WHEN GOVERNMENT MUST PAY: COMPENSATING RIGHTS AND THE CONSTITUTION

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INTRODUCTION

In November 1993, Republican political consultant Ed Rollins, the architect of President Reagan's 1984 landslide re-election victory, had good reason to gloat after his latest political triumph. He'd just guided Christine Todd Whitman to a remarkable victory over incumbent Democrat Jim Florio in New Jersey's gubernatorial race. Speaking to journalists in Washington, D.C., after the election, Rollins confessed that the key to Whitman's victory was a secret plan to suppress the black vote by funneling about $500,000 to black ministers and Democratic organizers to minimize or stop get-out-the-vote efforts on behalf of Governor Florio. As Rollins put it: "We went into the black churches and basically said to ministers who had endorsed Florio: 'Do you have a special project [in need of financial support]? We see you have already endorsed Florio. That's fine, but don't get up in the Sunday pulpit and preach. Don't get up there and say it's your moral obligation to vote on Tuesday, to vote for Jim Florio.'"[2] Rollins added that the Whitman campaign had also approached workers for black mayors who were unhappy with Florio and said: "How much have they paid you to do your normal duty? We'll match it. Go home, sit and watch television."[3] The result, Rollins reported: "I think to a certain extent we suppressed their votes."[4]

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2. *GOP Spent Money to Suppress New Jersey Voting*, CHICAGO TRIBUNE, November 10, 1993, at 2 (1993 WL 11121802).

3. Thomas B. Edsall, *GOP Consultant Describes Bribes to Suppress Black New Jersey Vote*, AUSTIN AMERICAN-STATESMAN, November 10, 1993, at A2 (1993 WL 6809913).

4. *Id.*

The Whitman campaign immediately denied Rollins's claims, and Rollins himself later recanted: "I went too far. My remarks left the impression of something that was not true and did not occur."[5] A federal grand jury investigated the matter, but it ultimately concluded that there was no evidence to back up the tale.[6]

The Rollins story provoked understandable outrage. Under federal law and the laws of all 50 states, it is illegal to buy or sell votes.[7] As a corollary to this general proscription, it is also generally illegal to pay someone not to vote.[8] The right to vote is, after all, a cherished freedom—and a fundamental right central to constitutional democracy—that should not be available for purchase or sale in the marketplace.[9] As a legal and philosophical matter, the right to vote is *inalienable* along with the rights to "life, liberty, and the pursuit of happiness" that Thomas Jefferson described so eloquently in the Declaration of Independence.[10]

Now imagine for a moment that it was not a political candidate—a private citizen—who allegedly paid people not to vote, but instead a government official or a government agency. Suppose, for example, that California's Franchise Tax Board, fearful that a high voter turnout will overwhelm the state's outdated election machinery, begins offering a $50 tax credit to every Californian over the age of 18 who *refrains* from voting in an upcoming election. Such a policy would not only be illegal;[11] it would almost certainly be unconstitutional. Just as state and local governments may not impose a poll tax,[12] so too government

5. *The Boasting of Ed Rollins*, WASHINGTON POST, November 12, 1993, at A24 (1993 WL 2088907).

6. Mike Kelly, *Ed Rollins Rides Again*, THE RECORD, NORTHERN NEW JERSEY, February 25, 1996, at O1 (1996 WL 6078909).

7. *See* Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1324 & n.1 (2000) (listing federal and state prohibitions on the buying and selling of votes).

8. *See, e.g.*, 18 U.S.C. § 597 (2000) (imposing a fine or imprisonment on anyone who "makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate," as well as on anyone who "solicits, accepts, or receives any such expenditures in consideration of his vote or the withholding of his vote").

9. *See* Brown v. Hartlage, 456 U.S. 45, 54 (1982) ("[A] State may surely prohibit a candidate from buying votes. No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.").

10. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. *See* 18 U.S.C. § 597 (2000); CAL. ELEC. CODE § 18521 (West 2004) (prohibiting gifts or other consideration to induce a person to vote or refrain from voting); CAL. ELEC. CODE § 18522 (West 2004) (prohibiting persons or controlled committees from making payments or offers to pay to induce a person to vote or refrain from voting).

12. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

may not offer a financial incentive to induce people not to vote because such an incentive functions in precisely the same way as a poll tax: It makes voting more costly relative to not voting.[13]

Now consider the more controversial issue of abortion. If it is unconstitutional for government to offer its citizens a financial incentive not to vote, shouldn't it be similarly unconstitutional for government to offer women a financial incentive not to procure an abortion? Somewhat surprisingly, the answer is no. Consistent with the Supreme Court's decisions in *Maher v. Roe*[14] and *Harris v. McRae*,[15] federal and state governments can—and do—offer poor pregnant women such financial incentives through the Medicaid program by subsidizing medical expenses incident to pregnancy and childbirth while denying coverage for medical services related to abortion.

Maher and *McRae* have provoked intense criticism because they sanction government programs that appear to undermine *Roe v. Wade*[16] by inducing poor pregnant women to bear children that they might otherwise choose not to have.[17] *Maher* and *McRae* effectively transform abortion—a liberty protected by the fundamental right to privacy—into a commodity, available only to those who can afford it.[18] This result is morally and legally indefensible to those who believe that if a fundamental right is "implicit in the concept of ordered liberty,"[19] or "deeply rooted in this Nation's history and tradition,"[20] then government

13. A tax credit offered to those who refrain from voting might also be regarded as an unconstitutional "penalty" on the right to vote under the Supreme Court's "unconstitutional conditions" cases. *See* Speiser v. Randall, 357 U.S. 513, 518 (1958) (holding unconstitutional the denial of a veterans' property tax exemption for failure to subscribe to a loyalty oath); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (invalidating a one-year residency requirement imposed as a prerequisite for eligibility for welfare); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257–58 (1974) (invalidating a one-year residency requirement imposed as a condition for non-emergency hospitalization or medical care at the county's expense).

14. 432 U.S. 464 (1977).

15. 448 U.S. 297 (1980).

16. 410 U.S. 113 (1973).

17. *See generally* Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on* Harris v. McRae, 32 STAN. L. REV. 1113 (1980); Leslie Friedman Goldstein, *A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector*, 8 HASTINGS CONST. L.Q. 313 (1981); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

18. *See* Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER J. 181, 196–204 (1991).

19. Palko v. Connecticut, 302 U.S. 319, 324 (1937).

20. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

ought to provide affirmative assistance to guarantee access to that right, regardless of ability to pay.

For years, constitutional scholars and the Supreme Court itself have struggled to define the circumstances under which government must affirmatively guarantee constitutional rights for the poor. These attempts have been largely unsuccessful. They have been either too ambitious, relying on theories that have proven to be judicially unmanageable and unacceptable, or too limited in their scope and reach, relying on theories that are explanatory but not prescriptive. I hope to provide a fresh perspective on the problem, along with a better framework with which to evaluate claims that government must provide affirmative assistance to the poor to ensure access to constitutional rights.

Part I of this Article analyzes a series of Supreme Court decisions—the "equal access" cases—that provide a constitutional basis for the notion that government must affirmatively guarantee constitutional rights for the poor. Part II contends that these decisions are often described either far too broadly, in terms of equal protection for the poor, or far too narrowly, in terms of a fundamental right of access to the courts or the political process. I suggest an alternative approach. The equal access cases may best be understood as recognizing a category of "compensating rights," in which government's obligation to affirmatively guarantee certain constitutional rights is designed to compensate for government coercion that burdens those rights. Part II then explores the theory of compensating rights in some detail, considering basic questions such as which rights and what degree of coercion should trigger government's duty to compensate. Finally, Part III applies the theory of compensating rights to the abortion funding decisions in *Maher v. Roe* and *Harris v. McRae*. Just as the equal access cases require the government to compensate for coercive financial barriers that threaten to deny access to the courts or the political process, so too government must compensate for the coercive pressure designed to persuade poor women to choose childbirth over abortion.

I. THE EQUAL ACCESS CASES

One of the chief analytical tools of constitutional interpretation is the basic distinction between positive and negative rights. The conventional thinking is that the Constitution confers no positive right to governmental aid or assistance; instead, the Constitution operates in a negative fashion, preventing the gov-

ernment from abridging certain rights or freedoms. It is often said that the Bill of Rights guarantees *freedom from* government interference, not a *right to* governmental assistance. As the Supreme Court explained in *DeShaney v. Winnebago County Department of Social Services*:[21]

> The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.... Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even when such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.[22]

While the distinction between positive and negative rights offers a useful guideline for constitutional interpretation and allows the courts to quickly and easily dispose of dubious claims to various constitutional "entitlements," it ignores a long line of decisions that challenge the conventional wisdom and blur the distinction between positive and negative rights. Fifty years in the making, these decisions recognize that constitutional rights are meaningless without the economic resources to enjoy them and that under certain circumstances, government must bear the costs of securing access to such rights for poor individuals otherwise unable to pay.

In *Griffin v. Illinois*,[23] the Supreme Court held that the Fourteenth Amendment's guarantees of equal protection and due process required a state to provide a trial transcript at its own expense to an indigent convict who could not otherwise effectively take advantage of the right to an appeal—a right which Illinois made generally available to all who could afford it: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[24] For the first time, the Supreme Court seriously wrestled with Anatole France's

21. 489 U.S. 189 (1989).
22. *Id.* at 195–96.
23. 351 U.S. 12 (1956).
24. *Id.* at 19.

challenge to the value of a guarantee of legal equality in the face of economic inequality: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[25] The Supreme Court apparently agreed that when a poor man's liberty was at stake, the Constitution required that the courthouse doors be open to him, even if the state must bear the cost.

Seven years later, in *Gideon v. Wainwright*,[26] the Supreme Court dramatically extended *Griffin*'s reach, unanimously holding that in a state prosecution involving the possibility of a substantial prison sentence, due process requires that a defendant be provided access to counsel regardless of his ability to pay. In *Douglas v. California*,[27] decided the same day as *Gideon*, the Court held that the government must provide indigent criminal defendants with free counsel on any initial appeal that a state's appellate courts must hear. Once again, the Court was emphatic in requiring that the instruments of justice be available to rich and poor alike:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[28]

While *Griffin*, *Gideon*, and *Douglas* all concerned equal access to the judicial process, the Warren Court was similarly zealous in preserving equal access to the political process. In *Harper v. Virginia Board of Elections*,[29] the Court invalidated an annual poll tax of $1.50 on all Virginia residents over the age of 21. Conceding that "a State may exact fees from citizens for many different kinds of licenses,"[30] the Court nevertheless concluded that voting cannot hinge upon the ability to pay because the right to vote is a "fundamental political right . . . preservative of

25. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 655 (15th ed. 1980) (quoting A. FRANCE, LE LYS ROUGE (1894)).
26. 372 U.S. 335 (1963).
27. 372 U.S. 353 (1963).
28. *Id.* at 357–58.
29. 383 U.S. 663 (1966).
30. *Id.* at 668.

all rights."[31] The Court did not stop there, however. Citing *Griffin* and *Douglas*, Justice Douglas, writing for a six-member majority, seemed to suggest that legislative classifications based on wealth, like those based on race, are "suspect" classifications triggering strict judicial scrutiny: "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[32]

The Warren Court's activism on behalf of the poor led some scholars to turn the positive/negative rights distinction on its head and to suggest that government has an affirmative constitutional obligation to provide all citizens with a minimally decent subsistence.[33] By today's standards, such proposals seem to verge on the ridiculous, but the fact that they were serious proposals when written is indicative of how far the Supreme Court had gone—and seemed prepared to go—in ensuring basic rights for the poor.

With the end of the Warren Court, the Supreme Court's ideological makeup shifted dramatically to the right, ending all hope for the kind of revolution that *Griffin*, *Gideon*, *Douglas*, and *Harper* seemed to promise. Indeed, in *San Antonio Independent School District v. Rodriguez*,[34] the Supreme Court expressly held that wealth is not a suspect classification, rejecting language in *Harper* and other cases that seemed to suggest otherwise.[35] But the Court remained surprisingly committed to the

31. *Id.* at 667 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

32. *Id.* at 668 (citations omitted).

33. *See, e.g.*, Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CAL. L. REV. 407, 408 (1966) ("By reasoning similar to that by which we have recently come to understand that the guarantee of due process requires a lawyer to be provided for persons too poor to engage private counsel . . . this paper works its way to conclusions requiring, as matters of constitutional entitlement, provision of the minimal necessaries of membership—and not merely existence—in our society."); Frank Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 35 (1969) (proposing a theory of minimum protection which would require government to mitigate the effects of the private marketplace when "persons have important needs or interests which they are prevented from satisfying because of traits or predicaments not adopted by free and proximate choice"); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987) (arguing for a constitutional right to "survival" or "subsistence" income); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986) (deriving a constitutional right to a decent material basis for life from the Declaration of Independence, from the preamble to the Constitution, and from parts of the Constitution proper).

34. 411 U.S. 1 (1973).

35. *See id.* at 28–29.

more limited principle in *Griffin*, *Gideon*, *Douglas*, and *Harper*: equality of access to the legal and political systems.

In *Boddie v. Connecticut*,[36] for example, the Court extended *Griffin*, *Gideon*, and *Douglas* beyond the confines of criminal law, holding that due process prohibits a state from denying access to its courts to poor persons who seek a divorce but who are unable to afford court fees and costs. Central to the Court's decision in *Boddie* was the "basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship."[37]

Boddie suggested that government may be required to subsidize access to the courts in all civil cases. The Supreme Court moved quickly to clarify its reasoning in *United States v. Kras*,[38] holding that the government was *not* required to waive a $50 filing fee for an indigent bankruptcy petitioner. The denial of access to a judicial forum in *Boddie*, the Court explained, touched directly "on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship," interests of "fundamental importance" under the Constitution.[39] A bankruptcy petitioner's interest in eliminating debt and in obtaining a new start in life, though important, do "not rise to the same constitutional level."[40] Three months later, *Ortwein v. Schwab*[41] relied on the same distinction in holding that government was not obliged to waive a $25 fee for an indigent welfare recipient seeking to appeal an adverse welfare determination.

Post-Warren Court decisions requiring government to afford equal political access to the poor are consistent with the principle set forth in *Kras* and *Ortwein* that the right to state assistance depends upon the existence of a fundamental right. In *Bullock v. Carter*,[42] the Court invalidated a Texas scheme under which candidates for local office had to pay ballot fees as high as $8,900. *Bullock* rejected as justifications for excluding poor candidates from the ballot the state's concern about unwieldy bal-

36. 401 U.S. 371 (1971).
37. *Id.* at 374.
38. 409 U.S. 434 (1973).
39. *Id.* at 444.
40. *Id.* at 445.
41. 410 U.S. 656 (1973).
42. 405 U.S. 134 (1972).

lots and its interest in financing elections.[43] In *Lubin v. Panish*,[44] the Court invalidated a California statute requiring payment of a ballot access fee fixed at a percentage of the salary for the office sought, explaining that a state may not require from an indigent candidate "fees he cannot pay."[45] While both *Bullock* and *Lubin* avoid any suggestion that classifications based on wealth are subject to heightened scrutiny, the Court's commitment to equal access to the political process preserves—and extends—the central holding of *Harper*.

In *Little v. Streater*,[46] the Court revisited and extended its decision in *Boddie* by holding that an indigent defendant in a state-supported paternity action could not be denied access to a blood grouping test merely because of his inability to pay. In requiring the state to pay for the blood test, the Court emphasized the magnitude of the interests at stake in a paternity action:

> The private interests implicated here are substantial. Apart from the putative father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of a parent-child relationship. This Court frequently has stressed the importance of familial bonds, whether or not legitimized by marriage, and accorded them constitutional protection. Just as the termination of such bonds demands procedural fairness, so too does their imposition.[47]

In *Lassiter v. Department of Social Services*,[48] decided the same day as *Streater*, the Court held that under certain circumstances, due process may require the state to appoint counsel for an indigent parent faced with termination of his or her parental rights. Though the Court declined to require the appointment of counsel in all such cases, including the *Lassiter* case itself, the Court did note:

> Informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well. Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's

43. *See id.* at 144–49.
44. 415 U.S. 709 (1974).
45. *Id.* at 718.
46. 452 U.S. 1 (1981).
47. *Id.* at 13 (citations omitted).
48. 452 U.S. 18 (1981).

> opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.[49]

Though many of the Supreme Court's most important decisions requiring the state to subsidize access to the judicial process were decided by a more liberal and more activist Court, the current Court continues to breathe new life into this area of the law. Over sharp dissents from the three most conservative Justices then on the Court—Rehnquist, Thomas, and Scalia—*M.L.B. v. S.L.J.*[50] held that Mississippi was required to waive appellate costs for an indigent mother who sought to appeal an order terminating her parental rights. Echoing *Boddie* and *Streater*, the Court was especially mindful of the fact that the state was seeking to terminate a parent-child bond, state action which strikes at the core of fundamental privacy rights.[51]

Gone from the post-Warren Court equal access cases is the passionate rhetoric decrying the plight of the poor. The later decisions reflect a more distant judicial temperament and are more firmly grounded doctrinally in the tepid language of procedural due process rather than the Warren era's open flirtations with the notion of equal protection for the poor. But beyond the rhetorical and doctrinal shifts, a basic principle emerges virtually unchanged: The enjoyment of certain fundamental rights ought not depend on the size of one's pocketbook.

II. A THEORY OF COMPENSATING RIGHTS

Spanning criminal and civil cases, and dealing with a broad range of underlying constitutional rights and doctrines, the equal access cases defy easy categorization. At the height of the Warren era, these decisions were thought to provide a constitutional basis for the recognition of positive rights, at least with respect to the minimum necessities of life.[52] Later commentators regarded the decisions as an early and ultimately unsuccessful effort to strike a blow against wealth classifications and economic inequality.[53] Today, the most popular constitutional law textbooks

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49. *Id.* at 33–34.

50. 519 U.S. 102 (1996).

51. *See id.* at 116–17 ("M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.").

52. *See* sources cited *supra* note 33.

53. *See, e.g.*, Note, *Discriminations Against the Poor and the Fourteenth Amend-*

describe the cases as recognizing a fundamental right of "access to the courts."[54]

These attempts to explain the equal access cases miss a more subtle—but perhaps more important—unifying principle. Stripped of their rhetorical and doctrinal nuances, on a very basic level these cases reflect a commitment to providing the individual with the means, financial or otherwise, to resist government coercion, particularly with respect to fundamental rights. The coercion may be as modest as it was in *Boddie*, where a $60 court fee effectively prevented poor persons from filing divorce petitions, burdening the fundamental right to marry. Or the coercion may be far more substantial and direct, as it was in *Gideon*, where all of the resources and prosecutorial power of the state were brought to bear upon an unrepresented indigent criminal defendant, whose physical freedom—liberty in its purest sense—was at stake.

The Court's concern with governmental coercion is evident from a close reading of the equal access cases. In *Gideon*, for example, the Court viewed the appointment of counsel as an essential counterweight to the coercive power of the state's criminal justice system:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. . . . Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can

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ment, 81 HARV. L. REV. 435, 436 (1967); Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. C.R.-C.L. L. REV. 105 (1972); Gary S. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 IOWA L. REV. 223 (1970); Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8–20 (1972); *see also* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 383-85 (3d ed. 2003) (characterizing decisions such as *Griffin*, *Gideon*, *Harper*, and *Boddie* as early examples of the Supreme Court's application of heightened scrutiny to statutes which disadvantaged the poor, but noting the Court's later rejection of the proposition that wealth is a suspect classification).

54. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 860–70 (15th ed. 2004); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1388–93 (9th ed. 2001); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 982–99 (2d ed. 2005); WILLIAM COHEN ET AL., CONSTITUTIONAL LAW: CASES AND MATERIALS 1055–60 (12th ed. 2005); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES 757–63 (7th ed. 2003).

> get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.[55]

A similar rationale explains *Ake v. Oklahoma*,[56] which required that an indigent criminal defendant in a capital case be provided with a state-subsidized psychiatrist to aid in the preparation of his insanity defense when his sanity at the time of the offense is seriously in question. As the Court noted, "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense."[57]

In *Boddie*, the coercion took a somewhat different form, in the state's monopoly over the procedures for dissolving a marriage:

> [B]ecause resort to the state courts is the only avenue to dissolution of their marriages, [appellants' plight] is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.[58]

In *Streater*, pervasive state involvement in the paternity action rendered the proceedings "quasi-criminal" in nature, exerting coercive pressure on the putative father comparable to that felt by a criminal defendant.[59] The state's failure to provide a complimentary blood test only magnified the coercive power of the state:

> [N]ot only is the State inextricably involved in paternity litigation such as this and responsible for an imbalance between the parties, it in effect forecloses what is potentially a conclusive means for an indigent defendant to surmount that disparity and exonerate himself. Such a practice is irreconcilable with the command of the Due Process Clause.[60]

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55. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
56. 470 U.S. 68 (1985).
57. *Id.* at 80.
58. Boddie v. Connecticut, 401 U.S. 371, 376–77 (1971).
59. Little v. Streater, 452 U.S. 1, 10 (1981).
60. *Id.* at 12; *see also id.* at 16 ("Without aid in obtaining blood test evidence in a

Finally, in *M.L.B.*, the state was required to waive appellate fees so that the appellant could effectively resist "the awesome authority of the State to destroy permanently all legal recognition of the parental relationship."[61] The Court further refined this principle elsewhere in the opinion: "[M.L.B.] is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication. Like a defendant resisting a criminal conviction, she seeks to be spared from the State's devastatingly adverse action."[62]

With renewed focus on the Court's concern with coercion, the line of cases spanning *Griffin* to *M.L.B.* may be viewed as recognizing a variety of "compensating rights." The rights recognized in these cases are compensating in two senses. First, there is a compensating element in the literal sense, since government must pay the costs associated with guaranteeing access for the poor. And second, there is a compensating element in the metaphorical sense, since the government assistance is designed to counterbalance government pressure or coercion with respect to fundamental rights. My theory of compensating rights would require more careful judicial scrutiny whenever government-created economic barriers effectively deny the poor access to a fundamental right. Closer scrutiny is also warranted when private economic barriers that effectively deny the poor access to a fundamental right are *coupled with* government pressure or coercion that burdens or discourages the exercise of the right. In these situations, government must either remove the source of the coercion or compensate for its effect by subsidizing the exercise of the right.

Framed in these terms, the equal access cases begin to make more sense. Many of the court access cases, including *Griffin*, *Boddie*, and *M.L.B.*, involve government-created economic barriers—court fees—that jeopardize the ability of indigent litigants to protect fundamental rights. The political access cases—*Harper*, *Bullock*, and *Lubin*—are of the same ilk. Government-imposed fees in those cases jeopardized the ability of indigent voters and candidates to participate in the political process.

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paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks a meaningful opportunity to be heard. Therefore, the requirement of fundamental fairness expressed by the Due Process Clause was not satisfied here.")

61. M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996) (citation and internal quotations omitted).

62. *Id.* at 105.

Situations in which government itself erects such economic barriers would seem to present the strongest—and simplest—case for judicial intervention.

The more difficult cases are the ones like *Gideon*, *Douglas*, and *Streater*, where the economic barrier that jeopardizes a fundamental right is not government-created, but is instead a product of the individual's own indigency. In such cases, government cannot simply remove the economic barrier, but must instead attempt to counterbalance the coercion, taking into account the degree of pressure exerted by the government and the importance of the right at stake for the individual. The high degree of government coercion in *Gideon*, *Douglas*, and *Streater*, coupled with the enormously high stakes for the individual defendants—the loss of physical liberty in *Gideon* and *Douglas* and the potential imposition of paternity in *Streater*—led the Court to conclude that compensation was constitutionally required.

While the equal access cases are perhaps the best examples of compensating rights, the theory also explains other constitutional doctrines. The Fifth Amendment's requirement that government pay "just compensation" when it takes private property for public use is a compensating right in both senses. The constitutionally required compensation guarantees that the individual is not powerless in the face of government's authority to zone, regulate, and even confiscate private property. The First Amendment requirement that government make available certain public forums for speech activities may also be viewed as a compensating right. The obligation to keep open certain areas for speech activities, even at considerable public cost, counterbalances legitimate restrictions on speech in other areas.[63] And the *Miranda* warnings, along with the substantive rights referenced in the warnings, are designed to counterbalance the inherently coercive nature of custodial interrogation.[64]

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63. *See* Harry Kalven, Jr., *The Concept of a Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 30 (comparing speech activities in public forums to "the poor man's printing press," and noting the importance of access to public forums for those "with little access to the more genteel means of communication"); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 717–23 (1992) (noting that the First Amendment's public forum doctrine serves to safeguard the openness of the marketplace of ideas by preserving access to a public resource central to public debate and dialogue); *see also* Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting) (noting that a city ordinance prohibiting loud and raucous sound trucks on public streets "can give an overpowering influence to views of owners of legally favored instruments of communication").

64. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) ("[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains

A. WHICH RIGHTS TRIGGER GOVERNMENT'S DUTY TO COMPENSATE?

If government must affirmatively guarantee access to constitutional rights, which rights should qualify for such preferred treatment? For example, governments of all levels impose heavy taxes on cigarettes and actively seek to discourage smoking by restricting the advertisement, sale, and consumption of tobacco products. Must government waive cigarette taxes for the poor to counterbalance coercion designed to discourage smoking? The simple answer is no, because smoking is not a *fundamental* constitutional right.

The equal access cases support this important distinction, emphasizing the difference between government-created economic barriers that burden *fundamental* constitutional rights and barriers that impinge upon far less important freedoms. The government was required to waive court filing fees in *Boddie* because they prevented the poor from obtaining divorces and burdened the fundamental right to marry. In *Kras* and *Ortwein*, by contrast, no such fee waiver was required because neither the right to file for bankruptcy nor the right to appeal an adverse welfare decision was a fundamental constitutional right.

Even within the class of fundamental rights, however, there are certain rights that, for lack of a better expression, just seem *more fundamental* than others. In his famous dissent in *Olmstead v. United States*,[65] Justice Louis Brandeis observed that the "right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men."[66] To protect that right, "every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[67] Justice Brandeis's thinking was well ahead of its time, and it would be another 37 years before the Supreme Court formally recognized a fundamental right to privacy implicit in the "penumbras" of the specific guarantees in the Bill of Rights.[68]

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inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

65. 277 U.S. 438 (1928).

66. *Id.* at 478 (Brandeis, J., dissenting).

67. *Id.*

68. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

Though the right to privacy has a relatively short constitutional pedigree when compared to other fundamental rights, commentators have recognized that personal decisions implicating the fundamental right to privacy occupy a special place. Ronald Dworkin argues that these "quasi-religious" decisions have a "profound spiritual character," involving judgments about the "intrinsic, cosmic importance of human life."[69] Professor Margaret Radin argues that the concept of "personhood" embraces fundamental decisions that are "integral to the self" and that a failure to respect an individual's "moral commitments" violates "our deepest understanding of what it is to be human."[70]

While eloquent, these efforts to describe the special status of certain personal decisions don't capture what precisely it is about the right to privacy that sets it apart from other fundamental rights. The critical distinction lies in a consideration of the *frequency* and *magnitude* of the decisions protected by the right to privacy. Decisions about marriage, procreation, and abortion, for example, are not ones we face frequently; indeed, many people confront these decisions just once in a lifetime. But while infrequent, the magnitude of these decisions cannot be overstated. A marriage or the birth of a child is a life-altering event which creates physical and emotional bonds and responsibilities that generally last a lifetime. Throughout our lives, we have countless opportunities to speak, associate, vote, and practice religion. While any restriction on these fundamental rights may be deeply offensive, such infringements on individual liberty somehow seem less significant when compared with the profound consequences of governmental coercion with respect to the personal decisions at the heart of the right to privacy.[71]

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69. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 15, 216–17 (1994).

70. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1905–06 (1987).

71. At first blush, these views appear to present a challenge to the dominant Ely-style political theories at the heart of current constitutional thought. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 100-104, 117, 181 (1980) (advocating a model of judicial review concerned principally with "unblocking stoppages in the democratic process" rather than with the protection of substantive values). Without question, the political rights specifically mentioned in the Constitution are critical to democracy and self-government, and should therefore be protected. But Ely himself concedes that "various rights not mentioned in the Constitution should nonetheless receive constitutional protection because of their role in keeping open the channels of political change." *Id.* at 172. The right to privacy is one such right because it serves equally important values of autonomy and self-determination, values that facilitate political participation. Indeed, constitutional protection of the right to privacy—particularly those facets of the right

The Supreme Court itself appeared to embrace these sentiments in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:[72]

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[73]

An interesting line of decisions dealing with the rights of prisoners adds additional support to the notion of a sort of hierarchy of fundamental rights, with the right to privacy occupying a preferred constitutional position. As a general matter, prisoners don't fare particularly well when asserting that their fundamental rights have been violated. Indeed, the Court appears to have accepted the notion that prisoners essentially forfeit many of their constitutional rights. The right to speak and communicate with fellow prisoners and the outside world, the right to associate, the right to practice religion, and the right to be free from intrusive searches are either nonexistent or severely circumscribed behind prison walls.[74] Indeed, a state may perma-

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concerned with reproductive freedom—is an essential means of safeguarding full and equal political participation for women. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); *see also id.* at 928 (Blackmun, J., concurring in part and dissenting in part) ("A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality.").

72. 505 U.S. 833 (1992).

73. *Id.* at 851 (citations omitted).

74. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) (inmates may be prohibited from meeting in groups); Wolff v. McDonnell, 418 U.S. 539 (1974) (prison officials may open attorney-inmate mail in the presence of the inmate); Pell v. Procunier, 417 U.S. 817 (1974) (prison may prohibit face-to-face media interviews with inmates); Block v. Rutherford, 468 U.S. 576 (1984) (prison may ban contact visits); Overton v. Bazzetta, 539 U.S. 126 (2003) (prison may prohibit non-contact family visits with minor nieces and nephews and children as to whom parental rights have been terminated); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding a prison regulation preventing Islamic inmates from attending weekly religious services); Bell v. Wolfish, 441 U.S. 520 (1979) (upholding warrantless searches of prison cells and body-cavity searches following a contact visit).

nently deprive convicted felons of the right to vote, even after the sentence and parole have been completed.[75]

In cases dealing with procreation, marriage, and bodily integrity, however, the Supreme Court has been highly protective of prisoners' rights. Nearly a quarter century before *Griswold*, *Skinner v. Oklahoma*[76] invalidated a law that permitted the sterilization of habitual criminals: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[77]

In *Winston v. Lee*,[78] the Supreme Court unanimously held that the Fourth Amendment prohibited a state from compelling a robbery suspect to undergo surgery to remove a bullet which the state needed for evidentiary purposes, despite testimony that the surgery involved few medical risks. The Supreme Court expressed a profound concern for the right to bodily integrity, an aspect of the right to privacy protected both by the Fourth Amendment and the *Griswold* line of privacy cases.[79]

Finally, in *Turner v. Safley*,[80] the Supreme Court struck down a prison regulation which prohibited inmates from marrying other inmates or civilians without the prison warden's consent. Using language similar to that which appeared later in *Casey*, the Supreme Court found that the right to marry was every bit as fundamental in prison as it is beyond prison walls.[81] In another part of the *Turner* opinion, however, the Court upheld a regulation prohibiting inmate-to-inmate correspondence.[82] Placing these two parts of the opinion side by side, *Turner* seems to suggest that the right to marry is simply *more fundamental* than the right to speech, even in the restrictive environment of a prison.

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75. *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

76. 316 U.S. 535 (1942).

77. *Id.* at 541.

78. 470 U.S. 753 (1985).

79. *See id.* at 759 ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime."); *see also* Washington v. Harper, 494 U.S. 210, 229 (1990) ("[A prisoner's] interest in avoiding the unwarranted administration of antipsychotic drugs is not insubstantial. The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.").

80. 482 U.S. 78 (1987).

81. *See id.* at 95–96.

82. *See id.* at 91–93.

While the Supreme Court has never explicitly acknowledged any kind of hierarchy of fundamental rights, these prisoners' rights cases do suggest just such a hierarchy. The Court is hostile to prisoners with respect to most fundamental rights, including the rights to speak, associate, vote, and practice religion. But when it comes to fundamental rights such as marriage, procreation, and bodily integrity—rights protected by the more general right to privacy—the Court is far more receptive. This apparent hierarchy provides real content to Justice Brandeis's observation in *Olmstead* that "the right to be let alone" is "the *most* comprehensive of rights and the right *most* valued by civilized men."[83]

If government coercion with respect to any fundamental right is of constitutional concern, then government coercion with respect to our "most valued" constitutional right, the right to privacy, is particularly worrisome. And when government actions exert a coercive influence on personal decisions or relationships protected by the right to privacy, government may be constitutionally required to render affirmative assistance designed to counterbalance the coercion and to enable the individual to make life-altering decisions in a truly free and voluntary fashion. The life-altering quality of the right at stake in *Boddie*, *Streater*, and *M.L.B.*—the right to marry in *Boddie*, the potential imposition of paternity in *Streater*, and the right to maintain a parent/child relationship in *M.L.B.*—led the Court to conclude that government assistance was necessary to counterbalance government coercion. Indeed, the Court treated the threat to personal liberty in *Boddie*, *Streater*, and *M.L.B.* as comparable to the possibility of the complete loss of physical freedom that triggered compensating obligations in criminal cases such as *Griffin*, *Gideon*, and *Douglas*.[84]

The extraordinary importance of the personal decisions protected by the right to privacy has led some scholars to argue that our traditional understanding of the negative nature of constitutional rights ought to be abandoned in favor of a more positive

83. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphases added).

84. *Lassiter* is something of an anomaly, for the Court declined to require the appointment of counsel for indigent parents facing parental termination proceedings. While noting that due process might require the appointment of counsel in certain circumstances, the Court apparently felt that an inflexible constitutional rule was unnecessary in light of the fact that nearly two-thirds of the states had by statute provided for the appointment of counsel in parental termination cases. *See* Lassiter v. Department of Soc. Serv., 452 U.S. 18, 31–34 (1981).

conception of the right to privacy, one which recognizes that "the abstract freedom to choose is of meager value without meaningful options from which to choose and the ability to effectuate one's choice."[85] According to this view, the right to privacy "includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual's personhood from degradation and to facilitate the processes of choice and self-determination."[86]

This argument has a certain emotional and philosophical appeal, but even at the height of the Warren era, the Supreme Court never embraced such an idealistic conception of the Constitution. The difficulty, then and now, lies in drawing reasonable lines. If government is obliged to affirmatively protect privacy simply because of its importance to the individual, then why shouldn't government likewise be obliged to subsidize other constitutional rights that may be important to an individual? And why, for that matter, shouldn't government be obliged to provide all citizens with adequate food, housing, and health care, the basic necessities of life without which constitutional rights are virtually meaningless?

This Article's theory of compensating rights provides a much firmer constitutional basis—one that the Supreme Court has already implicitly accepted in the equal access cases—for recognition of a government duty to render affirmative assistance in those limited circumstances in which government coercion burdens a fundamental right. Compensating rights fill the gap between the extremes of positive and negative rights, avoiding the intractable questions of line-drawing that have prevented broader judicial acceptance of the notion of positive rights, but providing a workable framework to correct the injustices that result from a purely negative conception of constitutional freedoms.

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85. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1478 (1991). *See also id.* at 1478 ("The definition of privacy as a purely negative right serves to exempt the state from any obligation to ensure the social conditions and resources necessary for self-determination and autonomous decisionmaking.")

86. *Id.* at 1479; *see also* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 15-2, at 1395 (2d ed. 1988) ("Ultimately, the affirmative duties of government cannot be severed from its obligations to refrain from certain forms of control; both must respond to a substantive vision of the needs of human personality."); Collin & Collin, *supra* note 18, at 202 ("[I]f a fundamental right is something so 'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition' then it seems to be a cost that the citizens of this nation agree must be borne in order to secure the type of society its members believe it to be and hope it will remain.").

B. WHAT DEGREE OF COERCION TRIGGERS GOVERNMENT'S DUTY TO COMPENSATE?

The equal access cases do not directly define the degree of coercion that is necessary to trigger government's duty to compensate. This is the far more difficult question, since many government actions may, in some subtle or indirect way, burden a fundamental constitutional right.[87] For example, the availability of government funding for the arts may burden First Amendment rights by encouraging some artists to produce works containing patriotic messages, while simultaneously discouraging other artists from producing works critical of the government or its policies. Similarly, an anomaly in the tax code—known the "marriage penalty"—may burden the fundamental right to marry by making it more attractive from a tax standpoint for some couples to remain single.[88] Is government funding of the arts constitutionally suspect? Is the anomaly in the tax code an unconstitutional "penalty" on the right to marry? The short answer is no, but the explanation is somewhat more complicated.

The question of what degree of coercion is necessary to trigger government's duty to compensate is essentially the same as the basic question that pervades virtually all constitutional analysis: What constitutes an "infringement" of a constitutional right? The Supreme Court has never provided a clear answer to this question—especially in the context of fundamental rights—other than to observe that it considers the "directness and substantiality of the interference" with the right.[89]

The equal access cases do suggest that there are two types of governmental coercion that trigger a duty to compensate. The first type may be most easily described as "economic coercion," which typically takes the form of a government-created financial barrier that burdens a fundamental right. The poll tax in *Harper*, the candidate filing fees in *Bullock* and *Lubin*, and the court fees in *Boddie* are all examples of this first type of coercion. The second type may be described as "power and resources coercion" because it stems from the inequality of power and resources be-

87. For an excellent discussion of this issue, see Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

88. *See generally* Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287 (1999); Robert S. McIntyre & Michael J. McIntyre, *Fixing the "Marriage Penalty" Problem*, 33 VAL. U. L. REV. 907 (1999).

89. Zablocki v. Redhail, 434 U.S. 374, 387 & n.12 (1978); *accord* Lyng v. Castillo, 477 U.S. 635, 638 (1986).

tween the government and the individual. This type of coercion occurs when government assumes an adversarial position vis-à-vis the individual with respect to a fundamental right, or when government exhibits hostility toward the exercise of a fundamental right. The criminal cases—*Griffin*, *Douglas*, and *Gideon*—are all prime examples, where the state serves as prosecutor against the criminal defendant, seeking to deprive him of his physical freedom. The state's effort to impose paternity in *Streater* is also an example of power and resources coercion. The government's duty to compensate in these cases does *not* depend upon the existence of a government-created financial barrier. Instead, the duty to compensate is derived from government pressure against the individual in a way that threatens to radically alter the individual's place in the world and his relationships with others.

Perhaps not surprisingly, the argument for compensation will be stronger when *both* types of coercion are found to exist. In the most recent equal access case, *M.L.B.*, both types of coercion were present. The state imposed a direct financial barrier by demanding payment of appellate costs before an appeal could be heard, and the state was in an adversarial position vis-à-vis the mother, seeking to terminate her parental rights. Indeed, the existence of both types of coercion is what distinguishes *M.L.B.* from *Lassiter*, in which only the second type of coercion was present. In *Lassiter*, the state's power and resource advantage over the indigent mother was *not* sufficient, by itself, to trigger government's duty to compensate by providing her with a free attorney to contest the termination of her parental rights.

The degree of coercion necessary to trigger government's duty to compensate is also a function of the importance of the right at stake for the individual. With respect to fundamental constitutional rights, relatively modest coercion may be enough to trigger government's duty to remove the source of the coercion or compensate for its effect. Conversely, when the right at stake is less important, a far greater degree of coercion will be necessary. The equal access cases provide support for this "sliding scale" approach.[90] Measured in terms of the actual court

90. In many respects, this "sliding scale" approach to coercion resembles the approach to equal protection advocated by Justice Thurgood Marshall. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting) (urging a "reasoned approached" to equal protection analysis in which "concentration is placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification") (citations and internal quotations omitted). Indeed, Justice Marshall's dissent in *Rodriguez* provides a more nu-

costs that the litigants sought to have waived in each case, the financial pressure in *Boddie*, *Kras*, and *Ortwein* was virtually identical: $60 to file for divorce, $50 to file for bankruptcy, and $25 to appeal an adverse welfare decision. But while the degree of coercion felt by poor litigants was essentially the same, only in *Boddie* was the government required to compensate for its effect. The right at stake in *Boddie*—the right to marry, a component of the fundamental right to privacy—was simply more important than the economic rights at stake in *Kras* and *Ortwein*.

Finally, although the equal access cases impose no such requirement, some consideration of the government's intent may be warranted. Such an inquiry is consistent with basic constitutional doctrine that regards deliberate violations of the Constitution as far more serious than governmental actions that only incidentally and unintentionally burden constitutional rights.[91] A government program that provides grants to artists is not unconstitutional merely because it may have the incidental effect of discouraging art critical of the government or its policies, but a government program that represents a calculated attempt to suppress disfavored viewpoints raises grave First Amendment concerns.[92] Similarly, provisions in the tax code that favor single over married filers are not unconstitutional merely because they may have the incidental effect of discouraging marriage,[93] but deliberate efforts to restrict or discourage marriage, to penalize the institution of marriage, or to discriminate based on marital status raise serious constitutional concerns.[94]

Discerning government's intent is always a difficult task, and an illicit motive, by itself, is insufficient to invalidate gov-

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anced—and more principled—explanation of the early equal access cases than most legal scholars or the Supreme Court itself have offered. *See id.* at 93, 98–105, 117–23.

91. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 328, 331 (1986); Washington v. Davis, 426 U.S. 229, 238–39 (1976).

92. *See* National Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (noting that if the National Endowment for the Arts "were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints," the constitutionality of the NEA might be in doubt).

93. *See* Druker v. Commissioner of Internal Revenue, 697 F.2d 46, 50 (2d Cir. 1982) ("[T]he marriage penalty is most certainly not an attempt to interfere with the individual's freedom [to marry]. It would be altogether absurd to suppose that Congress, in fixing the rate schedules in 1969, had any invidious intent to discourage or penalize marriage—an estate enjoyed by the vast majority of its members.") (citations and internal quotations omitted).

94. *See* Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that a Wisconsin law requiring a court order granting the permission to marry, conditioned upon proof of compliance with child support obligations, significantly interferes with the fundamental right to marry).

ernment action that is otherwise constitutional.[95] But when either of the two types of coercion described earlier—economic coercion or power and resources coercion—is *coupled* with evidence of an intentional effort by government to interfere with a fundamental constitutional right, the argument for imposing compensating obligations upon government becomes most compelling.[96] With these basic parameters in mind, I will now explain how the theory of compensating rights might be used to challenge the Supreme Court's abortion funding decisions.

III. COMPENSATING RIGHTS AND THE PUBLIC FUNDING OF ABORTION

Though useful in virtually any context, the theory of compensating rights is particularly illuminating when applied to the Supreme Court's abortion funding decisions, which have largely sidestepped the equal access cases and failed to appreciate their significance.

A. THE SUPREME COURT'S ABORTION FUNDING DECISIONS

In *Beal v. Doe*,[97] the Supreme Court decided a statutory question related to the public funding of abortion, holding that Title XIX of the Social Security Act does not require states that participate in the federal Medicaid program to fund nontherapeutic abortions.[98] *Maher v. Roe*,[99] a companion case to *Beal*, presented a related constitutional question: Must a state that participates in Medicaid pay for nontherapeutic abortions when it pays for medical services related to childbirth?

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95. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). *But see* Hunter v. Underwood, 471 U.S. 222 (1985) (invalidating a provision of the Alabama Constitution disenfranchising persons convicted of crimes involving moral turpitude because the provision was motivated by racial animus toward blacks).

96. *See* Dorf, *supra* note 87, at 1181 ("In general, laws having the purpose of frustrating the exercise of a right pose greater dangers than either facilitative targeted restrictions or incidental burdens arising out of neutral laws.").

97. 432 U.S. 438 (1977).

98. States that participate in Medicaid receive federal funding to provide medical assistance to needy persons. Though Title XIX does not require the states to provide funding for all forms of medical treatment, it does require that state Medicaid plans establish "reasonable standards" for determining the extent of covered services. *See id.* at 440–41 & n.2.

99. 432 U.S. 464 (1977).

In *Maher*, Connecticut limited state Medicaid benefits for first trimester abortions to those that were "medically necessary," a term defined to include psychiatric necessity. Connecticut's regulation was challenged by a group of indigent women who were unable to obtain a physician's certificate of medical necessity. A three-judge federal district court panel invalidated the Connecticut regulation for impermissibly "weight[ing] the choice of the pregnant mother against choosing to exercise her constitutionally protected right" to an abortion.[100] The Supreme Court reversed on a narrow 5-4 vote. Drawing a distinction between "direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy,"[101] the Court concluded that Connecticut had done nothing to interfere with the right to an abortion:

> The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there.[102]

Three years later, in *Harris v. McRae*,[103] the Supreme Court upheld the constitutionality of the Hyde Amendment, which barred the use of any federal funds to reimburse state Medicaid programs for the costs of performing abortions, unless a woman's pregnancy would place her life in danger, or the pregnancy was the result of rape or incest.[104] As in *Maher*, the plaintiffs in *McRae* argued that by subsidizing medical services related to childbirth, but excluding abortion from Medicaid coverage, the government effectively coerced indigent pregnant women into bearing children they would otherwise elect not to have. Once again, the Court rejected this argument:

> [I]t simply does not follow that a woman's freedom of choice

100. Roe v. Norton, 408 F. Supp. 660, 663–64 (1975).
101. Maher v. Roe, 432 U.S. 464, 475 (1977).
102. *Id.* at 474.
103. 448 U.S. 297 (1980).
104. *See id.* at 302. The Hyde Amendment was named for its congressional sponsor, Representative Henry Hyde of Illinois. It was originally adopted in 1976 as an amendment to the annual appropriation bill for the Department of Health, Education, and Welfare (now the Department of Health and Human Services). *See id.*

> carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.... [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.... Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that the Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.[105]

The majority decisions in both *Maher* and *McRae* virtually ignored the equal access cases. Indeed, the *McRae* majority contained no mention whatsoever of these cases, while the *Maher* majority dismissed them in two brief footnotes. In the first of these footnotes, the *Maher* majority distinguished *Boddie* based on the state's monopolization of the procedure for obtaining a divorce.[106] In a later footnote, the Court likewise dismissed *Griffin* and *Douglas* as cases "grounded in the criminal justice system, a governmental monopoly in which participation is compelled."[107]

The Court's narrow focus on the existence of a government "monopoly" in *Boddie*, *Griffin*, and *Douglas* misses entirely the larger principle at the heart of all of the equal access cases: It is government *coercion*—particularly with respect to a fundamental right—that triggers government's duty to compensate. A government monopoly isn't objectionable in itself; it is constitutionally problematic only because it constrains the range of choices available to the individual, exerting a *coercive effect* on the individual's decisionmaking process. A more thoughtful consideration of the equal access cases might have yielded a different result in *Maher* and *McRae*.

B. PROCREATIVE CHOICE: A FUNDAMENTAL RIGHT AT THE TOP OF THE HIERARCHY

The threshold requirement for application of the theory of compensating rights—the existence of a fundamental constitu-

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105. *Id.* at 316–17.

106. *See Maher*, 432 U.S. at 469–70 n.5 ("Because Connecticut has made no attempt to monopolize the means for terminating pregnancies through abortion the present case is easily distinguished from *Boddie*.").

107. *Id.* at 471 n.6.

tional right—poses little difficulty. The Supreme Court has long recognized that individual *choice* in matters of procreation lies at the heart of the right to privacy: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[108] The decision whether to continue or terminate a pregnancy has a unique, life-altering dimension, every bit as significant and worthy of constitutional protection as the right to marry in *Boddie* or the right to a relationship with one's own child in *M.L.B.* Indeed, procreative liberty, including the right to obtain an abortion, is but one important facet of *physical* liberty,[109] and to coerce or compel a woman to carry a pregnancy to term is not altogether different from the sacrifice of liberty which the state demands of convicted criminals. Laurence Tribe takes this argument even further:

> [T]he most striking thing about governmental choices like the one upheld in *McRae*—choices that leave some women with no alternative to continuing an unwanted pregnancy through childbirth—is that they require those women to make affirmative use of their bodies for childbearing purposes. Such governmental choices, in fact, require women to sacrifice their liberty, and quite literally their labor, in order to enable others to survive and grow in circumstances likely to create lifelong attachments and burdens. Indeed, there seems to me to be a strong parallel between a woman's right not to remain pregnant and every person's inalienable right not to be enslaved.[110]

Griffin, *Gideon*, and *Douglas* required that criminal defendants be provided with free transcripts and attorneys to compensate for the inequality of power and resources that threatened to deprive the defendants of their physical liberty. *Boddie*, *Streater*, and *M.L.B.* required government to compensate for coercive pressure that threatened to deprive the individuals of liberties protected by the fundamental right to privacy. The decision

108. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

109. *See* Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) ("[T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice.").

110. Tribe, *supra* note 17, at 337.

whether to terminate a pregnancy implicates precisely the same kinds of fundamental interests that led the Court in the equal access cases to demand compensation.[111] The only remaining question is whether government's decision to subsidize medical expenses incident to childbirth while excluding from Medicaid coverage expenses related to abortion is sufficiently coercive to trigger government's duty to compensate.

C. FUNDING CHILDBIRTH BUT NOT ABORTION: A LEGITIMATE VALUE JUDGMENT OR UNCONSTITUTIONAL COERCION?

At the outset, it is important to remember that the principal constitutional claim in *Maher* and *McRae* was *not* that there is an independent constitutional right to a state-financed abortion, but rather that government's decision to subsidize medical expenses related to pregnancy and childbirth while denying public funding for abortion had the effect of coercing poor pregnant women into having children they would otherwise elect not to have. In rejecting this contention, the *Maher* majority advanced two related arguments. First, in choosing to fund childbirth but not abortion, government places no obstacle in the path of a poor woman seeking to obtain an abortion. Second, any obstacle in the path of a poor woman seeking an abortion is the product of the woman's own indigency, and government need not remove any obstacle that it did not create.[112] Relying heavily on *Maher*, the *McRae* majority simply reiterated these two essential points.[113]

Though the Supreme Court declined to view it as such, the disparity in funding available for childbirth and abortion is coercive in both of the senses I have described. The funding disparity functions in precisely the same way as a government-created financial barrier that burdens a fundamental right, and it places the government in an adversarial position vis-à-vis the individual with respect to a fundamental right.

In concluding that the funding disparity in *Maher* and *McRae* placed no obstacle in the path of a poor woman seeking an abortion, the Supreme Court focused superficially on the

111. *See Casey*, 505 U.S. at 857 (placing *Roe v. Wade* "at the intersection of two lines of decisions," those which accord protection to "liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child," and those which protect "personal autonomy and bodily integrity").

112. *See* Maher v. Roe, 432 U.S. 464, 474 (1977).

113. *See* Harris v. McRae, 448 U.S. 297, 316–17 (1980).

form of the Medicaid program rather than its substantive effect. Had government chosen to impose a direct tax on the abortion procedure, there is little doubt that the Supreme Court would have invalidated the levy as an unconstitutional obstacle to the abortion right. But government's decision to fund childbirth while excluding abortion from Medicaid coverage has precisely the same *effect* as a direct tax on abortion because it makes abortion more costly relative to childbirth.

Speiser v. Randall[114] provides an excellent illustration of this point. At issue in *Speiser* was a California law that provided a property tax exemption to qualified veterans who filed a standard application with the local assessor. In 1954, the application form was revised to add a loyalty oath. The plaintiffs were honorably discharged veterans who were denied the tax exemption solely because they refused to subscribe to the oath.[115] The Supreme Court held that the denial of the tax exemption violated the First Amendment: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[116] By subsidizing medical expenses incident to childbirth while denying any coverage for services related to abortion, the overall effect of the Medicaid program on poor pregnant women is identical: They are deterred from obtaining abortions just as surely as if the state had imposed a direct tax or fine on abortion. As Justice Brennan explained in his dissent in *McRae*:

> By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating a pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse. It matters not that in this instance the Government has used the carrot rather than the stick. What is critical is the realization that as a practical matter, many poverty-stricken women will choose to carry their pregnancy to term simply because the Government provides funds for the associated medical services, even though these same women

114. 357 U.S. 513 (1958).

115. *See id.* at 514–15.

116. *Id.* at 518; *see also* National Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) ("[E]ven in the provision of subsidies, the Government may not aim at the suppression of dangerous ideas, and if a subsidy were manipulated to have a coercive effect, then relief could be appropriate.... In addition, as the NEA itself concedes, a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive certain ideas or certain viewpoints from the marketplace.") (citations and internal quotations omitted).

> would have chosen to have an abortion if the Government had also paid for that option, or indeed if the Government had stayed out of the picture altogether and had defrayed the costs of neither procedure. [¶] The fundamental flaw in the Court's due process analysis, then, is its failure to acknowledge that the discriminatory distribution of the benefits of governmental largesse can discourage the exercise of fundamental liberties just as effectively as can an outright denial of those rights through criminal and regulatory sanctions.[117]

Another example may prove helpful here. Suppose that the state of Virginia had responded to *Harper* with a tax credit of $1.50 for every voter who had his or her name *removed* from the voter registration rolls. There is little doubt that the Supreme Court would have found such a scheme to be invalid for the same reason that the poll tax itself was declared unconstitutional—it creates a disincentive to vote that is felt most acutely by the poor. If government cannot directly tax the right to vote, then it cannot achieve the same result indirectly by offering a tax credit to those who give up the right to vote. And to hold otherwise would violate the old admonition that prevents government from seeking to accomplish indirectly that which it is prohibited from doing directly.

In *Williams v. Illinois*,[118] for example, the Supreme Court relied heavily on *Griffin* in concluding that the state may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine: "A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly."[119] In other contexts, the Supreme Court has been similarly vigilant in preventing government from achieving indirectly that which it is prohibited from doing directly. In the aftermath of *Brown v.*

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117. *McRae*, 448 U.S. at 333–34 (Brennan, J., dissenting).

118. 399 U.S. 235 (1970).

119. *Id.* at 243; *see also* Harman v. Forssenius, 380 U.S. 528, 540 (1965) ("Constitutional rights would be of little value if they could be indirectly denied or manipulated out of existence.") (citations and internal quotations omitted); Missouri v. Jenkins, 515 U.S. 70, 92 (1995) ("In effect, the District Court has devised a remedy to accomplish indirectly what it admittedly lacks the remedial authority to mandate directly: the interdistrict transfer of students."); Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 265 (1951) ("The function of the District Court is not simply to serve as a facade behind which the [Federal Power] Commission is enabled to accomplish indirectly what it cannot do directly.").

Board of Education,[120] many southern states and localities attempted to avoid desegregation by privatizing public schools, parks, and recreational facilities. The Supreme Court routinely invalidated such schemes.[121]

The preceding discussion is not intended to call into question the constitutionality of all government funding decisions, but merely to illustrate the inconsistency with which the Supreme Court approaches the problem of coercion. When government resources are allocated in a manner intended to discourage the expression of disfavored viewpoints, the Court does not hesitate to describe such programs as unconstitutionally coercive, akin to a "penalty" on speech. But when government resources are allocated in a manner designed to discourage abortion—a similarly disfavored but constitutionally protected right—the Court characterizes the choice as a legitimate "value judgment" designed to "encourage actions deemed to be in the public interest."[122] The Court's greater tolerance for coercive funding programs that burden privacy than for those which burden speech is inconsistent with the hierarchy of fundamental rights apparent from *Turner v. Safley*. In light of this hierarchy, one would expect just the opposite approach: A far greater concern for government funding schemes that burden the right to privacy than for those that burden freedom of speech, just as *Turner* was far more troubled by a prison regulation that prohibited inmates from marrying one another than it was by a regulation that prohibited inmates from corresponding with one another.

The majority's related argument in both *Maher* and *McRae*—that the obstacle to abortion for poor women is indigency and that government need not remove any obstacle that it didn't create—fares no better when subjected to careful scrutiny. In *Gideon* and *Douglas*, the defendants' own indigency was the only obstacle preventing them from obtaining the assistance of counsel. Government was nevertheless required to provide ac-

120. 347 U.S. 483 (1954).

121. *See, e.g.*, St. Helena Parish Sch. Bd. v. Hall, 368 U.S. 515 (1962); Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964); Evans v. Newton, 382 U.S. 296 (1966); Gilmore v. City of Montgomery, 417 U.S. 556 (1974). *But see* Palmer v. Thompson, 403 U.S. 217 (1971) (holding that a city's decision to close all public swimming pools rather than attempting to operate them on a desegregated basis did not violate the equal protection clause). *Palmer* can be distinguished on the grounds that the city's decision—though perhaps motivated by racial prejudice—did not have a disparate racial impact. *See id.* at 226.

122. *See* Maher v. Roe, 432 U.S. 464, 474, 476 (1977).

cess to an attorney. In *Streater*, government was likewise required to provide free blood testing to a defendant in a paternity action even though the defendant's own indigency was what prevented him from obtaining the necessary tests.

Indeed, indigency is the real barrier in *all* of the equal access cases. The poll tax in *Harper*, the court costs in *Boddie*, and the filing fees in *Lubin* didn't *prevent* the poor from voting, or obtaining divorces, or running for office. The barrier in all of these cases was that the poor couldn't *afford* the fees. The subtle financial pressure on fundamental rights that was constitutionally impermissible in these cases was deemed constitutionally unobjectionable in *Maher* and *McRae*.

Government's efforts to influence the decisions of women with respect to abortion, rooted in hostility to the abortion right itself, is also coercive in a manner analogous to the adversarial role of government that triggered compensating obligations in cases such as *Gideon*, *Douglas*, *Streater*, and *M.L.B.* In *Gideon*, for example, government placed no obstacle between the poor defendant and his attorney; the only obstacle was Clarence Gideon's lack of funds. The Court nevertheless required the state to appoint counsel for Gideon because it provided him with a buffer against the enormous resources and coercive power of the state, helping to ensure a fair trial while preserving the independence and integrity of his decisionmaking process.

A woman faced with a life-altering decision whether to terminate her pregnancy needs a similar buffer that enables her to reach an informed and intelligent decision free from financial pressure or other forms of coercion. But the buffer surrounding the abortion decision originally constructed in *Roe v. Wade* and enlarged in subsequent decisions[123] has steadily eroded, allowing government to exert extraordinary pressure on a woman's decision to terminate her pregnancy. *Maher* and *McRae* marked the beginning of this steady erosion, approving programs that subsidized childbirth but excluded abortion from Medicaid coverage.

123. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976) (invalidating a requirement that a woman seeking an abortion obtain the consent of her spouse since the state cannot delegate veto power that the state itself is prohibited from exercising); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 443–45, 449–51 (1983) (invalidating regulations designed to influence a woman's informed choice between abortion and childbirth such as the required dissemination of information related to childbirth and adoption and an inflexible 24-hour waiting period); Thornburgh v. American Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986) ("The States are not free, under the guise of protecting maternal health or potential life, to intimidate women into continuing pregnancies.").

Casey continued the trend, inviting the states to adopt laws requiring waiting periods and pro-childbirth counseling that serve to deter some women, particularly poor women, from seeking or obtaining abortions.[124] More recently, a number of states have adopted so-called "TRAP" laws—targeted restrictions on abortion providers—which impose strict health and building code requirements upon abortion clinics that often require expensive modifications, raising the cost of abortions or driving abortion providers out of business entirely.[125] Collectively, these restrictions on the abortion right exert a powerful coercive effect on poor pregnant women. They not only influence, but may actually *corrupt*, the decisionmaking process. When government's power and resources are aligned so fully against the interests of an individual, cases such as *Gideon*, *Douglas*, *Streater*, and *M.L.B.* require that the government counterbalance the coercion, protect fundamental rights, and preserve genuine freedom of choice.

Not all government funding schemes that indirectly burden protected rights are constitutionally suspect. As the majority in *Maher* pointed out, for example, government's decision to fund public education without providing comparable funding for private education is not constitutionally problematic, even though the disparity in funding may discourage some parents from exercising their constitutionally protected right to choose private

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124. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 881–87 (1992). The Court did, however, express some concern that a 24-hour waiting period would be particularly burdensome "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others." *Id.* at 886 (internal quotations omitted).

125. *See, e.g.*, David E. Rovella, *Spearheading High-Impact Action in Court: Abortion Rights Group's Founder Oversees Lawsuits and a Staff of 10*, NAT'L L.J., Dec. 17, 2001, at B13 ("[Simon] Heller [of the Center for Reproductive Law & Policy] contends that the biggest threat to abortion rights is the proliferation of targeted restrictions on abortion providers, or TRAP laws. Such laws are used in 17 states to impose strict health and building code requirements on abortion clinics that, to be complied with, often require expensive physical modifications and can force some clinics to close.").

Legal challenges to the TRAP laws of various states have met with mixed success. *See, e.g.*, Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004) (invalidating portions of Arizona's law, but withholding summary judgment on female patients' due process and equal protection claims); Women's Med. Ctr. of Northwest Houston v. Bell, 248 F.3d 411 (5th Cir. 2001) (holding that licensing requirements that depended on whether a facility performed more than 300 abortions per year did not violate equal protection, but invalidating other provisions of the law as impermissibly vague); Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000) (holding that South Carolina's law does not violate due process or equal protection), *cert. denied*, 531 U.S. 1191 (2001); Women's Med. Prof'l Corp. v. Baird, 277 F. Supp. 2d 862 (S.D. Ohio 2003) (holding that Ohio's law violates substantive due process by creating an undue burden on women seeking abortions).

schooling.[126] Government's decision to fund childbirth and not abortion is qualitatively different, however, because it is merely one element in an *environment of coercion* intended to discourage abortion. Viewed in isolation, the funding disparity may not seem particularly coercive, but when coupled with state laws requiring waiting periods and pro-childbirth counseling and stringent health and safety regulations applied *only* to abortion facilities, doctors, and staff, the coercive effect on poor women is magnified dramatically. Indeed, the federal courts have repeatedly found that these kinds of government restrictions on the abortion right directly and measurably increase the cost and decrease the availability of the abortion procedure.[127] These recent findings undermine *McRae*'s conclusion that "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[128] If the government sought to increase the cost and decrease the availability of private education in a like manner, the argument for requiring government to counterbalance the coercion by funding private education on par with public education would be similarly compelling.[129]

The *Casey* decision marked a dramatic change in the Supreme Court's abortion jurisprudence. While professing to reaffirm the "central holding" of *Roe v. Wade*, the pivotal joint opinion authored by Justices O'Connor, Kennedy, and Souter abandoned *Roe*'s "rigid trimester framework" in favor of a new "undue burden" standard.[130] The joint opinion defined an "un-

126. *See Maher*, 432 U.S. at 476–77. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Supreme Court invalidated an Oregon law that required the parent or guardian of a child to send the child to a public school. The Court held that the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534–35. *See generally* Paula Abrams, *The Little Red Schoolhouse:* Pierce, *State Monopoly of Education and the Politics of Intolerance*, 20 CONST. COMMENT. 61 (2003).

127. *See Casey*, 505 U.S. at 885–86; *Tucson Woman's Clinic*, 379 F.3d at 541–42; *Women's Med. Ctr. of Northwest Houston*, 248 F.3d at 415 (noting that stringent licensing requirements would increase cost of abortion by as much as $100 per procedure); *Greenville Women's Clinic*, 222 F.3d at 162 (citing district court findings that South Carolina's regulations would increase the cost of abortions by $23 to $368 in certain areas); *Women's Med. Prof'l Corp.*, 277 F. Supp. 2d at 876–77 (noting that an Ohio regulation, if applied to a particular abortion provider, would force the closure of the clinic and would completely foreclose women from obtaining abortions in the Dayton area).

128. Harris v. McRae, 448 U.S. 297, 316 (1980).

129. *Cf.* Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S. 218 (1964) (school board's decision to close the county's public schools while contributing to the support of private segregated schools denied black students equal protection of the laws).

130. *See Casey*, 505 U.S. at 878–79.

due burden" as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"[131] language which parallels the Court's finding in *Maher* and *McRae* that government had placed "no obstacles . . . in the pregnant woman's path to an abortion."[132]

Under *Casey*'s undue burden standard, "a state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal,"[133] as will regulations which create a "structural mechanism by which the State . . . may express profound respect for the life of the unborn."[134] Consistent with these observations, the Supreme Court upheld Pennsylvania's 24-hour waiting period coupled with the provision of informational materials regarding alternatives to abortion.[135] *Casey* also reaffirmed the Court's conclusion in *Maher* and *McRae* that government is *not* required to subsidize abortion simply because it subsidizes medical expenses related to childbirth.[136] These restrictions on abortion were *not* sufficiently coercive, in the Court's view, to trigger compensating obligations designed to safeguard the right to abortion.

In support of its conclusion that government may restrict the availability of abortion without violating the core right protected by *Roe v. Wade*, *Casey* noted that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right," just as "not every ballot access limitation amounts to an infringement of the right to vote."[137] States must be given the flexibility to adopt measures designed to ensure that the woman's choice is "thoughtful and informed"[138] even if such measures have "the incidental effect of making it more difficult or more expensive to procure an abortion,"[139] just as the states are "granted substantial flexibility in establishing

131. *Id.* at 877.
132. Maher v. Roe, 432 U.S. 464, 474 (1977).
133. *Casey*, 505 U.S. at 878.
134. *Id.* at 877.
135. *See id.* at 881–87.
136. *See id.* at 874–75, 878 (citing language in *Maher* and *McRae* rejecting an "unqualified constitutional right to abortion" in favor of a description of the abortion right as one which "protects the woman from unduly burdensome interference," and concluding that the state may adopt measures to persuade a woman to choose childbirth over abortion).
137. *Id.* at 873.
138. *Id.* at 872.
139. *Id.* at 874.

the framework within which voters choose the candidates for whom they wish to vote."[140]

Casey's choice of analogies is curious, because the kinds of state regulations of abortion sustained in *Casey* would be regarded as coercive and patently unconstitutional if applied to the right to vote. A ballot access limitation that makes it more difficult or more expensive for the poor to vote or to run for office *is* regarded as an unconstitutional interference with the right to vote. That's precisely the point made in cases such as *Harper*, *Bullock*, and *Lubin*.[141] But beyond these cases, which the Court overlooked in *Maher*, *McRae*, and *Casey*, suppose that a state, in an effort to create a more informed and intelligent electorate, imposes a modest poll tax of $5 on the assumption that people will cast more thoughtful votes if they have to pay for the privilege.[142] Suppose further that the state imposes a two-hour waiting period at every polling place, during which time the voter is asked to read informational materials describing all of the candidates and ballot measures.

There is no question that such measures would serve government's legitimate interest in fostering informed and intelligent voting.[143] But there is also no question that such measures would create a "substantial obstacle" to voting, rendering them unconstitutional.[144] The modest commitment of time and effort

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140. *Id.* at 873–74.

141. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966); Bullock v. Carter, 405 U.S. 134, 143–44 (1972); Lubin v. Panish, 415 U.S. 709, 716 (1974).

142. *See Harper*, 383 U.S. at 684–85 (Harlan, J., dissenting) ("[I]t is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise.").

143. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 228 (1989) ("Certainly the State has a legitimate interest in fostering an informed electorate."); Anderson v. Celebrezze, 460 U.S. 780, 796 (1983) ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election.").

144. Following ratification of the Twenty-Fourth Amendment abolishing the poll tax as a requirement for voting in federal elections, Virginia removed the poll tax as an absolute prerequisite to qualification for voting in federal elections, but replaced it with a provision whereby the federal voter could qualify either by paying the customary poll tax or by filing a certificate of residence six months before the election. In Harman v. Forssenius, 380 U.S. 528 (1965), the Supreme Court invalidated the new provision. The Court noted that "constitutional rights would be of little value if they could be indirectly denied or manipulated out of existence." *Id.* at 540 (citations and internal quotations omitted); *see also* Dunn v. Blumstein, 405 U.S. 330, 354–60 (holding that a state's interest in knowledgeable and intelligent voting is insufficient to sustain a one-year durational residency requirement). *But cf.* Marston v. Lewis, 410 U.S. 679 (1973) (sustaining Arizona's 50-day residency requirement and voter registration deadline based on the state's need for a reasonable time period in which to prepare accurate voter lists).

required to vote in elections today is enough to keep roughly half of registered voters away from the polls. One can only guess how low voter turnout might be if every voter left the polling place $5 and two hours poorer.

Voting is a personal and private matter, and when a voter arrives at her polling place, the state *assumes* that the voter has thoughtfully considered her choices. Indeed, all 50 states have, through legislation, created restricted zones around polling places to prevent voter coercion and to safeguard the right to vote.[145] In *Burson v. Freeman*,[146] decided just one month before *Casey*, the Supreme Court had little difficulty concluding that such restricted zones are constitutional, even when they suppress core political speech in the vicinity of the ballot box.[147] The Supreme Court plainly understood the need for a private and secure environment—free from coercion or undue influence—in which voters may make thoughtful and intelligent decisions of extraordinary importance: "The State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice."[148]

Somewhat paradoxically, the Supreme Court has upheld legislative efforts designed to insulate pregnant women from the *private* coercion of anti-abortion protesters. In *Hill v. Colorado*,[149] the Supreme Court rejected a First Amendment challenge to a Colorado statute regulating speech-related conduct within 100 feet of the entrance to any health care facility. Specifically, the statute made it unlawful for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[150] In upholding the legislation, the Court emphasized the "particularly vulnerable physical and emotional conditions" of those who are attempting to enter

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A two-hour polling place waiting period, coupled with informational materials designed to ensure more thoughtful and intelligent voting, would also likely violate the federal Voting Rights Act. *See Dunn*, 405 U.S. at 357 & n.29; 42 U.S.C. § 1973aa (2000).

145. *See* Burson v. Freeman, 504 U.S. 191, 206 (1992); *see also* Robert Brett Dunham, Note, *Defoliating the Grassroots: Election Day Restrictions on Political Speech*, 77 GEO. L.J. 2137, 2143 (1989) (summarizing state statutes as of 1989).

146. 504 U.S. 191 (1992).

147. *See id.* at 211.

148. *See id.* at 210.

149. 530 U.S. 703 (2000).

150. *Id.* at 707.

health care facilities, and noted that government has "a substantial interest in controlling the activity around certain public and private places" such as "schools, courthouses, polling places, and private homes."[151]

The effect of decisions like *Maher*, *McRae*, and *Casey* is to deny to poor pregnant women the same kind of private and secure environment—free from coercion and undue influence—in which to make a thoughtful and intelligent decision of extraordinary importance. The very kind of state interference that would be regarded as coercive and patently unconstitutional with respect to voting is considered constitutionally unobjectionable with respect to procreative decisionmaking. As a result, government actively discourages abortion through its funding choices, as well as through a myriad of restrictions designed to deter women from seeking or obtaining abortions. This deterrent effect is neither incidental nor unintentional; it is, instead, the foreseeable and desired result.[152] The theory of compensating rights set forth in this Article would require government either to remove its coercive pressure on the abortion decision or to counterbalance it by funding abortion on an equal footing with childbirth.

CONCLUSION

Over the last 50 years, the Supreme Court has been largely unwilling to loosen the jurisprudential moorings that limit cases guaranteeing equal access to the courts and equal access to the political process. But at the heart of the equal access cases is something more: a profound commitment to providing the individual with the means to resist government coercion. Coercion in any form is constitutionally troublesome because it robs individuals of choice and ultimately destroys the very essence of freedom. But government coercion is most sinister when directed at those least able to resist it.

Government's decision to subsidize childbirth but not abortion through Medicaid exhibits all of the hallmarks of this most sinister form of government coercion, which is felt only by poor women attempting to exercise their constitutionally protected right to make procreative decisions. Indeed, financial induce-

151. *Id.* at 728–29.

152. *See* Harris v. McRae, 448 U.S. 297, 330–31 & n.4 (1980) (Brennan, J., dissenting) (describing the Hyde Amendment "for what it really is—a deliberate effort to discourage the exercise of a constitutionally protected right").

ments offered to poor women to persuade them not to procure abortions should provoke the same moral outrage that accompanied revelations that poor blacks were offered financial inducements to persuade them not to vote. Just as the equal access cases require the government either to remove or to compensate for coercive financial barriers that bar the poor from access to the courts or the political process, so too government must either remove or compensate for coercive pressure designed to persuade poor women to choose childbirth over abortion. Such a result would fulfill *Casey*'s rhetorical promise that "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy" should be made freely by the *individual*, rather than "under compulsion of the State."[153]

153. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).