What conditions may the government constitutionally impose on the receipt of "public assistance"? The Supreme Court first considered this question in 1963 in Sherbert v. Verner, and by 1989 had decided twenty-three such "unconstitutional conditions" cases. No pattern was readily visible in the results of these cases, however, and commentators' attempts to make sense of them yielded only expressions of despair and normative proposals.

In 1990, I offered a positive theory of the unconstitutional conditions doctrine in those twenty-three Supreme Court decisions. The theory proposed that the Court invalidated only those challenged conditions that required persons unable to earn a subsistence income, and otherwise eligible for the pertinent...
nent benefit, to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income.\textsuperscript{7}

Since the publication of my positive theory, the Court has decided two important unconstitutional conditions cases involving public assistance benefits: Employment Division, Department of Human Resources v. Smith,\textsuperscript{8} and Rust v. Sullivan.\textsuperscript{9} In addition, Professor Richard Epstein has published Bargaining with the State, the most comprehensive normative theory and detailed examination of the unconstitutional conditions doctrine ever presented by a legal scholar.

In this Essay, I revisit my positive theory of the unconstitutional conditions doctrine with two major goals. First, I seek to determine whether the Court's decisions in Smith and Rust are consistent with my positive theory and, therefore, also with the Court's previous decisions in unconstitutional conditions cases involving public assistance benefits. Second, I undertake a critical examination of Epstein's normative theory, as he has applied it to Smith and Rust and as it might be applied to other public assistance cases, in an attempt to ascertain whether overall social welfare would be increased if the Court were to employ Epstein's proposed test rather than the test my positive theory suggests the Court has implicitly applied in these cases since 1963.

Part I sets out the two-prong test that I contend the Court, sub silentio, has applied in unconstitutional conditions cases involving public assistance benefits, and discusses the test's normative underpinnings. It then describes the test that Epstein would have the Court employ in these cases and in all other unconstitutional conditions cases regardless of the government benefit at issue.

Parts II and III examine the Court's decisions in Smith and Rust, respectively, first in light of my positive theory and then as Epstein has applied his normative theory to each. Part IV applies Epstein's theory to two public assistance cases that he does not discuss, United States Department of Agriculture v. Moreno\textsuperscript{10} and Dandridge v. Williams,\textsuperscript{11} and compares the result reached and the analytic path taken under his normative theory with their counterparts under my positive theory.

The Essay concludes by explaining why it is hard to know whether overall social welfare would be increased if the Court either began to employ, or had always employed, Epstein's proposed test in unconstitutional conditions cases involving public assistance benefits rather than the test my positive theory suggests the Court has always implicitly applied in these cases.

I. A TALE OF TWO THEORIES

Under my positive theory, the Court, sub silentio, employs a straightforward two-prong test in deciding unconstitutional conditions cases involving

\begin{itemize}
\item \textsuperscript{7} Id. at 1188, 1213-20.
\item \textsuperscript{8} 494 U.S. 872 (1990).
\item \textsuperscript{9} 500 U.S. 173 (1991).
\item \textsuperscript{10} 413 U.S. 528 (1973).
\item \textsuperscript{11} 397 U.S. 471 (1970).
\end{itemize}
public assistance benefits. The first prong asks whether the challenged condition impinges on 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 is also affirmative will the Court overturn the challenged condition. My examination of the twenty-three challenges to conditions on public assistance benefits that the Court heard between 1963 and 1989 revealed this two-prong test to be both easily applied and a consistently good predictor of outcome, notwithstanding the fact that the decisions spanned the Warren, Burger, and Rehnquist Courts.

Implicit in this test is a baseline not previously considered by commentators: the Court compares the position of individuals unable to earn a subsistence income and otherwise eligible for the pertinent benefit, with the position of other, similarly situated individuals whose source of a subsistence income is employment. And the Court conducts this comparison with reference to the price the two groups are required to pay to exercise their constitutional rights. The baselines traditionally discussed in the unconstitutional conditions context, in contrast, would have the Court compare the position of individuals otherwise eligible for a conditioned public assistance benefit with their own 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.

Underlying this positive theory is an appreciation that the equality in the Constitution's allocation of rights is merely a formal one. Although we indeed share equally in the protection from various types of government interference which the Constitution promises, the exercise of many constitutional rights carries a price for the individual. And ours is fundamentally a market economy. Within our economy, we each have in equal measure the freedom to spend our (vastly unequal) resources as we choose. But the notion of "price," so central to both our economy and my positive theory, simultaneously perpetuates an unspoken inequality of costs: the same price is always a smaller proportion of the total resources of a wealthy person than of a poor one. Thus, by 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, the Court guarantees a certain non-wealth-dependent equality of constitutional rights within the constraints of our essentially market economy.

Richard Epstein, in contrast, has claimed an inability to see any desirable,
large patterns in the Court's decisions in cases involving unconstitutional conditions, and has therefore offered a normative proposal for deciding all of these cases regardless of the government benefit at issue. He would have the Court review challenged conditions on public assistance benefits (and seemingly any other enactments) with the single goal of maximizing Kaldor-Hicks efficiency. Unlike the Pareto test of efficiency, which requires that any social change make at least one person better off and leave no one worse off regardless of the relative sizes of any gains and losses, the Kaldor-Hicks measure requires only that "the winners could in principle compensate the losers and still remain better off by their own lights." And because this compensation need not actually be paid, the Kaldor-Hicks test spares society the "transaction costs drag" of the administrative burdens that would be incurred operating a just compensation requirement.

Epstein acknowledges that the courts may have difficulty evaluating legislation under the Kaldor-Hicks test: "Social legislation is ordinarily exceedingly complicated, especially when its indirect effects have to be taken into account, and the ability to marshall either theoretical or empirical evidence of the overall desirability of a social scheme is usually well beyond the competence of any court." Thus, he proposes that courts use a "disproportionate impact" or "pro rata" test as an "indirect means to determine whether the targets of legislation have been compensated by the state" and whether the legislation therefore increases aggregate social welfare. Where there is no "clean market solution" and government action is therefore necessary, the pro rata test enables the courts, first, to "choose that allocation of the surplus [from collective action] that maximizes the likelihood that the beneficial social change will be brought about by the legislature in the first place" and, second, to "minimize the administrative costs associated with the operation of the system."

In the context of challenges to conditions on government benefits, Epstein would have the courts sustain only those conditions that (1) advance the wel-
fear of all affected groups, and (2) do so in equal proportions. Thus, the question is not whether a potential benefit recipient (or even the entire class of these individuals) prefers the world with the conditioned benefit to a world in which the benefit is not available at all. Rather, "[t]he question is whether the condition advances overall social welfare, and there is no guarantee that this will happen just because it is consented to by the individual actor."

Epstein would have the courts use as their baseline "not the status quo ante,"—that is, a world in which the government does not make the benefit available at all—"but a best achievable state of affairs in which the program is put forward without the conditions attached." When a condition is challenged by a benefit claimant who is "aggrieved relative to the world as it might have been," Epstein would have the courts first "establish some use of monopoly power by the state, as with its control of access to public highways." He would then have the court examine the challenged condition to determine whether it yields pro rata gains and is therefore permissible, or "reduces the total size of the social surplus [resulting from the government action] by allowing it to be redistributed through factional intrigue," and is therefore impermissible.

In order better to understand how Epstein's proposed test differs from the test that my positive theory suggests the Court implicitly has applied in unconstitutional conditions cases involving public assistance benefits, it may be useful to apply both tests to some actual cases. In the next two sections, I examine two of the Court's most recent unconstitutional conditions decisions involving public assistance benefits, Employment Division, Department of Human Resources v. Smith and Rust v. Sullivan, in light of my positive theory and as Epstein has applied his normative theory to each.

II. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES v. SMITH

In Smith, two members of the Native American Church (hereinafter "respondents") were fired by their employer, a private drug rehabilitation organization, because they ingested peyote for sacramental purposes at a church ceremony. Oregon law prohibits the knowing or intentional possession of any listed "controlled substance," including peyote, unless it has been pre-
scribed by a medical practitioner, and the Oregon Supreme Court read this prohibition to make no exception for the sacramental use of the drug. The respondents' subsequent applications for unemployment compensation were denied by the State of Oregon under a statutory provision disqualifying from unemployment benefits anyone discharged for work-related "misconduct." Respondents challenged the denial of unemployment benefits on the ground that it violated their rights under the Free Exercise Clause of the First Amendment.

The Smith majority understood the case to require a decision only on the question of whether the Free Exercise Clause "permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug." For if Oregon's prohibition on peyote use, including religiously motivated use, "is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon," and "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation."

The Smith majority explicitly framed the issue precisely as my two-prong test predicts. If the challenged condition does not impinge on a constitutionally protected activity—if there is no First Amendment right to use peyote for sacramental purposes—the condition will be sustained. In the absence of any "contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs," the majority declined to hold that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation." That is, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'

Failing to find the sacramental use of peyote to be protected by the First Amendment, the Smith majority, consistent with my positive theory, readily sustained Oregon's denial of unemployment compensation to the respondents whose dismissal resulted from such use.

Richard Epstein, too, finds Smith an easy case—but in the other direction. He appears to agree that the denial of unemployment benefits to respondents must be sustained—that is, that respondents have no unconstitution-

36. Id.
37. Id. at 876 (citing Smith v. Employment Div., Dep't of Human Resources, 763 P.2d 146, 148 (Or. 1988)).
38. Id. at 874.
39. Id.
40. Id.
41. Id. at 876 (quoting Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 672 (1988)).
42. Id. at 882.
43. Id. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).
44. Id. at 890.
45. Epstein, supra note 5, at 265-68.
al conditions claim—if the sacramental use of peyote is not constitutionally protected. In contrast to the Smith majority, however, Epstein would find Oregon’s criminalization of peyote use in religious services invalid under the Free Exercise Clause. Considering “[t]he troubled line between action and expression that explains so little in ordinary First Amendment law [to be] of still less help in this context,” Epstein would have the Court “ask for some special justification for the restriction of the state criminal law in this context, wholly without regard to government intention or singling out.” And he believes such justification is lacking in Smith: respondents’ “use of peyote in religious observance poses no threat of harm to others” and “is sharply limited by time, place, and circumstance and carries with it none of the risks normally associated with general drug use.”

Thus, Epstein’s difficulty with Smith appears to lie not in the Court’s application of the “unconstitutional conditions doctrine,” but rather in its interpretation of the Free Exercise Clause of the First Amendment. And this highlights a larger problem with Epstein’s own applications of his normative theory. Although he claims to lack interest in declaring the New Deal unconstitutional, and indeed seems willing to accept welfare benefits as a fixture of the modern state, the focus of his reformist energies is scarcely limited to a new theory of the conditions that the state should be permitted to attach to the various benefits it offers.

Even when Epstein undertakes to apply his theory to an actual case, he frequently provides no answer to the question of whether the Court, given existing interpretations of the pertinent constitutional guarantee, should have permitted the government to offer the relevant benefit on the condition that recipients waive that constitutional right. For the Court and many others, this practice likely diminishes the utility, and ultimately the persuasiveness, of Epstein’s general theory of unconstitutional conditions.

46. Id. at 268. Epstein states that “[i]f the criminal prosecution should fail, so too should the state’s effort to use conduct (now lawful, and indeed protected) to deny unemployment benefits otherwise required by state law.” Id.
47. Id. at 267-68.
48. Id. at 267.
49. Id. at 267-68.
50. Id. at xiv. Epstein devoted an earlier book to that project. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter TAKINGS].
51. Epstein devotes Chapter 17 of Bargaining with the State to a discussion of welfare benefits, Chapter 16 to unemployment benefits, and a total of 76 pages to “Positive Rights in the Welfare State.”

Since his declared intent in Bargaining with the State is “to see that useful projects go forward in a sensible fashion, not to strike down unwise projects that should not go forward at all,” one might assume that Epstein is even willing to consider these forms of income redistribution to be examples of government “projects that promise some positive gain.” EPSTEIN, supra note 5, at xiv. Indeed, even in Takings, in which Epstein argued that “the eminent domain clause and parallel clauses in the Constitution render constitutionally infirm or suspect many of the heralded reforms and institutions of the twentieth century,” TAKINGS, supra note 50, at x, he expressly did not contend that “the ideal level of (voluntary) welfare support should be zero,” id. at 322. He argued rather that “if the state had never undertaken welfare programs, the demand for them would be a tiny fraction of what it is today.” Id.
III. Rust v. Sullivan

Although the regulations at issue in Rust v. Sullivan have been rescinded by the Clinton Administration, the unconstitutional conditions question that they presented remains important, both as a jurisprudential matter and because equivalent regulations might be imposed in the future. In Rust, Title X grant recipients and doctors who supervise Title X funds (hereinafter "petitioners") challenged, on behalf of themselves and their patient-clients, regulations interpreting a provision of Title X of the Public Health Service Act which specified that "'[n]one of the funds appropriated [to voluntary family planning projects] under this subchapter shall be used in programs where abortion is a method of family planning.'" 54

These regulations imposed three related conditions on any "project" receiving Title X funds: (1) it "may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning'"; 55 (2) it may not engage in "activities that 'encourage, promote or advocate abortion as a method of family planning'"; and (3) it must be "'physically and financially separate' from prohibited abortion activities.'" 56 Petitioners argued that the regulations violated the First Amendment free speech rights of Title X projects' clients and health providers by discriminating on the basis of viewpoint, and the Fifth Amendment right of the projects' clients to choose whether to terminate their pregnancy. 58

Before we can apply the test suggested by my positive theory to this case, we must ascertain what benefit and attached condition are at issue. If one understands the benefit offered the clients of Title X projects to be free family planning counseling other than abortion referrals or counseling concerning the use of abortion as a method of family planning, there is no attached condition. If one instead understands the benefits offered Title X projects' clients to be free family planning counseling, the attached condition is that these indigent women forego receiving information concerning abortion during their meetings with Title X counselors.

Accepting the latter formulation of the conditioned benefit at issue in Rust, we must now inquire whether there is a First Amendment right to receive information concerning abortion as a method of family planning. Insofar as the government could not constitutionally prohibit the dissemination of information concerning a fundamental right such as abortion, there surely is

54. Rust, 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6 (1970)).
55. Id. at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)).
56. Id. at 180 (quoting 42 C.F.R. § 59.10(a) (1989)).
57. Id. (quoting 42 C.F.R. § 59.9 (1989)).
58. Id. at 181, 192, 201.
59. The analysis under my positive theory focuses solely on the concerns of recipients of public assistance, not the concerns of its providers.
60. See Rust, 500 U.S. at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)) (emphasis added).
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such a First Amendment right. And the challenged condition therefore arguably impinges on a constitutionally protected activity.

Under the second prong of the test suggested by my positive theory, we must now ask 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 receive family planning information concerning abortion than similarly situated persons earning a subsistence income. And it seems clear that the condition does not have this effect. As the Rust majority observed, "a woman's right to receive . . . information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered." The condition simply leaves clients of Title X projects to pay the same, unsubsidized price for abortion information that those not eligible for Title X-funded counselling must pay. Thus, my positive theory predicts that the Court would sustain the condition challenged in Rust, as it in fact did.

Richard Epstein, in contrast, contends that Rust was wrongly decided, and he would strike down "either a prohibition or a requirement on [abortion] counseling." Although he begins by asserting that the answer to the "key question" of "whether there is any reason to be concerned with a uniform state position on the subject [of abortion counselling], either way" depends on an assessment of "the relative strength of the bargaining and takings risks" in this context, his subsequent inquiry occupies only six sentences.

In appraising the "bargaining risks" posed by the Title X scheme, Epstein inquires whether "the state wield[s] monopoly power in this area—in which case both uniform rules, you can't speak or you must speak, should be struck down." Although he contends that "there are no obvious barriers to entry that impede setting up rival programs to pick up the slack or to counteract the impression of the desirable options that government creates," he also speculates that "the menu of alternatives to government programs may be far greater in New York or San Francisco than it is in Amarillo or Fargo." And, apparently considering further investigation (or elaboration) unnecessary, Epstein concludes that the bargaining risks are unacceptably large in this context.

Epstein's consideration of the "takings risks" presented by the Title X scheme is more cursory still. He simply asserts that "the takings risk here is aggravated if the state takes either extreme position [on abortion counselling]"

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62. Rust, 500 U.S. at 203. The Rust majority acknowledged that "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information." Id.
63. Id.
64. Epstein, supra note 5, at 300.
65. Id. at 299-300.
66. Id. at 300.
67. Id.
68. Id.
It is informative to compare Epstein's discussion of *Rust* with his analysis of *Harris v. McRae*, a related, earlier case whose "irreducible tension" he believes "carries over to [Rust]." At issue in *Harris* was the Hyde Amendment to the Medicaid Act, which prohibits the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain narrowly specified circumstances, although federal Medicaid funds may be used to provide other medical services, including those incident to pregnancy and childbirth. Plaintiffs sought to enjoin enforcement of the Hyde Amendment under the Fifth Amendment's Due Process Clause and the religion clauses of the First Amendment.

The Medicaid Act after the Hyde Amendment can be construed as offering each otherwise eligible pregnant woman free pregnancy-related medical care on the condition that she not have an abortion and instead carry the pregnancy to term. Under the test suggested by my positive theory, we must first inquire whether this condition impinges on a constitutionally protected activity. And it clearly does: under *Roe v. Wade*, the government cannot constitutionally prohibit a woman from terminating her pregnancy during the first trimester.

Under the second prong of the test, we must now ask whether the effect of the challenged condition is to require women unable to earn a subsistence income and otherwise eligible for Medicaid benefits to pay a higher price to exercise their constitutional right to an abortion than similarly situated women whose source of a subsistence income is employment. And it seems clear that the condition does not have this effect. The Hyde Amendment did not, as it might have, require that all Medicaid, food stamps, or other public assistance be withheld from otherwise eligible women who choose to exercise their constitutional right to an abortion. It simply declined to subsidize the exertion...
cise of that right, leaving Medicaid-eligible women to pay the same market price that other women must pay if they choose to obtain an abortion. Thus, my positive theory predicts that the Court would sustain the condition challenged in *Harris*, as it in fact did.  

Epstein, too, would find the Hyde Amendment constitutional, but his view that *Harris* was correctly decided is difficult to reconcile with his conclusion that *Rust* was not. At the center of his analysis in both cases appears to be a reading of *Roe* to require some sort of "government neutrality" on issues of reproductive choice. Epstein is correct that "*Roe* works a double transformation at a single leap: abortions move from the status of criminal acts into "fundamental rights." And in subsequent cases the Court has in fact invalidated a variety of non-wealth-dependent restrictions on abortion, other than criminalization, which it found to "unduly burden" that right. But neither in *Roe* nor in any subsequent case did the Court mandate the sort of government neutrality on reproductive choice that Epstein seems to envision. Indeed, the Court in *Roe* explicitly held that its "decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests." Even during the first trimester, when the State's constitutional authority to regulate abortions is at its nadir, *Roe* mandates only that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."  

That a constitutional right is declared "fundamental" has never meant that the government must subsidize the exercise of that right either in every instance or whenever it chooses to subsidize the exercise of legitimate alternative activities. The fundamental right of parents to send their children to private schools, recognized in *Pierce v. Society of Sisters*, has never been interpreted to mean that the government must fund those schools if it chooses to

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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.  

In both *Harris* and *Maher*, the Court explicitly discussed this hypothetical: 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 the 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.  

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79. Compare id. at 285-94 with id. at 297-302.  
80. See id. at 286-90, 299-302.  
81. Id. at 289; see also *Roe*, 410 U.S. at 152-56.  
82. See, e.g., *Baker*, supra note 3, at 1231 n.170; see also *Tribe*, supra note 61, § 15-10, at 1341-45 and cases cited therein.  
84. Id. at 164.  
85. 268 U.S. 510 (1925).
provide public schools. Nor has the fundamental right to reproduce, first rec-
ognized in *Skinner v. Oklahoma*,86 ever been construed to require that the
government hand out a voucher good for “one free childbirth” with each free
condom it chooses to distribute.

But Epstein’s concern in both *Harris* and *Rust* with *Roe* and the nature of
the abortion right is something of a red herring in any case. For even though
he asserts that *Roe* requires a type of government neutrality on issues of repro-
ductive choice, which is not present in *Harris* or *Rust*,87 he nonetheless finds
*Harris* (but, intriguingly, not *Rust*) to have been correctly decided because of
the “takings risks” presented by the challenged condition.88 Observing that
“[t]he free exercise of religion, like the free exercise of speech, can be limited
as much by direct taxation as it can by prohibitions,”89 Epstein contends that
a persuasive free exercise argument in favor of the Hyde Amendment can be
made by those who oppose abortion for religious reasons but who, nonethe-
less, could be forced in the absence of the Amendment to pay, through their
taxes, for what they consider to be the murder of Medicaid recipients’ unborn
children.90 And this argument suggests to Epstein that the Hyde Amendment
is not only constitutional but “constitutionally mandated.”91

Epstein is quick to acknowledge, however, that “there are also establish-
ment clause arguments that can be brought against the Hyde Amendment.”92
Since “[m]any of those who oppose the funding of abortions do so on reli-
gious grounds,” taxpayers who support government funding of abortions for
indigent women might argue that when their opponents “turn their preferences
into law, they have [unconstitutionally] established, at least in part, their reli-
gious beliefs under the Medicaid statutes.”93

One might now expect Epstein to tote up the number of likely claimants
under both the Free Exercise and Establishment Clauses—much as the politi-
cal process arguably does in the course of enacting legislation such as the
Hyde Amendment—in order to reach the result that yields the greatest aggre-
gate social welfare. Instead, however, Epstein simply states that he finds the
Establishment Clause argument “more strained in this context than . . . its free
exercise alternative,”94 and concludes that, although “a very hard call,” the
Hyde Amendment should be sustained “but perhaps only by a bare 5 to 4
vote.”95

Unfortunately, Epstein’s analysis of *Harris* rests on a reading of the reli-
gion clauses to which the Court has never subscribed. Epstein is correct only
in his (implicit) view that the Establishment and Free Exercise Clauses both

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86. 316 U.S. 535 (1942); see also Eisenstadt v. Baird, 405 U.S. 438 (1972); TRIBE, supra
note 61, § 15-10.
88. Id. at 289-91. Compare id. at 297-302.
89. Id. at 290 (footnote omitted).
90. Id.
91. Id.
92. Id.
93. Id. at 290-91.
94. Id. at 291.
95. Id. at 294.
create exceptions to the usual rule against taxpayer standing. The Establishment Clause simply grants all taxpayers the right not to subsidize religion; it affords no taxpayer the right not to subsidize abortion. Thus, although the restrictions on abortion funding at issue in Harris may coincide with the tenets of the Roman Catholic faith, for example, the Court has never held that a statute violates the Establishment Clause just because it "happens to coincide or harmonize with the tenets of some or all religions." If an enactment "has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion," it does not contravene the Establishment Clause.

And, as the majority observed in Harris, the Hyde Amendment "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."

Nor has the Court been sympathetic to individual taxpayers' free exercise claims for exemptions from generally applicable taxes. Given the federal government's great interest in both the maintenance of, and uniform participation in, the tax system, the Court has held that the government must accommodate claims for exemptions only if doing so will not "unduly interfere with fulfillment of the governmental interest." And fearing that a slippery slope would result, the Court has been reluctant to require such exemptions:

If, for example, a religious adherent believes war [or abortion] is a sin, and if a certain percentage of the federal budget can be identified as devoted to war- [or abortion-] related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function.

It is not a coincidence that Epstein finds so much of basic religion clause doctrine wrongheaded, nor that the unconstitutional conditions cases involving public assistance benefits that he chooses to discuss are, to a highly disproportionate extent, ones in which he contends the religion clauses are implicated.

In our post-New Deal world, the religion clauses constitute the stron-

98. This was in fact a claim raised by the appellees in Harris, and acknowledged by the Court to be a plausible view of the challenged funding restriction. See Harris, 448 U.S. at 319-20.
99. Id. at 319 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).
100. Id. (quoting Committee for Public Educ. v. Regan, 444 U.S. 646, 653 (1980)).
101. Harris, 448 U.S. at 319; see also Roe, 410 U.S. at 138-41.
103. Lee, 445 U.S. at 260. Epstein, not surprisingly, considers the Court’s analysis in Lee to be "seriously defective," not least because "the Court is surely wrong when it writes as though there were a slippery slope problem." Epstein, supra note 5, at 268, 269-70. Thus, Epstein persists in advocating that the government create separate "risk pools" in various contexts, notwithstanding his awareness that the Court implicitly, but no less clearly, rejected this solution in Lee. Id. at 262 n.28.
104. Of the 25 unconstitutional conditions cases involving public assistance benefits which the
gest—perhaps the only—constitutional barrier to income redistribution that remains. Because Epstein precommitted not to devote *Bargaining with the State* to declaring the New Deal unconstitutional, but nonetheless believes that “a constitutional order that imposed restrictions upon redistribution through taxation and state welfare benefits” has much to recommend it, the religion clauses are his last, best hope. It is therefore not surprising that he systematically (mis)reads those clauses with an eye toward maximizing their coverage, or that he is most eager to discuss cases in which his expansive reading of these clauses could be deployed to curtail redistribution and thereby, he believes, increase aggregate social welfare. Indeed, Epstein himself observes that “[o]nce general takings and public trust arguments are no longer sufficient to forestall all forms of redistribution, whether covert or overt, between A and B, then additional pressure is placed upon the religion clauses to forbid redistribution both from or to any religious group.” He might have added that he, at least, would also comfortably place additional pressure on the notion of a “religious group.”

In the end, Epstein’s discussions of *Rust* and *Harris* are likely to leave the reader unsatisfied for at least two reasons. First, he never explains why his analysis of the takings risks at issue in *Rust* does not track his decisive analysis of those risks in *Harris*. Why doesn’t *Rust*, too, come down to the opposing free exercise and establishment claims of taxpayers which so trouble Epstein in *Harris*? As in *Harris*, the free exercise argument in *Rust* would be made by those who oppose abortion for religious reasons, but who nonetheless could be forced, in the absence of the challenged Title X regulations, to pay through their taxes for speech promoting what they consider to be the murder of unborn children. And taxpayers opposed to the Title X regulations would, as in *Harris*, argue that since many who favor the “gag order” imposed by the regulations do so on religious grounds, when they “turn their preferences into law, they have [unconstitutionally] established, at least in part, their religious beliefs under [federal law].” Thus, one would expect Epstein to sustain the Title X regulations at issue in *Rust* if, as in *Harris*, he finds the Establishment Clause argument in this context “more strained” than its free exercise alternative.


106. See supra note 51.

107. EPSTEIN, supra note 5, at 294; see also id. at 300-02.

108. Id. at 260-61. Although Epstein would clearly favor this additional pressure on the religion clauses, he does not demonstrate that the post-New Deal Court shares his preference.

109. Id. at 290.

110. Id. at 290-91.

111. Id. at 291.
Perhaps Epstein does not find the Establishment Clause argument more strained than its free exercise alternative in the context of Rust. Perhaps, for purposes of his "takings" analysis under the religion clauses, he considers government funding of speech promoting abortion (Rust) to be importantly different from government funding of actual abortions (Harris). Or perhaps he believes government funding of medical expenses related to childbirth, but not those related to abortion, to constitute the desired government neutrality on issues of reproduction in a way that the government funding of pro-life, but not pro-choice, reproductive counselling conceivably does not. Unfortunately, Epstein does not say.

Second, in applying his normative theory to Harris and Rust, Epstein never answers the question of whether the Court, given its existing understanding of the Free Exercise Clause, the Establishment Clause, and the constitutional right to an abortion, should have sustained the benefit condition at issue in either case. By basing his discussion of both cases on revisionist readings of the relevant constitutional guarantees, Epstein, as in his discussion of Smith, substantially undercuts the usefulness and persuasiveness of that analysis, and ultimately of his proposed normative theory, for those (surely including the Court) who do not subscribe to his readings.

IV. United States Department of Agriculture v. Moreno and Dandridge v. Williams

Given his penchant for both constitutional revisionism and unconstitutional conditions cases that lend themselves to analysis under the religion clauses, Epstein's discussion of cases such as Smith, Rust, and Harris sheds little light on the many unconstitutional conditions cases involving public assistance benefits that he does not discuss. Thus, before passing final judgment on Epstein's theory, it might be informative to attempt to apply it to cases such as United States Department of Agriculture v. Moreno and Dandridge v. Williams, which he does not discuss and which do not involve the religion clauses, even under Epstein's expansive reading of them.

At issue in Moreno was a federal statutory provision that disqualified for food stamps any otherwise eligible persons who lived in a household containing any unrelated individuals. This statute arguably required some persons otherwise eligible for food stamps to choose between receiving that public assistance or exercising their First Amendment freedom of association.

112. 413 U.S. 528 (1973).
114. Moreno, 413 U.S. at 529.
115. Although the First Amendment states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble," this freedom of association has never been understood to 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). Beginning with Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (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 states' police power. See also Tribe, supra note 61, § 15-17.
If I read Epstein correctly, he would have us inquire whether this combination of government largesse plus condition maximizes social welfare relative to other possibilities, including making the benefit available without the challenged condition.\textsuperscript{116} To begin, it is not clear that anyone gains from this particular condition on the receipt of food stamps. Some persons eligible for food stamps will likely forego living in households containing any unrelated individuals in order to receive this needed benefit. In doing so, however, they may give up not only the exercise of their First Amendment freedom of association, but also important economies of scale in their necessary living expenses. Nor would this condition appear to make the taxpayers who fund the food stamp program—or anyone else—better off. A small number of otherwise eligible persons may choose to forego food stamps and live in a household with unrelated individuals. But the ultimate savings, if any, to taxpayers from this tiny decrease in the total dollar amount of food stamps distributed will surely be outweighed many times over by the increased administrative and monitoring costs that will attend the imposition of this condition.\textsuperscript{117}

Thus, the condition on food stamp benefits at issue in \textit{Moreno} appears to be one of Epstein's "perverse conditions" with no allocative gains.\textsuperscript{118} And I expect that Epstein applauds the Court's inability to find any rational basis for this challenged condition under modern equal protection law,\textsuperscript{119} at least as much as he likely marvels at the ability of interest group politics to generate in the challenged legislation a set of outcomes from which no one apparently benefits.\textsuperscript{120}

An analysis of \textit{Moreno} under the test suggested by my positive theory reaches Epstein's result, but by a different route. The challenged condition clearly involves a constitutionally protected activity insofar as it impinges on food stamp claimants' First Amendment right to live with persons of their own choosing.\textsuperscript{121} Thus, we proceed under the second prong to ask whether the effect of this challenged condition is to require persons unable to earn a subsistence income, and otherwise eligible for food stamps, to pay a higher price to exercise their First Amendment freedom of association than similarly situated persons earning a subsistence income.

Anyone choosing to live in a household containing unrelated individuals might expect to incur certain costs from this choice of living situation and companions, such as diminished privacy or other inconveniences. The person whose source of a subsistence income is employment, however, does not typically in addition suffer the loss of that income should he exercise his constitutional freedom of association in this way. Thus, the condition challenged in \textit{Moreno} clearly imposes a surcharge on the price individuals eligible for food

\textsuperscript{116} EPSTEIN, supra note 5, at 98-103.
\textsuperscript{117} In addition to the increased administrative and monitoring costs, taxpayers may ultimately bear an increase in the cost of providing health care for those whose nutrition suffers as a result of their decision to forego food stamps.
\textsuperscript{118} EPSTEIN, supra note 5, at 99, 101.
\textsuperscript{119} \textit{Moreno}, 413 U.S. at 538.
\textsuperscript{120} EPSTEIN, supra note 5, at 101.
\textsuperscript{121} See supra note 115.
stamps must pay to exercise their First Amendment rights. And my theory therefore predicts that the Court would invalidate the condition, as it in fact did.\textsuperscript{122}

At least in the \textit{Moreno} context, the analytical path prescribed by Epstein's theory is not obviously more speculative, less determinate, or more convoluted than the path prescribed by the test suggested by my positive theory or, therefore, the path implicitly taken by the Court. And, as we have just seen, the destination reached is the same.

Consider one final case. \textit{Dandridge v. Williams} concerned a challenge on Fourteenth Amendment equal protection grounds to a Maryland "maximum grant regulation" that provided AFDC benefits to most eligible families in full accord with the state-computed "standard of need," but imposed a ceiling on the monthly amount of money any one family could receive.\textsuperscript{123} Thus, under the Maryland regulation, a family of nine with a state-computed need of nearly $300 per month, and a family of six with a computed need of $250 per month would each receive the same $250 per month maximum grant.\textsuperscript{124} This regulation arguably burdened the claimant parent's\textsuperscript{125} constitutional right to procreate insofar as it provided the parent a financial incentive to limit the family to six or fewer persons, the size at which the offered benefits were sufficient to cover the family's state-computed need.\textsuperscript{126}

As before, Epstein likely would have us ask whether this combination of government largesse plus condition will maximize social welfare relative to other possibilities, including making the benefit available without the challenged condition.\textsuperscript{127} If we assume, consistent with the Court's finding, that the state of Maryland was willing to devote only a determinate amount of its total revenue to AFDC benefits, and that this amount was insufficient to meet the state-computed need of \textit{all} recipient households,\textsuperscript{128} the issue becomes one solely of the optimal allocation of benefits among AFDC-recipient households. Should all eligible families, regardless of size, receive, say, 95\% of their state-

\textsuperscript{122} \textit{Moreno}, 413 U.S. at 538.


\textsuperscript{124} \textit{Id.} at 490-91 (Douglas, J., dissenting).


\textsuperscript{126} The fundamental constitutional right to procreate can be traced to \textit{Skinner v. Oklahoma}, 316 U.S. 535 (1942).

\textsuperscript{127} \textit{EPSTEIN, supra} note 5, at 98-103.

\textsuperscript{128} \textit{Dandridge}, 397 U.S. at 473-75.
computed need? Or should eligible families of six or fewer persons receive 100% of their computed need, while families with seven or more persons receive only 80% or less of theirs (the exact percentage decreasing as family size increases)?

Whether, under the latter scheme, the aggregate benefits to the smaller families exceed the aggregate costs to the larger families will depend on facts such as the effect of the scheme on both larger and smaller families' incidence of malnutrition, illness, homelessness, illiteracy, and death, and therefore poses a seemingly intractable measurement problem. But if I understand Epstein's general theory correctly, he would find this Maryland scheme unacceptable even if it were (somehow) determined to be Kaldor-Hicks efficient, because it fails his pro rata test.129 That is, the social gains induced by the Maryland scheme relative to a scheme that would give all eligible families 95% of their state-computed need are gains that accrue solely to families of six or fewer members. Thus, I expect Epstein would conclude that the Burger Court erred when it upheld the Maryland scheme.130

My positive theory, in contrast, suggests that the Court's decision in *Dandridge* was consistent with its decisions in other unconstitutional conditions cases involving public assistance benefits and, as in those other cases, therefore reflects the normative underpinnings of that theory.131 Under the Maryland scheme, an eligible parent with a family of six will not receive any increase in total AFDC benefits if he or she has another child.132 This means that the per capita income of the family will be reduced since seven people will be supported on the same amount of money as six were previously. This reduction in per capita income, however, does not require AFDC-eligible parents to pay a higher price to exercise their constitutional right to procreate than similarly situated persons earning a subsistence income: an analogous reduction in per capita income upon the birth of a child is typically realized by those whose source of a subsistence income is employment.133 That is, the price of exercising one's right to procreate typically includes a reduction in per capita income, whatever its source, assuming one's total monthly income is held constant.134 Because the Maryland scheme simply leaves AFDC-eligible parents to pay the same price to exercise their right to procreate that other,

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129. *Epstein, supra* note 5, at 96-103.


131. *See supra* notes 16-17 and accompanying text.


133. The underlying assumption, consistent with current and past law, is that parents are responsible for the financial support of their minor children in AFDC-recipient families as well as in families whose sole source of income is the parent(s)'s employment. For discussion of parents' legal duty to provide support for the maintenance of their children, 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).

134. 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.
non-indigent parents pay, my theory predicts that the Dandridge Court would sustain the challenged "maximum grant regulation," as it in fact did.  

Under my positive theory, the Maryland scheme is critically different from a hypothetical regulation under which the total monthly amount of AFDC benefits provided an eligible family of seven is less than, rather than the same as, that for an eligible family of six. This hypothetical scheme would require AFDC-eligible parents with families of six to pay a higher price to exercise their right to procreate than other, non-indigent parents pay. For in addition to the reduction in the family's per capita income that typically attends the birth of another child, these AFDC-eligible parents would also experience a reduction in their family's total AFDC income. Thus, my positive theory predicts that the Court, in contrast to its holding in Dandridge, would find this hypothetical scheme unconstitutional.

I expect that Epstein, in contrast, would find this hypothetical scheme neither better nor worse than the actual Maryland scheme at issue in Dandridge. For this hypothetical scheme, too, fails Epstein's pro rata test: the social gains induced by the hypothetical scheme relative to a scheme that would give all AFDC-eligible families 95% of their state-computed need are gains that accrue solely to eligible families of six or fewer members.

In the Dandridge context, Epstein's requirement that the Court assess whether the combination of government largesse plus challenged condition will maximize social welfare relative to other possibilities seems at first to pose an intractable measurement problem. It is not that courts are obviously less competent than the state legislature to assess the effect of the Maryland scheme on both larger and smaller families' incidence of malnutrition, illness, homelessness, illiteracy, and death. Rather, we doubt that any institution could accomplish the task. But this potentially fatal weakness in Epstein's proposed standard of judicial review appears largely obviated by its "pro rata" component. At least in the Dandridge context, it seems remarkably easy to identify any deviation from formal equality in the allocation of the social gains that the challenged benefit scheme generates.

Nonetheless, Epstein's pro rata test is problematic here because it yields a result that some, perhaps even Epstein, will find perverse. By precluding "maximum grant" limitations such as the challenged Maryland regulation, the test ensures those eligible for public assistance a different, more robust right to procreate than the Constitution currently affords those whose source of a subsistence income is employment. At present, neither public nor private employers are required by the Constitution to provide—and typically do not provide—employees a pay increase upon the birth of a child in order to ensure that the per capita income of the employee's family is not diminished by the employee's exercise of the constitutional right to procreate. Thus, by implicitly requiring a proportional increase in the family's total AFDC benefits whenever a recipient parent gives birth to another child, Epstein's pro rata test perversely

136. Epstein, supra note 5, at 96-103.
137. I also query how and whether we could assess the accuracy of any proffered results.
elevates procreation by these indigent parents from the constitutional right that all others have to a kind of constitutional entitlement.\textsuperscript{138}

V. CONCLUSION

Would social welfare be increased if in unconstitutional conditions cases involving public assistance benefits the Court employed Epstein's proposed test rather than the test my positive theory suggests the Court \textit{sub silentio} has applied in these cases since 1963? It is hard to know. To compare the tests is to compare apples and airplanes. The test suggested by my positive theory holds constant the existing law in all areas other than unconstitutional conditions cases involving public assistance benefits. In contrast, under Epstein's test, at least as he has applied it, the only constant is the goal of maximizing overall social welfare. Thus, as his discussions of \textit{Smith}, \textit{Rust}, and \textit{Harris} reveal, Epstein's analysis of unconstitutional conditions cases involving public assistance benefits frequently rests on revisionist readings of the relevant constitutional provisions and precedent, readings that were themselves presumably mandated by his larger goal of maximizing aggregate social welfare.

Moreover, as Epstein himself has observed in another context, "it is one thing to identify past errors" (as his normative theory does with great fecundity), "and quite another to remedy them, even if we could summon the will to do so."\textsuperscript{139} Just because a different standard of judicial review might \textit{in principle} be preferable to an existing one of long standing does not mean that a wholesale shift to that new standard \textit{today} would be equally preferable. The dislocation wrought by such a change might be prohibitively costly, even evil.\textsuperscript{140} Nonetheless, according to Epstein, "[a] correct theory at the very least can lead to incremental changes in the proper direction, even though it cannot transform the world," particularly given "the present structure of constitutional law [which] does admit a high degree of play at the joints."\textsuperscript{141}

But is Epstein's theory "correct"? This, too, is hard to know. Although not uncontroversial, his goal of maximizing overall social welfare is surely attractive to many (including the author of this Essay) and, in any case, not obviously evil.\textsuperscript{142} Moreover, when the task of determining whether a chal-

\textsuperscript{138} The resulting entitlement is not a pure one, however, since it exists only so long as the state chooses to provide AFDC at all, and the state has no constitutional obligation to offer this benefit. For a discussion of the distinction between constitutional rights and entitlements, see Baker, \textit{supra} note 3, at 1218-20.

\textsuperscript{139} \textit{Takings}, \textit{supra} note 50, at 306.

\textsuperscript{140} Epstein observed in \textit{Takings} for example, that to abolish welfare while keeping the minimum wage in place "should not be done" because it would "deprive individuals of welfare payments at the same time they are blocked from gainful employment." \textit{Id.} at 326. Epstein continued:

Similarly, many persons have made substantial forced contributions to Social Security that have already been spent on transfer payments to others. To abolish Social Security \textit{in medias res} is worse than foolish; it is evil. . . . Too many individuals have foregone the opportunity to accumulate private savings in reliance upon the programs that are now in place.

\textit{Id.}

\textsuperscript{141} \textit{Id.} at 329.

\textsuperscript{142} At least one reviewer has expressed frustration, however, that "the reader never learns why an indeterminate social improvement standard is better, for example, than an indeterminate
lenged condition on a government benefit advances overall social welfare relative to other possibilities takes the form of applying Epstein's "pro rata" test, it does not seem obviously more onerous or beyond the competence of the courts than established judicial tasks such as ascertaining the "best interests of the child" in custody disputes or deciding when police activity constitutes an "unreasonable search." Indeed my attempts above to apply Epstein's test to Moreno and Dandridge are evidence that the task is often quite readily performed. Nonetheless, as that analysis of Dandridge also reveals, his test yields results in some cases which appear perverse, at least within our current constitutional culture. More study is necessary to determine whether such results are the product of some larger deficiency in the substance of Epstein's theory, or merely of easily avoidable errors in its application.

By seeking to apply Epstein's central theory to cases that he has not directly addressed, I hope to have demonstrated my conviction that his approach to the paradox of unconstitutional conditions at a minimum forces us to consider these cases in a new and interesting way. That reasonable people might nonetheless disagree with Epstein's selection of baselines, or dispute whether a unitary standard can or should govern judicial review of cases raising unconstitutional conditions questions, should suggest the difficulty of the unconstitutional conditions paradox, not the inadequacy of Epstein's ambitious and thoughtful contribution.

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143. See, e.g., Palmore v. Sidoti, 466 U.S. 429 (1984); David L. Chambers, Rethinking the Substantive Rules for Custody Disputes in Divorce, 83 Mich. L. Rev. 477, 480-81 (1984) ("Today judges in most states are directed to determine what placement will serve the child's 'best interests,' a standard that seems wonderfully simple, egalitarian, and flexible.") (footnote omitted).


145. See supra Part IV.

146. See, e.g., Baker, supra note 3; Kreimer, supra note 5; Sullivan, supra note 5.
