan* regulations do.⁶⁴ The government is damming the free flow of information that is critical to the woman's decision.⁶⁵ What is at stake is the integrity of the decision-making process.

The *Sullivan* court, in relying on *Maher v. Roe*,⁶⁶ glossed over this distinction. In *Maher*, the Supreme Court addressed whether a woman's constitutional right to choose to have an abortion was un-

59. For a discussion of how the woman is left in a worse position, see *infra* notes 95-96 and accompanying text.

60. In *Maher v. Roe*, the state chose to provide Medicaid for medical services relating to childbirth but not for services relating to the provision of abortion. 432 U.S. at 466. The Supreme Court stated that "[t]he State may have made childbirth a more attractive alternative, thereby *influencing* the woman's decision, but it has imposed no restriction on access to abortion that was not already there." *Id.* at 474 (emphasis added). Nothing in *Maher* regulated the discussion between physician and patient, and therefore, although the government action may have affected the woman's ultimate decision, it was not an attempt to regulate the woman's decision-making process. Thus, analogy between *Maher* and *Sullivan* should be limited if applied at all.

61. "The constitutionally protected interest 'in making certain kinds of important decisions' free from government compulsion . . . protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher*, 432 U.S. at 473-74 (citing *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).

62. *Maher*, 432 U.S. at 474. The Supreme Court argued that "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . ." See *infra* note 82 for further discussion of justifying government spending on the fact that the potential recipient is no worse off than if the government had not offered the benefit.

63. See *infra* notes 72-78 and accompanying text for a discussion of *Thornburgh* and *Akron* and their applicability to the *Sullivan* regulations.

64. Unlike the statute in *Maher*, the *Sullivan* regulations control what the personnel at Title X clinics can and cannot say. See *Grants For Family Planning Services*, 42 C.F.R. §§ 59.7-.10 (1988).

65. *Sullivan*, 889 F.2d at 417 (Kearse, J., dissenting).

66. 432 U.S. 464 (1977).

duly burdened by the denial of Medicaid⁶⁷ payments needed to exercise that right.⁶⁸ By providing Medicaid for pregnant women who chose to have their child, while not providing the funds for those who chose to have an abortion, the government was effectively offering an incentive to the woman to choose childbirth.⁶⁹ The Supreme Court held that this government action did not intrude upon a woman's right to decide; it only offered the woman a monetary inducement to choose childbirth.⁷⁰ The *Sullivan* regulations, on the other hand, intrude upon the physician-patient relationship by restricting the information that the physician can communicate to the woman.⁷¹ By restricting the free flow of information between physician and patient, the government-sponsored physician discourages the woman from considering abortion as a viable alternative. This misinformation and intrusion into the physician-patient relationship distinguishes *Sullivan* from *Maher*. Therefore, the court's reliance on *Maher* was based on a misunderstanding of the nature of the government's acts.

Rather than relying on *Maher*, the *Sullivan* court should have relied on other Supreme Court decisions striking down governmental attempts to influence the woman's decision by intruding upon the physician-patient relationship.⁷² For example, in *Thornburgh v. American College of Obstetricians and Gynecologists*,⁷³ the Court found unconstitutional a requirement that the attending physician make certain specific statements⁷⁴ to the patient to insure that the consent for the abortion was truly informed.⁷⁵ The *Thornburgh*

67. Connecticut limited state Medicaid benefits for first trimester abortions to those that were "medically necessary." *Id.* at 466.

68. *Id.* at 473 (citing *Bellotti v. Baird*, 428 U.S. 132, 147 (1976)).

69. *Maher*, 432 U.S. at 478-79.

70. *Id.*

71. The *Sullivan* regulations specifically mandate that the Title X personnel tell the pregnant woman "that the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion . . . [and] that the project can help her to obtain prenatal care. . . ." Grants for Family Planning Services, 42 C.F.R. 59.8(b)(5) (1988).

72. See generally *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

73. 476 U.S. 747 (1986).

74. *Id.* at 760. In *Thornburgh*, the physician had to tell the woman, at least 24 hours before her consent could be given, the following: a) the name of the physician to perform the abortion, b) the fact that detrimental physical and psychological effects, not accurately foreseeable, may occur, c) the particular medical risks associated with the particular abortion procedure to be employed, d) the probable gestational age, e) the medical risks associated with carrying her child to term, f) the "fact that medical assistance may be available for prenatal care, childbirth, and neonatal care," and g) the "fact that the father is liable to assist" in the child's support. *Id.* at 760-61 (citation omitted).

75. The informed consent doctrine requires that the physician provide the patient with such information as the reasonable patient would consider material to the

Court struck down the regulations as attempts to persuade the woman to withhold her consent rather than to inform her.⁷⁶ It stated that the information requirements were "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician."⁷⁷ By prohibiting all discussion of abortion, the *Sullivan* regulations attempt to do the same thing in a more subtle,⁷⁸ yet more pervasive, manner.

The *Sullivan* court chose not to apply the reasoning in *Thornburgh* because that case involved regulations applicable to all physicians regardless of their public or private status, whereas the Title X regulations apply only to those clinics which accept Title X funds.⁷⁹ This, however, should not end the analysis. The court should have addressed whether the government can condition the woman's receipt of Title X counseling on her giving up her constitutionally protected right to decide, in the absence of government intrusion, whether to have an abortion. Although the doctrine of unconstitutional conditions⁸⁰ is not clearly established in cases involving first

decision whether to undergo the medical treatment. *Logan v. Greenwich Hosp. Ass'n*, 465 A.2d 294, 300 (Conn. 1983). When applying the doctrine, some courts have focused on what the reasonable physician would provide the patient with, although the trend is to focus on the reasonable patient. See Jipping, *supra* note 24, at 344-47, 366 (arguing that *Thornburgh* and *Akron* were decided incorrectly). See also, e.g., *Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir. 1972) (disclosure requires due regard for the patient's informational needs); *Cobbs v. Grant*, 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 514, 502 P.2d 1, 10 (Cal. 1972) (physician's obligation includes duty to disclose reasonable choices available); *Wilkinson v. Vesey*, 110 R.I. 606, 616, 295 A.2d 676, 687 (1972) (patient's right to make his decision in light of his individual value judgment is "the very essence of [the] freedom of choice").

Informed consent to prenatal care should require the physician to inform the woman about abortion if she inquires. This would put the focus on the reasonable patient, not the reasonable physician or reasonable government. In examining the physician's responsibility, the government "may define [it] to include verification that adequate counseling has been provided and that the woman's consent is informed." *Akron*, 462 U.S. at 449.

76. *Thornburgh*, 476 U.S. at 760. The Court stated that, "[a] requirement that the woman give what is truly a voluntary and informed consent, as a general proposition is, of course, proper and is surely not unconstitutional." *Id.*

77. *Id.* at 762.

78. The regulations' attempt is more subtle in that the woman may be less aware of their presence than the requirements in *Thornburgh*. At least the requirements in *Thornburgh* were ostensibly to inform the woman. Here, the government freely admits the motive behind the regulations is to encourage childbirth over abortion.

79. *Sullivan*, 889 F.2d at 413. That the court failed to apprehend the nature of the issues is evidenced in its discussion of *Thornburgh* and *Akron*. Justice Winter discussed these two cases in the court's analysis of whether there was an unconstitutional infringement upon free speech rights and stated that the dissent relied on these two cases. *Id.* at 413. Although it is correct that the dissent relied on these cases, the dissent mentioned these cases only in its discussion of the woman's privacy right. *Id.* at 417 (Kearse, J., dissenting).

80. The doctrine of unconstitutional conditions limits the power of Congress to make spending decisions. The limitation is currently restricted by a four-part test

amendment rights,⁸¹ the Supreme Court has held in the abortion context that the government action is constitutional so long as it does not leave the woman worse off than if the government had never provided prenatal health care.⁸² This is consistent with the

enunciated in *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). First, the spending must be in pursuit of "the general welfare." Second, the condition must be unambiguous. Third, the condition must be related to the federal interest. Fourth, the condition itself must not be unconstitutional. *Id.* at 207-08.

The *Dole* Court specifically stated that the fourth part is not a "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." *Id.* at 210. In upholding the grant of federal highway funds on the condition that states raise their drinking age to 21, the Court noted that "the State's action in so doing would not violate the constitutional rights of anyone." *Id.* at 211 (emphasis added). Therefore, the Constitution did not prohibit Congress from placing that condition on the receipt of highway funds. *Id.*

One commentator has argued that the *Sullivan* regulations violate all four parts of the test. See Note, *supra* note 25, at 413-15. The violation of the fourth part is the most obvious and detrimental. As this article argues, the conditional grant of Title X funds violates both the rights of the pregnant woman and the rights of personnel at Title X clinics.

In examining unconstitutional conditions, the Court has looked at the objective of the governmental action, *Washington v. Davis*, 426 U.S. 229, 238-48 (1976), and the impact of the condition. *Speiser v. Randall*, 357 U.S. 513 (1958); *Sherbert v. Verner*, 374 U.S. 398 (1963). For a discussion of these cases in the context of unconstitutional conditions, see Kreimer, *supra* note 47. See generally Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935) (what the state can deny absolutely it should be able to offer conditionally); O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CALIF. L. REV. 443 (1966) (in examining conditions on government benefits, the welfare recipient should be treated differently from the foreign corporation); Rosenthal, *Conditional Spending and The Constitution*, 39 STAN. L. REV. 1103 (1987) (arguing that Congress may not achieve indirectly through conditional spending what it may not constitutionally achieve directly).

81. See *Sullivan*, *supra* note 24, at 1416-17 (the doctrine's inconsistencies have caused confusion and opposite conclusions on identical issues).

82. *Maheer v. Roe*, 432 U.S. 464, 474 (1977). In *Maheer*, the Court stated that the "indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth." *Maheer v. Roe*, 432 U.S. 464, 478-79 (1977). This reasoning is analogous to the "greater and lesser" doctrine. The "greater and lesser" doctrine justifies placing conditions on the receipt of government benefits with the premise that if the government can withhold a benefit absolutely, then it can place a condition on the receipt of that benefit without leaving the potential recipient in a worse position. See Kreimer, *supra* note 44, at 1306. See also *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("if the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way"); *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897) ("the right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser"). Professor Kreimer explained: "[i]f the government may deny the claimant at will, the claimant appears no worse off when the government exercises that denial because of the claimant's failure to comply with a condition attached to the entitlement." Kreimer, *supra* note 47, at 1306. Kreimer goes on to disagree with the logical reasoning and the application of this theory. See *id.* at 1310-14.

Nevertheless, in *Webster v. Reproductive Health Services*, the Supreme Court seemed to follow the logic of the "greater and lesser" doctrine. The plurality stated that the state's refusal to allow the use of public facilities and personnel for the performance of abortions left the pregnant woman "with the same choices as if the State had chosen not to operate any public hospitals at all." 109 S. Ct. at 3052 (1989).

holding that government action is unconstitutional if it "unduly burdens" the woman in the exercise of her right to privacy.⁸³ Unlike most unconstitutional conditions cases, however, most women using Title X clinics cannot make a knowing election to give up their right since they will not know that the Title X clinic plans to misinform them.⁸⁴ Nevertheless, even those women who are aware of the regulations will be worse off than if no Title X funding existed.⁸⁵

Those women who are unaware of the nature of Title X clinics will be misled as to their options.⁸⁶ This certainly leaves them worse off than if the government had never chosen to offer family planning services.⁸⁷ Instead of having a certainty of receiving complete information in the absence of Title X, the woman can now receive complete information only if she happens to walk into a non-Title X clinic. The referral list which must be designed to lead the woman away from providers of abortion information will cause the woman delays in her search for complete health care. Those that know the nature of the Title X clinic are also worse off because the physician's

Unlike the plurality opinion, Justice O'Connor did not apply the "greater and lesser" doctrine; perhaps because she has been more hesitant in finding conditions on the receipt of government conditions to be constitutional. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 215 (1987) (O'Connor, J., dissenting) (allowing federal government to condition receipt of highway funds on state raising its drinking age to 21 "could effectively [allow Congress to] regulate almost any area of a State's social, political, or economic life"); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (arguing that the choice between submitting to the enlistment of state agencies to work for the federal government or abandoning the state's right to regulate utilities is an absurdity); *but see cf., South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (since state can force DUI suspect to take blood alcohol test, it can therefore give option of refusing the test and taking the penalty). The first two cases involved federal governmental acts potentially infringing upon the states' rights, whereas the *Neville* case involved the state potentially infringing upon citizens rights.

83. Although the *Webster* Court spoke only of "governmental obstacles," the standard has also been worded as a prohibition on government action that "unduly burdens" the woman's right. *See Maher v. Roe*, 432 U.S. 464, 473 (1977) ("the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy"); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (the government action "is not unconstitutional unless it unduly burdens the right to seek an abortion").

84. *See FCC v. League of Women Voters*, 468 U.S. 364 (1984) (broadcasting station could choose to continue forgoing its right to editorialize and receive government funds, or it could give up the funds and exercise its constitutional rights); *South Dakota v. Dole*, 483 U.S. 203 (1987) (state could continue to exercise its right to have a drinking age of 19, or it could give up that right and receive federal highway funds).

85. For a discussion of how the regulations leave the woman worse off, see *infra*, notes 95-96.

86. *See Sullivan*, 889 F.2d at 417 (Kearse, J., dissenting) (a woman cannot make an informed decision if she cannot obtain information as to one of her options).

87. *See Note, supra* note 24, at 424 (the government has excised one option from the range of choices). Even if the woman eventually finds the necessary information she needs to make a decision, should she choose to have an abortion, she will be at a greater risk of injury. For a discussion of the effect of the time concerns in obtaining an abortion and the potentially adverse health effects as the pregnancy continues, see *infra* note 96.

refusal to recognize abortion as an option will only serve to confuse and punish them, as well as heighten their anxiety.⁸⁸

The regulations also wedge the government's message discouraging abortion into the privacy of the physician-patient relationship by mandating the advocacy of prenatal care⁸⁹ and childbirth, and prohibiting the discussion of abortion. Pregnant women who seek counseling and advice submit themselves to the government-funded clinic with the expectation of receiving complete information from a trusted physician.⁹⁰ Instead, the physician must give the women incomplete and, therefore, misleading information. The physician is also prohibited from telling women where they can obtain the information necessary to make an informed decision.⁹¹ If a woman asks her physician about abortion, the physician must inform her that abortion is not recognized as a method of prenatal care.⁹² The physician can give only a referral list which must be weighed in favor of clinics which do not provide abortions.⁹³ The Title X personnel may not even refer the women to the yellow pages in the phonebook.⁹⁴

88. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 762 (1986) (holding that a mandated description of fetal characteristics "may serve only to confuse and punish her and to heighten her anxiety contrary to medical practice." (footnote omitted)).

89. Section 59.8(a)(2) of the regulations requires that the Title X personnel "provide the pregnant woman with information necessary to protect the health of the *unborn child* until such time as the referral appointment is kept." Grants for Family Planning Services, 42 C.F.R. § 59.8(a)(2) (1988) (emphasis added). She "must be referred for appropriate prenatal . . . services." *Id.* Although referral for prenatal services is critical for those women choosing childbirth, the personnel may not even use the referral list for "steering" clients who are contemplating abortion to providers of abortion counseling. *Id.* § 59.8(a)(3) (1988).

90. See, e.g., *Planned Parenthood of Chicago v. Kempiners*, 568 F. Supp. 1490, 1497 (N.D. Ill. 1981) (woman's counselor occupies position of great trust, and physician's discussion will have a critical impact on the woman's decision). Furthermore, although some women are economically capable of shopping around for alternative counseling and information, most of the women at Title X clinics are not able to find alternative counseling. See Brief for Appellant at 63 n.58, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989). For statistics demonstrating the importance of Title X funding, see *infra* note 99 and accompanying text.

91. Grants for Family Planning Services, 42 C.F.R. § 59.8 (1988).

92. *Id.* § 59.8(b)(5) (1988).

93. Section 59.8 of the regulations explains what can be on the referral list. The list cannot include any health care providers that principally provide abortions. 42 C.F.R. § 59.8(b)(4) (1988). Nor can the list be weighed in favor of health care providers which perform abortions. *Id.* § 59.8(a)(3). Under this standard, if the amount of health care providers in the relevant area that also provide abortions exceeds the amount that do not provide abortions, the Title X personnel must take some health care clinics off of the referral list which are medically in line with the woman's needs. This alone should be enough to strike the regulations down. *Thornburgh*, 476 U.S. at 762-63.

94. The clinic may "keep" the yellow pages, but it cannot "provide" them. See 53 Fed. Reg. 2922, 2942 (1988). Justice Cardamone addressed this in his concurring opinion, yet concluded that while the regulations "fall woefully short of the tolerant spirit that gave birth to and should continue to animate our constitutional system, [they] meet the letter of the law." *Sullivan*, 889 F.2d at 415 (Cardamone, J., concur-

The consequence of this information shortage is that some women will run out of time before they are fully informed; others may never be fully informed.⁹⁵ This affirmative mandate against the provision of information is just as detrimental to the woman,⁹⁶ if not more so, than the government attempt to influence the woman's decision that the Supreme Court struck down in *Thornburgh*.

This intrusion into the physician-patient dialogue constitutes a governmental obstacle⁹⁷ that unduly burdens a woman in the exercise of her privacy right to decide, in the absence of government

ring). Although the court's opinion found that the Title X clinic could provide the woman with the yellow pages if she requested 889 F.2d at 406 n. 1, both of the other judges disagreed. See 889 F.2d at 415 (Cardamone, J., concurring); and 889 F.2d at 416-17 (Kearse, J., dissenting).

95. Most of the women who rely on Title X clinics are not able to find alternative counseling. See Brief for Appellant at 63 n.58, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989).

Title X is the single largest voluntary family planning program funded by the federal government, providing over one-third of the total public family planning funds. The Program's targeted population consists of approximately 14.5 million women at risk for unintended pregnancy, including 5 million adolescent women ages 15-19 and 9.5 million adult women ages 20-44 in families with incomes below 150 percent of poverty.

Note, *supra* note 24, at 408.

96. Due to the increased health risks of abortion as the pregnancy continues, time is of the essence. *E.g.*, *Doe v. Bolton*, 410 U.S. 179, 198 (1973) (time is critical when the woman is seeking an abortion); See also *H.L. v. Matheson*, 450 U.S. 398 (1980) (there must be sufficient expedition in notifying parents of minor to provide an effective opportunity for an abortion); *Women's Community Health Center v. Cohen*, 477 F. Supp. at 550 (waiting period may prevent, at least temporarily, a woman who has already decided to have an abortion). If the woman has already decided to have an abortion, and the referral list that the Title X clinic gives her is designed to mislead her, the regulations are directly contrary to the compelling government interest in the woman's health.

97. The *Webster* Court used the "governmental obstacle" standard as the test for determining the constitutionality of the Missouri statute that prohibited the use of public facilities and employees for performing abortions. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3056 (1989). The *Sullivan* court, however, created its own standard under the guise of the *Webster* precedent.

First, the *Sullivan* court noted the holding in *Webster* that governmental action is constitutional so long as it "places no governmental obstacles in the path of a woman who chooses to terminate her pregnancy." *Sullivan*, 889 F.2d at 411 (quoting *Webster*, 109 S. Ct. at 3052) (emphasis added). In the next paragraph, the *Sullivan* court stated the test as, "no affirmative legal obstacle." *Sullivan*, 889 F.2d at 411 (emphasis added). Three sentences later, the *Sullivan* court concluded that "[s]ince these regulations create no affirmative legal barriers to access to abortion, therefore, *Webster* clearly refutes the privacy claims . . ." *Id.* at 411-12 (emphasis added).

This conclusion resolved nothing. Without any Supreme Court precedent to define what an "affirmative legal barrier" is, and the *Sullivan* court's failure to explain its new standard, the holding does not provide any logical conclusion. A simple syllogism serves to demonstrate the court's faulty reasoning. For instance: "since this vehicle is not a truck, therefore it is not a car." This is just as faulty as the *Sullivan* court's use of the affirmative legal barrier standard. There are many vehicles that are not trucks, but are cars. Likewise, there may be many government acts that are not affirmative legal barriers but are governmental obstacles. Regardless, the *Sullivan* court's new standard has no precedent to support it.

intrusion, whether to have an abortion.⁹⁸ Although the *Webster* Court questioned the validity of *Roe*, it nevertheless reaffirmed that governmental obstacles to the exercise of the woman's privacy right are unconstitutional.⁹⁹ Thus, the regulations must be narrowly tailored to further a compelling government interest.

Although the government may have a compelling interest in prohibiting Title X funds from being spent on the *performance* of abortions, prohibiting the *discussion* of this constitutionally protected right is unreasonable.¹⁰⁰ It is obvious that the government could not constitutionally further its interest in national security by mandating that before a university may receive government funds it must relinquish its right to hold discussions on communism.¹⁰¹ The *Sullivan* regulations are even more absurd in that they prohibit discussion critical to the exercise of a constitutionally protected right.¹⁰² More narrowly tailored regulations would prohibit only Title X funds from being spent on the *advocacy* of abortion rather than prohibiting all funds from being spent on non-directive counseling and referral.¹⁰³ Since nothing compels prohibiting this critical

98. In *Planned Parenthood v. Fitzpatrick*, 401 F. Supp. 544 (E.D.Pa. 1975), *aff'd mem. sub nom. Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) the court applied the rational relationship test to an informed consent statute. *Id.* at 587. The court used this test because the provision did "not chill the exercise of the abortion option." *Id.* However, the doctor, in addition to the state required information, was allowed to provide other information he believed to be relevant to the woman's decision. *Id.* at 587-88.

Conversely, under the *Sullivan* regulations, the physician is prohibited from providing any information about abortion that he or the woman may think is relevant to the woman's decision. Obviously, this does "chill the exercise of the abortion option." For the woman "cannot make an informed choice between two options when she cannot obtain information as to one of them." *Sullivan*, 889 F.2d at 417 (Kearse, J., dissenting). Therefore, strict scrutiny should be applied, and the regulations must be narrowly tailored to a compelling governmental interest.

99. *Webster*, 109 S. Ct. at 3052.

100. When the government's interest in potential life becomes compelling, whether it be at viability or before, it is compelling "only in the abortion context, not as a justification for speech restrictions." *Benshoof*, *supra* note 24, at 1932-33.

101. *See, e.g., Yates v. United States*, 354 U.S. 298, 324 (1957) (person cannot be convicted for teaching and advocating, as an abstract principle, the forceful overthrow of the government); *Dennis v. United States*, 341 U.S. 494, 502 (1951) (person cannot be convicted for "peaceful studies and discussions or teaching and advocacy [of communism] in the realm of ideas").

102. At least in prohibiting the discussion of communism or other ideologies that advocate the overthrow of the government the purported goal is to protect the nation from violent revolution, which no one has a constitutional right to do.

103. *See, e.g., Planned Parenthood of Cent. and N. Arizona v. Arizona*, 718 F.2d 939, 945 (9th Cir. 1983), *rev'g* 537 F. Supp. 90 (D. Ariz. 1982), *aff'd in part on other grounds*, 789 F.2d 1348 (9th Cir. 1986), *aff'd mem., sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986). In *Planned Parenthood v. Arizona*, the statute at issue prohibited state funds from being spent on abortions, abortion procedures, abortion counseling, or abortion referral. *Id.* at 941 n.1. Although some of the provisions may have been constitutional under the holding in *Harris v. McRae*, the statute went further and prohibited state funds from being spent for any other services in clinics which privately funded these same activities. *Id.* The court stated that a more

discussion, and the regulations could be more narrowly tailored, the condition on the receipt of Title X funds is unconstitutional.

In conclusion, HHS' attempt to discourage abortions by circumventing the protections afforded by the Constitution is valiant. Nevertheless, it fails because the regulations infringe upon the rights of the women who rely on Title X clinics. Similarly, the Second Circuit Court of Appeals' conclusion that the regulations are constitutional is faulty. The court reached the wrong conclusion because it failed to comprehend the nature of the privacy right at issue.¹⁰⁴ Although the Supreme Court may eventually reverse *Roe v. Wade*, as long as a woman has a constitutionally protected right to an abortion, the *Sullivan* regulations will be unconstitutional.

Christopher C. Kendall

narrowly drawn statute would accomplish the same goal by only forbidding the entities that receive state funds from using state funds for the abortion related activity. *Id.* at 945. This same standard is applicable to the *Sullivan* regulations.

The *Planned Parenthood v. Arizona* court also addressed and dismissed the "freeing up" theory which stands for the proposition that providing state funds to clinics frees up other funds, thus allowing the clinics to support abortion related activity. *Id.* at 945. The court noted that under this theory the state could prohibit all welfare to an indigent woman to keep from freeing up other funds she may have that may be used for an abortion. *Id.* See also *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (hinting that this would be unconstitutional).

104. *Massachusetts v. Secretary of HHS*, 899 F.2d 53 (1st Cir. 1990).