

# THE PRICES OF RIGHTS: TOWARD A POSITIVE THEORY OF UNCONSTITUTIONAL CONDITIONS

*Lynn A. Baker*†

INTRODUCTION .....	1185
I. CONDITIONAL ALLOCATIONS .....	1189
A. The Problem .....	1189
B. The Unconstitutional Conditions Doctrine .....	1193
II. THE PUBLIC ASSISTANCE CASES .....	1197
A. Challenges to Conditions .....	1198
B. The Court's Reasoning and Rhetoric .....	1202
C. The Genealogy of the Court's Approach .....	1206
III. THE PRICES OF RIGHTS: A POSITIVE THEORY .....	1213
A. Choices, Prices, Entitlements, and Rights .....	1213
B. Conditions Sustained .....	1220
1. International Union, Wyman, and Aznavorian ...	1221
2. <i>The Abortion Funding Cases</i> .....	1228
3. <i>The Marital Status Cases</i> .....	1232
4. <i>Dandridge and Castillo</i> .....	1235
C. Conditions Overturned .....	1239
1. <i>The Freedom of Association</i> .....	1239
2. <i>The Right to Travel</i> .....	1240
3. <i>The Right of Free Exercise</i> .....	1242
4. <i>The Right to Procreate</i> .....	1245
IV. THE NORMATIVE UNDERPINNINGS OF THE THEORY .....	1246
A. Institutional Competence and Redistribution .....	1246
B. Dignitary Interests and the Distribution of Rights ..	1251
C. Mystification .....	1253
V. CONCLUSION: RETHINKING UNCONSTITUTIONAL CONDITIONS .....	1255

## INTRODUCTION

In 1963, the Supreme Court began to apply the doctrine of un-

---

† Assistant Professor, University of Virginia School of Law. B.A., Yale University, 1978; B.A., Oxford University, 1982; J.D., Yale University, 1985.

I would like to thank Mike Klarman, Saul Levmore, Dan Ortiz, Glen Robinson, George Rutherglen, Bob Scott, Paul Stephan, Bill Stuntz, Pam Sumners, and participants in a University of Virginia Legal Theory Workshop for their valuable comments on earlier drafts.

constitutional conditions to cases involving an always controversial group of government benefits. With its decision in *Sherbert v. Verner*,<sup>1</sup> the Court began to delimit the conditions that states and the federal government could impose on the receipt of "public assistance."<sup>2</sup> Although this form of government largess<sup>3</sup> was a new context for its application, the doctrine itself had confounded courts for more than one hundred years<sup>4</sup> and commentators for nearly forty.<sup>5</sup> Despite wide acknowledgment of the doctrine's importance in modern constitutional law, attempts to explain how it arises or what it does have been largely unsuccessful.

This Article suggests a new approach to the unconstitutional

<sup>1</sup> 374 U.S. 398 (1963).

<sup>2</sup> By "public assistance" I mean all government-provided "necessities of life," whether in the form of a cash grant or in-kind aid. Such benefits include food stamps, medical care, and cash grants to those unable for various reasons to *earn* a subsistence income. I mean, therefore, to include not only "welfare," but also non-need-based income maintenance insurance schemes such as Unemployment Compensation and Social Security, which provide cash grants to the unemployed, some of whom might have savings and other assets sufficient to provide them a subsistence income even in the absence of paid employment.

For further description of the public assistance programs with which this Article is concerned, see *infra* notes 42-48 and accompanying text.

<sup>3</sup> I assume throughout this Article that there is no established constitutional right to welfare or other forms of public assistance as defined *supra* note 2. To be sure, much ink has been spilled over both sides of the question whether a right to "subsistence" does exist somewhere in the Constitution. For arguments in the affirmative, see, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter *Foreword*]; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986) [hereinafter *Rights and Redistribution*]; William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

For arguments in the negative, see, e.g., Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Richard A. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201; Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

<sup>4</sup> The earliest hint of the doctrine is found in *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855): "This consent [to do business as a foreign corporation] may be accompanied by such conditions as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution or laws of the United States . . ."

The first mention of the doctrine by name, however, does not occur for twenty more years: "Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so." *Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting).

<sup>5</sup> Two of the earliest discussions of the doctrine in the law reviews appear to be S. Chesterfield Oppenheim, *Unconstitutional Conditions and State Powers*, 26 MICH. L. REV. 176 (1927), and Maurice H. Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929).

conditions doctrine and, as a first test, uses it to examine the historically problematic group of cases involving public assistance benefits. Although a clear pattern is present in the rhetoric of the twenty-three such cases the Court has decided beginning with *Sherbert*, there is no similar facial pattern to be found in their results. The unconstitutional conditions doctrine itself remains murky. The Court has provided no coherent explication of when and how it will apply the doctrine in this area, and commentators' attempts to make sense of these cases have produced only expressions of despair and normative proposals.<sup>6</sup>

The approach suggested in this Article yields a positive theory of the Court's resolution of challenges to conditions on public assistance benefits. This theory reveals substantial underlying consistency in the decisions of the Warren, Burger, and Rehnquist Courts in an area so politically controversial that some at least might

---

<sup>6</sup> The principal recent commentaries on unconstitutional conditions which discuss these cases at some length are Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) [hereinafter *Foreword*]; Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984) [hereinafter *Allocational Sanctions*]; and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) [hereinafter *Unconstitutional Conditions*].

The other recent commentaries on the unconstitutional conditions doctrine either do not discuss the public assistance cases, or give them brief and incomplete attention. See Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989); Richard A. Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 SAN DIEGO L. REV. 189 (1989) [hereinafter *Bargaining Breakdown*]; John H. Garvey, *The Powers and the Duties of Government*, 26 SAN DIEGO L. REV. 209 (1989); Seth F. Kreimer, *Government "Largesse" and Constitutional Rights: Some Paths Through and Around the Swamp*, 26 SAN DIEGO L. REV. 229 (1989); William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989); Michael W. McConnell, *Unconstitutional Conditions: Unrecognized Implications of the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Albert J. Rosenthal, *Conditional Federal Spending as a Regulatory Device*, 26 SAN DIEGO L. REV. 277 (1989); Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73 (1988); Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289 (1989); Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327 (1989); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337 (1989) [hereinafter *Is There a Doctrine?*]; Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with particular reference to religion, speech, and abortion)* (Feb. 1990) (unpublished manuscript on file with author) [hereinafter *Doctrine Is Anachronism*]; Peter Westen, *The Rueful Rhetoric of "Rights"*, 33 UCLA L. REV. 977 (1986).

Some of the earlier unconstitutional conditions scholarship discussed the (then-existent) public assistance cases, but failed to provide (or, in some cases, even attempt) a positive theory of the Court's holdings. See, e.g., Frederick Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183 (1964); Hans A. Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1965); Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

expect to find systematically divergent results.<sup>7</sup> Contrary to these Courts' own rhetoric, however, the key is not the ever-problematic distinction between choice and coercion. Rather, the core of the doctrine's coherence, at least with regard to this group of cases, lies in the Court's tacit attempt to ensure a certain non-wealth-dependent equality of constitutional rights within the constraints of our essentially market economy.

This Article begins with a discussion of the general problem posed by statutory conditions on government benefits and the several explicit approaches suggested by the Court and its commentators. A brief discussion of the proposed general approach follows. Part II focuses on a group of cases that have been found especially problematic: constitutional challenges to statutory conditions on public assistance benefits. An initial examination reveals a surface consistency in the Court's reasoning and rhetoric in these cases. Those patterns, however, raise further, deeper issues for discussion and resolution.

Part III presents a positive theory of the unconstitutional conditions doctrine in challenges involving public assistance benefits. The theory proposes that the Court, *sub silentio*, has been employing a straightforward test in deciding nearly all conditional allocations cases involving these benefits: The Court declines to defer to the legislature only when the challenged condition requires persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income. The theory rests on two critical facts: The exercise of many constitutional rights carries a price for the individual; and statutory conditions on benefits can adversely and discriminatorily affect that price.

Part III concludes with a re-examination of the public assistance cases in light of the proposed positive theory. The normative underpinnings of the theory are discussed in Part IV. The Article concludes with speculation on both the value of this descriptive theory for understanding the Court's treatment of conditional allocations other than public assistance benefits, and the utility of the proposed overall approach for arriving at a general conception of the unconstitutional conditions doctrine.

---

<sup>7</sup> As in any other area of the law, the political and other normative preferences of individual judges might (consciously or unconsciously) affect their decisionmaking. The descriptive theory presented in this Article does not deny the possible existence of such influences. Rather, it reveals them to be mere "background noise" relative to the stronger "signal," described in my positive theory, which I suggest emanates from the public assistance cases presenting unconstitutional conditions problems.

## I

## CONDITIONAL ALLOCATIONS

## A. The Problem

Our modern American governments, both state and federal, build roads, employ workers, and grant licenses; they distribute tax exemptions, medical care, food stamps, and cash grants. They have, in short, enormous wealth and power.<sup>8</sup> In the absence of a clear constitutional entitlement, the issue arises as to what conditions, if any, the government might attach to its many forms of largess. This question is complicated by the fact that straightforward eligibility requirements for the receipt of such benefits or privileges are not readily distinguishable from potentially controversial conditions. In the case of welfare benefits, for example, *any* "eligibility requirement"—even a showing that one's income is below the government-established "poverty" level<sup>9</sup>—is arguably a "condition" on receipt of the benefit. This potentially all-inclusive set of "conditions" can be separated into two logically distinct sub-groups: 1) conditions that present a choice of actions; and 2) conditions that automatically disqualify persons who possess some immutable characteristic.

The first type of condition presents the otherwise eligible individual with a seeming choice of actions, frequently (but not always)<sup>10</sup> between complying with the attached condition and receiving the benefit, or not complying and forgoing receipt of the benefit. Typically these conditions create a situation in which the benefit provides the individual an incentive to act (or not) in a certain way, frequently (but not always) to waive a constitutional right.

The second type of condition, in contrast, does not present the individual with a choice of actions; there is in fact nothing the individual can now do, or could have done, to comply with the attached condition and receive the benefit. These conditions simply disqualify otherwise eligible persons because they possess some immutable characteristic. Such conditions therefore present issues of straightforward discrimination among classes of otherwise eligible individuals. Not surprisingly, challenges to this type of condition usually

---

<sup>8</sup> The classic discussion of the expanding wealth and power of the modern American state, and some of the attendant risks, is Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

<sup>9</sup> Some commentators during the Welfare Revolution found even means testing controversial, however. See, e.g., Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 *CALIF. L. REV.* 407, 425-34 (1966); Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 *CALIF. L. REV.* 479, 492-500 (1966).

<sup>10</sup> For a discussion of the exceptions, see *infra* notes 79 & 103 and accompanying text.

allege a denial of equal protection under either the fifth or fourteenth amendment.

This Article is concerned with the first type of condition, that which offers the claimant a "choice" of actions. Through the years, both the Court and commentators have provided various analyses of the problems posed by such conditions and have arrived at persuasive justifications for the competing solutions of absolute judicial deference and active judicial review. At the core of arguments in favor of absolute judicial deference is the right/privilege distinction embodied in Justice Holmes's famous trenchant response to the petition of a policeman who had been fired for violating a regulation that restricted his political activities: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>11</sup>

The Court has sometimes articulated a deferential approach that permits the State to attach *any* condition to a governmental allocation to which there is no absolute constitutional entitlement. The underlying premise is that the State's "greater" power not to bestow the benefit or privilege at all incorporates a "lesser" power to provide it conditionally.<sup>12</sup> Critics contend that this analysis contains

---

<sup>11</sup> *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). Holmes elaborated:

There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

155 Mass. at 220, 29 N.E. at 517-18.

Important commentaries on the right/privilege distinction include William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968), and Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

<sup>12</sup> This argument, as well as an explicit statement of the unconstitutional conditions doctrine, made its first appearance in a Supreme Court opinion in *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876), a case involving a state's withdrawal of a foreign corporation's business license in apparent retaliation for the corporation's invocation of federal diversity jurisdiction. The majority held that "If the State has the power to cancel the license . . . [i]t has the power to determine for what causes and in what manner the revocation shall be made." *Id.* at 542. Justice Bradley in dissent claimed that the state had imposed an "unconstitutional condition" on the right to do business. *Id.* at 543 (Bradley, J., dissenting). *Doyle* was first effectively reversed by *Barron v. Burnside*, 121 U.S. 186 (1887), then seemingly reinstated by *Security Mut. Life Ins. Co. v. Prewitt*, 202 U.S. 246, 257 (1906), but ultimately overruled by *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922).

Justice Holmes, however, was probably the best known and most frequent advocate of the "greater includes the lesser" argument. This advocacy began while he was a member of the Supreme Judicial Court of Massachusetts, *see Commonwealth v. Davis*, 162 Mass. 510, 511, *aff'd*, 167 U.S. 43 (1897), and continued throughout his tenure on the United States Supreme Court. *See, e.g., Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 602 (1926) (Holmes, J., dissenting); *Denver v. Denver Union Water Co.*, 246 U.S. 178, 196-97 (1918) (Holmes, J., dissenting); *Motion Picture Patents*

several logical flaws, foremost among them the assumption that the conditional denial of a benefit is qualitatively identical to an absolute denial.<sup>13</sup>

Another frequently invoked justification for absolute judicial deference follows the lines of the classical Pareto superiority test of modern welfare economics and its implied "bargain" model.<sup>14</sup> As compared to a world in which the State does not provide a particular

Co. v. Universal Film Mfg. Co., 243 U.S. 502, 519-20 (1917) (Holmes, J., dissenting); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 52 (1910) (Holmes, J., dissenting).

Among sitting justices, Rehnquist probably most frequently invokes the "greater includes the lesser" argument. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 596-97 (1983) (Rehnquist, J., dissenting); United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 129, *appeal dismissed, cert. denied*, 453 U.S. 917 (1981); Delta Air Lines, Inc. v. August, 450 U.S. 346, 368 (1981) (Rehnquist, J., dissenting) (accusing majority of ignoring "common-sense maxim" that the greater power includes the lesser); First Nat'l Bank v. Bellotti, 435 U.S. 765, 825-27 (1978) (Rehnquist, J., dissenting); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125-26 (1977); Arnett v. Kennedy, 416 U.S. 134, 153-54 (claimants "must take the bitter with the sweet" and accept whatever due process limitations accompany the benefit), *reh'g denied*, 417 U.S. 977 (1974).

Other of the current justices have also employed the argument, but less frequently or consistently. Compare, e.g., FERC v. Mississippi, 456 U.S. 742, 765 (Blackmun, J., using the argument in writing for a 5-4 majority), *reh'g denied*, 458 U.S. 1131 (1982) with Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 359 (1986) (Blackmun, J., dissenting in 5-4 decision and refusing to entertain the argument); compare FERC v. Mississippi, 456 U.S. at 761 (O'Connor, J., dissenting in part and concurring in part, and terming the argument "an absurdity") with South Dakota v. Neville, 459 U.S. 553, 566 (1983) (O'Connor, J., employing the argument in writing for a 7-2 majority); compare Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. at 359 (Stevens, J., dissenting in 5-4 decision and refusing to entertain the argument) with Metromedia, Inc. v. San Diego, 453 U.S. 490, 555 (1981) (Stevens, J., dissenting in part and employing the argument).

In any event, the "greater includes the lesser" argument appears to endure.

<sup>13</sup> Several commentators have demonstrated that the "greater power includes the lesser" argument fails deductively. See, e.g., John D. French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 239-42 (1961); Garvey, *supra* note 6, at 215-19; O'Neil, *supra* note 6, at 461; Thomas R. Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 110-11 (1916); Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 747 n.20 (1981).

Seth Kreimer has persuasively shown that the argument is also flawed as analogy. Kreimer, *Allocational Sanctions*, *supra* note 6, at 1311-14.

<sup>14</sup> Then Professor, now Judge, Richard Posner has described the test as follows:

A change is said to be Pareto superior if it makes at least one person better off and no one worse off. Such a change by definition increases the total amount of (human) happiness in the world. The advantage of the Pareto approach is that it requires information only about marginal and not about total utilities. And there seems ready at hand an operational device for achieving Pareto superiority, the voluntary transaction, which by definition makes both parties better off than they were before. However, the condition that no one else be affected by a "voluntary" transaction can only rarely be fulfilled. Moreover, the voluntary-transaction or free-market solution to the problem of measuring utility begs two critical questions: whether the goods exchanged were initially distributed so as to maximize happiness (were the people with money those who derive the most happiness from the things money can buy?) and whether a system of

benefit to which individuals have no absolute constitutional entitlement, a world in which the benefit is conditionally available arguably makes no one worse off, and makes those who accept the benefit with its attached condition better off, than before. Thus, the State should be able to attach any condition it chooses to the benefits it makes available since individuals, who are presumed to know their own best interests, are free to enter into only those bargains with the State that they believe will improve their own circumstances.<sup>15</sup> Under this analysis, the State has neither pressured nor coerced the individual. It has simply offered him a choice, indeed a choice that is not even available in a world without the benefit.

Two fundamental criticisms might be made of this argument. First, the seeming absence of the use or threat of force by the State does not necessarily mean that a "choice" between receipt of the benefit with the attached condition or nonreceipt of the benefit is a truly "free" or "uncoerced" one.<sup>16</sup> Second, the analysis arguably rests on the unjustified (and ultimately question begging) assumption that the appropriate baseline for the Pareto superiority comparison is a world in which the State does not provide the benefit at all rather than a world in which the State provides the benefit without the attached condition.<sup>17</sup> The choice of baselines is, of course, criti-

---

free markets creates more happiness than alternative systems of resource allocation would.

RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 54-55 (1981).

<sup>15</sup> This justification for judicial deference was first presented by Justice Holmes in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517-18 (1892) (emphasis added):

The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness by the implied terms of his contract. *The servant cannot complain, as he takes the employment on the terms which are offered him.*

Shades of this argument also appear in many of the opinions cited *supra* note 12.

Academic discussions of this particular justification include Epstein, *Foreword, supra* note 6, at 8-10; Epstein, *Bargaining Breakdown, supra* note 6; Merrill, *supra* note 5.

<sup>16</sup> The commentary is rife with discussion of difficulties with the choice/coercion distinction in conditional allocation cases. *See, e.g.*, Epstein, *Foreword, supra* note 6; Kreimer, *Allocational Sanctions, supra* note 6; Simons, *supra* note 6; Sullivan, *Unconstitutional Conditions, supra* note 6.

<sup>17</sup> The right/privilege distinction arguably supports the notion that the appropriate baseline for comparison in cases involving a benefit to which the claimant has no constitutional entitlement is a world in which the State does not provide the benefit at all. Indeed, an unconstitutional conditions problem does not arise if government is constitutionally obligated to provide a benefit.

The issue of the appropriate "baseline" is a pervasive one in the commentary on conditional allocations. *See, e.g.*, Epstein, *Foreword, supra* note 6, at 13 ("an account of baselines is essential to any general analysis of unconstitutional conditions") & 26-27 (noting existence of "many competing general constitutional visions" and of "the constitutional fault line of the post-1937 period"); Kreimer, *Allocational Sanctions, supra* note



cal: If the first baseline is employed, the State always wins and *any* condition is *always* permitted; if the second baseline is chosen, the State always loses and *no* condition is *ever* permitted.

Advocates of judicial review as the solution to the problems posed by conditional allocations would arrive at some baseline between these two extremes. Some proponents have favored a motivation analysis under which the Court is to invalidate those conditions arising from an unconstitutional purpose or intent.<sup>18</sup> Defenders of absolute judicial deference might be expected to provide the standard criticisms,<sup>19</sup> while other commentators have instead focused on difficulties of definition and implementation that motivation analyses traditionally pose constitutional adjudication.<sup>20</sup>

It is the second analytic framework for judicial review of conditional allocations—impact analysis—which the Court and its commentators have embraced as the most promising, if still problematic. This approach, broadly termed the unconstitutional conditions doctrine, is the focus of this Article.

## B. The Unconstitutional Conditions Doctrine

A fitting companion to the intent framework for judicial review of conditional allocations, the unconstitutional conditions doctrine is a type of effects test. In its classical formulation, the unconstitutional conditions doctrine prohibits conditions on allocations in which the government indirectly impinges on a protected activity or choice in a way that would be unconstitutional if the same result had

---

6, at 1352-78 (proposing three baselines that initially test the legitimacy of allocational sanctions); Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1419-21 (noting difficulty but importance of specifying norms to distinguish wrongful from permissible constraints on choice). *But see* Sunstein, *Doctrine Is Anachronism*, *supra* note 6, at 25 (proposing “a shift from an emphasis on whether there has been ‘coercion’ or ‘penalty’ to an inquiry into the nature of the interest affected by government and the reasons offered by government for its intrusion”).

<sup>18</sup> *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866), was the first case in which the Court employed a purpose analysis to strike down a challenged condition:

The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly.

Some later commentators urged a return to motive analysis in the hope of slowing the trend toward increasing regulation of corporations that might readily be justified by the “greater power includes the lesser” argument. *See, e.g.*, James M. Beck, *Nullification by Indirection*, 23 HARV. L. REV. 441 (1910); Oppenheim, *supra* note 5, at 176.

Kreimer, *Allocational Sanctions*, *supra* note 6, at 1327-40, provides the most comprehensive account of purpose analysis, its attractions, and its problems in the context of conditional allocations.

<sup>19</sup> *See supra* notes 12-15 and accompanying text.

<sup>20</sup> *See, e.g.*, Kreimer, *Allocational Sanctions*, *supra* note 6, at 1333-40.

been achieved through a direct governmental command.<sup>21</sup> For those favorably disposed toward the doctrine, the remaining debate ranges round the perception that while all true conditions on benefits provide incentives in favor of particular choices, not all such inducements, even in constitutionally protected areas, comprise proscribed burdens. Thus, a limiting principle has been sought.

The Court, in its search, has taken the perspective of the potential beneficiary and has focused on the extent and type of burden presented by the condition. Not surprisingly, given this perspective, the rhetoric of individual "choice" versus "coercion" permeates its discussions. In determining which conditions are coercive and therefore impermissible, the Court has explicitly looked to such characteristics as the "directness"<sup>22</sup> or "substantiality" of the condition's impact,<sup>23</sup> the likelihood that the condition will deter the exercise of a constitutional right,<sup>24</sup> the "germaneness" of the condition

<sup>21</sup> The classic statement of, and justification for, the doctrine was presented by Justice Sutherland in 1926:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926).

The various commentators have differed slightly, and ultimately unimportantly, in their statements of the doctrine. See, e.g., Epstein, *Foreword*, *supra* note 6, at 6-7 ("[T]his doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."); Kreimer, *Allocational Sanctions*, *supra* note 6, at 1340 ("If the consequence impinges upon a protected area in a way that would be unconstitutional had the same result flowed from a direct governmental command, this 'impact analysis' would invalidate the condition."); Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1415 ("The doctrine . . . holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. . . . [G]overnment may not do indirectly what it may not do directly . . ."); Van Alstyne, *supra* note 11, at 1445-46 ("[T]his doctrine declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly.").

<sup>22</sup> See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

<sup>23</sup> See, e.g., *Thomas*, 450 U.S. at 717-18; *Califano v. Jobst*, 434 U.S. 47, 58 (1977); *Maher v. Roe*, 432 U.S. 464, 474 (1977).

<sup>24</sup> See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Memorial Hosp. v. Maricopa*

to the purpose of the benefit program,<sup>25</sup> and the "importance" of the individual right or interest burdened.<sup>26</sup> These concepts, however, are scarcely less determinate than the notions of coercion and choice they are intended to delineate and define. Thus, one might conclude, at least at first glance, that the Court has simply relocated rather than resolved the original problem.

Indeed, the principal recent commentators on the unconstitutional conditions doctrine have all agreed that the Court has yet to arrive, explicitly or implicitly, at a clear limiting principle for deciding challenges to conditions on government benefits.<sup>27</sup> The failure of these commentators to present a positive theory of the existing case law is, I believe, the result of their general approaches to the doctrine and, therefore, paradoxically, of their ambitious attempts to organize all of unconstitutional conditions law.<sup>28</sup>

In his modern pioneering study of the unconstitutional conditions doctrine, Seth Kreimer<sup>29</sup> looked generally and broadly at all the conditional allocation cases without regard to the particular benefit, constitutional right, or government power involved. Finding little coherence in the Court's myriad applications of the doctrine, Kreimer proposed several baselines against which the Court might measure the coerciveness and, therefore, constitutionality of the State's bargains with its citizens.<sup>30</sup> While he rightly focused on the importance of a baseline for resolving conditional allocation challenges, Kreimer failed to arrive at any that might explain and describe the existing public assistance cases.

---

County, 415 U.S. 250, 257-60 (1974); *Graham v. Richardson*, 403 U.S. 365, 379-80 (1971).

<sup>25</sup> See, e.g., *Jobst*, 434 U.S. at 52-5; *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973).

<sup>26</sup> See, e.g., *Bowen v. Roy*, 476 U.S. 693, 727 (1986); *Thomas*, 450 U.S. at 717-18; *Memorial Hospital*, 425 U.S. at 259-60; *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

<sup>27</sup> See Epstein, *Foreword*, *supra* note 6, at 6-14; Kreimer, *Allocational Sanctions*, *supra* note 6, at 1340-51; Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1416-21.

<sup>28</sup> William Marshall and Cass Sunstein have recently suggested that a general descriptive theory of all of unconstitutional conditions law is not possible. See Marshall, *supra* note 6, at 244 ("It is my conclusion that despite, or perhaps because of, its ambition the search for a comprehensive theory of unconstitutional conditions is ultimately futile."); Sunstein, *Is There a Doctrine?*, *supra* note 6, at 338 ("Whether a condition is permissible is a function of the particular constitutional provision at issue; on that score, anything so general as an unconstitutional conditions doctrine is likely to be quite unhelpful."); Sunstein, *Doctrine Is Anachronism*, *supra* note 6, at 3 ("[T]he very idea of a unitary unconstitutional conditions doctrine is a product of the view that the common law is the ordinary course and that governmental "intervention"—the regulatory state—is exceptional. Despite its pervasiveness, this view is misconceived.").

<sup>29</sup> Kreimer, *Allocational Sanctions*, *supra* note 6.

<sup>30</sup> *Id.* at 1359-78. Kreimer's proposed baselines are "history," "equality," and "prediction." *Id.*

More recently, both Richard Epstein<sup>31</sup> and Kathleen Sullivan<sup>32</sup> have undertaken similarly ambitious studies of the conditional allocation cases. Their approach differed importantly from Kreimer's in their suggestion that the unconstitutional conditions doctrine might be best understood not as a single, large, and intricate portrait, but rather as a quilt of smaller, individually complete segments framed by a single broad border. Neither Epstein nor Sullivan, however, provided a coherent theory to explain either the existing conditional allocations case law or the public assistance cases taken alone. With regard to the latter, Sullivan quickly concluded that the Court's frequent invocation of "coercion" as the basis for striking down conditions in cases involving individual rights did not rest on "a consistent or satisfying theory,"<sup>33</sup> and she went on to make an admittedly normative proposal. Epstein, in contrast, examined comparatively few public assistance cases<sup>34</sup> and ultimately presented the unhelpfully broad conclusion that the doctrine operates in this area of government power "to forestall redistribution of wealth along forbidden dimensions."<sup>35</sup>

My suspicion, consistent with the views of Epstein and Sullivan, is that the unconstitutional conditions doctrine as a whole may ultimately be best understood as some sort of quilt. I am tentatively inclined to disagree with both, however, as to the size and composition of the component segments. Epstein's are broad squares differentiated by the State power exercised in making the conditional allocation;<sup>36</sup> Sullivan's are even larger blocks distinguished by the type of entity whose rights are potentially affected by the condi-

---

<sup>31</sup> Epstein, *Foreword*, *supra* note 6.

<sup>32</sup> Sullivan, *Unconstitutional Conditions*, *supra* note 6.

<sup>33</sup> *Id.* at 1433.

<sup>34</sup> Epstein's discussion of the "government benefits" cases, Epstein, *Foreword*, *supra* note 6, at 73-102, provides detailed analysis of only three (albeit important and prototypical) public assistance cases: *Sherbert v. Verner*, 374 U.S. 398 (1963); *Harris v. McRae*, 448 U.S. 297 (1980); and *Lyng v. International Union*, 485 U.S. 1360 (1988).

<sup>35</sup> Epstein, *Foreword*, *supra* note 6, at 97.

<sup>36</sup> Epstein described his approach as follows:

I have adopted an approach that first identifies the different heads of government power and then shows how the doctrine of unconstitutional conditions plays itself out with respect to their exercise. By beginning with the powers and not the limitations, it is easier, I think, to follow both the doctrine's historical development and its institutional framework.

*Id.* at 15.

Epstein subsequently examines six categories of government power: the state incorporation power; taxing, spending, and federalism; public roads and highways; the police power; employment; and government benefits. Under the last category, Epstein examines tax exemptions and freedom of speech, tax exemptions and free exercise, the religion cases, Medicaid benefits and abortions, and food stamps.

tioned benefit.<sup>37</sup> I suggest smaller segments demarcated by the nature of the benefit to which the condition attaches.<sup>38</sup>

As a first test of the utility of my proposed general organizing principle in fashioning a comprehensive positive theory of the unconstitutional conditions doctrine, this Article will examine the group of cases involving public assistance benefits. One might intuitively expect the import of any condition on these benefits to be greater for the potential recipients than the import of conditions on other types of benefits for their respective recipients. First, public assistance benefits, by definition, provide the very necessities of life to persons unable to earn a minimum income. Second, there is no equally reliable alternative to the government to which such persons might turn for those necessities. In this uniquely desperate context, what function does the unconstitutional conditions doctrine serve? The following analysis of the public assistance cases reveals the doctrine's role to be one of ensuring that persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, are not required to pay a higher price to exercise their constitutional rights than persons earning such an income. In this way, a certain non-wealth-dependent equality of constitutional rights is ensured within the constraints of our essentially market economy.

Given the uniquely desperate situation of potential beneficiaries of public assistance, we should not be surprised if the unconstitutional conditions doctrine is ultimately found to serve a different function in cases involving challenges to conditions on other types of benefits. Indeed, we should be surprised if it is otherwise.

## II

### THE PUBLIC ASSISTANCE CASES

Public assistance programs<sup>39</sup> have long been an important part

---

<sup>37</sup> Sullivan's groupings center on the corporation, state, and individual as rightholders.

<sup>38</sup> In a sense, then, my preliminary organizing principle in the search for a positive theory of the unconstitutional conditions doctrine incorporates those of both Epstein and Sullivan. Public assistance benefits, for example, are a subset both of Sullivan's "individual rights" category and of Epstein's "government benefit" group of State powers.

William Marshall and Cass Sunstein have recently argued that the critical organizing variable is instead the constitutional protection involved. Marshall, *supra* note 6, at 244 (whether a condition on a benefit is unconstitutional "depends upon the definition of the particular constitutional protection involved"); Sunstein, *Is There a Doctrine?*, *supra* note 6, at 338 (arguing for particularized inquiry "into whether the particular infringement affects a protected interest in a constitutionally troublesome way, and, if so, whether the government is able to justify any such effect"); Sunstein, *Doctrine Is Anachronism*, *supra* note 6, at 25 (same).

<sup>39</sup> For a definition of "public assistance," see *supra* note 2.

of our federal and state statutory law,<sup>40</sup> and various conditions have equally long been attached to the benefits these programs provide. It was not until comparatively recently, however, that the Supreme Court began to confront challenges to the constitutionality of those conditions.<sup>41</sup> This Part begins with a brief summary of the challenges to various conditions on public assistance benefits which the Court has heard beginning in 1963. After a discussion of the nature and genealogy of surface patterns in the reasoning and rhetoric of those cases, this Part concludes with an examination of further important questions raised, but not answered, by those patterns.

### A. Challenges to Conditions

At the time of *Sherbert*, the overall scheme of public assistance programs in this country was scarcely different than it is today.<sup>42</sup> At present, all of these programs provide either cash grants or in-kind aid to those unable for certain reasons to earn an income that meets government-established subsistence standards. Although not all public assistance benefits are strictly need-based or means-tested, all serve to improve the economic condition of those unable to earn a subsistence income.<sup>43</sup> All therefore also serve to reduce the in-

---

<sup>40</sup> For discussions of the history of American public assistance programs, see, e.g., MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1986); CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984); FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* (1971); Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175 (1955); Calvin Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286 (1962).

<sup>41</sup> The rise of such litigation in the early 1960s is frequently attributed to the coming of the Welfare Revolution in which "welfare rights" emerged as a national issue. See F. PIVEN & R. CLOWARD, *supra* note 40, at 248-340.

<sup>42</sup> The Social Security Act of 1934 established the basic scheme of income maintenance programs in this country. Although the Act has since undergone several substantial amendments, the basic structure of the present scheme differs in only three major respects from that in existence when *Sherbert* was decided in 1963. First, Congress did not enact the Food Stamp program until 1964. See Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964). Second, neither Medicare nor Medicaid was established until 1965. See Health Insurance for the Aged Act, Pub. L. No. 89-97, 79 Stat. 285 (1965). Third, the Supplemental Security Income program ("SSI") was revamped in 1972 from a federal-state cost-sharing program administered by the states into a program that was wholly funded and administered by the federal government. See Social Security Amendments of 1972, Pub. L. No. 92-603, tit. III, § 301, 86 Stat. 1465 (1972).

For detailed descriptions of the existing overall scheme of public assistance programs, see, e.g., SAR A. LEVITAN, *PROGRAMS IN AID OF THE POOR* (5th ed. 1985); THEODORE R. MARMOR, JERRY L. MASHAW & PHILLIP L. HARVEY, *AMERICA'S MISUNDERSTOOD WELFARE STATE*, ch. 2 (1990).

<sup>43</sup> At present, our public assistance programs are aimed at those who are not *unwilling* but rather *unable*, typically for reasons beyond their control, to earn a subsistence living. At least as a secular concept, however, this notion of the "deserving poor" is of fairly recent vintage.

Prior to the Great Depression, all poverty in this country was usually regarded as

equalities in wealth that are a natural part of a market economy.

The cash-grant public assistance programs combine to provide benefits to individual adults<sup>44</sup> who are unable (or are presumed to be unable) to earn a subsistence income for certain reasons: disability, work-related injury, old age, or the unavailability of suitable employment. The "categorical" organization of the cash-grant programs means that the reason for the individual's failure to earn a subsistence income is the first determinant of the benefit(s), if any, for which a claimant will be eligible. Some cash-grant programs are need-based, providing benefits to all claimants whose current income and assets, for permissible reasons, do not meet the pertinent "poverty" or "need" standard.<sup>45</sup> Other programs are non-need-based, federally mandated insurance schemes that provide benefits only to previously employed, insured persons and their economic dependents during certain periods of unemployment.<sup>46</sup>

In contrast to the cash-grant programs, the in-kind aid pro-

---

"the obvious consequence of sloth and sinfulness." F. PIVEN & R. CLOWARD, *supra* note 40, at 46 (quoting ROBERT H. BREMNER, *FROM THE DEPTHS: THE DISCOVERY OF POVERTY IN THE UNITED STATES* 15-16 (1956)). The mass economic distress of the Depression, however, forced an acknowledgment that poverty might at least sometimes be the fault of the "system" rather than a mark of individual failure of morals or character. *Id.* at 57, 61.

In a fascinating piece, Theodore Lowi has noted that this shift in attitudes toward the poor precisely parallels the shift in attitudes toward the sick at the end of the 1800s prompted by Pasteur and Koch's "germ theory" of disease. Theodore J. Lowi, *The Welfare State, the New Regulation, and the Rule of Law*, in *DISTRIBUTIONAL CONFLICTS IN ENVIRONMENTAL-RESOURCE POLICY* (Allen Schnaiberg, Nicholas Watts & Klaus Zimmerman eds. 1986).

<sup>44</sup> Not all programs, however, have the individual as the actual claimant unit. Food stamps, for example, are given to "households," 7 U.S.C. §§ 2014-2015 (1988), and Aid to Families with Dependent Children ("AFDC") is provided to "families," 42 U.S.C. § 607(a)-(c) (1982 & Supp. V 1987).

<sup>45</sup> SSI provides a need-based monthly stipend to the aged, blind, and disabled. 42 U.S.C. §§ 1381, 1382(a) (1982 & Supp. V 1987) (statement of benefit determinations and eligibility); *id.* § 1382c (definition of aged, blind, disabled). With the Social Security Amendments of 1972, SSI was converted from a federal-state cost-sharing program into a fully federally funded program. *See supra* note 42.

AFDC is a federal-state cost-sharing program that provides aid to dependent children (and their families) who have been deprived of parental support because of the unemployment of the resident parent who is the principal wage earner. 42 U.S.C. § 607(a)-(c) (1982 & Supp. V 1987). Other cost-sharing cash grant programs include Aid to the Blind, *id.* §§ 1201-1206, and Aid to the Permanently and Totally Disabled, *id.* §§ 1351-1355.

In addition to these federal-state cost-sharing programs, some states and localities also fund their own need-based general assistance programs to provide cash grants, medical care, or other in-kind aid to those who do not qualify for federal aid. S. LEVITAN, *supra* note 42, at 41-42.

<sup>46</sup> The Old Age, Survivors, and Disability Insurance program ("OASDI") provides cash grants to insured individuals when unemployed due to a disability or old age, and to their survivors, with the size of the grant determined by past earnings. OASDI Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 285 (codified as amended in scattered

grams are not "categorical"; eligibility is therefore determined without regard to the *particular* reason, among the group of acceptable reasons, for the claimant's failure to earn a subsistence income. All of the in-kind aid programs are need-based<sup>47</sup> except Medicare, which provides highly subsidized medical insurance to *all* elderly and disabled persons.<sup>48</sup>

Nearly each of these public assistance programs has been the subject of at least one of the twenty-three constitutional challenges to conditions on public assistance benefits which the Court has heard beginning in 1963.<sup>49</sup> Although the twenty-three cases span

sections of 42 U.S.C.); 42 U.S.C. § 414 (1982 & Supp. V 1987) (definition of insured individual); *id.* § 415 (computation of benefits).

Unemployment Compensation ("UC") is a similarly non-need-based insurance program that provides cash grants indexed to past earnings and work experience to insured workers during periods of forced idleness. 26 U.S.C. § 3304(a) (1988). Both OASDI and UC are funded through federally imposed payroll taxes on employers in all states. *Id.* § 3301 (UC tax payable by employer); *id.* § 3101(a) (OASDI tax payable by employees); *id.* § 3111(a) (OASDI tax payable by employer).

<sup>47</sup> The food stamp program provides benefits to all households receiving other forms of public assistance, as well as other households with net incomes below the poverty line after certain deductions. 7 U.S.C. §§ 2014-2015 (1988). Although the federal government pays the entire cost of food stamp benefits, *id.* § 2019, states are responsible for half of all administrative costs incurred in operating their agencies, *id.* § 2025(a).

Medicaid, the sole cost-sharing, in-kind aid program, is funded through federal reimbursements to states of 50% or more of the medical costs incurred by low-income persons. 42 U.S.C. § 1396-1396p (1982 & Supp. V 1987). It provides health care to persons receiving federally supported public assistance. *Id.* §§ 1396, 1396a(a)(10)(A)(i). The states may also choose to extend Medicaid eligibility to other low-income ("medically needy") persons who are ineligible for public assistance. *Id.* § 1396a(a)(10)(A)(ii).

<sup>48</sup> Medicare offers all elderly and disabled persons subsidized medical insurance without regard to need. 42 U.S.C. §§ 1395d-g, 1395k-n (1982 & Supp. V 1987) (statement of benefits); *id.* § 1395o (eligible individuals).

<sup>49</sup> Five of the twenty-three cases have involved Unemployment Compensation: *Sherbert v. Verner*, 374 U.S. 398 (1963); *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975) (per curiam); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); and *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989).

Four cases have involved AFDC: *Dandridge v. Williams*, 397 U.S. 471 (1970); *Wyman v. James*, 400 U.S. 309 (1971); *Bowen v. Roy*, 476 U.S. 693 (1986); and *Bowen v. Gilliard*, 483 U.S. 587 (1987).

Three have involved Medicaid: *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McCrae*, 448 U.S. 297 (1980); and *Williams v. Zbaraz*, 448 U.S. 358, *reh'g denied*, 448 U.S. 917 (1980).

Three have involved food stamps: *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Lyng v. Castillo*, 477 U.S. 635 (1986); and *Lyng v. International Union*, 485 U.S. 360 (1988).

Two have involved state "welfare" benefits: *Shapiro v. Thompson*, 394 U.S. 618 (1969); and *Graham v. Richardson*, 403 U.S. 365 (1971).

Two have involved county or city medical benefits: *Memorial Hosp. v. Maricopa*



three very different Supreme Courts,<sup>50</sup> an evenness is found in their results: Through the years, the Court has found challenged conditions unconstitutional nearly as often as it has sustained them.<sup>51</sup> And the conditions the Court has prohibited are no less various than those it has upheld.<sup>52</sup>

Although divided relatively equally in their outcomes, the twenty-three challenges to conditions on public assistance benefits do not, at first glance, present any clear *pattern* of result. At least facially, there does not appear to be any attribute shared by those conditions the Court has permitted or those it has prohibited. Nor does any characteristic appear to distinguish the two groups. To take perhaps the most intuitively appealing possibility, the seriousness or intrusiveness of the burden that the condition imposes on the potential beneficiary does not seem persuasively to distinguish the permitted from the prohibited conditions. For example, the

County, 415 U.S. 250 (1974); and *Poelker v. Doe*, 432 U.S. 519, *reh'g denied*, 434 U.S. 880 (1977).

Two have involved Social Security benefits: *Califano v. Jobst*, 434 U.S. 47 (1977); and *Califano v. Boles*, 443 U.S. 282 (1979).

Two have involved SSI benefits: *Califano v. Torres*, 435 U.S. 1 (1978) (*per curiam*); and *Califano v. Aznavorian*, 439 U.S. 170 (1978).

<sup>50</sup> Between 1970 and 1981, the Burger Court decided 15 of the 23 cases: *Dandridge*, 397 U.S. 471; *Wyman*, 400 U.S. 309; *Graham*, 403 U.S. 365; *Moreno*, 413 U.S. 528; *Memorial Hospital*, 415 U.S. 250; *Turner*, 423 U.S. 44; *Maher*, 432 U.S. 464; *Poelker*, 432 U.S. 519; *Jobst*, 434 U.S. 47; *Torres*, 435 U.S. 1; *Aznavorian*, 439 U.S. 170; *Boles*, 443 U.S. 282; *Harris*, 448 U.S. 297; *Williams*, 448 U.S. 358; *Thomas*, 450 U.S. 707.

The Rehnquist Court has thus far issued opinions in six (during 1986-1989): *Roy*, 476 U.S. 693; *Castillo*, 477 U.S. 635; *Hobbie*, 480 U.S. 136; *Gilliard*, 483 U.S. 587; *International Union*, 485 U.S. 360; *Frazee*, 109 S. Ct. 1514.

The Warren Court was responsible for two (in 1963 and 1969): *Sherbert*, 374 U.S. 398; *Shapiro*, 394 U.S. 618.

<sup>51</sup> The Court has sustained the challenged condition in 13 of the 23 cases and has overturned it in 10. This relative evenness in the Court's holdings is an important fact sometimes overlooked or distorted by commentators. Kathleen Sullivan, for example, has written: "Apart from [*Sherbert*, *Shapiro*, and *Speiser* (a tax exemption rather than public assistance case)] and those applying them to very similar facts, not a single other challenge to a condition on a government welfare program has succeeded in the Supreme Court." Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1436-37 (footnote omitted).

This statement contains two major flaws. First, its tone implies an extreme (and factually incorrect) unevenness in the Court's holdings in the direction of undue judicial deference. Second, while it is not clear what further cases Sullivan would include as involving "very similar facts"—she explicitly cites at 1437, footnote 87, only *Memorial Hospital*, *Hobbie*, and *Thomas*—she clearly ignores several cases in which the Court in fact overturned the challenged condition: *Moreno*, 413 U.S. 528; *Turner*, 423 U.S. 44; *Graham*, 403 U.S. 365; and *Roy*, 476 U.S. 693.

<sup>52</sup> Successful challenges to conditions on public assistance benefits have involved (explicitly or implicitly) the constitutional rights to free exercise, to travel, and to procreate, as well as the freedom of association.

Unsuccessful challenges have similarly involved the constitutional rights to travel, procreate, have an abortion, choose one's marital status, and be free from unreasonable searches, as well as the freedom of association.

condition, sustained in *Wyman v. James*, that one let a caseworker into one's home if one would receive AFDC benefits,<sup>53</sup> is scarcely less intrusive than the condition, prohibited in *United States Department of Agriculture v. Moreno*, that one live only with persons to whom one is related if one would receive food stamps.<sup>54</sup> Likewise, the condition upheld in the abortion funding cases, that a woman not have a "medically necessary" abortion if she would receive free medical care during her pregnancy,<sup>55</sup> is not obviously less burdensome than the condition, overturned in *Dandridge v. Williams*, that one reside in the same state for at least one year if one would receive welfare benefits.<sup>56</sup>

### B. The Court's Reasoning and Rhetoric

Contrasting sharply with the lack of any surface pattern in the results of the public assistance cases is the clear consistency of the Court's explicit reasoning on the way to those holdings. This consistency transcends any differences in the structure of the challenges and in the particular constitutional provisions under which the claims are brought. In cases in which the Court concluded that the challenged condition was impermissible, it typically found (1) that the condition operated as a "fine," "penalty," "burden," or "impingement" on the exercise of a constitutional right other than equal protection, and (2) that the government's interest in the condition was insufficiently "compelling" to justify the burden on the right. In contrast, in cases in which the Court concluded that the condition was permissible, it uniformly found (1) that the condition did not burden or impinge upon any constitutional right, and (2) that there was, in any case, a "rational basis" for the condition.

In reaching its result in each case, the Court's first determination—whether the condition impinges on or burdens a constitutional right—is virtually dispositive. Whether the challenge is brought under the equal protection clause or under another constitutional provision, the Court has explicitly applied a two-step test in which it inquires (1) whether the condition at issue impinges on, burdens, or penalizes the exercise of a constitutional right, and (2) whether the condition is justified by a "compelling state interest" (when the answer to (1) is "yes") or a "rational basis" (when the answer to (1) is "no"). In applying this test, the Court has *never*

---

<sup>53</sup> 400 U.S. 309 (1971).

<sup>54</sup> 413 U.S. 528 (1973).

<sup>55</sup> *Williams v. Zbaraz*, 448 U.S. 358, *reh'g denied*, 448 U.S. 917 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519, *reh'g denied*, 434 U.S. 880 (1977); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>56</sup> 397 U.S. 471 (1970).

found the State's interest sufficiently compelling to justify a condition that burdens a constitutional right. The Court has *always* been able to find a rational basis for conditions that impose no such burden, however.<sup>57</sup> Thus, from the State's perspective, the "compelling state interest" standard is difficult in theory and fatal in fact, while the "rational basis" requirement is minimal in theory and virtually nonexistent in fact.<sup>58</sup>

This surface pattern, then, gives rise to a further, critical question: On what basis does the Court distinguish a condition that burdens or impinges on a constitutional right from one that does not? In seeming response to this question, the Court's rhetoric presents several clear patterns. A condition that "coerces" claimants<sup>59</sup> or is likely to deter them from exercising a constitutional right<sup>60</sup> simultaneously (and impermissibly) burdens those claimants. In contrast, a condition that is empirically unlikely to affect a claimant's exercise of a right constitutes no such burden.<sup>61</sup> This pattern, of course, is not an answer to, but rather a restatement of, the original question:

<sup>57</sup> *Moreno* appears to be an exception to this pattern insofar as the Court applied the "rational basis" standard but found the challenged condition impermissible. This deviation is explained, however, by the fact that this is one of the two post-*Dandridge* public assistance cases in which the Court did not apply the two-step test; that is, the Court did not explicitly inquire into whether the challenged condition impinged upon or burdened a constitutional right other than equal protection. Despite this deviation in approach, the Court's ultimate holding in the case is consistent with the pattern discernible in the other cases. See *infra* notes 206-09 and accompanying text.

<sup>58</sup> Although many of the public assistance cases were not brought as equal protection challenges, the application of each of these standards yields results that precisely parallel those seen in equal protection cases since the "new" equal protection. See Gerald Gunther, *The Supreme Court, 1971 Term: Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>59</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("[A]ppellant's declared ineligibility for benefits derives solely from the practice of her religion, [and] the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."); *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981) (quoting *Sherbert*); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) ("In . . . the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice."); *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514, 1516-17 (1989) (quoting *Hobbie*).

<sup>60</sup> See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 257 (1974) ("[I]t is far from clear that the challenged statute is unlikely to have any deterrent effect."); *Graham v. Richardson*, 403 U.S. 365, 379 (1971) ("Alien residency requirements for welfare benefits necessarily operate . . . to discourage entry into or continued residency in the State."); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("We do not doubt that the one-year waiting-period device is well suited to discourage the influx of poor families in need of assistance.").

<sup>61</sup> See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) ("[I]n the overwhelming majority of cases [the challenged provision] probably has no effect at all."); *Lyng v. International Union*, 485 U.S. 360, 365 (1988) (quoting *Lyng v. Castillo*).

On what basis does the Court distinguish a condition that impermissibly coerces a claimant, or that impermissibly deters him from exercising a constitutional right, from one that does not? The nature of the benefit involved cannot alone be the dispositive (or even a particularly informative) factor, notwithstanding both its importance as an initial organizing principle and the Court's frequent statements to the contrary.<sup>62</sup> Each of these cases concerned a public assistance benefit that was intended to provide recipients certain "necessities of life."<sup>63</sup>

Merely to "burden" or "impinge on" a constitutional right is seemingly different from "violating" that right. A finding of a constitutional violation would presumably end the Court's inquiry. A finding that a constitutional right is merely burdened, however, moves the Court's analysis to the next step where it must determine whether the burden is justified by a "compelling state interest." To be sure, all burdens on the exercise of constitutional rights are not equal. Not all burdens may be sufficiently onerous that they ultimately constitute a violation of a constitutional right. That a burden does not rise to the level of a violation, however, does not logically render it a nonburden. Yet this is the leap in reasoning that the Court seems to make in those cases in which it has found that the constitutional right potentially affected is not burdened or impinged upon. This leap is especially puzzling when one considers that the Court typically has acknowledged that the condition at issue is likely to affect, or have an impact on, some constitutionally protected activity.<sup>64</sup>

---

<sup>62</sup> See *infra* notes 80-98 and accompanying text.

<sup>63</sup> The abortion funding cases also involve "necessities of life" even though one might contend that abortions themselves do not typically qualify as such necessities. First, in three of the four cases the challenged regulation denied funding even for "medically necessary" abortions. See *Williams v. Zbaraz*, 448 U.S. 358, 360, *reh'g denied*, 448 U.S. 917 (1980); *Harris v. McRae*, 448 U.S. 297, 302 (1980); *Poelker v. Doe*, 432 U.S. 519, 520, *reh'g denied*, 434 U.S. 880 (1977). Second, free medical care during pregnancy was the conditioned benefit at issue in all four of the cases, and the Court has historically considered general medical care to be a "necessity of life." See *Memorial Hospital*, 415 U.S. at 259-61; see also *infra* notes 88-98 and accompanying text.

<sup>64</sup> In *International Union*, for example, the Court concluded that for purposes of food stamp eligibility, discounting income lost because a member of the household is on strike "does not infringe either the associational or expressive rights of appellees . . ." 485 U.S. at 364 (emphasis added). Merely one paragraph later, however, the Court admitted that the statutory provision *would burden* certain claimants' associational and expressive rights: "Denying such benefits makes it harder for strikers to maintain themselves and their families during the strike and exerts pressure on them to abandon their union." *Id.* at 368.

Similarly, in *Harris* the Court held that the Hyde Amendment, which permitted states participating in the Medicaid program *not* to pay for "medically necessary" abortions, "d[id] not impinge on [Medicaid recipients'] due process liberty recognized in *Wade*." 448 U.S. at 318. The Court also found, however, that Congress intended and expected the Amendment to affect adversely the willingness of pregnant Medicaid recip-

In addition to the rhetoric of coercion and deterrence, the Court has also employed a rhetoric of "directness" in further delineating what constitutes a "burden" on a right. Again a pattern emerges: The Court has repeatedly asserted that *the effect* of the statutory condition need not be *direct* for the condition to be impermissible.<sup>65</sup> This statement, however, is scarcely more helpful than the Court's other rhetoric. At least facially, no condition on the receipt of a benefit is ever a direct prohibition on the exercise of a right, for the potential recipient can continue to exercise that right simply by forgoing the benefit. Thus, any effect on the exercise of one's constitutional rights of such a condition (1) is always indirect rather than direct, and (2) never constitutes a direct prohibition, but is always only a burden or impingement on the exercise of a constitutional right. Moreover, insofar as the condition provides the claimant an incentive to behave in one way rather than another, it arguably always burdens some behavior. If the burdened activity is to some degree protected under the Constitution, one's exercise of the relevant constitutional right is likewise constrained and burdened.<sup>66</sup>

---

ients to exercise their constitutional right to choose a first-trimester abortion over childbirth: "The Hyde Amendment . . . by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *Id.* at 315.

In *Bowen v. Gilliard*, 483 U.S. 587 (1987), the Court likewise found that no fundamental right was impinged upon and invoked a type of intent test: "[T]he [challenged] amendment [is not] an act whose design and direct effect is to 'intrud[e] on choices concerning family living arrangements.' . . . 'This is not a case in which [the] government seeks to foist orthodoxy on the unwilling.'" *Id.* at 602 (citations omitted). As in *Harris* and *International Union*, however, the *Gilliard* Court simultaneously conceded that the challenged condition might affect claimants' exercise of the right of association: "[S]ome families may decide to modify their living arrangements in order to avoid the effect of the amendment . . ." *Id.* at 601.

<sup>65</sup> See, e.g., *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("'[I]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'" (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607, *reh'g denied*, 368 U.S. 869 (1961)); *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981) ("Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987) (same).

<sup>66</sup> There is a further difficulty with the Court's discussion of the role that the "directness" of the condition's effect might play in determining its burdensomeness. In *Gilliard*, the challenged condition required a family wishing to receive AFDC benefits to include within its filing unit a child for whom child support payments are being made by a noncustodial parent. *Gilliard*, 483 U.S. at 590. The Court ultimately found that the condition at issue did not burden a constitutional right and strict scrutiny was, therefore, not necessary. The Court conceded en route, however, that the challenged condition

In sum, the Court's explicit two-step test, as well as the patterns in its reasoning and rhetoric, create as many questions as they answer about the public assistance cases. Most importantly, they raise, and do not resolve, the dispositive issue of how the Court determines whether a condition on receipt of a public assistance benefit impermissibly burdens a constitutional right. As the positive theory presented in Part III shows, the Court does in fact employ a consistent limiting principle in these cases. But that principle bears scant relationship to either the Court's two-step test or its rhetoric of coercion, deterrence, burdens on constitutional rights, and directness of effect. Two questions then arise: Why does the Court employ the reasoning and rhetoric that it does; and why is the Court not instead explicit about the true limiting principle? The second question will be taken up in Part IV; the first is the topic of the next section.

### C. The Genealogy of the Court's Approach

The two-step test that the Court has explicitly used with rare exception<sup>67</sup> to decide challenges to the constitutionality of conditions on public assistance benefits was seemingly formulated out of the first three such cases that it heard: *Sherbert v. Verner*,<sup>68</sup> *Shapiro v. Thompson*,<sup>69</sup> and *Dandridge v. Williams*.<sup>70</sup> As might be expected given that *Sherbert* was a straightforward first amendment case, while *Shapiro* and *Dandridge* posed equal protection claims, the test blurs any distinction between equal protection and other types of challenges. Indeed, the test is in many respects the confluence of developments in both equal protection doctrine and the import of the right/privilege distinction which those three cases represent.

---

might inhibit AFDC claimants' exercise of their first amendment right of association, but declared this effect unburdensome explicitly because it was "indirect":

That some families may decide to modify their living arrangements in order to avoid the effect of the amendment, does not transform the amendment into an act whose design and *direct effect* is to "intrud[e] on choices concerning family living arrangements. . . . Congress adopted this rule in the course of constructing a complex social welfare system that necessarily deals with the intimacies of family life. This is not a case in which government seeks to foist orthodoxy on the unwilling."

*Id.* at 601-02 (emphasis added) (citations omitted).

Thus, the Court seemingly—and inexplicably—came full circle: Notwithstanding its explicit contrary statements in *Sherbert* and its progeny, the "directness" of a condition's effect on the exercise of a constitutional right *might* in fact determine the condition's burdensomeness.

<sup>67</sup> United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973), and Califano v. Jobst, 434 U.S. 47 (1977), are the two post-*Dandridge* exceptions. See *supra* note 57 and accompanying text; *infra* notes 173-80 & 206-09 and accompanying text.

<sup>68</sup> 374 U.S. 398 (1963).

<sup>69</sup> 394 U.S. 618 (1969).

<sup>70</sup> 397 U.S. 471 (1970).

By the time the Court decided *Sherbert*, the importance of the right/privilege distinction<sup>71</sup> had dissipated sufficiently—and the unconstitutional conditions doctrine had simultaneously developed<sup>72</sup>—so that the Court could assert that the challenged condition could not “be saved from constitutional infirmity on the sole ground that the unemployment compensation benefits are not appellant’s ‘right’ but merely a ‘privilege.’”<sup>73</sup> “It is too late in the day,” the Court affirmed, “to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege.”<sup>74</sup> The Court stated that a finding of either an improper “purpose or effect” would be sufficient to invalidate the challenged provision.<sup>75</sup> The “effect” test, however, would be the more difficult of the two for the State to pass.<sup>76</sup>

The rhetoric of choice and coercion was the Court’s most attractive remaining option when faced with the resulting difficulty of determining what an impermissible effect might be in this context. Of the several possibilities, a showing of actual deterrence was seemingly most problematic for two reasons. First, the Court arguably had two conflicting evils to protect against: deterrence from receiving a benefit to which one is in every other respect statutorily entitled, or deterrence from exercising a constitutional right. Second, even assuming the latter to be the greater evil,<sup>77</sup> what showing by the claimants could be persuasive? Since not all persons otherwise eligible for the benefit may be interested in exercising the constitutional right at issue, empirical evidence of deterrence would be neither possible nor helpful.

The Court’s remaining option was an effects test that focused

<sup>71</sup> For a general discussion of this distinction, see *supra* note 11 and accompanying text.

<sup>72</sup> In his classic 1968 piece, William Van Alstyne described the doctrine of unconstitutional conditions as one of five means employed by the Court “to circumvent the harsh consequences of the right-privilege distinction as applied to private interests in the public sector.” He added that none of these means “involves any direct repudiation of the right-privilege distinction as a limitation on claims of substantive due process in the public sector.” Van Alstyne, *supra* note 11, at 1445; see also Smolla, *supra* note 11, at 70 (discussing “remarkable resiliency” of the right/privilege distinction in procedural due process cases).

<sup>73</sup> *Sherbert*, 374 U.S. at 404.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* (“[I]f the *purpose or effect* of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.” (emphasis added) (citation omitted)).

<sup>76</sup> “[W]e [have] emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms.” *Id.* at 405 (emphasis added).

<sup>77</sup> The Court’s rhetoric of burdens, fines, and impingements on constitutional rights implies that it in fact considers this the greater of the two evils.

not on whether otherwise eligible individuals *are* deterred by the challenged condition from exercising a constitutional right, but whether they *are likely to be*. Here there were seemingly two possibilities. The Court could look directly to the "burdensomeness" of the condition. But this language, without more, was problematic for the reasons set out above.<sup>78</sup> Thus, seemingly by default, the Court chose its other (ultimately equally indeterminate) option and focused on the nature of the "choice" that the condition posed claimants.

By the time of *Shapiro*, in sum, the right/privilege distinction was no longer dispositive of challenges to conditional allocations, but merely determined when the unconstitutional conditions doctrine with its rhetoric of coercion and deterrence would be invoked to decide such cases. Both *Shapiro* and *Dandridge* involved equal protection challenges, however, and, as such, presented new difficulties.<sup>79</sup>

Formulated as an equal protection challenge, any public assistance case contains two characteristics that have proven problematic in the development of equal protection doctrine: Each concerns "necessities of life" such as food, medical care, or a minimum income; and each concerns wealth classifications.<sup>80</sup> Throughout the evolution of equal protection doctrine,<sup>81</sup> both "necessities" and

---

<sup>78</sup> See *supra* Part II(B).

<sup>79</sup> Interestingly, although only some conditional allocation challenges are explicitly brought as equal protection claims, all of the cases could be thus formulated. For in each public assistance case, the challenged condition provides persons unable to earn a subsistence income, and otherwise eligible for the benefit, a financial incentive not to engage in a particular behavior. No such incentive, however, is provided similarly situated persons earning a subsistence income. Thus, each such condition separates those earning a subsistence income but otherwise eligible for the benefit from otherwise eligible persons unable to earn a subsistence income by providing only the latter an incentive not to engage in a particular behavior.

Most, but not all, such conditions also create a second classification that separates those generally eligible for the benefit into two categories of claimants: those who will nonetheless engage in the disqualifying behavior stated in the condition and forgo the benefit to which they are otherwise entitled, and those sufficiently desirous of the benefit that they will instead forgo engaging in the disqualifying behavior in order to receive it.

The two groups of cases in which the challenged condition does not create this classification are *Sherbert* and the subsequent unemployment compensation cases, and *Shapiro* and certain of the later right-to-travel cases. In neither group does the condition at issue provide the claimant a "choice" between exercising a constitutional right or receiving a benefit. The choice, rather, is between exercising a constitutional right or not; the benefit at issue is in fact not obtainable given the claimant's circumstances. See *infra* notes 210-31 and accompanying text; see also Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1434-37 (discussing *Sherbert* and *Shapiro*).

<sup>80</sup> Those cases involving means-tested benefits most obviously employ wealth classifications. Cases concerning non-need-based public assistance benefits such as Unemployment Compensation, however, also involve wealth classifications insofar as the recipients are persons unable to earn a subsistence income.

<sup>81</sup> Good summaries of the doctrine's development appear in Joseph Tussman &



wealth classifications were seen—with either hope or dread—as the next frontier for some form of heightened scrutiny. *Shapiro* in several respects typifies the optimistic expansionism of both the late Warren Court and its commentators.<sup>82</sup>

Shortly before *Shapiro* was decided, the Warren Court had suggested in dicta that wealth classifications were suspect.<sup>83</sup> Explicitly building on *Sherbert's* holding that a constitutional challenge to a condition is not per se decided by the fact that “public assistance benefits are a ‘privilege’ and not a ‘right,’”<sup>84</sup> the *Shapiro* Court determined both that heightened scrutiny was appropriate and that there was no “compelling governmental interest” in the resulting classification.<sup>85</sup> The Court seemed to give conflicting messages, however, as to whether it was the nature of the penalty created by the condition or the right penalized which mandated strict scrutiny.<sup>86</sup> Friends and, ironically, enemies of the new equal protection

Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) (pre-Warren Court doctrine); Gunther, *supra* note 58 (Warren Court developments); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) (same) [hereinafter *Developments*].

<sup>82</sup> For discussions of that expansionism, see Gunther, *supra* note 58, at 8-9; *Developments*, *supra* note 81; and the commentaries cited therein.

<sup>83</sup> See *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 807 (1969) (“And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect . . . .”); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966).

<sup>84</sup> *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

<sup>85</sup> *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969). In explaining its choice of heightened scrutiny, the Court noted that the one-year waiting-period requirement created a classification “which serve[d] to penalize the exercise of [a constitutional] right,” and that such classifications were unconstitutional “unless shown to be necessary to promote a *compelling* governmental interest . . . .” *Id.* at 634 (emphasis in original).

It is interesting that the *Shapiro* Court cited the standard applied in *Sherbert*, a straightforward first amendment case, in support of its choice of the “compelling governmental interest” standard to resolve an equal protection claim. *Id.* In this way, the Court began to blur the distinction between equal protection challenges to conditional allocations and claims brought under substantive, enumerated constitutional rights.

<sup>86</sup> The *Shapiro* Court’s primary statement as to why strict scrutiny was mandated is vague:

The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and *any classification which serves to penalize the exercise of that right*, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

*Id.* at 634 (emphasis added).

Support for both the right penalized and the nature of the penalty (disqualification for welfare benefits) as the critical variable in the Court’s choice of standards appears elsewhere in the opinion. *Compare id.* at 638 (“Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.”) (emphasis in original) *with id.* at 638 n.21 (reserving judgement on whether waiting periods in other areas—voting, tuition-free education, professional licenses, and hunting and fishing

expansionism on the Court were both nonetheless inclined to read *Shapiro* as applying the "compelling [governmental] interest" test "merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life'."<sup>87</sup>

In *Dandridge*, decided during its first term, the Burger Court gave notice that while the Warren Court's two tiers would be retained, strict scrutiny would not be warranted if the challenged legislation merely concerned either wealth classifications or necessities.<sup>88</sup> Rather, legislation in the areas of "economics and social welfare" would receive substantial deference, with a statutory classification being upheld "if any state of facts reasonably may be conceived to justify it."<sup>89</sup> Although the Court firmly and unambiguously stated that the "reasonable basis" standard would be applied in cases such as *Dandridge*, it still seemed ill at ease with its own doctrinal lumping of laws involving "[t]he most basic economic needs of impoverished human beings" with laws regulating business or commerce.<sup>90</sup> Thus, while following the script of the old equal protection—minimal scrutiny resulting in a sustaining of the challenged legislation—the Court sympathetically, if "impotently,"

---

licenses—promote compelling state interests or are penalties upon the exercise of the right to travel).

<sup>87</sup> *Id.* at 661 (Harlan, J., dissenting) (quoting majority opinion in *Shapiro*, 394 U.S. at 627). In his dissent in *Shapiro*, Justice Harlan stated that he found the "suspect criteria" branch of the "compelling interest" doctrine to be sound only when applied to racial classifications and, therefore, did not consider wealth a suspect criterion. *Id.* at 659. He further stated that he believed the "particularly unfortunate and unnecessary," "fundamental right" branch of the doctrine to have "reappeared today in the [*Shapiro*] Court's cryptic suggestion . . . that the 'compelling interest' test is applicable merely because the result of the classification may be to deny the appellees 'food, shelter, and other necessities of life' . . ." *Id.* at 661.

In their dissent in *Dandridge*, Justices Marshall and Brennan—two of the *Shapiro* majority—similarly read *Shapiro* as "suggest[ing] that whether or not there is a constitutional 'right' to subsistence . . . , deprivations of benefits necessary for subsistence will receive closer scrutiny, under . . . the . . . Equal Protection Clause[], than will deprivations of less essential forms of governmental entitlements." *Dandridge v. Williams*, 397 U.S. 471, 523 n.18 (Marshall & Brennan, JJ., dissenting), *reh'g denied*, 378 U.S. 914 (1970).

<sup>88</sup> The Court distinguished *Dandridge* (in which it employed the "reasonable basis" test of minimal scrutiny) from *Shapiro* (in which it employed the "compelling governmental interest" test of strict scrutiny) by asserting that the legislation at issue in the former did not affect any freedoms guaranteed by the Bill of Rights, while that at issue in the latter interfered with the constitutionally protected freedom of interstate travel. *Dandridge*, 397 U.S. at 484 & n.16; see Gunther, *supra* note 58, at 14.

In making this distinction, the *Dandridge* Court implied that earlier readings of *Shapiro*, which held the nature of the penalty at issue to be the dispositive factor, were in error. See *supra* notes 86-87.

<sup>89</sup> *Dandridge*, 397 U.S. at 485 (citations omitted).

<sup>90</sup> The Court seemingly mitigated some of its own unease by noting that minimal scrutiny was the standard consistently applied to state legislation restricting the availability of employment opportunities. *Id.*

acknowledged “the dramatically real factual difference” between legislation providing income maintenance benefits and that regulating industry.<sup>91</sup>

Out of *Sherbert*, *Shapiro*, and *Dandridge*, the Court fashioned the two-step test that it has since explicitly applied in virtually all cases challenging conditions on income maintenance benefits under either the equal protection clause or a particular substantive constitutional right.<sup>92</sup> *Sherbert*'s contribution was the explicit acknowledgment that a condition would not be considered per se constitutional simply by virtue of being attached to a benefit or mere statutory entitlement rather than a constitutional entitlement. From *Shapiro* and *Dandridge*, the Court took two tiers of review as well as the vocabulary of equal protection.

Consistent with the equal protection doctrine as it was developed in *Dandridge*, neither a wealth-based classification nor a denial of “necessities” is alone, or when combined with the other,<sup>93</sup> sufficient to induce any form of heightened scrutiny for conditional allocations. The sole determining characteristic, rather, is whether a constitutional right is impinged upon. Thus, heightened scrutiny, which requires a showing of a “compelling state interest,” is saved for legislation that is determined under the first prong of the test to burden or penalize the exercise of a constitutional right. Other challenged legislation is instead subjected to deferential, “rational basis” scrutiny.

*Shapiro*'s more subtle contribution to the two-step test is most clearly seen in the Court's determinations as to whether the challenged condition in fact burdens the exercise of a constitutional right. In *Shapiro*, the Warren Court hinted that the nature of the benefit at issue—public assistance benefits providing “necessities of life”<sup>94</sup>—was critical to its holding that the disqualification of persons who had recently moved into the jurisdiction constituted a penalty on the exercise of their constitutional right to travel.<sup>95</sup> The early

---

<sup>91</sup> *Id.*

<sup>92</sup> See *supra* note 67 and accompanying text.

<sup>93</sup> These two characteristics, by definition, will always appear together in public assistance cases.

<sup>94</sup> 394 U.S. 618, 627 (1969) (defining “welfare” as “aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life”).

<sup>95</sup> The hint appears in the Court's quick distinguishing of waiting periods attached to welfare benefits from those attached to other types of benefits.

[E]ven under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. . . . We imply no view[, however,] of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such re-

Burger Court seized on this hint and proceeded to define and delineate "necessities of life"<sup>96</sup> in the conditional allocations context, explicitly noting that "governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements."<sup>97</sup> Although the Court has made clear that the nature of the benefit is not alone dispositive, it is *Shapiro's* intriguing legacy that discussion of the greater fundamental-ness of benefits providing "necessities of life" (re)appears in seven of the nine subsequent cases in which the Court overturned a condition on public assistance benefits.<sup>98</sup>

---

quirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel.

*Id.* at 638 & n.21 (emphasis in original).

<sup>96</sup> The Court in *Memorial Hospital*, explicitly building on *Shapiro*, noted that: Whatever the ultimate parameters of the *Shapiro* penalty analysis, it is at least clear that medical care is as much a "basic necessity of life" to an indigent as welfare assistance. . . . It would be odd, indeed, to find that the State of Arizona was required to afford [the indigent claimant] welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.

*Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 259-60 (1974) (footnotes and citations omitted).

The Court further noted that it saw no reason to distinguish between emergency and nonemergency medical care in this regard:

The State could not deny [the indigent claimant] care just because, although gasping for breath, he was not in immediate danger of stopping breathing altogether. To allow a serious illness to go untreated until it requires emergency hospitalization is to subject the sufferer to the danger of a substantial and irrevocable deterioration in his health.

*Id.* at 260-61.

The *Memorial Hospital* Court went on to distinguish in-state tuition from "necessities of life," noting that several lower courts had done so "in a way that would clearly include medical care in the latter category":

"While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing, and shelter. *Shapiro involved the immediate and pressing need for preservation of life and health* of persons unable to live without public assistance, and their dependent children. Thus, the residence requirement in *Shapiro* could cause great suffering and even loss of life. The durational residence requirement for attendance at publicly financed institutions of higher learning [does] not involve similar risks. Nor was petitioner . . . precluded from the benefit of obtaining higher education. Charging higher tuition fees to non-resident students cannot be equated with granting of basic subsistence to one class of needy residents while denying it to an equally needy class of residents."

*Id.* at 260 n.15 (quoting *Starns v. Malkerson*, 326 F. Supp. 234, 238 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971)) (emphasis added).

<sup>97</sup> *Id.* at 259.

<sup>98</sup> In addition to *Shapiro*, 394 U.S. at 618, 627, 638 & n.21, and *Memorial Hospital*, 415 U.S. at 259-60, see *Graham v. Richardson*, 403 U.S. 365, 379-80 (1971) ("[I]n the ordinary case an alien, becoming indigent and unable to work, will be unable to live

## III

## THE PRICES OF RIGHTS: A POSITIVE THEORY

The genealogy of the Court's general approach, as well as the patterns in its reasoning and rhetoric, are clear. Remaining, however, is the central question of what limiting principle, if any, actually guides the Court's decisionmaking in the public assistance cases. This Part proposes, and then tests, a positive theory of these cases.

## A. Choices, Prices, Entitlements, and Rights

In its classical formulation, the unconstitutional conditions doctrine provides that whatever the Constitution forbids the State to do directly, it equally forbids it to do indirectly.<sup>99</sup> As we have seen, however, when applying the doctrine in the public assistance cases the Court has effectively reformulated it so that the critical determinant of the permissibility of a given condition is whether it burdens, penalizes, or impinges on a constitutional right. Unfortunately, the Court does not provide a consistent or coherent standard for distinguishing burdens from nonburdens. Thus, its explicit approach does not enable one either to explain the holdings of the existing cases or reasonably to predict the outcome of future ones.

In addition to its explicit two-step test, the Court's rhetoric of choice and coercion independently provides another possible formulation of, and justification for, the unconstitutional conditions doctrine. Under this approach, the Court would condemn conditions that "coerce" a rightholder into not exercising a constitutional right or, conversely, that "coerce" one who exercises a right into sacrificing a benefit to which he would otherwise be entitled. Although there are many difficulties with this interpretation of the doctrine,<sup>100</sup> the gravest is that it simply does not explain the existing

---

where, because of discriminatory denial of public assistance, he cannot 'secure the necessities of life, including food, clothing and shelter.' State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode."); *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981) ("Where the state conditions receipt of an *important benefit* upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.") (emphasis added); *Bowen v. Roy*, 476 U.S. 693, 727 (1986) (quoting *Thomas*); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (quoting *Thomas*) & 144 (1987) ("forfeiture of unemployment benefits for choosing [fidelity to religious belief] over [continued employment] brings unlawful coercion to bear on the employee's choice"); *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514, 1517 (1989) (quoting *Hobbie*).

<sup>99</sup> See *supra* note 21.

<sup>100</sup> Kathleen Sullivan provides an excellent overview of these difficulties in *Unconstitutional Conditions*, *supra* note 6, at 1428-56.

cases. For example, while the condition at issue in *Sherbert v. Verner* and the subsequent unemployment compensation cases,<sup>101</sup> and that at issue in *Shapiro v. Thompson* and certain of the later right-to-travel cases,<sup>102</sup> might both be understood as providing the claimant an inherently coercive choice of actions,<sup>103</sup> the choice is not one between exercising a constitutional right or receiving public assistance benefits. The "choice" posed Mrs. Sherbert was not between working on her Sabbath and receiving unemployment compensation, on the one hand, or not working on her Sabbath and not receiving unemployment compensation, on the other hand. For if Mrs. Sherbert refrained from exercising her first amendment right and worked on her Sabbath, she would not be unemployed and would not be eligible for (or need) unemployment compensation.<sup>104</sup> Similarly, the claimants in *Shapiro* could not have obtained welfare benefits from the destination state by not exercising their right to travel and remaining in the state of origination.<sup>105</sup>

*Turner v. Department of Employment Security*,<sup>106</sup> another case in which the Court overturned the challenged provision, is also not explained by this "coercive choice" interpretation of the doctrine. For the "choice" posed the claimant was not between exercising a constitutional right or receiving public assistance benefits: The claimant would receive the pertinent benefits even without complying with the challenged condition—but she would not receive them for the same period of time.<sup>107</sup>

Nor can the abortion funding cases<sup>108</sup> or the marital status<sup>109</sup>

<sup>101</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *Frazee*, 109 S. Ct. 1514; *Hobbie*, 480 U.S. 136; *Thomas*, 450 U.S. 707; *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975) (per curiam).

<sup>102</sup> *Shapiro*, 394 U.S. 618; *Memorial Hospital*, 415 U.S. 250; *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>103</sup> See Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1434-37. The choice posed Mrs. Sherbert, for example, was that between working on her Sabbath in order to have an income, on the one hand, and exercising her first amendment right, not working on her Sabbath, and not having an income, on the other hand. Similarly, the choice posed the claimants in *Shapiro* and the other right-to-travel cases was that between moving to the state with a one-year waiting period and not receiving welfare benefits from that state until the waiting period had passed, on the one hand, and not exercising one's right-to-travel, staying in one's present location, and receiving whatever welfare benefits one might be eligible for there, on the other hand.

<sup>104</sup> *Sherbert*, 374 U.S. at 400-01.

<sup>105</sup> *Shapiro*, 394 U.S. at 622-26.

<sup>106</sup> 423 U.S. 44 (1975) (per curiam).

<sup>107</sup> The challenged condition declared otherwise eligible pregnant women temporarily ineligible for unemployment benefits for a period extending from twelve weeks before the expected date of childbirth until six weeks after the birth. *Id.*

<sup>108</sup> *Williams v. Zbaraz*, 448 U.S. 358, *reh'g denied*, 448 U.S. 917 (1980); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519, *reh'g denied*, 434 U.S. 880 (1977); *Maher v. Roe*, 432 U.S. 464 (1977).

<sup>109</sup> *Califano v. Boles*, 443 U.S. 282 (1979); *Califano v. Jobst*, 434 U.S. 47 (1977).

cases be explained by this interpretation of the doctrine. Although each of these cases seemingly offers the claimants precisely the sort of "coercive" choice prohibited by this formulation, the Court consistently sustained the challenged condition. In *Maher* and each of its progeny,<sup>110</sup> the claimant was in fact presented a "choice" between exercising her then-existent right to choose an abortion, on the one hand, or receiving free medical care during her pregnancy, on the other hand. The Court nonetheless found this choice uncoercive,<sup>111</sup> and the condition, therefore, unproblematic. Likewise, in both of the marital status cases, the challenged condition seemingly offered otherwise eligible claimants a "choice" between exercising their constitutional "freedom of personal choice in matters of marriage and family life" or receiving certain Social Security benefits, yet the Court sustained the condition.<sup>112</sup>

Under a third interpretation of the doctrine, seen more often in the commentary than the cases,<sup>113</sup> certain constitutional rights may not be surrendered, even through voluntary exchange, because they are inalienable. Thus, *any* choice—coercive or not—between the receipt of a government benefit and the exercise of an inalienable constitutional right is impermissible. At least with regard to the public assistance cases, this formulation of the unconstitutional conditions doctrine has scarcely more explanatory power than the others. First, it provides no standard for determining which constitutional rights are inalienable and under what circumstances. Nor does it provide a coherent explanation for why all constitutional rights should not always be either alienable or inalienable.

Both the coercion and inalienability interpretations of the doctrine can be understood in terms of the condition's effect on the "price" of the benefit.<sup>114</sup> Under both formulations, a condition is

---

<sup>110</sup> *Maher*, 432 U.S. 464; *Poelker*, 432 U.S. 519; *Harris*, 448 U.S. 297; *Williams*, 448 U.S. 358.

<sup>111</sup> *Maher*, 432 U.S. at 474-77; *Poelker*, 432 U.S. at 521 (incorporating reasoning of *Maher*); *Harris*, 448 U.S. at 312-18; *Williams*, 448 U.S. at 368-69 (incorporating reasoning of *Harris*).

<sup>112</sup> *Boles*, 443 U.S. 282; *Jobst*, 434 U.S. 47.

<sup>113</sup> Two of the principal recent commentators have discussed this "inalienable rights" interpretation of the doctrine at substantial length. See, e.g., Kreimer, *Allocational Sanctions*, *supra* note 6, at 1378-93; Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1476-89. Only a very few conditional allocation cases, however, employ this approach and rhetoric. See *Wyman v. James*, 400 U.S. 309, 328 (1971) (Douglas, J., dissenting) (government should not be permitted "to 'buy up' rights guaranteed by the Constitution"); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (legislation should not be upheld which involves "a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold"); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights.").

<sup>114</sup> Even those who have employed other approaches have noted that the cases might be viewed in this way. See, e.g., Epstein, *Foreword*, *supra* note 6, at 15 ("In principle

prohibited if it results in the benefit's price being the waiver or "sale" of a constitutional right.<sup>115</sup> I propose that we instead understand the doctrine in terms of the condition's effect on a different price—the "price" of exercising one's constitutional rights. One does not, of course, actually *buy* from the government permission to engage in a constitutionally protected activity. A legislature can, however, statutorily impose group-specific burdens on the exercise of such activities. Although a given burden may impose different costs on individual members of the burdened group, that burden effectively alters the legislatively determined price that all members of the group must pay, relative to otherwise similarly situated persons, in order to exercise their constitutional rights. Because an inability to earn a subsistence income is the first prerequisite for receipt of public assistance benefits, other conditions on the receipt of those benefits necessarily will affect persons unable to earn a subsistence income systematically differently than similarly situated persons earning such an income.

In approaching the unconstitutional conditions doctrine in terms of the challenged condition's effect on the price to differentially wealthy individuals of exercising their constitutional rights, I would move beyond a simple conception of the doctrine as prohibiting conditions that transform the price of exercising one's constitutional rights into the waiver or complete forgoing of a benefit to which one would otherwise have been entitled. For that is nothing more than a restatement of the coercion and inalienability formulations of the doctrine, and therefore carries with it all of their weak-

---

there are two ways to organize the discussion [of unconstitutional conditions]. The first is to examine how the doctrine works with respect to its distinct limitations upon the 'prices' people have to pay in order to obtain benefits from the government. . . . I have chosen not to follow that course . . .").

Notwithstanding Epstein's claim, there is a third possible approach—that which is proposed in this Article.

<sup>115</sup> In the unconstitutional conditions context, the market analogy may appear strained. As Kathleen Sullivan has noted:

First, no general market exists for the benefits the government "sells." Second, government cannot itself use the right "transferred." An agreement to be silent in exchange for a subsidy, for example, does not augment the government's own power to "speak"; the "buyer" does not appear to gain what the "seller" loses. Both apparent anomalies, however, are easily dispelled. For any benefit that government uniquely provides, acceptance of a condition resembles an exchange with a monopolist. And the "sale" of a right resembles a personal service contract more than a sale of a good; for example, the government places the would-be speaker on retainer to remain silent. Government may also acquire from the "sale" of constitutional rights permission to do what otherwise it could not do: "sale" of the right to trial or the right against self-incrimination in exchange for a lesser charge, for example, permits the government to convict without trial or independent evidence.

Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1477 n.284.



nesses discussed above. I intend to show in this Part, however, that a more complex (and interesting) variant of this conception does in fact explain the existing public assistance cases.

I propose that the Court has in effect been employing an utterly determinate two-step test in deciding nearly all of the conditional allocations cases involving public assistance benefits.<sup>116</sup> The first prong asks whether the challenged condition involves a constitutionally protected activity. If not, the condition is sustained. If so, however, the second prong then asks whether the effect of the challenged condition is to require persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a higher price to engage in that constitutionally protected activity than similarly situated persons earning a subsistence income. Only if the answer to this question too is affirmative will the Court decline to defer to the legislature and overturn the challenged condition.

Thus, I suggest that the Court, *sub silentio*, has been employing a previously unarticulated baseline to decide the public assistance cases. The Court does not compare the position of those otherwise eligible for a conditioned public assistance benefit with *their* position in either a world in which that benefit is made available without the attached condition or a world in which that benefit is not made available at all. Rather, the Court compares the position of those unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, with the position of those who are employed and earning such an income. The Court conducts this latter comparison with reference to the price the two groups are required to pay to exercise their constitutional rights.

At the core of my proposed positive theory and its choice of baselines is the recognition that ours is primarily a market economy and that economic structure has inescapable implications for the meaning and operation of constitutional rights. Both the text of our Constitution as well as many Supreme Court decisions provide individuals protection from the State in the form of constitutional rights. These are sometimes denoted "negative" rights insofar as their aim is to keep the government from infringing certain individual liberties, from intruding in certain areas of individuals' lives.<sup>117</sup> "Positive" rights, in contrast, might be better understood as entitlements that require the government to provide individuals certain

---

<sup>116</sup> The two exceptions, better explained by an alternative but not inconsistent theory, are discussed *infra* notes 152 & 191.

<sup>117</sup> I employ here essentially Charles Fried's variant of this distinction. He defines a "negative right" as "a right that something not be done to one, that some particular imposition be withheld . . . the right[] not to be interfered with in forbidden ways . . ." CHARLES FRIED, *RIGHT AND WRONG* 110 (1978).

goods or services.<sup>118</sup> While generally controversial and of limited utility in some contexts,<sup>119</sup> the negative/positive right distinction is both meaningful and important when viewed from an economic perspective. This distinction, moreover, is critical to understanding how the exercise of each constitutional right comes to bear the price it does.

Assuming a hypothetical baseline of a society with a market economy and no constitutional rights or other laws, the addition of a constitutional right to, say, use contraceptives, does not, without more, change the market price for contraceptives.<sup>120</sup> Persons interested in exercising their new constitutional right must, in the absence of a gift of contraceptives, purchase contraceptives in order to do so. Some persons, however, may be unable to afford the market price for contraceptives and may, therefore, be unable to exercise their new constitutional right. Others, who may be able to afford contraceptives, may not want to exercise their new right, either as an

---

<sup>118</sup> Again, my usage follows that of Fried. He defines a "positive right" as a claim to some share of scarce goods. *Id.*

As Seth Kreimer has rightly noted, Fried's distinction, taken alone, is not especially useful in deciding what withholdings of benefits might be permitted: "Under [Fried's] formulation, a withholding of benefits may be a violation of both negative and positive rights." Kreimer, *Allocational Sanctions*, *supra* note 6, at 1324 n.98; see also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 887 (1986) ("[S]ome clauses [of the Constitution] are more likely to be interpreted to have 'positive' components than others."); Garvey, *supra* note 6, at 220 ("The terms 'positive' and 'negative' . . . suggest a kind of preconstitutional baseline from which we measure our liberty."); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 503 (1987) ("Whether a right is 'positive' or 'negative' turns out to depend largely on whether it calls for alterations in existing practices."); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 888 (1987) ("Whether rights are treated as 'negative' or 'positive' turns out to depend on antecedent assumptions about baselines—the natural or desirable functions of government."); Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 553 ("every freedom is both a freedom from and a freedom to").

I use the positive/negative right distinction, however, merely as a starting point for my discussion of the operation of constitutional rights and entitlements within a market economy.

<sup>119</sup> The origins of this positive/negative right distinction are usually attributed to Isaiah Berlin and his distinction between positive and negative liberty. For Berlin, "negative liberty" addresses the question "How far does government interfere with me?" while "positive liberty" responds to the question "By whom am I ruled?" ISAIAH BERLIN, *TWO CONCEPTS OF LIBERTY* 14-15 (1958). Among the criticisms of Berlin's distinction are C. B. MACPHERSON, *Berlin's Division of Liberty*, in *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 95 (1973); and Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967).

<sup>120</sup> This assumes, *inter alia*, that the use of contraceptives was not previously a crime. For one might logically expect to see some decline in price upon decriminalization, whether or not decriminalization is also accompanied by the establishment of a constitutional right. It also assumes that there was not previously a special "tax" on contraceptives. The hypothetical's assumption of "no laws" assumes away both of these possibilities.

absolute matter (as in the case of a couple who would like to have a child), or as a matter of relative preferences (as in the case of a couple that might exercise the right if it were costless, but prefers to spend their financial resources in other ways). In a market economy, in sum, the exercise of many constitutional rights bears a price that individuals are free to pay or not depending on how they choose to allocate their personal resources.<sup>121</sup>

In a market economy, a substantive constitutional right functions to prevent the State from imposing various deterrents to certain activities, above and beyond those economic deterrents that are a natural concomitant of a market economy. These deterrents include, but are not limited to, criminal penalties.<sup>122</sup> A constitutional right does not require the State also to remove the *background* economic impediments to engaging in the protected activity, which necessarily exist in a market economy.<sup>123</sup> The result is that the exercise of many constitutional rights will be distributed within the society much like any other good, and this distribution will be affected by, and subject to, existing wealth endowments.

A constitutional entitlement, in contrast to a constitutional right, necessarily affects the price that individuals must pay for certain goods or services. With reference to the above baseline, a constitutional *entitlement* to contraceptives ensures that all persons interested in using them will be able to do so, regardless of their economic situation, by reducing the price of contraceptives to zero. Unlike rights, entitlements eliminate *all* economic inequalities and other deterrents with regard to the object of the entitlement. *Statutory* entitlements, such as public assistance benefits, alter the economic baseline for certain groups. Persons eligible for the entitlement will receive either additional income, as in the case of cash-grant programs, or some State-subsidized discount on the market price of certain goods or services, as with food stamps. Such entitlements provide their recipients greater purchasing power within the market economy, thereby diminishing the economic inequality

---

<sup>121</sup> Some constitutional rights, of course, are costless to exercise. For further discussion, see *infra* text following note 242.

<sup>122</sup> See, e.g., *infra* note 170 (discussion of the various State-created burdens on the right to choose an abortion which the Court has found impermissible).

<sup>123</sup> In one sense, these background economic impediments, although distinguishable, are as much a product of the State as its discrete laws, regulations, and constitutional provisions. The distinction between these two general types of "state action" in the economic realm has been much discussed in the academic literature. Most notably, Judge (then Professor) Ralph Winter and Frank Michelman have discussed (albeit, reaching different conclusions) the difficulties of drawing the "state action" line in the context of equal protection claims and wealth inequalities. See generally Michelman, *Foreword*, *supra* note 3; Winter, *supra* note 3.

among citizens without disturbing the overall structure of the economy.

All of the conditional allocation cases involving public assistance benefits concern a statutory entitlement and, therefore, also a legislatively altered economic baseline: Persons eligible for the entitlement will have greater purchasing power within the market economy than they did prior to the entitlement. I suggest that the unconstitutional conditions doctrine operates in these cases to ensure that persons similarly situated but for differing abilities to earn a subsistence income are not required to pay systematically different prices in order to exercise their constitutional rights. That is, a condition will be prohibited if it requires persons unable to earn a subsistence income to pay more to exercise their constitutional rights than similarly situated persons earning a subsistence income. All other conditions on public assistance benefits will be upheld as being within the discretion of the legislature.

In the remainder of this Part, I undertake to test the descriptive power of this new formulation of the unconstitutional conditions doctrine by re-examining the public assistance cases in light of it. First, this examination shows that my proposed positive theory does coherently and accurately describe nearly all of the existing public assistance cases. In particular, it readily accommodates the structure of both the unemployment compensation cases and certain of the right-to-travel cases, which its predecessors could not. Second, it explains the Court's holdings in the abortion funding cases, the marital status cases, and the right-to-procreate case, which other interpretations of the doctrine have found so puzzling. In addition, the notion of "price" permits a more subtle, and ultimately accurate, appreciation of how "choice," "coercion," and "deterrence" operate in the context of the public assistance cases. Finally, this approach recognizes an important and historically overlooked grey area between waiving or "selling" a constitutional right and having or exercising it.

## B. Conditions Sustained

In thirteen of the public assistance cases, the Court sustained the challenged condition. As this Part shows, the results of those cases are explained by the theory. In none of those cases does the challenged condition require persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a surcharge over the price that similarly situated persons earning a subsistence income must pay to exercise a constitutional right. As might be predicted from the theory, these cases consist of two types: those that do not involve a constitutionally protected activity (or,

therefore, the exercise of *any* constitutional right); and those that *do* concern a constitutional right but do not require persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a surcharge over the price that similarly situated persons earning a subsistence income must pay to exercise it.

### 1. International Union, Wyman, and Aznavorian

*Lyng v. International Union*<sup>124</sup> involved a challenge to a 1981 amendment to the Food Stamp Act which provides that no household shall become eligible to receive food stamps during the time that any of its members is on strike, nor shall it be allotted more food stamps than it is already receiving because the income of the striking member has decreased. If a household had been eligible for food stamps immediately prior to the strike, however, it would not be per se disqualified for those benefits simply because one of its members had gone on strike.<sup>125</sup>

We begin by asking whether the challenged condition involved a constitutionally protected activity. Although workers may have a constitutional right to associate with one another “‘in pursuit of a common goal by lawful means,’”<sup>126</sup> and may also have an equally well-established constitutional right to express themselves about union matters,<sup>127</sup> there is little support for the existence of a constitutional right to strike.<sup>128</sup> Indeed, insofar as the present collective bargaining system was established in the National Labor Relations Act, Congress could presumably at any time simply repeal the Act without violating any constitutional provision: “[U]nion members have no ‘fundamental right’ to the protection of labor statutes.”<sup>129</sup>

<sup>124</sup> 485 U.S. 360 (1988).

<sup>125</sup> *Id.* at 363 n.2. Even these households, however, would not receive an increased allotment as the result of a decrease in the income of the striking member or members of the household. *Id.*

<sup>126</sup> *Id.* at 366 (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933, *reh'g denied*, 459 U.S. 898 (1982); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 5-6, *reh'g denied*, 377 U.S. 960 (1964)).

<sup>127</sup> *Id.* at 369.

<sup>128</sup> Indeed, it is not clear what protections such a right would provide. Even critics of the Court's reasoning and holding in this case have conceded that “the Court has never treated labor strikes themselves as protected speech or association, given their commercial context and nonspeech aspects.” Sullivan, *supra* note 6, at 1438 n.93.

<sup>129</sup> Epstein, *Foreword*, *supra* note 6, at 98. Epstein's discussion of this point bears repetition:

The chief significance of the constitutional decisions in [the area of the NLRA] was the repudiation of the system of private property and competitive markets as the baseline against which permissible legislative enactments were measured. Without accepting that baseline, the shift from competitive markets to cartel arrangements cannot be regarded as a “penalty” or a “taking” from employers made subject to the new restrictions. By the same token, the legal structure of the original Wagner Act

In the absence of a constitutional right to strike, the theory predicts that the Court will defer to Congress and sustain the condition. Consistent with the theory, the Court in *International Union* upheld the challenged statutory provision.<sup>130</sup>

*Wyman v. James*,<sup>131</sup> a structurally similar case, is the only public assistance case in which a condition was challenged under the claimant's fourth amendment right to be free from "unreasonable searches."<sup>132</sup> It is also a case that commentators have found espe-

was held constitutionally permissible, although not constitutionally required. As long as union members have no "fundamental right" to the protection of labor statutes, then the current statutory framework, however well-established, does not establish any new definitive constitutional baseline against which subsequent legislative decisions must be tested.

*Id.* (footnotes omitted).

<sup>130</sup> *International Union*, 485 U.S. at 372-73.

En route to this holding, the Court was peculiarly vague as to whether its finding that the challenged statute "has no substantial impact on any fundamental interest," *id.* at 370, is based on (1) a determination that no "fundamental interest" is involved, or (2) a determination that a fundamental interest is involved but the statute's impact on it is not "substantial." In one part of the opinion, the Court appears to be asserting the latter view:

[I]n this case, the statute at issue does not "directly and substantially interfere" with appellees' ability to associate for [the] purpose [of asserting their lawful rights]. . . . It does not "order" appellees not to associate together for the purpose of conducting a strike, or for any other purpose, and it does not "prevent" them from associating together or burden their ability to do so in any significant manner. . . . [I]t seems "exceedingly unlikely" that this statute will prevent individuals from continuing to associate together in unions to promote their lawful objectives.

*Id.* at 366 (citations omitted).

A few paragraphs later, however, the Court appears to be asserting that no fundamental rights are at all affected by the challenged statute. The *International Union* Court mentions that in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977), it upheld a statute that denied unemployment compensation benefits to workers who were unemployed due to a labor dispute other than a lockout, "saying that the case 'does not involve any discernible fundamental interest.'" *International Union*, 485 U.S. at 368 (quoting *Hodory*, 431 U.S. at 489). The *International Union* Court notes that the *Hodory* Court applied the "rational basis" test, "indicat[ing] that fundamental rights guaranteed by the First Amendment were not implicated there." *Id.* at 368 n.6.

The Court asserts that *Hodory* governs *International Union* with regard to whether fundamental first amendment rights are involved, finding no pertinent distinction between a striking employee and a "non-striking employee of a parent company that found it necessary to close because its subsidiary was on strike . . ." *Id.* at 368.

It seems obvious, however, that the two cases are substantially and pertinently different. The strikers in *International Union* were presented a choice by the statutory provision at issue: food stamp eligibility or striking. The nonstriking employees in *Hodory*, in contrast, were not presented any choice by the statutory provision involved; there was nothing they could refrain from doing or could do (except, perhaps, encourage the strikers to go back to work) to render themselves eligible for unemployment compensation. Indeed, this absence of any direct choice facing the appellants in *Hodory* makes the case, for the purposes of this Article, not a conditional allocation case.

<sup>131</sup> 400 U.S. 309 (1971).

<sup>132</sup> The fourth amendment provides:

cially troublesome.<sup>133</sup> *Wyman* involved a challenge to certain New York statutes and regulations which conditioned the receipt of Aid to Families with Dependent Children ("AFDC") benefits on the mother permitting "periodic home visit[s]" by a caseworker.<sup>134</sup> In order to test the positive theory against this case, we must ask, first, whether the activity at issue—denying entry into one's home to a caseworker without a warrant—was protected under the Constitu-

---

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

U.S. CONST. amend. IV.

<sup>133</sup> *James v. Goldberg*, 303 F. Supp. 935 (S.D.N.Y. 1969), the lower court decision in *Wyman*, itself spawned a substantial literature. Commentators were mixed in their opinions as to what the Supreme Court both would do and should do. Some were concerned that the Court would not provide the poor sufficient protection if it merely required caseworkers to obtain a search warrant by affirming the lower court's determination that the challenged condition did require the relinquishment of the claimant's fourth amendment rights. See, e.g., Douglas Q. Wickham, *Restricting Home Visits: Toward Making the Life of the Public Assistance Recipient Less Public*, 118 U. PA. L. REV. 1188 (1970). Other commentators, however, were seemingly more surprised by the lower court's holding and more unsure as to what the Supreme Court might do. See, e.g., Note, *Rehabilitation, Investigation, and the Welfare Home Visit*, 79 YALE L.J. 746 (1970) (authored by Nancy Gertner). These commentators agreed, however, that the best resolution of the problem might be for the welfare administration to separate investigation and social services throughout the system. See, e.g., Wickham, *supra*, at 1208-16; Note, *supra*, at 758-61.

The major commentary after the Supreme Court's decision in *Wyman* was that of Robert Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James*, 69 MICH. L. REV. 1259 (1971). Burt did not find the Court's decision substantively problematic, noting that the decision essentially reduced to whether to require the caseworker to obtain a search warrant and, regardless of the Court's choice, "it seemed likely that welfare practices would be hardly affected." *Id.* at 1259. Although he found the result in *Wyman* "not unreasonable," Burt was nonetheless troubled by the Court's refusal to impose a warrant requirement: "It would . . . have signified judicial skepticism of the general reach of the governmental powers asserted, and would have announced the Court's determination to use its remedies, however limited, to assure that the legitimate government interests claimed are not stretched beyond their proper bounds." *Id.* at 1260.

Among the principal recent unconstitutional conditions scholars, Richard Epstein, *Foreword, supra* note 6, does not discuss *Wyman*. Seth Kreimer and Kathleen Sullivan, however, both find the decision problematic. Sullivan has considered this case wrongly decided because of her fundamental assumption that an "unreasonable search" in the fourth amendment meaning of the term was involved. Sullivan, *Unconstitutional Conditions, supra* note 6, at 1437 (AFDC conditioned on recipient's submission to "warrantless searches of her home" (emphasis added)). The Court itself found, however, that no search, let alone an "unreasonable search," was involved. See *infra* notes 136-48 and accompanying text.

Kreimer discusses *Wyman* largely in passing and seemingly with disapproval. He cites the Court's reasoning in *Wyman* as support for the Court's continued use of the argument that a particular allocational sanction should be permitted because the claimant retains the choice of noncompliance. Kreimer, *Allocational Sanctions, supra* note 6, at 1304 n.31. He also cites the case as an example of what he considers to be the unfortunate continued vitality of the right/privilege distinction. *Id.* at 1308 n.43.

<sup>134</sup> *Wyman*, 400 U.S. at 310-13.

tion at the time the Court decided *Wyman*.<sup>135</sup> In its decision in *Wyman*, the Court noted both that it “consistently has been most protective of the privacy of the dwelling”<sup>136</sup> and that “one’s Fourth Amendment protection [against unreasonable searches and seizures] subsists apart from his being suspected of criminal behavior.”<sup>137</sup> The Court found, however, that no “search . . . in the Fourth Amendment meaning of that term” was at issue in *Wyman*.<sup>138</sup>

The Court’s conclusion that the challenged condition did not involve a “search” was seemingly independent of the fact that disqualification for AFDC benefits rather than criminal sanctions would follow refusal of the caseworker’s home visit.<sup>139</sup> Rather, the Court focused on the caseworker’s assertedly benign posture and purpose in reaching its result.<sup>140</sup> The Court noted that two purposes were at the core of the home visit:<sup>141</sup> To assist in the “rehabilitation” of the parent recipient to a condition of self-support,<sup>142</sup> and to ensure that the needs of the dependent child whose family requires financial

<sup>135</sup> The Court might well decide this case differently today. See, e.g., 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.3(a) (2d ed. 1987) (arguing that *Wyman* Court was “unquestionably incorrect in its assertion that a home visit is not a search.”).

<sup>136</sup> *Wyman*, 400 U.S. at 316.

<sup>137</sup> *Id.* at 317.

<sup>138</sup> *Id.* Although the Court conceded that “the caseworker’s posture in the home visit is perhaps, in a sense, both rehabilitative and investigative,” it concluded that “this latter aspect . . . is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context.” *Id.*

<sup>139</sup> *Id.* at 309. Although the Court in *Wyman* notes (1) that the type of visitation actually at issue in the case is not directly forced or compelled, and (2) that the beneficiary’s denial to the caseworker of permission to enter is not a criminal act, these aspects do not appear dispositive of the Court’s finding that such a “visit” does not constitute a “search” in the fourth amendment meaning of the term. *Id.* at 316-17. The caseworker’s posture and purpose appeared to be far more important to the Court’s determination. See *infra* note 142.

<sup>140</sup> “[T]he visit is ‘the heart of welfare administration’; . . . it affords ‘a personal, rehabilitative orientation, unlike that of most federal programs’ . . .” *Wyman*, 400 U.S. at 319-20 (quoting Note, *supra* note 133, at 748); see also *id.* at 317-24.

<sup>141</sup> A further, but less central, purpose was protecting against fraud. *Id.* at 322.

<sup>142</sup> *Id.* at 317 (“caseworker’s posture in the home visit is . . . both rehabilitative and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context”); *id.* at 319 (“emphasis of the New York statutes and regulations is . . . upon ‘close contact’ with the beneficiary, upon restoring the aid recipient ‘to a condition of self-support’”) (quoting Note, *supra* note 133, at 748); *id.* at 319-20 (“home visit . . . is ‘the heart of welfare administration’ . . . it affords ‘a personal, rehabilitative orientation, unlike that of most federal programs’”).

*Id.* at 322-23 (“The visit is . . . made by a caseworker of some training whose primary objective is . . . the welfare, not the prosecution, of the aid recipient for whom the worker has profound responsibility. . . . The caseworker is not a sleuth but rather, we trust, is a friend to one in need.”); *id.* at 323 (“The home visit is not a criminal investigation . . . and . . . is not in aid of any criminal proceeding.”).



assistance were being met.<sup>143</sup> Only the second of these purposes is arguably "investigative" rather than "rehabilitative" and might therefore, according to the Court, involve a "search" under the fourth amendment.

With regard to this child protective function of the home visit, the Court held that "[t]he dependent child's needs are paramount, and only with hesitancy would we relegate those needs . . . to a position secondary to what the mother claims as her rights."<sup>144</sup> Thus the Court undertook to balance the mother's fourth amendment rights against both the State's *parens patriae* interest in the child and the child's right to the financial assistance that the State has made available for its survival and well-being. In weighing the various interests involved, the Court emphasized the many precautions taken by the New York agency to "minimize[] any 'burden' upon the homeowner's right against unreasonable intrusion."<sup>145</sup> The Court found that the "visit" was merely an "interview" in the home.<sup>146</sup> In sum, the *Wyman* Court concluded that the caseworker's periodic home visits did not constitute a "search" within the meaning of the fourth amendment.<sup>147</sup> At the very least, the Court noted, these visits represented a "carefully defined" exception to the warrant requirement.<sup>148</sup>

Insofar as the challenged condition did not therefore involve any constitutionally protected activity by the claimant, the theory

<sup>143</sup> *Id.* at 318-19.

<sup>144</sup> *Id.* at 318.

<sup>145</sup> *Id.* at 321. The Court described these precautions as follows:

Mrs. James received written notice several days in advance of the intended home visit. The date was specified. . . . Privacy is emphasized. The applicant-recipient is made the primary source of information as to eligibility. Outside informational sources, other than public records, are to be consulted only with the beneficiary's consent. Forcible entry or entry under false pretenses or visitation outside working hours or snooping in the home are forbidden.

*Id.* at 320-21 (footnote omitted).

<sup>146</sup> *Id.* at 317-18.

<sup>147</sup> Had the Court held the home visit to be a search and required the caseworker to have a warrant for entry, the result would again be consistent with the theory. Because there is no constitutional right to deny entry to one's home to a government official bearing a search warrant, it would be permissible under the theory for the state to terminate or deny AFDC benefits to claimants who refuse a home visit under these circumstances since no constitutionally protected behavior by the claimant is involved.

<sup>148</sup> If there is no search, there is neither any need for a warrant nor any possibility of a fourth amendment violation. Nonetheless, the Court went on, explicitly for argument's sake, to consider whether there would be a fourth amendment violation if the visit did somehow constitute a search. The Court suggested that the visit might constitute a search if the average beneficiary felt she could not refuse consent to the visit. *Id.* at 318. Unfortunately, the Court provided no explanation for why an inability to refuse consent in this way would change the purportedly dispositive "interview nature" of the visit into that of a search within the fourth amendment meaning of the term. Indeed, the Court may well have been more concerned about the admittedly "investigative," if not

predicts that the Court will defer to the legislature or agency and sustain the condition. Consistent with the theory, the *Wyman* Court upheld the New York statutes and regulations that conditioned the receipt of AFDC benefits on the mother's willingness to permit the caseworker to make a "home visit."<sup>149</sup>

*Califano v. Aznavorian*<sup>150</sup> concerned a challenge to a provision of the Social Security Act which held that any person who spent at least thirty consecutive days entirely outside the United States would not receive Supplemental Security Income ("SSI") benefits during that

necessarily criminal-violations-seeking, aspects of the caseworker's visit and complicated role.

At the time of the *Wyman* decision, there was little fourth amendment doctrine in general and scarcely any concerning "administrative" or noncriminal investigations or searches. Indeed, as the *Wyman* Court noted, the only existing precedent regarding "administrative" searches or investigations was *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), both by a divided Court. The *Wyman* Court distinguished those cases in part by contrasting their purpose—"a true search for violations"—with the assertedly far more benign purposes of the caseworker's visit. *Wyman*, 400 U.S. at 324-25.

The Court had, however, previously confronted a few issues pertinent to *Wyman*. It had established that a valid search warrant was required for all searches of private property "except in certain carefully defined classes of cases . . ." *Id.* at 316-17 (citing *Camara* and further supporting cases). The Court had further determined that such exceptions to the warrant requirement would be restricted to those situations when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara*, 387 U.S. at 533; see *Schmerber v. California*, 384 U.S. 757, 770-71 (1966). The Court appeared to consider the facts of *Wyman* to constitute such an exception, concluding that the warrant procedure had "seriously objectionable features in the welfare context," *Wyman*, 400 U.S. at 323, and was "out of place." *Id.* at 324.

Indeed, the *Wyman* Court found that the purposes of the caseworker's visit would be frustrated by a warrant requirement. First, the Court noted that such a requirement would substantially alter the friendly and nonadversarial nature of the parent-caseworker relationship, necessary for rehabilitation purposes, by implying conduct "either criminal or out of compliance with an asserted governing standard." *Id.* at 324. In addition, the Court found that because a warrant issues upon a showing of probable cause that a governing standard or criminal law has been violated, the caseworker would not even be able to obtain a warrant to undertake either rehabilitative or child protective activities. *Id.* at 323.

With regard even to the latter, an arguably (at least partially) investigative function, the Court noted that the caseworker's purpose was not to search the home or to uncover criminal conduct but simply "to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it." *Id.* at 324. Perhaps most importantly, however, the Court had established prior to *Wyman* that the purpose of a warrant was to enable the citizen to verify "the need for or the appropriate limits of the inspection." *Camara*, 387 U.S. at 540. While warrant procedures and the New York agency's regulations at issue in *Wyman* both prohibit entry under false pretenses, *Wyman*, 400 U.S. at 321, the Court noted that the latter in fact provided the AFDC mother more procedural protections than the former. For the agency regulations further specify that visitation is not to take place outside working hours, that the claimant is to receive written notice of the visit several days in advance, and that "snooping" in the home is prohibited. *Id.* at 320-21, 323-24.

<sup>149</sup> *Id.* at 326.

<sup>150</sup> 439 U.S. 170 (1978).

period or during an additional thirty-day period upon his return to the United States. Such persons would, however, continue to receive those benefits during any briefer period of absence from the United States.<sup>151</sup> The plaintiff explicitly did not question "the constitutional validity of the basic decision of Congress to limit SSI payments to residents of the United States,"<sup>152</sup> but contended that the thirty-day "waiting period" upon his return to the United States impermissibly burdened his constitutional freedom to travel abroad.<sup>153</sup>

By the time the Court decided *Aznavorian*, it had already established that the right to travel did not provide constitutional protection against the government's use of reasonable residency requirements to limit eligibility for various privileges and benefits to bona fide residents.<sup>154</sup> The constitutional right to travel did, however, require the states to treat new and old bona fide residents equally.<sup>155</sup> In *Aznavorian*, the Court noted that "the longer a person

<sup>151</sup> *Id.* at 171-72.

<sup>152</sup> *Id.* at 177. This principle was established in another right-to-travel public assistance case, heard the same term, in which the Court sustained the challenged condition. The result in that case, however, is probably better explained independently of the positive theory presented here. *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam), concerned a provision of the Social Security Act which restricted SSI benefits to residents of the 50 states and the District of Columbia. The plaintiffs, various individuals who had received SSI benefits while living in one of the 50 states and whose benefits were terminated when they moved to Puerto Rico, claimed that the exclusion of residents of Puerto Rico from the federally funded SSI program impermissibly violated their constitutional right to travel.

Had the *Torres* Court overturned the challenged condition, it would have effectively held that, when allocating federal resources, the federal government cannot constitutionally distinguish between residents of the United States and non-residents. Such a holding, moreover, would effectively interpret the right to travel as requiring each state to continue to pay benefits indefinitely to any persons who had once resided there. This doctrine would thereby destroy the states' independent power under the Constitution to enact laws concerning matters of state interest, which are uniformly applicable to all of their residents. *See, e.g., Coyle v. Smith*, 221 U.S. 559, 567 (1911); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868).

<sup>153</sup> 439 U.S. at 175. The *Aznavorian* Court cited *Kent v. Dulles*, 357 U.S. 116, 126-27 (1958), for the proposition that "freedom of international travel is 'basic in our scheme of values' and an 'important aspect of the citizen's liberty.'" 439 U.S. at 175-76. The Court went on to distinguish the "virtually unqualified" constitutional right of interstate travel from the "'right' of international travel . . . [which] has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment . . . [and, therefore,] can be regulated within the bounds of due process." *Id.* at 176 (quoting *Torres*, 435 U.S. at 4 n.6).

<sup>154</sup> *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972) (states have the power to require that voters be bona fide residents of the relevant political subdivision); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) (same); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 625 (1969) (same); *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (same); *Pope v. Williams*, 193 U.S. 621 (1904) (same).

<sup>155</sup> *See, e.g., Dunn*, 405 U.S. 330; *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam) (fifty-day residency requirement for voting not justified).

is out of the country, the greater [is] the possibility that he is no longer a resident" but merely a visitor upon his return.<sup>156</sup> Thus, the Court construed the thirty-day "waiting period" for SSI eligibility imposed on persons returning to the United States after thirty or more consecutive days abroad as reasonably necessary to provide "assurance that the beneficiary's residency here is genuine."<sup>157</sup> The Court concluded that the thirty-day "waiting period" was a requirement for bona fide residency rather than a penalty imposed on bona fide residents who had recently exercised their constitutional right to travel.

Insofar as the constitutional right to travel did not guarantee the recently returned *Aznavorian* plaintiff the benefits accorded longer residents of the United States until he could again establish bona fide residency, the challenged condition did not involve any constitutionally protected activity. Thus, the theory predicts that the Court would sustain the challenged condition, as the *Aznavorian* Court in fact did.<sup>158</sup>

In *International Union, Wyman*, and *Aznavorian*, in sum, the challenged condition did not affect or involve any constitutionally protected activity by the claimants. The theory predicts that the Court will defer to the legislature and sustain such conditions, as it uniformly did. The remaining public assistance cases in which the Court similarly deferred to the legislature and upheld the challenged condition are of a different sort. Each of these, unlike the above three cases, concerns a condition that does involve a constitutionally protected activity. Each, however, fails to meet the second prong of the theory's test: In none of these cases does the condition require persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a higher price to exercise their constitutional rights than similarly situated persons earning such an income. Thus, the theory predicts that the Court will sustain the challenged condition in each case.

## 2. *The Abortion Funding Cases*

Of all the public assistance cases, those concerning abortion funding have received the most academic (and public) attention and have been considered the most controversial.<sup>159</sup> In 1977 and again

---

<sup>156</sup> *Aznavorian*, 439 U.S. at 178.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Among the principal recent commentators on the unconstitutional conditions doctrine, Epstein concluded that *Harris* was rightly decided, but believed it required the Court "to choose the lesser of two evils." Epstein, *Foreword, supra* note 6, at 94. Sullivan appeared to conclude that the abortion funding cases were wrongly decided. Sullivan, *Unconstitutional Conditions, supra* note 6, at 1496-97, 1499, 1504-05. Kreimer stated ex-

in 1980, the Court decided several cases involving abortion funding and the poor.<sup>160</sup> Two of the three such cases decided by the Court in 1977 involved constitutional challenges to state Medicaid programs which provided funding for various medical conditions, including childbirth, but which excluded certain categories of abortions.<sup>161</sup> In *Maher v. Roe*, the Connecticut Welfare Department did not provide Medicaid coverage for first trimester abortions other than those certified as "medically necessary," although the Medicaid program generally subsidized the medical expenses incident to pregnancy and childbirth.<sup>162</sup> Two indigent women who were unable to obtain a physician's certificate of medical necessity contended that the state regulation violated their fourteenth amendment rights of due process and equal protection.<sup>163</sup> A companion case, *Poelker v. Doe*, concerned a similar equal protection challenge to a city policy providing publicly financed hospital services for childbirth as well as for abortions involving "a threat of grave physiological injury or death to the mother," but not for other, elective abortions.<sup>164</sup>

The two abortion funding cases that the Court decided in 1980 posed constitutional challenges to the Hyde Amendment to the Medicaid Act, which provides that states participating in the Medicaid program are not required to fund certain medically necessary

---

explicitly that he found the abortion funding cases "particularly heartless and misguided in their result . . ." Kreimer, *Allocational Sanctions*, *supra* note 6, at 1298 n.18.

Other commentators have been similarly divided in their views of these cases. See, e.g., Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 336 (1985) (arguing that *Harris* was wrongly decided); Peter Westen, *Correspondence*, 33 STAN. L. REV. 1187 (1981) (same); 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) (same); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 811-14 (1983) (criticizing Perry's discussion); Marie A. Failinger, *An Offer She Can't Refuse: When Fundamental Rights and Conditions on Government Benefits Collide*, 31 VILL. L. REV. 833 (1986) (arguing that *Maher* and *Harris* were wrongly decided); Gary J. Simon, *Abortion, Poverty, and the Equal Protection of the Laws*, 13 GA. L. REV. 505 (1979) (finding *Maher* wrongly decided); Susan F. Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981) (providing descriptive theory).

<sup>160</sup> Although the case involves an unconstitutional conditions challenge, this Article does not discuss the Court's most recent abortion decision, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (plurality decision), because it does not concern any public assistance benefit, but rather the use of public employees and facilities. Moreover, no public funds were actually at issue since the evidence in *Webster* showed that "the State does recoup all of its costs in performing abortions, and no state subsidy, direct or indirect, is available." *Id.* at 3052.

<sup>161</sup> The third case, *Beal v. Doe*, 432 U.S. 438 (1977), presented a question of statutory construction and, therefore, is not pertinent to the present discussion.

<sup>162</sup> 432 U.S. 464, 466 (1977).

<sup>163</sup> *Id.* at 467.

<sup>164</sup> 432 U.S. 519, 520, *reh'g denied*, 434 U.S. 880 (1977).

abortions. In *Harris v. McRae*, this provision was challenged as violating the fifth amendment's guarantees of due process and equal protection.<sup>165</sup> In *Williams v. Zbaraz*, the Court faced a similar challenge to the Hyde Amendment on fifth amendment equal protection grounds, as well as a companion challenge on fourteenth amendment equal protection grounds to comparable funding restrictions in the governing Illinois statute.<sup>166</sup>

All four of these abortion funding cases are structurally similar. In each, the indigent woman is seemingly provided free medical care during her pregnancy on the condition that she not have an abortion and instead carry the pregnancy to term.<sup>167</sup> These cases are especially problematic because the holding in each appears inconsistent with the unconstitutional conditions doctrine as classically formulated.<sup>168</sup> Were a state to have enacted a law criminalizing all first-trimester abortions except those funded under the statutes at issue in the above four cases, the Court unquestionably would have found the law unconstitutional at the time those cases were decided.<sup>169</sup> According to the classic statement of the unconstitutional conditions doctrine, it should be equally impermissible for a state to provide medical benefits to women during pregnancy on the condition that they not have an elective abortion. Yet in each of these abortion funding cases, the Court upheld such a condition on the receipt of free medical care by indigent, pregnant women, finding that the challenged regulation did not "impinge upon" the constitutional right recognized in *Roe*.<sup>170</sup>

<sup>165</sup> 448 U.S. 297, 311 (1980).

<sup>166</sup> 448 U.S. 358, 368-69, *reh'g denied*, 448 U.S. 917 (1980).

<sup>167</sup> The cases differ largely on the kinds of abortions not funded. In *Williams*, the only abortions funded under the Illinois law were those " 'necessary for the preservation of the life of the woman seeking such treatment.' " 448 U.S. at 360 (quoting ILL. REV. STAT., ch. 23, § 5-5 (1979)). In *Harris*, abortions were permitted to be funded either " 'where the life of the mother would be endangered if the fetus were carried to term' " or in promptly reported cases of rape or incest. 448 U.S. at 302 (quoting Hyde Amendment, Pub. L. No. 96-123, 93 Stat. 926 (1979)).

In *Maher*, the only first-trimester abortions funded were those certified by a physician as "medically necessary," including those necessary for reasons of mental health. 432 U.S. at 466. In *Poelker*, abortions were provided/funded only when there was "a threat of grave physiological injury or death to the mother." 432 U.S. at 520.

<sup>168</sup> For elaboration on this formulation of the doctrine, see *supra* note 21.

<sup>169</sup> See, e.g., *Doe v. Bolton*, 410 U.S. 179, *reh'g denied*, 410 U.S. 959 (1973); *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973).

<sup>170</sup> *Harris*, 448 U.S. at 318; *Maher*, 432 U.S. at 474. The Court in *Poelker* stated that it was incorporating its reasoning in *Maher*. See 432 U.S. at 521. The Court in *Williams* stated that it was incorporating its reasoning in *Harris*. See 448 U.S. at 369.

Much of what has been considered problematic about the abortion funding cases is the Court's interpretation of the nature of the constitutional right recognized in *Roe*. In these cases, the Court has termed that right a "fundamental" one. *Harris*, 448 U.S. at 314; *Maher*, 432 U.S. at 474. Thus, one commentator has concluded: "[R]oe does more than just decriminalize abortion. Rather, *Roe* works a double transformation at a single

In order to apply the theory to these cases, we must reformulate them in terms of the cost to the individual of exercising the constitutional right at issue. In each of the abortion funding cases, the constitutional right at issue is the then-existent right to terminate one's pregnancy during the first trimester. The indigent women receiving Medicaid benefits who chose to have an abortion were simply left to pay the market price for that medical service. Insofar as the exercise of the claimants' constitutional right to choose an abortion did not also involve the loss of any statutory entitlement, the challenged condition created no surcharge on the price to them of exercising the right. The claimants, persons unable to earn a subsistence income, were simply left to pay the same price to exercise their constitutional right to an abortion as similarly situated persons earning a subsistence income.

It is informative to contrast the position of the pregnant women in the abortion funding cases with their position under a hypothetical law that declared any woman who elected to have an abortion ineligible for food stamps, free general medical care, or some *other* particular type of free medical treatment to which they would otherwise be entitled by statute.<sup>171</sup> Under this hypothetical law, the cost

---

leap: abortions move from the status of criminal acts into 'fundamental rights,' which are as strongly protected as religious beliefs." Epstein, *Foreword, supra* note 6, at 91. See also Sullivan, *Unconstitutional Conditions, supra* note 6, at 1497 & n.358 (*Roe* "may be interpreted either as requiring government neutrality on reproductive choice, or as merely barring criminalization and its equivalents while leaving government free to express its preference for childbirth over abortion in other ways. . . . The abortion funding cases . . . plainly did not interpret *Roe* to require neutrality, but they were wrong.")

Indeed, several post-*Roe* decisions made clear that more than decriminalization was guaranteed insofar as the Court invalidated several other types of restrictions on the woman's freedom of procreative choice. See, e.g., *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (invalidating state law regulating sale, distribution, advertising, and display of contraceptives insofar as it applied to nonprescription contraceptives); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976) (a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion"; declining to rule in absence of state court ruling); *Planned Parenthood v. Danforth*, 428 U.S. 52, 70-71 (1976) (invalidating husband's consent requirement); *Doe v. Bolton*, 410 U.S. 179 (1973) (invalidating state statutory scheme imposing various procedural conditions on performing abortions); see also *Maher*, 432 U.S. at 472-74.

No matter how one interprets the right established in *Roe*, the Court in the abortion funding cases clearly read it as excluding any right to the elimination of underlying economic inequalities. *Harris*, 448 U.S. at 316-18; *Maher*, 432 U.S. at 474.

<sup>171</sup> Indeed, the Court in both *Maher* and *Harris* posed and responded to this hypothetical:

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in *Shapiro*, and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the State "penalizes" the woman's decision to have an abortion by refusing to pay for it. *Shapiro* and *Maricopa County* did not hold that States would penalize the right to travel interstate by refusing to pay the bus

to a claimant of an abortion is the market price for the service *plus* the loss of a statutory benefit for which she would have been eligible had she not exercised the pertinent constitutional right. That is, the claimant, an individual unable to earn a subsistence income, would be required to pay a higher price than a similarly situated person earning a subsistence income in order to exercise her constitutional right to an abortion. Thus, the theory predicts that the Court would overturn the hypothetical law, but would uphold the legislation actually at issue in the abortion funding cases, as the Court in fact did.<sup>172</sup>

### 3. *The Marital Status Cases*

In both *Califano v. Jobst*<sup>173</sup> and *Califano v. Boles*,<sup>174</sup> the challenged condition did not merely reduce the amount of benefits claimants would receive if they exercised a particular constitutional right. Rather, it effectively offered claimants a "choice" between exercising a particular constitutional right or receiving certain Social Security benefits.

Under the condition at issue in *Jobst*, a claimant eligible for derivative Social Security benefits as a disabled dependent child of a covered, deceased wage earner was *per se* disqualified for those benefits when he exercised his constitutional right to marry.<sup>175</sup> The

fares of the indigent travelers. We find no support in the right-to-travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.

*Maher*, 432 U.S. at 474-75 n.8.

A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. . . . But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

*Harris*, 448 U.S. at 317 n.19.

<sup>172</sup> *Harris*, 448 U.S. at 318; *Maher*, 432 U.S. at 474. The Court in *Poelker* stated that it was incorporating its reasoning in *Maher*. See 432 U.S. at 521; the Court in *Williams* stated that it was incorporating its reasoning in *Harris*. See 448 U.S. at 369.

<sup>173</sup> 434 U.S. 47 (1977).

<sup>174</sup> 443 U.S. 282 (1979).

<sup>175</sup> 434 U.S. at 48-53.

The Court first characterized marriage as a fundamental right in dictum in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), a case having nothing to do with the law of marriage. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), a case involving the compulsory sterilization of certain convicted criminals, the Court stated, "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." *Id.* at 541.

By the time of its decision in *Jobst*, the Court had come to include the constitutional



challenged provision of the Social Security Act arguably burdened the claimant's constitutional right to marry insofar as it provided him a financial incentive not to exercise that right.<sup>176</sup> Under the theory, it is necessary to ask whether this condition on Social Security dependency benefits requires minor children of insured persons<sup>177</sup> unable to earn a subsistence income to pay a higher price to exercise their constitutional right to marry than minor children of insured persons earning a subsistence income.

As the *Jobst* Court noted, "marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families."<sup>178</sup> Indeed, the price of exercising one's right to marry typically includes a cessation of one's parents' legal obligation to provide economic support.<sup>179</sup>

Thus, as compared to dependents of insured persons earning a subsistence income, dependents of insured persons not able to earn a subsistence income would not appear to be adversely affected by exercising their right to marry. Whereas the former group of dependents are legally entitled to financial support from their parents prior to marriage, the latter group instead received that support from the State in the form of Social Security "dependency" benefits. And just as parents earning a subsistence income are not usually legally obliged to provide financial support to their children after the latter marry, the State's obligation *with regard to dependency benefits* likewise ceases upon the marriage of the claimant. After marriage, of course, former recipients of Social Security dependency benefits—as well as those who received premarital economic support from their parents—may qualify for various other types of public assistance benefits. Insofar as the condition challenged in *Jobst* did not require the minor children of insured persons unable to earn a subsistence income to pay a higher price to exercise their constitutional right to marry than minor children of insured persons earning

---

right to marry in both the more general "right to privacy" and the fourteenth amendment "freedom of personal choice in matters of marriage and family life." See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974).

<sup>176</sup> The constitutional right to marry is nowhere explicitly invoked in the Court's opinion in *Jobst*.

<sup>177</sup> For details on who is covered under the Social Security scheme, see *supra* notes 42-43 and accompanying text.

<sup>178</sup> 434 U.S. 47, 53 (1977).

<sup>179</sup> For discussions of the scope of the parental duty to provide one's children economic support, see, e.g., ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 177-228 (2d ed. 1989); WALTER WADLINGTON, CHARLES H. WHITEBREAD & SAMUEL DAVIS, *CHILDREN IN THE LEGAL SYSTEM* 713-37 (1983).

a subsistence income, the theory predicts that the condition will be upheld. Consistent with the theory, the Court sustained the condition.<sup>180</sup>

At issue in *Boles* was a related provision of the Social Security Act, which restricted "mother's insurance benefits"<sup>181</sup> to widows and divorced wives of deceased insured wage earners, denying them to the mother of an illegitimate child who was never married to the deceased wage earner who fathered the child.<sup>182</sup> By presenting such mothers a financial incentive to marry, the challenged provision arguably burdened their constitutional "freedom of personal choice in matters of marriage and family life."<sup>183</sup>

For any woman, the price of exercising her constitutional right not to marry the father of her child includes the loss of any *spousal* financial support (both during marriage and upon divorce) to which she would be legally entitled if she married him.<sup>184</sup> As compared to mothers of illegitimate children whose fathers were insured under the Social Security program but earning a subsistence income, the mothers of illegitimate children whose fathers were insured but not able to earn a subsistence income (in this case, because of death) were not required to pay a higher price to exercise their constitutional right not to marry.

While the biological father of an illegitimate child is usually legally obliged to support the child financially,<sup>185</sup> he typically has no similar financial obligation to the child's mother.<sup>186</sup> When the child's parents are, or have been, married, however, the father frequently is legally obliged financially to support his wife (the child's mother).<sup>187</sup> "Mother's insurance benefits" under the Social Security Act simply continue, upon the death of the wage earner, to provide the economically dependent spouse the financial support to which she was previously legally entitled. Insofar as the mother of an illegitimate child was not legally entitled to similar spousal financial support from the child's father prior to his death, the denial to

---

<sup>180</sup> *Jobst*, 434 U.S. at 58.

<sup>181</sup> For a description of who is eligible for these benefits, see *Califano v. Boles*, 443 U.S. 282, 285-86 & n.5 (1979).

<sup>182</sup> *Id.* at 285-87.

<sup>183</sup> *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974). This constitutional right is never explicitly mentioned by the Court in *Boles*.

<sup>184</sup> For general discussions of the scope of spousal support duties during marriage and upon divorce, see, e.g., HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 250-58, 619-71 (2d ed. 1988); WALTER WADLINGTON, *CASES ON DOMESTIC RELATIONS* 238-48, 1108-57 (2d ed. 1990).

<sup>185</sup> For general discussions of parents' financial obligations to their biological children, see, e.g., H. CLARK, *supra* note 184, at 197-201, 258-66; R. MNOOKIN & D. WEISBERG, *supra* note 179, at 177-228.

<sup>186</sup> See *supra* note 184.

<sup>187</sup> See *supra* note 184.

her of those benefits does not constitute a surcharge on the price of exercising her constitutional right not to marry. In the absence of such a surcharge, the theory predicts that the Court will sustain the challenged condition, as the *Boles* Court did.<sup>188</sup>

#### 4. *Dandridge and Castillo*

*Dandridge v. Williams*<sup>189</sup> and *Lyng v. Castillo*<sup>190</sup> each involved a challenged condition that provided claimants a financial incentive, short of per se disqualification for the pertinent benefit, not to exercise certain constitutional rights.<sup>191</sup> In neither of these cases, however, did that condition require persons unable to earn a subsistence income and otherwise eligible for the pertinent benefit to pay a higher price to exercise those rights than similarly situated persons earning a subsistence income.

*Dandridge* concerned a challenge on fourteenth amendment equal protection grounds to a Maryland "maximum grant regulation" which provided AFDC benefits to most families in full accord with the state-computed "standard of need," but imposed a ceiling on the monthly amount of money any one family unit could receive.<sup>192</sup> Thus, under the Maryland regulation, a family of nine with a state-computed need of \$296.15 per month and a family of six with a computed need of \$250.00 per month would each receive the

---

188 443 U.S. 282, 293-97 (1979).

189 397 U.S. 471 (1970).

190 477 U.S. 635 (1986).

191 *Bowen v. Gilliard*, 483 U.S. 587 (1987), is a related conditional allocations case, but its result is most readily explained independently of the theory. In *Gilliard*, claimants challenged on fifth amendment grounds a provision of the Deficit Reduction Act which requires a family filing for AFDC benefits to include within its claimant unit any child living with the family for whom child support payments are being made by a noncustodial parent. Under the challenged provision, a larger family is always entitled to a larger total amount of benefits than a smaller family. The actual amount of AFDC benefits to be provided the family, however, is to be reduced by the amount of money any of the resident children receives in child support from a noncustodial parent. Thus, the challenged provision arguably burdens the claimants' first amendment freedom of association by providing an incentive to have children receiving financial support from a noncustodial parent not live with the family in order to maximize the total amount of the family's AFDC benefits.

Had the Court overturned the challenged condition, it would have effectively held that there is some rational basis for the state to distinguish child support from other types of income when determining whether a claimant unit's total income is below the established "need" standard. In this regard, the *Gilliard* Court noted that the government has an "interest in distributing benefits among competing needy families in a fair way" and, therefore, "[w]hen considering the plight of two five-person families, one of which receives no income at all while the other receives regular support payments for some of the minor children, it is surely reasonable for Congress to conclude that the former is in greater need than the latter." *Id.* at 599.

192 *Dandridge*, 397 U.S. at 473-75.

same \$250.00 per month maximum grant.<sup>193</sup> The regulation arguably burdened the claimant parent's<sup>194</sup> constitutional right to procreate and/or freedom of association insofar as it provided the parent a financial incentive to limit the resident family to six or fewer persons, the size at which the maximum benefits were sufficient to cover the family's state-computed need.<sup>195</sup>

Under the theory, one must ask whether this condition requires claimants, persons unable to earn a subsistence income and otherwise eligible for AFDC benefits, to pay a higher price in order to exercise their constitutional rights than similarly situated persons earning a subsistence income. Using the above figures, a mother with a family of six will not receive any increase in total AFDC benefits if she has another child. This means that her *per capita* income will be reduced since seven people will be supported on the same amount of money as six were previously. This per capita reduction in income, however, does not require her to pay a higher price to exercise her constitutional right to procreate than similarly situated persons earning a subsistence income. For an analogous per capita reduction in income upon the birth of another child is realized by those whose source of a subsistence income is their employment rather than a government benefits program.<sup>196</sup> That is, the price of exercising one's right to procreate typically includes a per capita reduction in income, whatever its source, assuming one's total monthly income is held constant.<sup>197</sup>

Nor does the challenged condition require those unable to earn a subsistence income, and otherwise eligible for AFDC benefits, to pay a higher price to exercise their first amendment freedom of association than similarly situated persons earning such an income. If a family of seven, for example, has one child live elsewhere in order to reduce the size of its AFDC claimant unit to six, the family does

---

<sup>193</sup> *Id.* at 490-91 (Douglas, J., dissenting).

<sup>194</sup> Although the pertinent federal statutory provisions do not restrict AFDC benefits to single-parent families, *see* 42 U.S.C. § 607(a)-(c) (1982 & Supp. V 1987), the vast majority of claimants have historically been female-headed, single-parent households. *See* S. LEVITAN, *supra* note 42, at 30-39.

<sup>195</sup> Interestingly, neither the claimant's right to procreate nor freedom of association was explicitly mentioned by the *Dandridge* Court.

<sup>196</sup> The underlying assumption, consistent with current and past law, is that parents are responsible for the financial support of their minor children in AFDC families as well as in families whose sole source of income is employment. For discussion of the parents' legal duty to provide for the maintenance of their children, *see, e.g.*, R. MNOOKIN & D. WEISBERG, *supra* note 179, at 177-228.

<sup>197</sup> This is a reasonable assumption since the total dollar amount of one's monthly earnings through employment is, in any case, not usually related to family size. That is, a private employer is not typically expected to provide an employee a pay increase upon the birth of a child in order to ensure that the per capita income of the employee's family remains constant.

not thereby increase its total monthly amount of benefits. The family's *per capita* income may now be greater than if all seven family members were living at home, but only if the family is not providing the nonresident child financial support. This state of affairs is the same for a family whose source of a subsistence income is employment rather than AFDC benefits.

It is also informative to consider a hypothetical regulation under which the total monthly amount of benefits for a resident family of seven is *less than*, rather than the same as, that for a family of six. Persons whose source of a subsistence income is employment rather than AFDC benefits do not typically experience a similar reduction in their total (rather than per capita) monthly income upon the birth of a child. This hypothetical regulation, therefore, would require those unable to earn a subsistence income, and otherwise eligible for AFDC benefits, to pay a higher price to exercise their right to procreate and/or their freedom of association than similarly situated persons earning a subsistence income. Thus, the theory predicts that the Court would strike down this hypothetical regulation, but would sustain that actually at issue in *Dandridge*, as the Court in fact did.<sup>198</sup>

*Castillo* involved a fifth amendment equal protection challenge<sup>199</sup> to an amendment to the Food Stamp Act, which considered parents, children, and siblings who live together to be a single "household" for food stamp purposes, even if they bought their food and prepared their meals as separate economic units.<sup>200</sup> Although, under the amendment, the total amount of food stamps increased with household size, the per capita amount declined. Thus, a household of one, for example, would receive \$70, a household of two \$128, a household of three \$183, and a household of four \$233.<sup>201</sup> The regulation arguably burdened the associational rights of eligible family members by providing them a financial incentive either to live apart in order to increase their per capita food

---

<sup>198</sup> *Dandridge*, 397 U.S. at 486-87.

<sup>199</sup> The basis for the challenge was the "guarantee of equal treatment" in the due process clause of the fifth amendment. *Lyng v. Castillo*, 477 U.S. 635, 636 & n.2 (1986). Since *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Court has found implicit in the fifth amendment an equal protection strand that applies against the federal government, and has interpreted the scope of the fifth and fourteenth amendments' equal protection guarantees identically. *Wayte v. United States*, 470 U.S. 598, 608 n.9 (1985); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("[Our] approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.").

<sup>200</sup> *Castillo*, 477 U.S. at 636-37. Under the amendment at issue, more distant relatives or groups of unrelated persons who lived together were not treated as a single household unless they also customarily purchased food and prepared meals together. *Id.* at 636 & n.1.

<sup>201</sup> *Id.* at 640 n.4.

stamp allotment, or to buy their food and prepare their meals as a single economic unit in order to benefit from economies of scale.<sup>202</sup>

Unlike that in *United States Department of Agriculture v. Moreno*,<sup>203</sup> the statutory provision challenged in *Lyng v. Castillo* did not per se disqualify otherwise eligible claimants for food stamp (or any other) benefits that they would have received had they not exercised their first amendment freedom of association. Rather, the claimants received the benefits to which a household of their size and total earned income was statutorily entitled. Although the per capita amount of food stamps decreased as household size increased, this decline did not require claimants to pay a higher price to exercise their freedom of association than households earning a subsistence income. For this per capita reduction simply reflected "the economies of scale that may be realized in group purchase and preparation of food."<sup>204</sup> These same economies of scale provide persons earning a subsistence income a similar incentive to minimize their per capita food expenditures by buying and preparing their food together.

A hypothetical law that reduced the *total* amount of food stamp benefits as household size increased, unlike the statutory provision at issue in *Castillo*, would require persons unable to earn a subsistence income, and otherwise eligible for food stamps, to pay a higher price to exercise their freedom of association than similarly situated persons earning a subsistence income. For no such reduction in total (rather than per capita) funds available for food purchase is, without more, experienced by persons earning a subsistence income if they similarly choose to live as a single, large household rather than as two or more smaller ones. Insofar as the challenged amendment did not require those unable to earn a subsistence income,<sup>205</sup> and otherwise eligible for food stamps, to pay a higher price to exercise their freedom of association than similarly situated persons earning a subsistence income, the theory predicts

---

<sup>202</sup> The Court quickly dismissed the possibility that the condition burdened family members' associational rights, and applied, among others, an "empirical" test of deterrence:

Nor does the statutory classification "directly and substantially" interfere with family living arrangements and thereby burden a fundamental right. . . . The "household" definition does not order or prevent any group of persons from dining together. Indeed, in the overwhelming majority of cases it probably has no effect at all. It is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the cost of separate housing would almost certainly exceed the incremental value of the additional stamps.

*Id.* at 638.

<sup>203</sup> See discussion of *Moreno*, *infra* notes 206-09 and accompanying text.

<sup>204</sup> *Castillo*, 477 U.S. at 640.

<sup>205</sup> See *id.* at 642-43.

that the Court would sustain the amendment. Consistent with the theory, the *Castillo* Court upheld the challenged condition.

In sum, while the statutory provisions challenged in *Dandridge* and *Castillo* arguably provided the claimants a financial incentive not to exercise a particular constitutional right, neither provision required persons unable to earn a subsistence income, and otherwise eligible for the benefit at issue, to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income. In the absence of any such surcharge, each of the challenged conditions was, consistent with the theory, sustained.

### C. Conditions Overturned

The ten public assistance cases in which the Court has found a condition impermissible have implicitly or explicitly involved four different constitutional rights: the first amendment freedom of association, the right to travel, the right of free exercise, and the right to procreate. Notwithstanding this diversity, these decisions too are consistent with the positive theory set out above.

#### I. *The Freedom of Association*

*United States Department of Agriculture v. Moreno*<sup>206</sup> is the only public assistance case in which the Court overturned a condition involving the claimants' first amendment freedom of association. At issue was a federal statutory provision that per se disqualified for food stamps any otherwise eligible persons who lived in a household containing any unrelated individuals.<sup>207</sup> As a result of the condition, persons unable to earn a subsistence income, and otherwise eligible for food stamps, were required to pay a higher price to exercise their constitutional freedom of association than similarly situated persons earning such an income.<sup>208</sup>

*Anyone* choosing to live in a household containing any unrelated individuals might expect to incur certain costs arising out of the choice of living situation and companions, such as loss of privacy or other inconveniences. The person whose employment provides him a subsistence income, however, does not typically suffer the additional loss of that income upon exercising his constitutional free-

---

<sup>206</sup> 413 U.S. 528 (1973).

<sup>207</sup> *Id.* at 529.

<sup>208</sup> One's first amendment freedom of association does not, of course, include an *absolute* right to live with an unrelated person under any and all circumstances. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding village ordinance restricting land use to one-family dwellings and defining "family" as not more than two unrelated persons). Since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926), reasonable zoning laws bearing a substantial relation to the public health, safety, or general welfare have been held to be valid exercises of the police power.

dom of association. Thus, persons unable to earn a subsistence income and otherwise eligible for food stamps, but who are per se disqualified for that statutory entitlement upon a particular exercise of their constitutional freedom of association, are required to pay a higher price to exercise that freedom than persons earning a subsistence income. Thus, the theory predicts that the *Moreno* Court would invalidate the challenged provision of the Food Stamp Act, as it in fact did.<sup>209</sup>

## 2. *The Right to Travel*

Of the ten public assistance cases in which the Court has overturned the challenged condition, three have concerned the common-law constitutional right to travel.<sup>210</sup> *Shapiro v. Thompson* involved constitutional challenges to statutory provisions of several

<sup>209</sup> 413 U.S. at 538.

*Moreno* is one of only two post-*Dandridge* public assistance cases in which the Court did not apply the two-step test. It is further interesting that the majority did not even mention the potential recipients' freedom of association, which would have permitted more rigorous scrutiny under the "compelling state interest" standard. In his concurrence, however, Justice Douglas framed the case as involving the claimants' first amendment rights and concluded that the condition was impermissible because it "ha[d] an impact on the rights of people to associate for lawful purposes with whom they choose." *Id.* at 544-45. Treating *Moreno* (erroneously) as an equal protection case involving no "fundamental interest," the Court reached the same result by finding no rational basis for the challenged condition.

As an equal protection case, *Moreno* is often considered noteworthy for two reasons. First, the case is one of the few instances in which the Burger Court *invalidated* legislation on the avowed basis of traditional equal protection criteria. In addition, the Court claimed to be applying the same "traditional" equal protection analysis that it had in *Dandridge v. Williams*, 397 U.S. 471 (1970), but with the opposite result.

In *Dandridge*, the Court rejected an effort to extend the Warren Court's "fundamental interests" strand of new equal protection to claims involving "necessities" and refused to subject classifications in welfare benefits programs to strict scrutiny. Instead, it held those programs to lie in the "social and economic field" and, therefore, to be subject to the very deferential rational basis scrutiny. *Id.* at 484. The *Dandridge* Court coined the description of "traditional equal protection analysis" as "not requir[ing] that every classification be drawn with precise 'mathematical nicety.'" *Moreno*, 413 U.S. at 538 (quoting *Dandridge*, 397 U.S. at 485).

Thus, in order to invalidate the disqualifying provision of the Food Stamp Act in *Moreno*, it was necessary for the Court to find the classification at issue "not only 'imprecise,'"—a finding insufficient to invalidate the legislation in *Dandridge*—but "wholly without any rational basis." *Moreno*, 413 U.S. at 538.

Notwithstanding the difficulties *Moreno* poses within equal protection doctrine, its result is entirely consistent with the positive theory of public assistance cases presented in this Article.

<sup>210</sup> The *Shapiro* Court described the source of the constitutional right to travel as follows:

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by



states which made otherwise eligible residents ineligible for welfare assistance if they had not resided within the jurisdiction for at least the year prior to their applications for assistance.<sup>211</sup> *Graham v. Richardson* challenged an Arizona statutory provision that denied welfare benefits to otherwise eligible resident aliens who had not resided in the United States for at least fifteen years.<sup>212</sup> In *Memorial Hospital v. Maricopa County*, the plaintiffs challenged an Arizona statute requiring a year's residence in a county as a condition to receiving non-emergency hospitalization or medical care at the county's expense.<sup>213</sup>

The plaintiffs in each of these cases had been residents of the pertinent state or county for at least one month, long enough reasonably to distinguish themselves from mere visitors<sup>214</sup> and, therefore, long enough to come under the protection of the constitutional right to travel.<sup>215</sup> In addition to the price of transportation, the price of exercising one's constitutional right to travel typically includes being treated (for better or worse) like other residents of the destination state after one has lived there sufficiently long to distinguish oneself from a mere visitor. The plaintiffs in *Shapiro*, *Graham*, and *Memorial Hospital*, however, were required to pay an additional sum in order to exercise that constitutional right: For periods ranging from twelve months<sup>216</sup> to fifteen years,<sup>217</sup> they could

Chief Justice Taney in the *Passenger Cases*, [48 U.S. (17 How.)] 283, 492 (1849) . . . .

We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. . . .

394 U.S. 618, 629-30 (1969) (footnote omitted).

<sup>211</sup> *Id.* at 621-27. The Connecticut claimant and three of the District of Columbia claimants had all applied for, and had all been denied, AFDC benefits; the fourth District of Columbia claimant had applied for, and had been denied, benefits under the program for Aid to the Permanently and Totally Disabled; the two Pennsylvania claimants had applied for, and had been denied, AFDC benefits.

<sup>212</sup> 403 U.S. 365 (1971). The Arizona statute provides assistance to persons permanently and totally disabled only if they either (1) are a citizen of the United States, or (2) have resided in the United States a total of 15 years. *Id.* at 367.

Also at issue in *Graham* was a Pennsylvania statute that denied welfare benefits to otherwise eligible resident aliens because of their alienage. *Id.* at 365. This statute provided that persons eligible for assistance were limited to (1) citizens of the United States or (2) those who had filed a declaration of intention to become citizens between January 1, 1938, and December 31, 1939. *Id.* at 368-70. This statutory provision does not pose an unconstitutional conditions challenge, however, insofar as it involves alienage, an immutable characteristic. See *supra* text following note 10.

<sup>213</sup> 415 U.S. 250, 251-53 (1974).

<sup>214</sup> See, e.g., *Marston v. Lewis*, 410 U.S. 679 (1973) (per curiam); *Dunn v. Blumstein*, 405 U.S. 330 (1972). For further discussion, see *supra* notes 150-57 and accompanying text.

<sup>215</sup> For further discussion of the "reasonableness" test of residency requirements that is embodied in the right to travel, see *supra* notes 154-57 and accompanying text.

<sup>216</sup> *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 252 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 623-27 (1969).

not receive various public assistance benefits to which longer residents of the pertinent state or county were statutorily entitled. No similar "waiting period" for the receipt of a subsistence income was imposed on similarly situated new arrivals whose source of that income was employment rather than government benefit programs. That is, new arrivals were not also legally precluded from obtaining, or being paid for, employment during the same period of time.

Insofar as the challenged conditions in the three cases required persons unable to earn a subsistence income to pay a higher price to exercise their constitutional right to travel than similarly situated persons earning such an income, the theory predicts that the Court would overturn each of the challenged conditions. Consistent with the theory, the Court in *Shapiro*,<sup>218</sup> *Graham*,<sup>219</sup> and *Memorial Hospital*<sup>220</sup> found impermissible the pertinent state and county practices of temporarily disqualifying for certain public assistance benefits otherwise eligible residents who had relatively recently exercised their right to travel into that state or county.<sup>221</sup>

---

217 *Graham v. Richardson*, 403 U.S. 365, 367 (1971).

218 394 U.S. at 627.

219 403 U.S. at 370-76.

220 415 U.S. at 261-70.

221 The Court has explicitly struggled with the issue of what duration of residency requirement or waiting period amounts to a "penalty" or "prohibition" for purposes of applying the unconstitutional conditions doctrine. The test is not mere impingement on the right to travel, for as the Court has noted, "Although any durational residence requirement impinges to some extent on the right to travel, the Court . . . did not declare such a requirement to be *per se* unconstitutional." *Memorial Hosp.*, 415 U.S. at 256. Indeed, the Court has distinguished "appropriately defined and uniformly applied bona fide residence requirements" from "waiting-period requirement[s]." *Id.* at 255.

The Court has typically applied a two-part "requisite impact" test. *Id.* at 256-57. First, the Court has claimed to have considered "whether the waiting period would deter migration." *Id.* at 257; *see also Shapiro*, 394 U.S. at 629. But it has gone on to construe this prong of the test into relative meaninglessness. Although indicating in *Memorial Hospital* that the State must show that "the challenged statute is *unlikely* to have any deterrent effect," 415 U.S. at 257 (emphasis added), the Court has also indicated that the claimants need not show that any "'actual deterrence'" resulted from the residency requirement. *Id.* at 258 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972)). The Court in *Dunn*, a post-*Shapiro* case, noted that "none of the litigants [in *Shapiro*] had themselves been deterred [from interstate travel]," and added that "*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel." *Dunn*, 405 U.S. at 339-40.

Thus, the critical prong is apparently the second: "the extent to which the residence requirement served to *penalize* the exercise of the right to travel." *Memorial Hosp.*, 415 U.S. at 257. Here, the Court distinguishes mere "burdens" or "costs" from actual "penalties." "Although any durational residence requirement imposes a potential cost on migration, . . . some 'waiting period[s]' . . . may not be penalties." *Id.* at 258-59 (quoting *Shapiro*, 394 U.S. at 638 n.21).

The nature of the benefit to which the waiting period or residency requirement attaches plays a seemingly dispositive role in distinguishing penalties from mere burdens, at least when the duration of the waiting period is held constant. As the Court in *Memorial Hospital* noted, the denial of the "fundamental political right" to vote or of

### 3. *The Right of Free Exercise*

Half of the ten public assistance cases in which the Court found a condition unconstitutional concerned the claimants' rights under the free exercise clause of the first amendment. In *Sherbert v. Verner*, an employer discharged a member of the Seventh-Day Adventist Church because the employee would not work on Saturday, the Sabbath Day of her faith.<sup>222</sup> When the plaintiff-employee was unable to obtain other employment because she would not take Saturday work, she filed a claim for unemployment compensation. The state Employment Security Commission found that her unwillingness to work on Saturday disqualified her for unemployment compensation under the pertinent South Carolina statute.<sup>223</sup>

In a similar case brought twenty-four years later, *Hobbie v. Unemployment Appeals Commission*,<sup>224</sup> an employee for some two and one-half years informed her employer that she was joining the Seventh-Day Adventist Church and that, for religious reasons, she would no longer be able to work on Saturdays or after sundown on Fridays.<sup>225</sup> When her employer discharged her for refusing to work shifts which included her Sabbath, the plaintiff-employee filed a claim for unemployment compensation. The state Bureau of Unemployment Compensation denied her claim on the ground that her refusal to work

---

"necessities of life" such as welfare assistance have been adjudged penalties, but the denial of lower tuition at state institutions of higher education has not. *Id.*

In addition, however, the duration of the waiting period is seemingly a pertinent factor in determining when a penalty rather than a mere burden exists and, therefore, in determining when the right to travel is implicated.

<sup>222</sup> 374 U.S. 398, 399-401 (1963).

<sup>223</sup> *Id.* at 401.

<sup>224</sup> 480 U.S. 136 (1987). *Hobbie* was potentially distinguishable from *Sherbert* on two grounds. First, unlike the employee in *Sherbert*, Paula Hobbie was "the agent of change" and, therefore, arguably responsible for the consequences of the conflict between her job and her religious beliefs. In *Sherbert*, the employee held his religious beliefs at the time of hire. The conflict between work and beliefs arose as a result of subsequent changes in the conditions of employment initiated by the employer. The *Hobbie* Court ruled that it would not "single out the religious convert for different, less favorable treatment than that given an individual whose adherence to his or her faith precedes employment." The Court read the first amendment as protecting "the free exercise rights of employees who adopt religious beliefs or convert from one faith to another after they are hired. The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry . . . is the burden involved." *Id.* at 144 (footnote omitted).

Second, the state bureau deemed the claimant in *Sherbert* to be completely ineligible for unemployment compensation. In *Hobbie*, however, the claimant faced only a "limited disqualification" from receipt of benefits. This disqualification was "for the week of the departure and until [the claimant] becomes reemployed and earns [at least] 17 times the weekly benefit amount." 480 U.S. at 143 n.8. The *Hobbie* Court held, however, that, "[t]he immediate effects of ineligibility and disqualification are identical, and the disqualification penalty is substantial." *Id.* at 143.

<sup>225</sup> *Id.* at 138.

scheduled shifts constituted "misconduct connected with [her] work" and therefore disqualified her for benefits under the applicable Florida statute.<sup>226</sup>

In the most recent such case, *Fraze v. Illinois Department of Employment Security*, William Frazee refused a temporary position offered him by his employer because the job would have required him to work on Sunday.<sup>227</sup> Frazee told his employer that he was "a Christian" and could not work on "the Lord's day."<sup>228</sup> He then applied to the Illinois Department of Employment Security for unemployment benefits claiming there was "good cause" for his refusal to work on Sunday. Both the Department and its Board of Review denied his claim.<sup>229</sup>

For persons insured under the Unemployment Compensation scheme<sup>230</sup> but earning a subsistence income, the price of exercising their first amendment right of free exercise typically includes the price of transportation to and from church services, monetary contributions to the church, and any *additional* earnings foregone by respecting a religion's prohibition of work on its Sabbath. Under the condition challenged in the above three cases, however, similarly situated insured persons unable to earn a subsistence income except by violating their religion's prohibition against work on the Sabbath must pay a higher price in order to exercise their right of free exercise: They are also disqualified from receiving the subsistence income to which they are otherwise statutorily entitled under the Unemployment Compensation scheme. Similarly situated insured persons earning a subsistence income, in contrast, are not required to forgo their entire subsistence income in order to exercise their

---

<sup>226</sup> *Id.*

<sup>227</sup> 109 S. Ct. 1514, 1515 (1989).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 1515-16. The characteristic of *Fraze* which potentially distinguished it from *Sherbert* and *Hobbie* was that Frazee, unlike the claimants in the other cases, "was not a member of an established religious sect or church, nor did he claim that his refusal to work resulted from a 'tenet, belief or teaching of an established religious body.'" *Id.* at 1516 (citation omitted).

The *Fraze* Court acknowledged, "[t]here is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause' . . . . Purely secular views do not suffice." *Id.* at 1517 (citations omitted). The Court went on to hold, however, that "we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection." *Id.* at 1517-18 (footnote omitted).

The Court noted that "an asserted belief might be 'so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause,'" *id.* at 1518 n.2 (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981)), but concluded that "claims by Christians that their religion forbids Sunday work cannot be deemed bizarre or incredible." *Id.*

<sup>230</sup> For details as to who is insured, see *supra* note 46.

religion, but only any additional income that might have been earned through labor on the Sabbath.

Thus, for insured claimants otherwise unable to earn a subsistence income, the challenged condition renders the price of exercising one's first amendment right of free exercise greater than that for similarly situated insured persons earning such an income. Consistent with the theory, the Court in *Sherbert*, *Hobbie*, and *Frazee* found unconstitutional the pertinent states' practices of per se disqualifying for unemployment compensation otherwise eligible persons whose religious beliefs prohibited work on the Sabbath.<sup>231</sup>

#### 4. *The Right to Procreate*

The remaining case in which the Court overturned the condition at issue, *Turner v. Department of Employment Security*, concerned a challenge to a Utah law that declared pregnant women ineligible for unemployment benefits for a period extending from twelve weeks before the expected date of childbirth until six weeks after the birth.<sup>232</sup> Under the Utah statute, unemployment compensation is granted unemployed persons who are *available for employment*. During the eighteen-week period at issue, however, pregnant women are conclusively and irrebuttably presumed to be "unable to work" and are therefore denied unemployment benefits.<sup>233</sup>

Any woman insured under the unemployment compensation program who exercises her fourteenth amendment right to " 'freedom of personal choice in matters of marriage and family life' " <sup>234</sup> and becomes pregnant pays a price to exercise that right. This price typically includes the costs of prenatal care and delivery, and may also include any wages lost when the woman is unable to work. An

---

<sup>231</sup> *Frazee*, 109 S. Ct. at 1516-18; *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

The other two free exercise challenges to conditions on public assistance benefits that the Court has heard have involved religious practices other than the observance of one's Sabbath: engaging in certain types of religiously prohibited work, *Thomas v. Review Bd.*, 450 U.S. 707 (1981); and referring to one's child by Social Security number when applying for benefits, *Bowen v. Roy*, 476 U.S. 693 (1986).

As in the above three cases, each condition required persons otherwise unable to earn a subsistence income to pay a higher price in order to exercise their right of free exercise than similarly situated persons otherwise earning such an income. Upon the exercise of that right, the former group would lose their entire subsistence income provided by Unemployment Compensation or AFDC benefits. The latter group, however, would retain their income, losing only any additional income that might have been obtained by not exercising their right of free exercise. Consistent with the theory, the Court in each case overturned the challenged condition. *Thomas*, 450 U.S. at 717; *Roy*, 476 U.S. at 726-33.

<sup>232</sup> 423 U.S. 44, 44 (1975) (per curiam).

<sup>233</sup> *Id.* at 45.

<sup>234</sup> *Id.* at 46 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974)).

insured woman earning a subsistence income, however, will not typically be required by her employer to take unpaid maternity leave at some predetermined point in her pregnancy if she is able and willing to continue working beyond that point. Indeed, with regard to public employers, the Court in *Cleveland Board of Education v. LaFleur* held unconstitutional as a due process violation irrebuttable presumptions that a pregnant woman is unable to continue work beyond a predetermined point in her pregnancy. The Court ruled that her employer cannot constitutionally require her to take unpaid maternity leave at a predetermined time.<sup>235</sup>

The condition challenged in *Turner* denied unemployment compensation, and therefore a subsistence income, to an insured pregnant woman during a period in which she was able and willing to work, but was irrebuttably presumed unable to do so. The condition, therefore, requires her to pay a higher price to exercise her right to procreate than a similarly situated insured woman who is employed during pregnancy. Thus, the theory predicts that the Court would find the challenged Utah law impermissible, as the *Turner* Court in fact did.<sup>236</sup>

#### IV

#### THE NORMATIVE UNDERPINNINGS OF THE THEORY

As we have seen, the pattern of results that emerges from the public assistance cases is thoroughly consistent with the Court *sub silentio* applying a previously unarticulated, straightforward formulation of the unconstitutional conditions doctrine. When confronted with a challenge to a condition on public assistance benefits, the Court usually will defer to the legislature and sustain the condition except when that condition requires persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a higher price to engage in some constitutionally protected activity than similarly situated persons earning a subsistence income.

Although interesting and important in itself, the uncovering of this pattern raises two further issues that merit discussion. First, why did the Court choose this particular interpretation of the doctrine to apply in these cases? What norms does it embody and reinforce? Second, why is the Court not explicit about the formulation of the doctrine that it employs in these cases, instead enshrouding its discussion in the incoherent and indeterminate rhetoric of coercion, burdens, penalties, and impingements?

---

<sup>235</sup> *LaFleur*, 414 U.S. 632.

<sup>236</sup> *Turner*, 423 U.S. at 46-47.

### A. Institutional Competence and Redistribution

The norm most obviously embodied in the formulation of the doctrine that the Court has applied in the public assistance cases is that regarding its own role and that of the legislature in matters of economic redistribution. The legislature emerges from the cases with the sole power to determine what publicly funded benefits it will make available to various individuals or entities.<sup>237</sup> The Court's role in the present context is more complicated. Traditional conceptions of the separation of powers and the role of judicial review portray the Court as the protector of constitutional rights, especially the rights of minorities who are likely to be relatively powerless in democratic majoritarian politics.<sup>238</sup> As we have seen, however, conditional allocations pose unique problems for constitutional adjudication and the traditional conception of the Court's role. In this context, the Court is not *directly* concerned with straightforward violations of constitutional rights as it is when faced with constitutional challenges not involving conditions on benefits.<sup>239</sup> Rather, the Court's task is ensuring a particular type of equality in the allocation of constitutional rights: an equality in the price that persons similarly situated, but for their differing abilities to earn a subsistence income, must pay to exercise those rights.

In its concern with the *price* that different individuals are required to pay to exercise a given constitutional right, the Court indi-

---

<sup>237</sup> Indeed, in *Bowen v. Gilliard*, 483 U.S. 587 (1987), the Court explicitly acknowledged "Congress' 'plenary power to define the scope and the duration of the entitlement to . . . benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program.'" *Id.* at 598 (quoting *Atkins v. Parker*, 472 U.S. 115, 129 (1985)). The *Gilliard* Court also recognized that "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another are "not confided to the courts. The discretion belongs to Congress unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *Id.* (citations omitted), (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), quoting *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

<sup>238</sup> This is the portrayal provided by process theory, which would protect judicial review from accusations of being undemocratic by claiming that it in fact reinforces democratic processes. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). Proponents of the theory find it attractive in part because it reaffirms the primacy of the legislature while minimizing the intrusiveness of judicial review. See, e.g., Paul Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141 (1978).

Critics of process theory have noted that it does not explain the Court's actual behavior, see, e.g., Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989), and that it cannot ultimately avoid substantive commitments, see, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Tribe, *supra*.

<sup>239</sup> See also Sunstein, *Is There a Doctrine?*, *supra* note 6, at 344 ("[T]he unconstitutional conditions doctrine is an awkward and crude effort to bring under constitutional scrutiny a range of measures that affect constitutional rights in serious ways, but that would not otherwise be subject to serious judicial review.").

rectly focuses not only on potential violations, but also on the overall distribution, of constitutional rights. The distribution that the Court would protect is an equality of opportunity, of a sort, to exercise one's constitutional rights within the constraints of our market economy and its inherent wealth inequalities.

With regard to a very few constitutional rights, the Court has invalidated certain State-imposed conditions that might deter or entirely prevent the poor, because of background wealth inequalities, from exercising those rights.<sup>240</sup> These constitutional rights involve services over which the State has a monopoly.<sup>241</sup> That is, the legislature had already removed the provision of these services, and therefore their distribution, from the market. The Court merely eliminates certain remaining effects of underlying wealth inequalities. The exercise of even these constitutional rights, however, may

---

<sup>240</sup> These constitutional rights include the right to marry, which the Court has termed a "fundamental liberty protected by the Due Process Clause" and by the "'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause," *Zablocki v. Redhail*, 434 U.S. 374, 383-84 (1978); and the right to judicial dissolution of one's marriage, which the Court has similarly located, *see* *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

In *Boddie*, the Court found that due process prohibited a state from denying, solely because of inability to pay court fees and costs, access to its courts to indigents who, in good faith, seek judicial dissolution of their marriage. 401 U.S. at 383. In *Zablocki*, the Court invalidated, pursuant to the equal protection clause of the fourteenth amendment, a Wisconsin statute providing that any resident of Wisconsin "having minor issue not in his custody and which he is under obligation to support by any court order or judgment" may not marry without a court approval order. Under the statute, a court approval order for marriage can be granted only upon a showing that the support obligation has been met and that children covered by the support order "are not then and are not likely thereafter to become public charges." 434 U.S. at 375 (quoting Wis. STAT. § 245.10(1)).

The Court in several other areas has also invalidated wealth-based conditions on the exercise of certain rights or interests not grounded in the United States Constitution: defending one's self in the criminal justice system, voting, and running for elective office. These, too, are areas in which the government has a monopoly and which our society deems too important to be controlled by the market. *See, e.g.*, *Bullock v. Carter*, 405 U.S. 134 (1972) (invalidating on fourteenth amendment equal protection grounds unreasonably high candidate filing fee for state primary election); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating poll tax on fourteenth amendment equal protection grounds without ruling on whether there is an implicit constitutional right to vote in state elections); *Douglas v. California*, 372 U.S. 353 (finding equal protection violated by state's refusal to provide indigent defendant counsel for purpose of exercising state statutory right to appeal criminal conviction), *reh'g denied*, 373 U.S. 905 (1963); *Griffin v. Illinois*, 351 U.S. 12, *reh'g denied*, 351 U.S. 958 (1956) (finding equal protection violated by state's refusal to provide indigent defendant a trial transcript for purpose of exercising state statutory right to appellate review of criminal conviction).

<sup>241</sup> *See Zablocki*, 434 U.S. at 387 (result of the challenged condition is that some persons "are absolutely prevented from getting married"); *Boddie*, 401 U.S. at 374 (noting "state monopolization of the means for legally dissolving [the marital] relationship").



still entail certain costs.<sup>242</sup>

Some other constitutional rights are inherently costless (or nearly so) to exercise, at least in some forms. For example, wealth does not particularly affect the ability to practice one's religion or to deny entry to one's home to police who would undertake a warrantless search of it. Many constitutional rights, however—the rights to travel, use contraceptives, bear arms, and send one's children to private school, to take but a few examples—require for their exercise products or services that are distributed through the market. And wealth does, therefore, affect individuals' willingness, as well as ability, to exercise these other, frequently common-law, constitutional rights.

The public assistance cases have involved each of these three types of constitutional rights. In each case, the Court applied the doctrine to ensure that the effects of background inequalities of wealth, inherent in a market economy, were not further exacerbated by indirect legislative manipulations. The Court did not, however, attempt to *eliminate* those background wealth inequalities, or therefore to provide a truly equal opportunity to exercise one's formal constitutional rights. Indeed, so long as we retain a primarily market economic structure, the most equality the Court *can* provide is in the "prices" the legislature effectively charges differentially wealthy individuals to exercise particular constitutional rights. The Court simply cannot, within the constraints of a market economy, ensure equality in the *cost* to differentially wealthy individuals of exercising those rights.

The interpretation of the doctrine that the Court *sub silentio* has applied in the public assistance cases, then, provides an unusually determinate balancing of values of individual liberty and equality consistent with free market liberalism.<sup>243</sup> The value of individual autonomy, exemplified by the choice one has in allocating one's financial resources, lies at the core of our market economy. The mar-

---

<sup>242</sup> For example, in the case of one's constitutional right to marry or to divorce, the exercise of the right sometimes worsens an individual's general economic condition.

<sup>243</sup> The appropriate balancing of liberty and equality within political structures has long occupied distributive justice theorists. Fundamental to their discussions has been the appreciation that neither absolute liberty nor absolute equality can exist without a total abolition of the other value. Among the best of this work is ROBERT NOZICK, *Distributive Justice*, in ANARCHY, STATE, AND UTOPIA 149-231 (1974); JOHN RAWLS, *Background Institutions for Distributive Justice*, in A THEORY OF JUSTICE 274-84 (1971); MICHAEL WALZER, *Security and Welfare*, in SPHERES OF JUSTICE 64-94 (1983); Ronald Dworkin, *Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Ronald Dworkin, *Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Ronald Dworkin, *The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Bernard Williams, *The Idea of Equality*, in PROBLEMS OF THE SELF 230-49 (1973).

This issue also forms much of the core of classical liberal thought. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 113-43 (Stuart Hampshire ed. 1978).

ket notion of "price" also incorporates a kind of equality in its general indifference to characteristics of potential purchasers other than ability and willingness to pay. Within this market structure, constitutional rights provide a further sphere of individual autonomy, protecting the individual from the State in certain areas. Because they are generally applicable to all citizens, these rights also embody another important equality among individuals. Simultaneous preservation of the individual autonomy made possible by the market economy, however, requires that this latter equality of rights remain a formal one. In sum, although the formulation of the unconstitutional conditions doctrine applied in the public assistance cases would distinguish and delineate legislative and judicial powers, the exercise of each involves a balancing of liberty and equality. The legislature first determines whether, what, and how much economic redistribution will take place, and the Court then ensures an equality of price in the exercise of constitutional rights.

In the public assistance cases, this delineation of institutional powers further shifts the burden of hard choices. Were the Court to sustain conditions that required persons unable to earn a subsistence income, and otherwise eligible for a particular benefit, to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income, it would leave the former individuals with the hard choice of not exercising a constitutional right that they might otherwise choose to exercise, or exercising it at a higher price than similarly situated persons earning a subsistence income. Given the extreme financial limitations of persons unable to earn a subsistence income, nearly any increase in the price of exercising a constitutional right may make that "hard choice" all too easy.

So, instead, the Court uses the unconstitutional conditions doctrine in these cases to shift the hard choice back to the legislature and, therefore, the general population. The legislature is left to choose between not making the benefit available at all, or distributing the benefit in such a way that persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, are not required to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income. At least in the area of public assistance benefits, liberal fears that majoritarian democratic processes might result in a complete revocation of benefits whose conditions the Court has found impermissible have not been fulfilled.<sup>244</sup> Rather, the statutory entitlements

---

<sup>244</sup> Chief Justice Warren expressed these fears in his dissent in *Shapiro v. Thompson*, 394 U.S. 618, 650-51 (1969). Among the commentators, such fears have been articulated by Kreimer, *Allocational Sanctions*, *supra* note 6, at 1393-95; Simon, *Rights and*

have uniformly been continued, but without the offending condition attached. Indeed, in one notable instance, the relevant governmental entity voluntarily rescinded a challenged condition after the Court had sustained it.<sup>245</sup>

## B. Dignitary Interests and the Distribution of Rights

Kantian norms of individual dignity and worth are also embodied in the interpretation of the doctrine that the Court has seemingly applied in the public assistance cases.<sup>246</sup> In addition to its obvious practical import, the formal distribution of rights serves important symbolic and descriptive functions in any society. A polity powerfully describes individuals—to itself, those individuals, and others—by the rights it grants and denies them. To attach a surcharge to the price that a discrete group of persons—those who depend on public assistance for the necessities of life—must pay to exercise a constitutional right is, to be sure, less offensive to our values of equality and individual dignity than formally to deny them that right altogether. It is, nonetheless, to create a system of constitutional caste and relegate that group to the lower levels.<sup>247</sup>

---

*Redistribution*, *supra* note 3, at 1467-86; and Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1499 n.366.

<sup>245</sup> After the *Wyman* decision, sections 351.10 and 351.21 of Title 18 of the New York Code of Rules and Regulations were amended, abolishing the home visit requirement in favor of "face to face" visits which were permitted to take place outside of the home. In addition, HEW issued new "quality control" guidelines relating to home visits that provided: "Most interviews will be held in the home. However, it may be held elsewhere and the client may request that it be held elsewhere." U.S. DEPT. OF H.E.W., Q.C. MANUAL: QUALITY CONTROL IN PUBLIC ASSISTANCE III-S (1972).

<sup>246</sup> Kant's notion of individual dignity is typically thought to be summarized in the following:

For rational beings all stand under the *law* that each of them should treat himself and all others, *never merely as a means*, but always *at the same time as an end in himself*. But by so doing there arises a systematic union of rational beings under common objective laws—that is, a kingdom. Since these laws are directed precisely to the relation of such beings to one another as ends and means, this kingdom can be called a kingdom of ends (which is admittedly only an Ideal).

IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* § 75 (H.J. Paton trans. 1948), in H.J. PATON, *THE MORAL LAW* 95 (1978).

"Kantian" dignitary theories have found much currency in contemporary American legal and political theory. See B. ACKERMAN, *supra* note 243; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); AMY GUTMANN, *LIBERAL EQUALITY* (1980); Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885 (1981).

<sup>247</sup> Kathleen Sullivan, *Unconstitutional Conditions*, *supra* note 6, also discusses the unconstitutional conditions doctrine in the context of distributive concerns, but from a normative rather than a positive perspective. Moreover, her conception of the core concept—"constitutional caste"—is importantly different from my own in several respects. First, Sullivan's notion incorporates an inalienability theory—"these decisions may be read as judging *some rights* too important to be reserved for selected privileged groups,"

By prohibiting this more subtle, but no less real, form of discrimination, the unconstitutional conditions doctrine does more than embody a concern for the dignitary equality of those who are eligible for, indeed dependent upon, public assistance benefits. For the harms, dignitary and other, of a system of constitutional caste extend well beyond those it visits on the human beings it condemns to the lowest levels. Those who create and perpetuate such a system also, and importantly, describe themselves.

From the Court's formulation of the unconstitutional conditions doctrine in the public assistance cases, a more complete vision of our Constitution gradually emerges. Instead of promising protection from State interference in certain areas, and promising this protection equally to all, our Constitution's vow is a more complex one of imperfect equality and autonomy within the constraints of a market economy. Included in that vision is one of ourselves as very human participants (creators, victims, victors) in the struggle to balance inherently conflicting fundamental values.

Although the Court's rhetoric of choice, coercion, and deterrence does not, as we have seen, explain its holdings in the public assistance cases, it is not as irrelevant or ultimately valueless as some commentators have claimed.<sup>248</sup> For a unique mixture of these three notions is in fact embodied in the concept of "price" at the core of the Court's actual decisional principle. The "choice" is apparent in the freedom to spend one's resources as one chooses, and in the blindness of prices to characteristics of the purchaser other than ability and willingness to pay. Implicit also in the notion of price, however, is the *inequality of costs* that the notion is designed to ignore: The same price is always a smaller proportion of the total resources of a wealthy person than of a poor one. This inequality of ultimate costs exerts a "coercive" pressure, "deters," by rendering some choices extremely burdensome or even financially impossible for those with fewer resources.

There is a second important level, however, at which notions of choice, coercion, and deterrence operate in the area of public assis-

---

*id.* at 1498 (emphasis added)—and therefore carries with it all of the difficulties of inalienability theories discussed *supra* note 113 and accompanying text.

Second, Sullivan's notion of constitutional caste does not separate out the background wealth inequalities that I describe as inevitable concomitants of a market economy, *see id.* at 1497-99. Indeed, she is forced to incorporate the problematic limiting principle of inalienable rights in her framework precisely because she would simultaneously somehow preserve the basic outlines of a market economy.

Perhaps best exemplifying the various differences in our distributive concerns are our respective discussions of the abortion funding cases. Compare, e.g., Sullivan, *Unconstitutional Conditions*, *supra* note 6, at 1497-99, with my discussion *supra* notes 159-72 and accompanying text.

<sup>248</sup> See *supra* notes 27-35 and accompanying text.

tance benefits. Persons unable to earn a subsistence income are unusually vulnerable to any conditions imposed on the receipt of those benefits because they are of the most fundamental kind, intended and expected to enable recipients to obtain the most basic necessities of life.<sup>249</sup> These persons, by definition, do not have an alternative source of income in paid labor. Nor is there at present a reliable alternative to the State as a provider of public assistance benefits to which these persons might turn. There is, in sum, a desperation to the economic situation of persons unable to earn a subsistence income which might cause one to predict that they are especially likely to comply with quite nearly any condition on the receipt of public assistance benefits. The extremity of the context in which these benefits are awarded is also reason to believe that the formulation of the unconstitutional conditions doctrine which the Court applies in this area may well not be its decisional principle when other types of conditional allocations are involved. For other types of benefits may be less fundamental or may have relatively good market substitutes.

### C. Mystification

The remaining question is why the Court would feel the need to obscure its true decisional principle in the public assistance cases beneath a rhetoric of coercion, fines, penalties, and impingements. This rhetoric, to be sure, is not a whimsical creation of the Court, but can be traced, as we have seen, to important developments in equal protection doctrine and in the right/privilege distinction.<sup>250</sup> But why does the Court resist articulating the essentially straightforward principle that appears to govern its decision-making in the public assistance cases?

Hints of one plausible answer appear in the Court's opinions in *Harris v. McRae*<sup>251</sup> and *Maher v. Roe*.<sup>252</sup> Writing for the majority in *Maher*, Justice Powell was quick to delimit the nature of the abortion right established in *Roe v. Wade* as "not . . . an unqualified 'constitutional right to an abortion,'" but as "protect[ing] the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."<sup>253</sup> Although the majority conceded that "indigency . . . may make it difficult—and in some cases, perhaps, impossible—for some women to have abor-

---

<sup>249</sup> Such benefits either provide the necessity in kind, or provide cash with which the beneficiary might purchase necessities in the market.

<sup>250</sup> See *supra* Part II(C).

<sup>251</sup> 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980).

<sup>252</sup> 432 U.S. 464 (1977).

<sup>253</sup> *Id.* at 473-74.

tions," this statement comes almost as an aside.<sup>254</sup> Indeed, the only discussion by the *Maher* majority of the distinction between a State-imposed penalty on a right and State failure to subsidize exercise of that right was in the relatively benign context of state funding of private schools.<sup>255</sup> The majority, in sum, barely acknowledged the ultimately unequal, because wealth-dependent, allocation of many constitutional rights, concluding simply that " 'the Constitution does not provide judicial remedies for every social and economic ill.' "<sup>256</sup>

Justice Brennan's dissent in *Maher*, in which two other justices joined, expressed outrage at the majority's "distressing insensitivity to the plight of impoverished pregnant women."<sup>257</sup> He left no doubt that at the core of this rage (and confusion) was the inherently unequal, because wealth-dependent, distribution of many constitutional rights. Brennan's dissent goes on to quote Anatole France's famous biting comment on the "majestic equality" of the law which " 'forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' "<sup>258</sup> In failing (refusing) to distinguish pervasive and inescapable background wealth inequalities from financial or other burdens that might be imposed on a woman's abortion right through discrete regulation, the dissent began to force into uncomfortable view the fundamental conflict that the Court has usually hidden in the public assistance cases beneath its ultimately incoherent, but benign, rhetoric of coercion, deterrence, and burdens.

Some three years later in *Harris*, the Court came as close as it ever has in the public assistance cases to acknowledging that the abortion right, like many other constitutional rights, has no greater reality than an aspiration for those without the financial resources to exercise it.

The 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. . . .

Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. *To hold*

---

<sup>254</sup> *Id.* at 474.

<sup>255</sup> *Id.* at 477.

<sup>256</sup> *Id.* at 479 (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972)).

<sup>257</sup> 432 U.S. 464, 483 (1977) (Brennan, J., dissenting).

<sup>258</sup> *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)).

*otherwise would mark a drastic change in our understanding of the Constitution. . . . Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.*<sup>259</sup>

The majority, in an extraordinary move, went on explicitly to discuss other *individual* constitutional rights whose exercise is wealth dependent:

It cannot be that because government may not prohibit the use of contraceptives, . . . or prevent parents from sending their child to a private school, . . . government, therefore, has an affirmative constitutional obligation to ensure that *all persons* have the financial resources to obtain contraceptives or send their children to private schools.<sup>260</sup>

As in *Maher*, the dissenters in *Harris* would not acknowledge the important difference between constitutional entitlements and constitutional rights, or accept the existence of the wealth inequalities that are a necessary, if unfortunate, concomitant of a market economy. Indeed, Justice Marshall went so far as to assert that the challenged legislation upheld by the majority "is the product of an effort to deny to the poor the constitutional right recognized in *Roe*."<sup>261</sup>

It is possible, then, that the Court's silence as to its true decisional principle throughout the public assistance cases signifies its recognition of the uncomfortable and precarious balance it has struck in order simultaneously to accommodate a market economy and an equal distribution of constitutional rights. For no more than the dissenting justices in *Maher* and *Harris* do we like to be reminded that the equality of protection the Constitution promises each of us in its allocation of rights is a merely formal one. To explicitly acknowledge the inescapably wealth-dependent distribution of constitutional rights is, after all, to confess ultimate inequality in the realm that perhaps most importantly symbolizes equality within our political structure: constitutional rights.

## V

### CONCLUSION: RETHINKING UNCONSTITUTIONAL CONDITIONS

My goal in this Article has been to present a positive theory of the unconstitutional conditions doctrine in the historically controversial and problematic context of public assistance benefits. Although interesting and important in its own right, this theory may

<sup>259</sup> *Harris v. McRae*, 448 U.S. 297, 316-18 (emphasis added).

<sup>260</sup> *Id.* at 318 (emphasis added) (citations omitted).

<sup>261</sup> *Id.* at 338 (Marshall, J., dissenting).

also have important implications for the operation of the doctrine in cases involving other types of benefits and beneficiaries.

I have suggested that no single meaningful positive theory is likely to explain the operation of the doctrine in its myriad contexts, but that a positive theory may well be possible for each group of cases involving the same type of government benefit or privilege. If the nature of the benefit involved is the critical determinant of the group of conditional allocation cases that a particular positive theory will explain, two interrelated questions arise. On what basis is one to distinguish benefit types from one another? And why is the type of benefit the critical characteristic (if it in fact is) for grouping the cases? Somewhat circularly, answers to these questions must await further examination of the unconstitutional conditions doctrine in cases involving other types of benefits. Nonetheless, the positive theory of public assistance cases presented in this Article provides some plausible hints.

First, the type of benefit may be distinguishable by, and have explanatory importance because of, the nature of its recipient—individual, state, or corporation, to take three broad possibilities. For example, although some categories of government benefits, such as tax exemptions, may be available to more than one type of recipient (both individuals and corporations), there may be reason to treat these as two different types of benefits. For although individuals, states, and corporations are all protected in various ways from the federal government under our Constitution, both the text of the Constitution and the Court's interpretations of it indicate that the nature and extent of that protection may vary with the type of entity protected.

In some instances, these differences may arise from the fact that a particular type of protection is simply inappropriate to, or cannot intelligibly be enjoyed by, a particular type of entity. In others, the general category of protection may be appropriate to more than one type of entity but, for various reasons, the scope or details of that protection may vary with the type of entity protected. Given these general differences in the application of our Constitution to various types of protected entities, one might logically expect the unconstitutional conditions doctrine also to reflect and be attentive to these differences.

Second, insofar as our Constitution operates within a market economy, the type of benefit may be further delineated by, and be of further explanatory importance because of, its position in the economy. To begin, some government benefits have relatively good market substitutes while others do not, thereby affecting both the ability and willingness of the potential recipient to do without the



benefit. At present, for example, public employment has close, if not perfect, substitutes in the private sector.<sup>262</sup> The government has a nearly complete monopoly on reliable financial and in-kind assistance to the poor and unemployed, however. One might therefore expect the doctrine of unconstitutional conditions to operate differently with regard to these two types of government benefits to individuals. Indeed, Richard Epstein's examination of conditional allocation cases involving government employment led him to conclude that the law in fact "find[s] fewer occasions to invoke the unconstitutional conditions doctrine in the context of government employment than in other contexts . . . ."<sup>263</sup>

Although it is well beyond the scope of this piece to examine conditional allocation cases involving other types of benefits, this study of the public assistance cases may provide a few valuable guideposts for future discussions of the unconstitutional conditions doctrine. First, no single, meaningful positive theory is likely to describe accurately the operation of the doctrine in its myriad contexts.<sup>264</sup> Second, we might expect emerging positive theories of different groups of conditional allocation cases each to be consistent with the delicate balance of values, embodied in free market liberalism, which forms the foundation of our system of governance.

---

<sup>262</sup> Indeed, some have noted that the large number of government employers may help to create a competitive labor market even with regard to those government positions for which there is no clear private-sector analogue. See, e.g., Stephen F. Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 3, 27-31 (1983).

<sup>263</sup> Epstein, *Foreword*, *supra* note 6, at 68. Epstein noted en route to this conclusion that "[i]t is very hard to create monopolies in labor markets without explicit government intervention to block free entry." *Id.* Epstein suggested this as the reason why the unconstitutional conditions doctrine seemingly plays less of a role in cases involving government employment. *Id.*

<sup>264</sup> Indeed, the ultimately normative, all-encompassing frameworks recently proposed by Sullivan, Epstein, and Kreimer may turn out to be also among the best we can achieve by way of a single, *all-encompassing* positive theory.