

1995

Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine

Jonathan Romberg
Seton Hall School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Social Welfare Law Commons](#)

Recommended Citation

Jonathan Romberg, *Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine*, 22 Fordham Urb. L.J. 1051 (2011).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol22/iss4/8>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Is There a Doctrine in the House? Welfare Reform and the Unconstitutional Conditions Doctrine

Cover Page Footnote

Clinical Assistant Professor of Law, Seton Hall School of Law; 1993-95 John J. Gibbons Fellow in Public Interest and Constitutional Law at Crummy, Del Deo, Dolan, Griffinger & Vecchione, Newark, New Jersey. The Gibbons Fellowship, acting on behalf of the American Civil Liberties Union of New Jersey, served as co-counsel for Plaintiffs in *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995), appeal pending, see Part VB, along with Legal Services of New Jersey and the NOW Legal Defense and Education Fund. I would like to thank Crummy, Del Deo for its commitment to pro bono lawyering through the Gibbons Fellowship, and for permitting me to write this Article during my tenure as a Gibbons Fellow.

IS THERE A DOCTRINE IN THE HOUSE? WELFARE REFORM AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Jonathan Romberg*

A state . . . may not use any part of [its federal welfare block grant] to provide cash benefits for a child born out-of-wedlock to an individual who has not attained 18 years of age¹

[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to the individual responsibility or wrongdoing. . . . Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth²

* * *

A state . . . may not use any part of [its federal welfare block grant] to provide cash benefits for a minor child who is born to a recipient of benefits³

If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.⁴

* Clinical Assistant Professor of Law, Seton Hall School of Law; 1993-95 John J. Gibbons Fellow in Public Interest and Constitutional Law at Crummy, Del Deo, Dolan, Griffinger & Vecchione, Newark, New Jersey. The Gibbons Fellowship, acting on behalf of the American Civil Liberties Union of New Jersey, served as co-counsel for Plaintiffs in *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995), *appeal pending*, see Part VB, along with Legal Services of New Jersey and the NOW Legal Defense and Education Fund. I would like to thank Crummy, Del Deo for its commitment to *pro bono* lawyering through the Gibbons Fellowship, and for permitting me to write this Article during my tenure as a Gibbons Fellow.

1. Personal Responsibility Act, H.R. 4, 104th Cong., 1st Sess. § 101 (proposed codification at 42 U.S.C. § 405(a)(4) (1995)).

2. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175-76 (1972).

3. H.R. 4, § 106.

4. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis deleted).

I. Introduction

The unconstitutional conditions doctrine spans two well-established principles of constitutional law. First, the constitution does not generally obligate the government to provide any person with an affirmative benefit, even a subsistence benefit such as welfare.⁵ Second, the constitution prohibits the government from enacting legislation that infringes a person's fundamental rights, such as privacy⁶ and travel,⁷ or that is based upon a suspect classification, such as alienage⁸ and birth status.⁹

Between these settled principles lies an open question: does the Constitution permit the government to pass legislation offering a gratuitous benefit, but conditioning the provision of that benefit on the recipient's surrender of an otherwise-existing constitutional right? In particular, can the government provide welfare benefits with strings attached that would violate the Constitution if imposed directly? Unfortunately, a century of jurisprudence addressing these questions has produced two conflicting answers: Yes, the greater-includes-the-lesser doctrine dictates that the government's greater power to deny a benefit entirely includes the lesser power to offer the benefit with any condition attached, even a condition that would be unconstitutional if imposed standing alone;¹⁰ and No, the unconstitutional conditions doctrine dictates that the government may not indirectly infringe a constitutional right when it may not do so directly.¹¹

The Supreme Court has held that:

5. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border."); *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970) ("[T]he Constitution does not empower this Court to second-guess state officials charged with . . . allocating . . . funds among the myriad of potential recipients.").

6. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977) (holding that individuals have privacy interests in avoiding disclosure of personal information and in making certain kinds of important decisions free from government interference).

7. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.").

8. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (establishing that "classifications based on alienage, like those based on nationality or race, are inherently suspect").

9. See, e.g., *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 168-76 (1972) (holding that courts should carefully scrutinize laws discriminating on the basis of illegitimacy under the Equal Protection Clause).

10. See *infra* notes 52-83 and accompanying text.

11. See *infra* notes 84-110 and accompanying text.

even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . . This would allow the government to "produce a result which [it] could not command directly."¹²

On the other hand, the Supreme Court has held that "[c]onstitutional concerns are greatest when the State attempts to impose its will by force of law; [however] the State's power to encourage actions deemed to be in the public interest"—e.g., by offering a conditioned benefit—"is necessarily far broader."¹³ The inconsistency between these two positions has been well documented by commentators,¹⁴ and has even been noted by members of the Court.¹⁵ The Court, however, has made no serious attempt to clarify its divergent approach to unconstitutional conditions cases. Numerous commentators have attempted to do so, but no consensus has emerged.

The reason for this lack of consensus is the impossibility of articulating an all-encompassing doctrine of unconstitutional conditions that will resolve every case involving a conditioned benefit, regardless of the right and benefit at issue. It is possible, however, to articulate a set of considerations generally relevant to unconstitutional conditions cases that remains sensitive to both the nature of the underlying constitutional right and the character of the particular benefit.

Part II of this Article discusses welfare benefits, both historically and currently, focusing on the ebb and reascendance of welfare as a means to sort the "worthy" from the "unworthy" poor. Part III.A. introduces the unconstitutional conditions doctrine; Part III.B. examines its historical enemy, the greater-includes-the-lesser

12. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citations omitted); see also *Frost & Frost Trucking Co. v. Railroad Comm'n of CA.*, 271 U.S. 583, 593-94 (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.").

13. *Maher v. Roe*, 432 U.S. 464, 476 (1977).

14. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416-17 (1989); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1297-98 (1984).

15. See, e.g., *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2328 n.12 (1994) (Stevens, J., dissenting).

doctrine, and explains how some conditions placed on benefits can be unconstitutional, notwithstanding the surface appeal of the greater-includes-the-lesser doctrine. Part IV.A. examines the unconstitutional conditions case law, addressing both its historical development and its present muddled state. Currently, courts resolve unconstitutional conditions cases by engaging in a largely unreasoned, formalistic, and outcome-dispositive threshold decision to apply either rational relations or heightened scrutiny review. Part IV.B. discusses various criteria that commentators have offered for determining whether a particular case should be subjected to minimal or heightened scrutiny. This Article ultimately rejects each of these suggested criteria as inadequate, and indeed the entire project as misguided.

Instead, this Article proposes that courts should subject unconstitutional conditions cases to intermediate scrutiny rather than presuming that a conditioned benefit is either valid or invalid based on its formal attributes. In conducting intermediate scrutiny, courts should consider: (i) the degree of equality or neutrality demanded by the underlying constitutional right; (ii) the importance of the benefit to the recipient; (iii) the germaneness of the condition to the reason the government may legitimately deny the benefit in the absence of the condition, and thus whether the government is attempting to use its economic and regulatory powers to gain leverage over a constitutional right; and (iv) whether the offer of the conditioned benefit would make an individual worse off, overall, than she otherwise would or should have been.

Part V discusses unconstitutional conditions in the particular context of current welfare reform proposals. Part V.A. argues that conditions imposed upon welfare and other subsistence benefits should be scrutinized with particular care and addresses the potential implications of current welfare reform measures for unconstitutional conditions analysis. In light of the analytical approach set forth earlier in the Article, Part V.B. presents possible unconstitutional conditions challenges to current welfare reform proposals, focusing on two of those proposals, a durational residency requirement and a child exclusion provision. The Article concludes that these conditioned benefits violate the constitutional rights of AFDC recipients.

II. Welfare Reform

Aid to Families with Dependent Children (AFDC), or "welfare" as it is commonly known, is a "scheme of cooperative federalism"¹⁶ created by Title IV of the Social Security Act of 1935 (the Act).¹⁷ State AFDC plans that have been approved by the Secretary of the United States Department of Health and Human Services (HHS) as complying with the Act receive partial reimbursement from the federal government.¹⁸ Although states have "considerable latitude" as to the allocation and level of resources they commit to AFDC,¹⁹ "[s]tates that seek to qualify for federal AFDC funding must operate a program not in conflict with the Social Security Act."²⁰ In other words, all applicants who meet federal eligibility criteria are entitled to receive AFDC benefits. They are not, however, entitled to any particular level of benefits, and, specifically, are not entitled to benefits meeting the standard of need the state itself has determined are necessary for needy children to lead a minimally decent life.²¹

A. Welfare as We Knew It

AFDC, as originally enacted during the Depression, was an extremely narrow program that provided temporary assistance to children of the "worthy poor."²² Congress created the AFDC program largely in order to "assist[] the children of women who were white, widowed, and had been connected to men for a substantial

16. *King v. Smith*, 392 U.S. 309, 316 (1968).

17. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 601-87 (1988 & Supp. V 1993)).

18. See 42 U.S.C. §§ 603 & 1318 (1991); see also *Benó v. Shalala*, 30 F.3d 1057, 1061 (9th Cir. 1994) ("Participating states and the federal government jointly finance the program and state governments administer it under plans approved by the Secretary of Health and Human Services.").

19. *King*, 392 U.S. at 318-19.

20. *Van Lare v. Hurley*, 421 U.S. 338, 340 (1975); see *Townsend v. Swank*, 404 U.S. 282, 286 (1971) (holding that a state eligibility standard that excludes those eligible for AFDC under federal standards violates the Social Security Act and is therefore invalid). This obligation arises from 42 U.S.C. § 602(a)(10) (1991).

21. In New Jersey, for example, AFDC grant amounts are approximately 45% of the standard of need. Compare N.J.A.C. 10:81-1.2A with 10:81-2.B; see also *In re Petitions for Rulemaking*, 566 A.2d 1154, 1156-57 (N.J. 1989) (noting that New Jersey AFDC families receive "less than 60% of the minimum cost of living," even when a full food stamp allotment is taken into account).

22. The "mothers' pension welfare programs, which were the precursors of AFDC," had also been shaped by a preference for the "worthy" poor. *King*, 392 U.S. at 320-21.

portion of their lives."²³ The legislative history of the Act explicitly authorized each state to go beyond federal AFDC eligibility standards to "impose such further eligibility requirements—as to means, moral character, etc.—as it sees fit."²⁴

This restriction of AFDC benefits to the "worthy poor" was attacked in the 1940s and 1950s.²⁵ Eventually, the Secretary of Health, Education, and Welfare (the precursor agency to HHS) embraced these criticisms, ruling that "[a] State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable . . ."²⁶ Congress approved this administrative interpretation in a somewhat amended form,²⁷ "preclud[ing] the States from . . . denying AFDC assistance to dependent children on the basis of their mothers' alleged immorality or to discourage illegitimate births."²⁸ States could no longer deny AFDC to federally eligible children because their families were morally "unworthy."

In 1962, Congress amended the Act to include a waiver mechanism.²⁹ Section 1315 authorized HHS to exempt states from com-

23. Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 723 (1992). As Michael Katz explains, the sponsors of AFDC believed that AFDC would be a small program supporting widows with children. However, by the 1960s, "AFDC . . . supported growing numbers of women whose husbands had deserted or divorced them, or who had never married. Increasing numbers of them were women of color. Hostility to the program and its recipients mounted Poor women now became [known as] the undeserving poor." MICHAEL B. KATZ, *The Undeserving Poor, in THE WAR ON POVERTY TO THE WAR ON WELFARE* 68-69 (1989).

24. H.R. Rep. No. 615, 74th Cong., 1st Sess. 24 (1935); S. Rep. No. 628, 74th Cong., 1st Sess. 36 (1935); see also *King*, 392 U.S. at 321 (explicating this legislative history and the consequent "suitable home provisions [that] frequently disqualified children [from AFDC eligibility] on the basis of the alleged immoral behavior of their mothers").

25. "Critics argued, for example, that such disqualification provisions undermined a mother's confidence and authority, thereby promoting continued dependency; that they forced destitute mothers into increased immorality as a means of earning money; that they were habitually used to disguise systematic racial discrimination; and that they senselessly punished impoverished children on the basis of their mothers' behavior" *King*, 392 U.S. at 321-22.

26. State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare (July 1, 1961), cited in *King*, 392 U.S. at 323 n.19.

27. See 42 U.S.C. §§ 604, 608 (1988 & Supp. V 1993); see also *King*, 392 U.S. at 323-26.

28. *King*, 392 U.S. at 324.

29. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 122, 76 Stat. 192 (codified as amended at 42 U.S.C. § 1315(a) (1988 & Supp. V 1993)) [hereinafter Section 1315].

pliance with the basic eligibility requirements set forth in section 602 of the Act for "any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of [the Act]."³⁰

B. Welfare as We Know It

For approximately twenty years, HHS approved a rather narrowly circumscribed set of waivers under section 1315.³¹ Beginning in the mid-1980s, and continuing at an accelerating rate with the blessing of Presidents Reagan, Bush, and Clinton, HHS has granted waivers under section 1315 for a large number of state AFDC plans that are extremely broad in scope.³² Recent waivers have included experimental projects that terminate eligibility after a set period of time; increase work requirements; cut off or reduce benefits if children are truant from or unsuccessful in school, or are not immunized; alter benefit levels based on duration of residency within the state; and exclude children from eligibility if they were conceived by or born to a mother who was receiving AFDC.³³

Congress amended the Act by passing the Family Support Act of 1988 (the FSA), which created the Job Opportunities and Basic Skills (JOBS) training program.³⁴ Congress modeled JOBS after state experimental programs intended to move welfare recipients toward economic self-sufficiency by imposing more onerous work and training responsibilities. The FSA required all states to implement a statewide JOBS program by October 1, 1992.³⁵ These

30. *Id.*

31. See Susan Bennett & Kathleen A. Sullivan, *Disentitling the Poor: Waivers and Welfare "Reform,"* 26 U. MICH. J.L. REF. 741 (1993); Lucy A. Williams, *The Abuse of Section 1115 Waivers: Welfare Reform in Search of a Standard,* 12 YALE L. & POL'Y REV. 8 (1994); see also *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973); *Crane v. Mathews*, 417 F. Supp. 532 (N.D. Ga. 1976); *California Welfare Rights Org. v. Richardson*, 348 F. Supp. 491 (N.D. Cal. 1972).

32. See generally Bennett & Sullivan, *supra* note 31 (examining the recent trend of state waiver exemptions granted by the HHS); Williams, *supra* note 31 (discussing the abuse of § 1115 through broad executive waiver approvals and how this has resulted in alterations of the AFDC program by the state); see also *Welfare Developments in 1994*, 28 CLEARINGHOUSE REV. 1109, 1111 (1995) ("Encouraged by President Clinton's support for state experimentation, 34 states submitted new applications for AFDC waivers from February 1993 through September 19, 1994.").

33. See *Welfare Developments in 1994*, *supra* note 32, at 1111-12.

34. 42 U.S.C. § 1305 (1991).

35. HOUSE WAYS AND MEANS COMMITTEE, 1994 GREEN BOOK: OVERVIEW OF ENTITLEMENT PROGRAMS 338 (Comm. Print 1994) [hereinafter 1994 GREEN BOOK]. States were required to begin implementation of the program by October 1, 1990. *Id.* at 326. By January of 1994, all states had implemented a statewide program. *Id.* at 344-48, table 10-4.

JOBS programs have been largely unsuccessful at moving recipients off welfare and into the workforce.³⁶

C. Welfare, We Hardly Knew Ye

President Clinton, Congress and the American public have been dissatisfied with the pace of welfare reform under the FSA and the section 1315 waiver process. Indeed, as a presidential candidate, Clinton called for "end[ing] welfare as we know it."³⁷ As President, he proposed a welfare reform package that makes significant changes in the present system, but that maintains its status as a federal entitlement.³⁸

In the 1994 elections, the Republican party took control of both Houses of Congress, promising to fulfill its "Contract With America."³⁹ A cornerstone of this Contract is the Personal Responsibility Act (the PRA),⁴⁰ which promises not merely to end AFDC as we know it, but, in effect, simply to end it. The PRA has two central features. First, it would eliminate the federal entitlement to benefits for dependent children who satisfy the criteria for need set forth in the Social Security Act. Instead, it would give states block grants to distribute in any manner they see fit and would end states' obligation to supplement federal monies with their own funds. Second, it would permit, or in some cases require, states to deny benefits to those who fail to comply with certain conditions set by Congress.⁴¹

These features of the Personal Responsibility Act fundamentally recast the AFDC program. First, in the absence of any federally enforceable right to benefits or any obligation for states to provide matching funds, states could drastically curtail eligibility criteria and procedural safeguards. Moreover, eliminating the federal enti-

36. For a study of the weaknesses of the JOBS program, see UNITED STATES GENERAL ACCOUNTING OFFICE, WELFARE TO WORK: CURRENT AFDC PROGRAM NOT SUFFICIENTLY FOCUSED ON EMPLOYMENT (HEHS-95-28 1994).

37. See "I Still Believe in a Place Called Hope," L.A. TIMES, July 17, 1992, at A10.

38. See BILL CLINTON & ALBERT GORE, JR., PUTTING PEOPLE FIRST (1992).

39. See Robert Pear, *House Backs Bill Undoing Decades of Welfare Policy*, N.Y. TIMES, Mar. 25, 1995 at A6.

40. Personal Responsibility Act, H.R. 4, 104th Cong., 1st Sess. (1995).

41. See H.R. 4, § 101 (proposed codification at 42 U.S.C. § 405(a)(4)) (denying AFDC to certain children born out-of-wedlock); H.R. 4, § 101 (proposed codification at 42 U.S.C. § 405(a)(5)) (denying AFDC for additional children born to AFDC recipients) (known as the "Child Exclusion" or "Family Cap"); H.R. 4, §§ 401-03, 104th Cong., 1st Sess. (1995) (denying or sharply limiting eligibility of illegal aliens, lawful nonimmigrants, and lawful immigrants for federally financed public assistance benefits); H.R. 4, §§ 411-13 (similarly denying or limiting noncitizens' eligibility for state-financed public assistance benefits).

tlement to benefits would eradicate an enormously important cultural marker: even though not constitutionally mandated, the federal entitlement to AFDC reified the generally perceived moral obligation to provide needy children and their families with the basic necessities of life.

Second, the provisions in the PRA that target behavior of AFDC recipients represent a sharp break from historical attitudes toward welfare. Even in the days when AFDC was restricted to the "worthy" poor, Congress largely intended to channel resources to those who "deserved" them—e.g., chaste widows⁴²—rather than to coerce the unworthy into mending their errant ways.⁴³ The AFDC program, as envisioned in the PRA, is no longer a means to support all needy children within their families,⁴⁴ nor is it even a retrenchment to supporting some needy children. Instead, the PRA conceives of AFDC benefits as a means to impose conditions of receipt in order to induce the parents of needy children to alter their behavior. In particular, the PRA is intended to influence personal behavior in areas of autonomy protected by the Constitution, and, perhaps, by the unconstitutional conditions doctrine.

III. Unconstitutional Conditions and the Greater-Includes-the-Lesser Doctrine

A. Unconstitutional Conditions

Unconstitutional conditions cases lie at the intersection between two jurisprudential worlds. On the one hand, the government has broad freedom to spend, tax, prohibit and regulate "[i]n the area of economics and social welfare."⁴⁵ "[S]tatutory discrimination [in

42. See Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 281 (1991) (quoting STUART BUTLER & ANNA KONDRATAS, *OUT OF THE POVERTY TRAP: A CONSERVATIVE STRATEGY FOR WELFARE REFORM* 138-39 (1987)).

43. Under the mothers' pension welfare programs, "[s]ome poor persons were thought worthy of public assistance, and others were thought unworthy because of their supposed incapacity for 'moral regeneration.'" *King v. Smith*, 392 U.S. 309, 320 (1968).

44. See 42 U.S.C. § 601 (1988).

45. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). State legislatures have such authority both under specific state constitutional provisions and under their inherent police power. Although Congress's power is ostensibly more circumscribed under the United States Constitution, in practice there is little that Congress cannot accomplish under the spending, taxing and commerce powers, see U.S. CONST. art. I, §§ 7-9, except that which is independently constitutionally proscribed. See *Buckley v. Valeo*, 424 U.S. 1, 90 (1976) (citations omitted) ("[T]he General Welfare Clause [U.S. Const. art. 1, § 8 is] . . . a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. . . . It is for

the areas of economics and social welfare] will not be set aside if any state of facts reasonably may be conceived to justify it."⁴⁶ A rational relationship to any legitimate governmental interest will suffice.⁴⁷ On the other hand, when government action draws a suspect classification or impinges upon a fundamental right, courts engage in strict scrutiny to ensure that the action is narrowly tailored to achieve a compelling governmental interest.⁴⁸ In unconstitutional conditions cases, these two jurisprudential worlds overlap and the "sharp difference"⁴⁹ between cases subject to rational relations review and those subject to heightened scrutiny becomes murky.

Unconstitutional conditions cases involve a government offer of some form of "largesse" that the government is not constitutionally obligated to provide.⁵⁰ This largesse may take the form of either a benefit or an exemption from an otherwise existing obligation. Or-

Congress to decide which expenditures will promote the general welfare[.]"); *see also* *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). Thus Congress has exercised—with the imprimatur of the Supreme Court—virtually unlimited power to legislate in any area it desires, except when it faces an independent constitutional constraint. *But cf.* *United States v. Lopez*, 115 S. Ct. 1624 (1995) (limiting the scope of the commerce power by holding that a regulated activity must substantially affect interstate commerce). In the welfare context, *Lopez* will be of little import as Congress is empowered to offer conditioned AFDC benefits under the Spending Clause.

46. *Dandridge*, 397 U.S. at 485 (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)).

47. *See, e.g., Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (holding that rational basis scrutiny permits a statutory scheme requiring a higher standard of proof for commitment of mentally ill persons than for commitment of the mentally retarded).

48. *See, e.g., Regan v. Taxation With Representation*, 461 U.S. 540, 547 (1983). The Court has employed intermediate scrutiny in cases involving distinctions based on gender, *see, e.g., Craig v. Boren*, 429 U.S. 190 (1976), and illegitimacy, *see, e.g., Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), requiring that the action be substantially related to an important governmental interest. Unconstitutional conditions case law has thus far not placed any significant reliance on the distinction between intermediate and strict scrutiny, instead focusing on whether any form of heightened scrutiny is warranted.

49. 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, 17 (1972).

50. The expanding importance of such benefits was described most notably by Charles A. Reich:

Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale. . . . Increasingly, Americans live on government largess—allocated by government on its own terms, and held by recipients subject to conditions which express "the public interest."

Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

dinarily, there are virtually no constraints on such offers of largesse. An unconstitutional conditions problem arises, however, when the government offers a benefit with a condition attached that, if imposed directly, would violate the Constitution. In particular, the problem arises when the conditioned benefit exerts pressure on a constitutionally protected choice—a realm that the government ordinarily may influence only with a narrowly tailored, compelling justification.⁵¹ The question in unconstitutional conditions cases is whether an individual's consent to receiving a gratuitous conditioned benefit can immunize what would otherwise be an unconstitutional infringement of her right to make a personal decision free from government influence. In other words, is the carrot mightier than the stick?

B. The Greater-Includes-the-Lesser Doctrine

1. The Argument

Unconstitutional conditions cases present a subset—albeit a notoriously muddled subset—of the larger juridical question of whether the greater power includes the lesser. The basic problem is this: if A is permitted to do X, and if W is less than X, when, if ever, is A forbidden from doing W? The intuitive answer seems to be never; if A can do X, why shouldn't A be able to do less than X?⁵²

51. The unconstitutional conditions doctrine has been applied not only to cases in which an individual has been offered a conditioned benefit, but also to cases in which the federal government has encroached upon the autonomy of a state by offering the state a conditioned benefit. Such cases are beyond the scope of this Article. Although these federalism cases present some of the same issues as the individual rights cases, they resolve very few of them, as the unconstitutional conditions doctrine has had virtually no success in the arena of federalism. *See, e.g.,* *South Dakota v. Dole*, 483 U.S. 203, 207-11 (1987) (upholding the conditioning of federal highway funding on a state's adoption of a minimum drinking age, given that the condition was germane to the benefit and "the financial inducement offered by Congress [was not] so coercive as to pass the point at which 'pressure turns into compulsion' ") (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

52. *See, e.g.,* *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986) (ruling that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling") (Rehnquist, J.); *see also* *Lockerty v. Phillips*, 319 U.S. 182, 187-88 (1943) (holding that congressional power to ordain and establish lower federal courts includes the lesser power of investing them with the degree of jurisdiction that Congress deems proper).

As explained by Justice Holmes—the most well-known and, with the possible exception of Justice Rehnquist, the most vigorous defender of the greater-includes-the-lesser argument—"[e]ven in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a

In the unconstitutional conditions context, the greater-includes-the-lesser argument plays out as follows: the government is not obligated to provide benefit Z, and it is constitutionally forbidden from infringing on right Y, which proscribes direct governmental interference with the choice between actions Y_0 and Y_1 . When, if ever, may the government offer benefit Z, making action Y_0 more attractive than Y_1 , i.e., offering benefit Z conditioned on the waiver of right Y? Again, the intuitive answer seems to be that the government can always make such an offer. The individual remains free to reject the conditioned benefit and end up no worse off than if the government never offered a benefit at all, something the government was, by hypothesis, entitled to do.⁵³

The intuitive force of the greater-includes-the-lesser doctrine is bolstered by its ease of translation into the paradigm of welfare economics. The Pareto principle states:

if no person in state [of affairs] A is worse off than he was in state B, and at least one person is better off in state A than he was in state B, then state A must be judged as superior to state B.⁵⁴

In unconstitutional conditions terms, the Pareto principle calls for a comparison between state A, in which an individual does not have benefit Z, but has constitutional right Y to choose freely between actions Y_0 and Y_1 , and state B, in which the government offers the individual the choice whether to accept benefit Z, which substantially influences her decision between Y_0 and Y_1 . Because Pareto analysis assumes that everyone rationally seeks to maximize her own well-being,⁵⁵ the individual can choose for herself which state she prefers. If she accepts the government's offer of condi-

certain way." *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

53. Because an individual offered a conditioned benefit can never be worse off than if she were denied the benefit entirely, Justice Holmes argued that there is a fallacy involved in talking about unconstitutional conditions. . . . I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which a state has absolute arbitrary power. . . . The consequence is the measure of the condition. When the only consequence of a breach is a result that the state may bring about directly in the first place, the condition cannot be unconstitutional

Western Union, 216 U.S. at 54 (Holmes, J., dissenting).

54. Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 9 (1989); see also Michael E. Hartmann, *Cleaning Up with Banquo's Ghost in the Dairyland?*, 27 AKRON L. REV. 445, 448-49 (1994).

55. Jeffrey Standen, *The Fallacy of Full Compensation*, 73 WASH. U. L.Q. 145, 226 (1995).

tioned benefit Z, she has decided she is better off in state B than in state A; if she rejects Z, she is no worse off than in state A.⁵⁶ The individual cannot lose; she can only win. The state of the world containing an offer of a conditioned benefit cannot be inferior to the state of the world without that offer; therefore, no conditioned benefit can be unconstitutional.⁵⁷

2. *The Counterargument*

(a) *Logic*

Scholars have long criticized the greater-includes-the-lesser argument as being logically flawed.⁵⁸ If “greater” and “lesser” are defined in anything other than tautological terms the syllogism is not logically valid.⁵⁹ In many cases, however, this does not present a particularly convincing response to the greater-includes-the-lesser argument. Legal reasoning is rarely deductively valid. If an action is “lesser” than a permissible action in some reasonable sense of the word, there is an extremely strong inductive basis for finding that the lesser action should also be permitted.⁶⁰

Moreover, the logical flaw in the greater-includes-the-lesser doctrine provides virtually no assistance in countering the argument in the unconstitutional conditions context. In this area, there is an apparently foolproof means of determining whether one power is indeed lesser than another: the individual subject to exercise of the “lesser” power—the offer of the conditioned benefit—is free to

56. It is not just that the aggregate good of the world increases in state B; the Pareto principle is specifically intended to insure that no individual is worse off in state B, including the individual who has rejected an offer of a conditioned benefit. She is simply not harmed, so the argument goes, by an offer of a conditioned benefit that makes an otherwise unwanted choice more attractive.

57. As Professor Epstein has asked, “Why does the doctrine [of unconstitutional conditions] exist at all? Why should there be any limitation at all on a system of government power that rests on the actual consent of the individuals whose rights are thereby abridged?” Epstein, *supra* note 54, at 8; see also Sullivan, *supra* note 14, at 1428 (“The Court has never satisfactorily refuted the argument that offers of conditioned benefits expand rather than contract the options of the beneficiary class, and so present beneficiaries with a free choice.”); cf. Kreimer, *supra* note 14, at 1354 (“[O]ne who is not rendered worse off by an intervention has no right to complain of it. . . . Should I wish to decline [an] offer, I can walk away without sanction. I thus have no right to complain.”).

58. See Thomas R. Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 110-11 (1916); see also Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 B.Y.U. L. REV. 227, 245-47 (1994).

59. In other words, unless “lesser” is defined in relation to “greater” to mean “the property of being a power that is permissible if the greater power is permissible,” the syllogism is not logically compelled.

60. See Kreimer, *supra* note 14, at 1310-11 & nn.54-55.

decline it in favor of the permissible “greater” power—the absence of any benefit. Even if not deductively compelled, it is quite difficult to explain why the government’s power to offer nothing does not entail the power to offer a choice between nothing and a conditioned benefit.

(b) *Pragmatism and Redefinition*

Commentators have also contended that, beyond its formal inadequacy, the greater-includes-the-lesser syllogism suffers from a “fundamental failing” that is more pragmatic.⁶¹ Professor Seth Kreimer maintains that the argument’s surface appeal depends on “ripping a problem from its historical context” by assuming “that the government could have, in fact, wielded the greater power . . . of denying the benefit entirely”⁶²

The strength of Kreimer’s argument lies not in its recognition that the government may, as a practical matter, have compelling reasons to provide a benefit even though it has the formal power not to do so. Instead, its force lies in the implicit redefinition of the question a reviewing court should decide: is an individual who is offered a conditioned benefit better off than she otherwise actually would have been, not is she better off than she otherwise theoretically could have been. The greater-includes-the-lesser argument is premised on the understanding that ground zero—state A—is no benefit, rather than the state of affairs that would have existed if the government were forbidden to place a condition on the benefit. Professor Kreimer asserts that the proper comparison is not between the conditioned benefit and no benefit at all, but between the conditioned benefit and the “position [an individual] would have enjoyed in the normal course of events.”⁶³

But what right does an individual have to complain that the government normally would have decided, at its discretion, to provide a benefit?⁶⁴ It seems more unfair if a conditioned benefit is less

61. *Id.* at 1313.

62. *Id.*

63. *Id.* Kreimer proposes employing “three variables . . . in evaluating what should be considered [a] ‘normal’ [course of events]: prediction, equality, and history.” Seth F. Kreimer, *Government “Largesse” and Constitutional Rights: Some Paths Through and Around the Swamp*, 26 SAN DIEGO L. REV. 229, 237 n.38 (1989) [hereinafter Kreimer, *Government “Largesse”*]; see also Kreimer, *supra* note 14, at 1351-78 (explaining the prediction, equality and history baselines more thoroughly).

64. “To hold that conditions coerce recipients because they make them worse off with respect to a benefit than they *ought* to be runs against the ground rules of the negative Constitution on which the unconstitutional conditions problem rests.” Sullivan, *supra* note 14, at 1450 & nn.150-51 (emphasis added) (rejecting Professor

desirable to an individual than what she would have received in the normal course of events, but unfairness is not tantamount to unconstitutionality. Something more is needed to overcome the argument that the government's power to deny a benefit includes the lesser power to offer the benefit with a condition attached.

(c) *Constitutional Rights Are Different*

Commentators have also argued that the inalienability of some constitutional rights overcomes the greater-includes-the-lesser doctrine.⁶⁵ Constitutional rights are different from other rights because constitutional rights are more often inalienable, i.e., not subject to waiver, even if the individual possessing the right does not wish to retain it.⁶⁶ If a constitutional right is inalienable, runs the argument, then an individual cannot waive the right by consenting to receipt of a conditioned benefit.

The sorts of rights at issue in unconstitutional conditions cases, however, are not inalienable, at least not in the traditional sense. Rather than constraining an individual's decisional autonomy, they protect it. In these cases, unlike ordinary cases involving inalienable rights, the Constitution does not forbid an individual from waiving her right to exercise Y_0 and instead choosing Y_1 . The concept of inalienability, however, can be understood broadly enough to encompass unconstitutional conditions cases. The constitution may proscribe governmental influence over an individual's choice between Y_0 and Y_1 even if the individual would consent to that interference.⁶⁷

Kreimer's proposed baselines as "untenable" given broad "government discretion over benefits").

65. See, e.g., Kreimer, *supra* note 14, at 1378-93.

66. Inalienable rights sometimes arise from systemic concerns that render individual consent inadequate to protect larger scale matters such as the structure of the polity itself rather than the rights of individual citizens. Voting rights, for example, are not transferable. See 42 U.S.C. § 1973i(c) (1988) (prohibiting sale of vote). Other inalienable rights arise from natural law-like conceptions that are so fundamental that they are, in a sense, explicit in the concept of ordered liberty. Consent, for example, cannot authorize involuntary servitude. See *Pollack v. Williams*, 322 U.S. 4, 24 (1944); *Bailey v. Alabama*, 219 U.S. 219, 241-45 (1911); U.S. CONST. amend. XIII. Paternalism is another frequent justification for inalienability. Even when constitutional rights are not strictly inalienable, there is generally a heightened standard for their waiver. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding that waiver of constitutional rights must be knowing, willful and voluntary).

67. Indeed, this conception is not nearly as odd as many, including Professor Sullivan, have made it out to be. Professor Sullivan correctly points out that "making decisions inalienable creates duties." Sullivan, *supra* note 14, at 1486. She further argues that "such duty-creation is inappropriate for constitutional liberties that consist of freedom *for* potential private decisions, rather than freedom *from* them. To

Arguing that a right is inalienable, however, even in this expanded sense, merely restates the problem rather than providing a reasoned explanation for prohibiting a conditioned benefit. Just because a right is labeled inalienable does not explain why the government should be prohibited from offering a benefit that alters the incentives surrounding a constitutionally protected decision but that makes an individual no worse off vis-a-vis the disfavored choice. Inalienability simply does not provide an adequate rubric for explicating unconstitutional condition cases.⁶⁸

There are, however, two relatively straightforward reasons why the greater-includes-the-lesser argument does not dispose of the unconstitutional conditions doctrine. Constitutional rights are different from rights possessed by private parties in a market context because they do more than protect the process of exchange. Constitutional rights curb the government not only from employing certain forbidden means, but also from attempting to reach certain proscribed ends.

First, this means that constitutional harm cannot be measured solely on an absolute scale in which receipt of no benefit serves as a benchmark. If the government is employing a forbidden means or attempting to achieve a forbidden end, relative harm may be constitutionally cognizable even if no individual is worse off than she would have been in the absence of governmental action. Some constitutional rights contain an implicit guarantee of governmental equality or neutrality; these rights are infringed by governmental non-neutrality, even in the absence of direct harm. In the unconstitutional conditions context, rights requiring governmental neutrality can be infringed by an attempt to influence a constitutionally protected realm of individual autonomy through the offer of a conditioned benefit. An individual's consent to receive what is, in effect, a bribe to make a governmentally favored choice does not

oblige the exercise of speech or privacy rights would misconstrue their meaning. . . . If the abortion right is deemed inalienable—for example, in order to equalize the power relationship between men and women on the whole—are pregnant women obliged to choose abortion?" *Id.* at 1487. But Professor Sullivan, perhaps intentionally, is missing the point. The right that is arguably inalienable is not exercise of Y_0 , but rather the right to choose between Y_0 and Y_1 free from government interference.

68. See *id.* at 1486-89; Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1215 (1990). Kreimer considers issues of inalienability to have broader ramifications for unconstitutional conditions cases, see Kreimer, *supra* note 14, at 1378-93, but this is largely a semantic distinction. See *id.* at 1389-90 (discussing many of the factors in Sullivan's systemic conception of unconstitutional conditions); *id.* at 1391 n.357 (mentioning an argument similar to that presented *infra*).

necessarily immunize violation of the underlying constitutional norm of neutrality.

Different constitutional rights require differing degrees of governmental neutrality.⁶⁹ According to the majority of the current Court, unequal subsidization on the basis of race is suspect in every context because there are few if any valid justifications for such classifications.⁷⁰ A statute granting \$100 to all whites would violate the Equal Protection Clause just as much as a tax of \$100 imposed on all blacks; the absence of "direct" harm is constitutionally irrelevant. Similarly, in the unconstitutional conditions context, a statute granting \$100 to every person who agreed not to criticize the government for a year would be clearly unconstitutional. As with race, unequal subsidization on the basis of religious or political viewpoint is extremely difficult to justify because strict neutrality is at the very essence of these rights to free speech and exercise. The Court has been more willing to tolerate unequal subsidization for other rights, such as privacy, when the government has a substantial competing interest such that absolute non-interference is unnecessary.⁷¹

69. The degree of neutrality required by the underlying constitutional norm is not, however, a static, abstract quality inherent in the constitutional provision; in differing factual contexts, differing degrees of governmental neutrality may also be proper. For example, conditions attached to subsistence benefits should require a greater degree of government neutrality among constitutionally protected options. *See infra* Part VA.

70. The Court recently broadened the prohibition against unequal subsidization on the basis of race to include congressionally supported subsidization of narrowly limited affirmative action programs, overruling *Metro Broadcasting Inc v. F.C.C.*, 497 U.S. 547 (1990). *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995). It remains to be seen whether Justice O'Connor's plurality opinion will recognize some form of affirmative action as a compelling interest in the absence of direct, prior discrimination.

71. *See, e.g., Maher v. Roe*, 432 U.S. 464, 474 n.8 (1977) (upholding unequal spending in the realm of procreative freedom and distinguishing cases involving underlying First Amendment rights that impose a "governmental obligation of neutrality" (quoting *Sherbert v. Verner*, 374 U.S. 398, 409 (1963))). "[S]ome constitutional rights are not rights to government neutrality at all. In some contexts, government has available to it certain justifications that allow it to be selective in decisions with respect to funding, licensing, or employment. [Based on a proper] understanding of the relevant right, . . . [i]n some cases the government has legitimate and distinctive interests that permit it to engage in conduct on the spending side that would be impermissible on the criminal side." Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 606-07 (1990) (offering as examples, public school funding, secrecy agreements for government intelligence agents, financing childbirth but not abortion, and limiting food stamps to non-striking workers). Sunstein argues correctly that even if one disagrees with a narrow understanding of these rights, and even if one thinks that some of these rights should encompass a claim to governmental

Second, there is an equally crucial, if less obvious, distinction between market rights and constitutional rights that serves to justify the unconstitutional conditions doctrine. Commentators have noted this argument in passing,⁷² but it remains greatly underemphasized in the unconstitutional conditions literature: If the government were permitted to leverage its power so as to bargain around constitutional barriers as if it were a private actor, all constitutional protections could crumble.

The rubric of greater and lesser power in the unconstitutional conditions context is grounded on the implicit assumption that rights and benefits are fungible, i.e., they can be freely exchanged so long as both parties to the exchange consent. Professor Frank Easterbrook has asked:

If people can obtain benefits from selling their rights, why should they be prevented from doing so? One aspect of the value of a right—whether a constitutional right or title to land—is that it can be sold and both parties to the bargain made better off. A right that cannot be sold is worth less than an otherwise-identical right that may be sold. Those who believe in the value of constitutional rights should endorse their exercise by sale as well as their exercise by other action.⁷³

As the unconstitutional conditions cases demonstrate, this is not always true.

The reason that the greater-includes-the-lesser argument cannot apply to constitutional rights is that the Constitution, unlike the rules that structure interactions between private parties in a market context, is not predicated on the assumption that all exchanges are equally valid.⁷⁴ An offer made by the government to Farmer Jones is fundamentally different from an offer made by Farmer Smith to Farmer Jones. Farmers Smith and Jones have equivalent, limited degrees of power in the market framework. Farmer Jones has no

neutrality, a narrow understanding is nonetheless "perfectly intelligible." *Id.* at 607-08.

72. See *infra* note 77.

73. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347 (footnotes omitted).

74. With rare exceptions, the rules controlling interactions between private parties are not concerned with the goals of the parties in entering the deal, or with the consequences that will result from the deal. These exceptions generally involve criminal acts, which in some instances society has determined should not occur whatever the preferences of the persons involved. See RESTATEMENT (SECOND) OF TORTS § 892C (1977). The market rules require only that the deal be formed under conditions of "genuine" consent. See RESTATEMENT (SECOND) OF TORTS § 892 (1977) (discussing the meaning of "consent").

cause to complain if Farmer Smith offers to trade his oranges for Farmer Jones' apples, unless Farmer Smith engages in duress, fraud, coercion or some other act that is forbidden under the rules of exchange in the market.⁷⁵

The government, however, is an entirely different kind of player than Farmer Smith, authorized by a higher order of powers and bound by a higher order of rules. It has the power not only to bargain within the rules of the market, but to change the rules themselves without Farmer Jones' permission. Even more importantly, the Constitution grants the government virtually untrammelled power to do whatever it wants when it taxes, spends or regulates in the areas of economics and social welfare.⁷⁶ Only in a few narrow areas does Farmer Jones have any appreciable constitutional protection from government action. In order for these regions of protected individual autonomy to retain any integrity, however, the Constitution must include a higher order rule: the Constitution must not only protect these areas against direct governmental interference, but also constrain the government from indirectly interfering with these constitutional rights by offering a bargain that leverages its unfettered power in the realm of economics and social welfare.⁷⁷

The government can gather wealth and power virtually without limit, so long as it is careful to avoid constitutionally protected areas when it is acting directly. The government can then trade back the excess wealth and power it has gathered in exchange for access

75. This understanding is dependent, of course, on the implicit assumption that Farmers Jones and Smith are situated within a capitalist, market economy, which is by no means a "natural" arrangement or necessary assumption, and likely not even a particularly accurate description of interactions between modern-day American farmers. For purposes of distinguishing between Farmer Smith and Uncle Sam, however, this idealized conception of gentlemen farmers will suffice.

76. See *supra*, note 45 and accompanying text.

77. Commentators have noted this problem in passing, though they have failed to appreciate its centrality to the unconstitutional conditions doctrine. See, e.g., Epstein, *supra* note 55 at 45-46 (identifying "[t]he danger that the Congress will leverage its broad spending powers to subvert" constitutional guarantees, and arguing that "[t]he power of discretion [would] allow[] the federal government to redistribute revenues, raised by taxes across the nation," from those that wished to assert a disfavored constitutional right to those who did not). Sullivan also warns of "[t]he danger . . . [that a governmental] Leviathan, swollen with tax dollars, will buy up people's liberty. Moved . . . by the desire to expand the sphere of state power by exerting moral and social control that it could not constitutionally impose directly, the state will buy people out to control their decisionmaking." Sullivan, *supra* note 14, at 1494 (citing Robert Reich, *The New Property*, 73 *YALE L.J.* 733 (1964)). See also Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 *SAN DIEGO L. REV.* 289, 293 (1989).

to those constitutionally protected areas. As the Court warned in *Nollan v. California Coastal Commission*,⁷⁸ the Constitution forbids the “extortion” that would result from “a regime in which . . . leveraging of the police power is allowed [to] produce stringent . . . regulations which the State then waives to accomplish other purposes” in constitutionally protected areas.⁷⁹

The crucial point is that without the unconstitutional conditions doctrine there is virtually no constraint on the government’s ability to garner extra bargaining chips from the arena in which it has sweeping power—economics and social welfare—and sneak those chips over to the arena of constitutionally protected rights. Without the unconstitutional conditions doctrine requiring careful scrutiny of conditioned benefits, the government would always be able to bargain for what it wants, even in areas where the Constitution supposedly constrains its actions.

This ability to leverage power can most obviously be exercised through taxing and spending. The government can dip into the revenues it has raised through taxation and use some of the “excess” wealth to induce the populace to alter its behavior in a constitutionally protected area by subsidizing a governmentally favored choice. Similarly, the government can take a pre-existing benefit, e.g., welfare, and impose a condition on that benefit which is intended to influence an individual’s constitutionally protected choice. The government can also attempt to influence constitutionally protected decisions somewhat more subtly by offering exemptions from existing or newly imposed regulation or taxation. Depending on the nature of the benefit and the underlying constitutional right, such incentive structures may present exactly the same constitutional concerns as direct governmental action that intrudes on a protected choice.⁸⁰

78. 483 U.S. 825 (1987).

79. *Id.* at 837 & n.5.

80. A concrete example may clarify the problem. Suppose that apple growing is constitutionally protected but orange growing is not, i.e., that apple-growing regulations face strict scrutiny and orange-growing regulations rational relations review. Through the offer of a conditioned benefit, the government can use its power to regulate oranges as leverage to regulate apples. For instance, the government could forbid Farmer Jones from growing oranges unless he also grows Granny Smith apples. If Farmer Jones accepts the benefit of being permitted to grow oranges, he will be forced to consent to governmental interference in his apple growing, something the government could not achieve through direct regulation. With the offer of a conditioned benefit, the government can bargain around what is intended to be a systemic constraint on its ability to “foist orthodoxy on the unwilling.” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (quoting *Califano v. Jobst*, 434 U.S. 47, 54 n.11 (1977)).

IV. Cases and Commentary on the Unconstitutional Conditions Doctrine: A Veil of Tiers

A. Cases

1. *The Historical Development*

Until the early part of this century, courts relied heavily on the formal principle that the power to deny a benefit entirely logically entails the power to offer the benefit with any condition attached.⁸¹ As a result, government largesse was subject to virtually no constitutional limitations. At the turn of the century, Justice Holmes was the most notable champion of the argument that the greater power includes the lesser. In an opinion he wrote while on the Supreme Judicial Court of Massachusetts, Holmes held that a policeman had waived his First Amendment rights by consenting to an employment contract with the government. "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁸² Similarly, the United States Supreme Court upheld an ordinance that required a permit from the mayor in order to speak in a municipal park: "The [municipality's] right to absolutely exclude all right to use [the park] necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."⁸³

The unconstitutional conditions doctrine first developed at the turn of the century in response to "attempts by state populists to contain emerging corporate power."⁸⁴ Initially, the Supreme Court upheld many such populist measures, permitting states to allow foreign corporations the benefit of entrance into a state conditioned upon waiver of rights enjoyed by local corporations.⁸⁵ During the *Lochner* era,⁸⁶ the Court "reversed course,"⁸⁷ inquiring closely into states' offers of conditioned benefits that pressured for-

81. See *supra* part III.B.

82. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

83. *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897) *aff'g* *Commonwealth v. Davis*, 39 N.E. 113 (Mass. 1895) (Holmes, J.).

84. Kreimer, *supra* note 14, at 1303-04.

85. See *Sullivan*, *supra* note 14, at 1429-30. The cases were by no means consistent, however. See Kreimer, *supra* note 14, at 1304 n.30.

86. See *Lochner v. New York*, 198 U.S. 45 (1905) (finding unconstitutional a state law imposing a sixty-hour limit on bakers' work weeks and ushering in three decades of careful scrutiny and frequent invalidation of legislation interfering with economic rights protected by the common law).

87. *Sullivan*, *supra* note 14, at 1429.

eign corporations' property rights.⁸⁸ It was in this context that the Court articulated one of the strongest defenses of the unconstitutional conditions doctrine:

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.⁸⁹

After the collapse of the *Lochner* era in the mid-1930s,⁹⁰ the unconstitutional conditions doctrine laid largely dormant for two decades. Then, in a trio of cases authored by Justice Brennan, the Court resurrected the unconstitutional conditions doctrine with a different political tilt, this time slanted toward protecting individual rights and liberties against government encroachment.⁹¹ In the first of these cases, *Speiser v. Randall*,⁹² the Court struck down a California statute that granted a tax exemption only to those veterans who signed a loyalty oath to the state and federal governments:

88. Sunstein, *supra* note 71, at 596-97. "In the early days of the regulatory state, legislation that is now generally taken as constitutionally uncontroversial—for example, minimum wage and maximum hour legislation—was subject to attack under the due process clause The common law system began to be seen not as a natural or impartial order, but as a set of collective choices. . . . At its inception, the unconstitutional conditions doctrine was [intended] to protect common law rights in the face of threats to those rights created by the rise of the regulatory state." *Id.*

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

90. *See, e.g., West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage legislation); *see generally* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-7 (2d ed. 1988).

91. *See Sullivan, supra* note 14, at 1505 ("The doctrine of unconstitutional conditions was invented by a laissez-faire Court bent on dismantling progressive legislation that reduced the liberty of corporations, but then perpetuated by a Court seeking strong protection for personal liberties.").

92. 357 U.S. 513 (1958).

To deny [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech [and] necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.⁹³

The coercive, penalizing nature of the statute caused the Court to treat the conditioned benefit as if the State had imposed a direct proscription on speech.⁹⁴

In *Sherbert v. Verner*,⁹⁵ the Court invalidated a state's denial of unemployment benefits to a woman who was fired for refusing to work on Saturday in contravention of her religious principles.⁹⁶ The Court held that "[g]overnmental imposition of such a choice [between government benefits and religious practices] puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."⁹⁷ Finally, in *Shapiro v. Thompson*,⁹⁸ the Court held unconstitutional state statutes that denied AFDC benefits to those who had moved into the state within the previous year.⁹⁹ It ruled that the migrants "were exercising a constitutional right [to travel], 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."¹⁰⁰ These three cases provided full constitutional protection to conditioned benefits, finding the indirect restraints on constitutional rights imposed by these conditions no different, for purposes of judicial review, than direct state interference.

In the last twenty-five years, the Court has retreated from this broad approach to unconstitutional conditions cases, often finding that offers of conditioned benefits differ from direct proscriptions and thus warrant only rational relations review. The Court articulated this perspective most conspicuously in the abortion funding

93. *Id.* at 518-19 (finding the statute unconstitutional on procedural grounds).

94. *Id.* at 518 ("[The] deterrent effect [of requiring a signed oath] is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech.")

95. 374 U.S. 398 (1963).

96. *Id.* at 409-10.

97. *Id.* at 404.

98. 394 U.S. 618 (1969).

99. *Id.* at 638.

100. *Id.* at 634.

cases.¹⁰¹ In these cases, the Court held that even though there is “a constitutionally protected interest ‘in making certain kinds of important decisions’ free from governmental compulsion, . . . [that right] implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.”¹⁰² The Court held that the government, in refusing to provide benefits for abortion, had not *interfered* with a constitutional right, either directly or indirectly; it had merely declined to *subsidize* the exercise of a particular constitutionally protected choice:

[A] woman’s freedom of choice [does not] carr[y] with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman’s exercise of her freedom of choice, it need not remove those not of its own creation. . . . Although Congress has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, [this] refusal to subsidize certain protected conduct . . . cannot be equated with the imposition of a ‘penalty’ on that activity.¹⁰³

The Court employed the same line of reasoning in *Rust v. Sullivan*¹⁰⁴ to uphold a prohibition on Title X funding to reproductive health clinics “where abortion is a method of family planning.”¹⁰⁵ The Court held that the regulations did not violate the Constitution because “the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. . . . The condition that federal funds will be used only to further the purposes of a grant does not

101. *Rust v. Sullivan*, 500 U.S. 173, 196-98 (1991); *Harris v. McRae*, 448 U.S. 297, 315-18 (1980); *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980); *Maher v. Roe*, 432 U.S. 464, 479 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

102. *Maher*, 432 U.S. at 473-74 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 & nn. 24, 26 (1977)). Thus, in *Maher* the Court upheld a state regulation limiting Medicaid benefits for abortions to those that were medically necessary. *Maher*, 432 U.S. at 480. In *McRae*, the Court upheld even more restrictive Congressional appropriations legislation providing Medicaid funding for abortions only when the life of the mother was endangered. *McRae*, 448 U.S. at 325.

103. *McRae*, 448 U.S. at 316-17 & n.19 (distinguishing *Maher* from *Sherbert v. Verner*, 374 U.S. 398 (1963)).

104. 500 U.S. 173 (1991).

105. *Id.* at 184.

violate constitutional rights.”¹⁰⁶ The Court has applied analogous reasoning in other recent cases.¹⁰⁷

Finally, in evaluating unconstitutional conditions cases under the Takings Clause of the Fifth Amendment, the Court has recently applied a much more stringent test, reminiscent of its solicitude for property rights during the *Lochner* era. In reviewing the issuance of building permits conditioned on a private property owner ceding a property right to the state, the Court required that there be a “rough proportionality” between the condition and the “legitimate state interest” in denying the permit in the absence of the condition.¹⁰⁸

Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.¹⁰⁹

The Court has offered no explanation why governmental pressure on property rights requires more exacting review than similar pressure on liberty rights.¹¹⁰

106. *Id.* at 196, 198.

107. *See, e.g.,* *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852-53 (1984) (upholding grant of federal student loan conditioned on student’s willingness to certify registration for the draft, notwithstanding Fifth Amendment privilege against self-incrimination); *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976) (upholding public financing of political campaign conditioned on candidate’s consenting to otherwise unconstitutional limitation on private campaign expenditures).

108. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2319 (1994) (quoting *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987)).

109. *Id.* at 2317.

110. Perhaps the closest thing to an explanation is the Court’s bald statement in *Nollan* that “the right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘governmental benefit.’” *Nollan*, 483 U.S. at 833 n.2. If a governmental benefit means something the government is not constitutionally compelled to do, as it is understood in all other unconstitutional conditions cases, then the right to build whatever one pleases on one’s property, whatever the consequences to the public good, cannot remotely be described as anything but a governmental benefit. *Cf. Sunstein, supra* note 71, at 600 n.28 (“The takings clause is . . . anti-redistributive The notion of ‘redistribution’ itself depends on a theory of antecedent entitlements. If existing distributions are themselves without prepolitical status, and if they are questionable from the standpoint of justice, efforts to change them will not appear to be ‘redistribution’ at all.”).

2. *Two Models*

Throughout its development, unconstitutional conditions case law has been marked by shallow analysis and deep contradiction. Almost invariably, courts have invoked one of two inconsistent, outcome-dispositive models without adequately explaining why that model was applicable. Cases upholding a conditioned benefit have relied on the existence of a greater power,¹¹¹ implicit consent,¹¹² a mere refusal to subsidize,¹¹³ practical interference but no coercion,¹¹⁴ or incidental rather than direct and substantial effect.¹¹⁵ Cases finding a conditioned benefit unconstitutional have found the condition to be a coercive penalty¹¹⁶ or burden,¹¹⁷ to in-

111. *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345-46 (1988) (stating that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling").

112. *Wyman v. James*, 400 U.S. 309, 317-18 (1971) (arguing that by receiving AFDC, recipients implicitly consented to the search of their homes; such consent may be revoked, but at the price of AFDC eligibility) (dictum).

113. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) (upholding legislation denying tax exemption for non-profit organizations, other than veterans' groups, engaged in lobbying); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam) (finding no infringement of right to travel from denying Supplemental Security Income to those who move to Puerto Rico given that residents of Puerto Rico have no right to such income). The same reasoning was also dispositive in the abortion funding cases. See *supra* note 99.

114. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988) (upholding road construction and timber harvesting on land used by Native Americans for religious rituals because the actions, though interfering with spiritual activities, would not coerce the Native Americans into violating their religious beliefs).

115. *Lyng v. Automobile Workers*, 485 U.S. 360, 365-66 (1988) (upholding statute selectively denying food stamps to households of striking workers because it did not directly and substantially interfere with family living arrangements); *Bowen v. Gilliard*, 483 U.S. 587, 601-02 & n.17 (1987) (upholding amendments to AFDC that potentially reduced benefits to families receiving child support for children included in the family unit because the design and direct effect of the amendments did not intrude on choices concerning family living arrangements); *Lyng v. Castillo*, 477 U.S. 635, 638-39 (1986) (upholding statute defining household for purposes of food stamp eligibility because it did not directly or substantially interfere with family living arrangements); *Califano v. Boles*, 443 U.S. 282, 294 (1979) (upholding provision of social security benefits to widows and divorced wives, but not to unwed mothers, under rational relations test because of absence of substantial impact on illegitimate children); *Califano v. Aznavorian*, 439 U.S. 170, 177 (1978) (upholding denial of Supplemental Security Income to beneficiary spending entire month outside of the United States, relying on lesser interest in international than interstate travel); *Califano v. Jobst*, 434 U.S. 47, 54 (1977) (upholding social security eligibility standard under rational relation review, notwithstanding potential unintended and incidental deterrence of marriage).

116. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (striking down state statute that criminalized covering-up of license plate motto as an improper "penalty" because imposing such "a condition [upon] driving an automobile" violated the First Amend-

volve a suspect classification and greater than incidental effect,¹¹⁸ to be irrational,¹¹⁹ to lack a rough proportionality to the benefit,¹²⁰ or to pressure not only government-funded but also private actions.¹²¹

ment); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 258 (1974) (“[A] classification which ‘operates to *penalize* those persons . . . who have exercised their constitutional right of interstate migration,’ must be justified by a compelling state interest.”) (emphasis added in original) (alteration in original) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970) (separate opinion of Brennan, White, and Marshall, JJ.)); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (“[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, [the government] may not deny a benefit to a person on a basis that it infringes his constitutionally protected interests [because] his exercise of those freedoms would in effect be penalized and inhibited.”); *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972) (striking down durational residence requirements for voting because the law impermissibly conditioned and penalized the right to travel by imposing prohibitions on only those persons who had recently exercised that right); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (invalidating statutory provisions denying welfare assistance to state residents of less than a year because the classification impermissibly penalized the right to travel); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958) (overturning veterans’ tax exemption requiring loyalty oath because denying an “exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech”).

117. *Arkansas Writers’ Project Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (reviewing and striking down state sales tax exemption for certain specialty journals under strict scrutiny because “a discriminatory tax on the press burdens rights protected by the First Amendment”); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (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 (1961)); see also *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144-45 (1987) (same); *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981) (same).

118. *Moore v. City of East Cleveland*, 431 U.S. 494, 498-99 (1977) (plurality) (striking down housing ordinance limiting occupancy of a dwelling unit to members of a single family because the governmental interests advanced were not sufficient to overcome the rule’s direct intrusion on choices concerning family living arrangements).

119. *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (overturning as irrational denial of food stamps to households containing unrelated persons because that limitation was totally unrelated to the purposes of the food stamp legislation).

120. *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2319 (1994) (striking down condition placed on development of commercial property because the city failed to demonstrate that the condition would further its stated goals); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987) (striking down condition placed on property owners’ rebuilding permit because it failed to substantially further the governmental interest that justified denial of the permit).

121. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (overturning condition placed on federal funding that public broadcast stations not engage in editorializing because “[t]he station has no way of limiting the use of limiting the use of all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity”).

What all of these cases share is a binary approach to analyzing conditioned benefits. Some conditioned benefits are treated as if they are as constitutionally problematic as direct interference with a right. These conditions are subject to heightened scrutiny and, as a practical matter, are always invalidated.¹²² Other conditioned benefits are treated as if constitutional concerns are completely absent. These conditions are almost invariably upheld under the rational relationship test applied to economic and social welfare legislation.¹²³

The vital construct missing from these cases is a coherent fault line. For instance, the cases and commentary are completely inconsistent about whether it is the purpose or effect of a conditioned benefit that triggers heightened scrutiny.¹²⁴ The cases do *implicitly* sort conditioned benefits into two crude categories. The rough benchmark is whether the person offered a conditioned benefit has been unfairly made worse off by the offer.¹²⁵ If the conditioned

122. See Baker, *supra* note 68, at 1202-03; Gary Feinerman, Note, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369, 1400 (1991).

123. See Baker, *supra* note 68, at 1202-03. One of the very few cases with a different result is *Moreno*, 413 U.S. 528, which struck down a completely non-germane condition placed on food stamps as irrational. See *supra* note 119; cf. TRIBE, *supra* note 90, § 15-17 n.15 (explicating *Moreno's* limited precedential force).

124. See, e.g., Baker, *supra* note 68, at 1193 (discussing disagreement among commentators as to whether unconstitutional conditions cases should be analyzed for wrongful intent or impact, and advocating for the latter); Kreimer, *supra* note 14, at 1333-40 (arguing that purpose analysis is not workable); *id.* at 1340-47 (advocating for modified version of impact analysis); Sullivan, *supra* note 14, at 1499-1500 (arguing for heightened scrutiny as to any "benefit condition whose primary purpose or effect" is to alter a constitutionally protected choice).

The correct answer is that the relevant inquiry may turn on intent or effect, and very likely encompasses both. As a threshold matter, the analysis must include whatever considerations are relevant to the underlying constitutional right. Moreover, both intent and impact are almost always relevant to a complete analysis of an unconstitutional conditions case, even when that would not be true in analyzing a more direct infringement of the same constitutional provision. Intent is almost always relevant to determining whether the government is imposing a condition solely in order to pressure a constitutionally protected choice. See discussion of germaneness *infra* part IVB3. Effect is also almost always relevant because it is crucial in unconstitutional conditions cases to consider the impact of the denial of the benefit. See discussion *infra* part IVB1.

125. See Patricia M. Wald, *Government Benefits: A New Look at an Old Gifhorse*, 65 N.Y.U. L. REV. 247 (1990). Judge Wald correctly criticizes the Court for subjecting many unconstitutional conditions cases to rational relations review under a simplistic understanding of harm. The Court improperly "asserts that no constitutional right is implicated at all unless the government acts affirmatively to place an individual in a position worse than he would have occupied if government had stayed out of the picture entirely." *Id.* at 256.

benefit imposes a burden, assesses a penalty or erects an obstacle—i.e., if, overall, it makes the person worse off than she would or should otherwise be—and if it influences a constitutionally protected area of decisional autonomy, then the indirectness of the harm does not insulate the condition from strict judicial scrutiny. On the other hand, if the offer of a conditioned benefit does not harm the person because it increases her options, has an incidental and unintended effect on a constitutional right, or merely subsidizes a governmentally favored alternative—i.e., if the person is overall no worse off than she would otherwise be—the harm is found not only to be indirect but nonexistent for purposes of judicial review.¹²⁶

The engine that drives this binary approach is the categorical mode of constitutional review.¹²⁷ Since the New Deal, courts have consistently sorted constitutional cases into distinct, formal tiers of minimal and heightened scrutiny.¹²⁸ Despite opposition on the Court—most notably in a series of dissents authored by Justice Marshall¹²⁹—and in scholarly commen-

126. This criterion, for instance, underlies the distinction in the case law upholding the validity of conditions placed on funds that the government itself has offered, but overturning conditions placed on benefits that apply to recipients' non-government funded activity as well. See, e.g., *Rust v. Sullivan*, 500 U.S. 173, 196-99 & n.5 (1991) (upholding condition because it did not "effectively prohibit[] the recipient from engaging in the protected conduct outside the scope of the federally funded program"); *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (striking down partial federal funding of public broadcasting stations conditioned on station's agreeing not to editorialize); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding denial of tax exemption for constitutionally protected lobbying activities because non-lobbying activities could be segregated and thus remain tax exempt).

127. In unconstitutional conditions cases, both mid-level and strict scrutiny are treated as sharply different from rational relations review. See *supra* notes 46-49 and accompanying text.

128. "[T]he Court ties itself to the twin masts of strict scrutiny and rationality review in order to resist (or appear to resist) the siren song of the sliding scale. Bipolar two-tier review did penance for the appearance of naked value choices that had brought the Court into disrepute in the *Lochner* era." Kathleen M. Sullivan, *The Supreme Court 1991 Term, Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992); see generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (arguing that modern constitutional jurisprudence applies too much balancing).

129. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting) (arguing that equal protection analysis should reject distinct tiers of review). "Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." *Id.*; see generally Gay Gellhorn, *Justice Thurgood Marshall's Jurisprudence of Equal Protection of the Laws and the Poor*, 26 ARIZ. ST. L.J. 429 (1994).

tary,¹³⁰ the two-tiered approach remains firmly entrenched. Unconstitutional conditions cases have thus been analyzed under the same rubric as other constitutional cases in which the initial sorting decision as to standard of review is virtually outcome-dispositive. This judicial approach is particularly inappropriate in the unconstitutional conditions context, in which a formal description of the nature of a conditioned benefit is almost entirely unhelpful in determining whether it should be constitutionally proscribed. Furthermore, the Court has been unable to articulate a coherent, formal sorting principle to harmonize its seemingly intuitive and inconsistent approaches to unconstitutional conditions cases.¹³¹

B. Commentary: Possible Solutions

There are two potential solutions to the problematic inconsistency and incoherence in the case law: either find a principle to ground a coherent unconstitutional conditions doctrine, or abandon the attempt. Commentators have urged both approaches. The great majority have chosen the former route, adhering to a two-tiered method of analysis but proposing what they consider to be a more consistent and rigorous approach to sorting cases into either heightened scrutiny or rational relations review.

1. Coercion, Threats, Offers and Baselines

A number of scholars have attempted to identify those conditioned benefits that merit heightened scrutiny by refining the Court's rough approach to unconstitutional conditions cases. These commentators have drawn on a philosophical analysis of coercion to distinguish between constitutionally suspect threats and constitutionally permissible offers. The most well-known of these

130. See, e.g., Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 182 (1984) (arguing that multi-tier judicial review is "an overly rigid structure that retards constitutional analysis by diverting thought away from the merits of cases and by constricting thought through a priori categories"). Although Shaman's critique is powerful, his prognostication is suspect; multi-tier judicial review has demonstrated little sign of breakdown in the past decade.

131. On reflection, this is not particularly surprising because a formally consistent sorting principle as to scope of review in unconstitutional conditions cases would often produce clearly incorrect results. Given the Court's adherence to traditional two-tiered review, it is apparent why the Court has, *sub silentio*, folded its understanding of harm into its description of the formal nature of the conditioned benefit. That is the only way to arrive at the result the Court would reach if it balanced the constitutional infringement against the government interest supporting the condition, in light of the benefit at issue, as I believe the Court should be and indeed already is implicitly doing.

theories is propounded by Professor Kreimer, who contends that "[t]hreats are allocations that make a citizen worse off than she otherwise would be because of her exercise of a constitutional right. Offers merely expand her range of options, leaving the citizen better off."¹³² Threats receive heightened scrutiny; offers are subject to rational relations review. According to Professor Kreimer, history, equality and prediction provide the proper baselines against which to measure whether a citizen is better or worse off after the imposition of a conditioned benefit.¹³³

The problem with this approach is not, as Professor Sullivan and others have argued, that it is hopelessly indeterminate and dependent on an underlying normative view of what the world is or should normally be like.¹³⁴ It is no more indeterminate or normative than much of constitutional analysis. The problem with the threat/offers distinction, even as informed by Professor Kreimer's three baselines, is that it is not sufficiently sensitive to the varying concerns relevant to the particular constitutional right and benefit at issue, thus providing only part of the relevant analysis in each case.¹³⁵ In addition, there is no reason why the threat/offers distinction should serve as a sorting mechanism for scope of review purposes rather than as a component of the actual analysis of the constitutionality of a conditioned benefit.

There is, however, a vital insight that should be derived from the threat/offers distinction and from Professor Kreimer's baselines,

132. Kreimer, *supra* note 14, at 1300-01.

133. In reviewing a conditioned benefit, "once it is clear that a constitutional liberty has been infringed or that a right should be treated as inalienable, there is no reason to apply a lower standard of justification to the prima facie unconstitutional governmental action than would be applied to a more traditional violation." Kreimer, *supra* note 14, at 1393; *see also id.* at 1352.

Another proponent of the threat/offers distinction, Professor Simons, suggests that the government threatens and unfairly exploits its citizens by exacting contributions from them without either offering a reciprocal benefit or demonstrating that they have contributed to the problem the exaction is intended to remedy. Kenneth W. Simons, *Offers, Threats and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 309-10 (1989). He argues that heightened scrutiny is warranted for such threats, except when the threatened condition is germane to the purpose of the benefit; such "impure threats," along with offers, should receive minimal scrutiny. *Id.* at 324-25. Sullivan also discusses various normative conceptions of threats, offers, and coercion, ultimately rejecting this approach. *See Sullivan, supra* note 14, at 1442-56 (citing, *inter alia*, Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440 (S. Morgenbesser et al. eds., 1969)).

134. *See Sullivan, supra* note 14, at 1450 & nn.150-51.

135. Kreimer attempts to rectify this problem by appending a discussion of inalienability as providing, in certain circumstances, further reason to subject a conditioned benefit to heightened scrutiny. *See Kreimer, supra* note 14, at 1378-95.

namely that the government should not be free to bargain for individuals' constitutional rights on the open market. On the other hand, there should not be a rigid rule precluding the government from offering a package deal that decreases an individual's well-being on a constitutional axis, but more than makes up for that harm by increasing an individual's well-being on a different axis. If such a package deal is helpful to the individual rather than harmful, there is good reason to review the condition less rigorously than if the constitutional infringement were imposed more directly and without any concomitant benefit. The possibility that a conditioned benefit will help a recipient overall, though harming her in a constitutionally protected area, provides "a core and unavoidable insight: Funding, regulating, and licensing decisions are indeed sometimes different from [direct interference such as fines or] criminal punishment."¹³⁶

However, even if an individual would willingly accept a package deal as helpful, stringent review may nonetheless still be appropriate. The constitutional right at issue may require strict equality on the rights axis, and thus forbid the government offering a tradeoff between the rights and benefits axes, even if a recipient would consent to that bargain.

2. *Systemic Redistribution of Rights*

Professor Kathleen Sullivan proposes an alternative approach to unconstitutional conditions cases that also adheres to a two-tiered standard of review. She contends that

[u]nconstitutional conditions, no less than "direct" infringements, can . . . [1] alter the balance of power between government and rightholders, . . . [2] skew the distribution of constitutional rights *among* rightholders [when the] government has an obligation of evenhandedness or neutrality with regard to [that] right, [and] [3] can create an undesirable caste hierarchy in the enjoyment of constitutional rights. . . . An appropriate test would subject to strict review any government benefit condition whose primary purpose or effect is to pressure recipients to alter a choice about exercise of a preferred constitutional liberty in a direction favored by government. Put another way, it would require strict review any time a government benefit condition redistribute[s], or [i]s intended to redistribute, power to

136. Sunstein, *supra* note 71, at 608.

government or among rightholders in violation of any of the three distributive concerns discussed above¹³⁷

Professor Sullivan has explained three pivotal ways in which conditioned benefits can be constitutionally problematic.¹³⁸ She has not, however, explicated how her account is particularly helpful in actually analyzing unconstitutional conditions cases. When she purports to apply her analysis, she just sensitively and sensibly weighs the governmental interest against the constitutional infringement.¹³⁹ Because her systemic account of unconstitutional conditions only serves to trigger heightened scrutiny, Professor Sullivan manages to avoid explicitly acknowledging that actual analysis of unconstitutional conditions cases can only occur within the framework of the particular constitutional provision and benefit at issue.¹⁴⁰

Moreover, although superficially adhering to two-tiered review, she implicitly abandons that paradigm by requiring that every questionable case undergo heightened scrutiny. Professor Sullivan does not, however, present a convincing argument that all conditioned benefits pressuring constitutionally protected choices should be subjected to traditional heightened scrutiny review. There are systemic reasons why at least some offers of conditioned benefits are less problematic than direct infringements of the same constitutional right; those systemic concerns should be reflected in the scope of review.¹⁴¹ Finally, Professor Sullivan fails to acknowledge

137. Sullivan, *supra*, note 14 at 1490, 1499-1500. Lynn Baker's proposed totalizing paradigm can be understood as a hybrid requiring the presence of both Sullivan's second and third concerns, and perhaps the first, in order to invalidate a conditioned benefit. Baker argues that the only coherent way to explain unconstitutional conditions cases involving public benefits is to "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 engage in that constitutionally protected activity than similarly situated persons earning a subsistence income." Baker, *supra* note 68, at 1217.

138. Professor Sullivan's three categories can be mapped onto the concerns discussed *supra* Part III.B.2.c and *infra* at Part V.A. Her first category guards against government leverage of power in non-constitutional areas into power over constitutional rights. Her second category addresses constitutional rights that contain a strict requirement of government neutrality or equality. Her third category focuses on the special case of placing a condition on subsistence benefits that are extraordinarily difficult for the indigent to refuse.

139. See Sullivan, *supra* note 14, at 1499-1505.

140. Sullivan does acknowledge that the second and third of her systemic concerns are only relevant where the underlying "constitutional rights entail such obligations . . ." *Id.* at 1496.

141. There is a significant leap from "recogniz[ing] that government *can* as readily aggrandize excessive power or maldistribute power among rightholders through selec-

the importance of germaneness in unconstitutional conditions cases.¹⁴²

3. *Germaneness*

Other scholars, and a few cases, have focused on the germaneness of the condition to the benefit as the proper benchmark against which conditioned benefits should be measured.¹⁴³ Germaneness requires that a condition placed on a benefit be reasonably necessary in order for the government to offer the benefit at all; it demands that the offer of a conditioned benefit be a lesser power than the denial of the benefit in a strict sense of the term. For instance, germaneness explains why it is proper for the Central Intelligence Agency to condition employment on waiver of some First Amendment rights. Willingness to enter into and abide by some form of secrecy agreement is likely necessary for the government to be willing to offer the employment opportunity.¹⁴⁴

tive subsidization as through conditions that more obviously restrict liberty," *id.* at 1499 (emphasis added), to in effect insisting that there is never any reason for a court to review conditioned benefits differently from direct interference. *Id.* Indeed, one commentator has criticized Sullivan for this proposition along the very same lines that Sullivan criticizes Kreimer's argument—for failing to acknowledge the crucial importance of the negative Constitution. See Feinerman, *supra* note 122, at 1399.

142. See Sullivan, *supra* note 14, at 1476 (maintaining that "germaneness theories fail to resolve unconstitutional conditions problems" because "germaneness has more to do with disciplining governmental activity according to some independent norm of appropriate legislative process than it does with protecting constitutional rights").

143. See Simons, *supra* note 133 (arguing that non-germane threats should be subject to heightened scrutiny); Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935) (arguing that germaneness is an essential component of unconstitutional conditions analysis); see also Kreimer, *supra* note 14, at 1374-75 (explicating how germaneness is relevant to analysis under each of his three proposed baselines).

The takings cases have imposed a relatively stringent germaneness obligation, requiring that there be an essential nexus, and a rough proportionality in degree, between the reason the government may legitimately deny a benefit and the reason the government wishes to offer the benefit with the condition attached. See *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2319 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); see also *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (overturning non-germane limitation on provision of food stamps to households containing unrelated members).

144. See *Snepp v. United States*, 444 U.S. 507, 516 (1980) (assuming that government could constitutionally require intelligence officer to receive specific prior approval before publishing any information related to the Agency). Germaneness also helps to explain why some conditioned benefits are constitutionally unproblematic, notwithstanding the pressure on a choice constitutionally protected from direct infringement. The classic example is government funding of certain artists and not others—expressionists, say, but not impressionists. One reason this selective funding is not problematic is that the government's basis for funding expressionism and not impressionism is the same as its basis for funding art in the first place: it thinks that

The germaneness approach is a promising threshold sorting mechanism for determining which conditioned benefits merit heightened scrutiny. The fundamental purpose for requiring germaneness is guarding against the leveraging concern discussed above in Part III.¹⁴⁵ The germaneness inquiry smokes out those conditions that the government imposes simply for the purpose of pressuring a constitutional right. If the justification for a condition must be linked to and proportional to the reason for denying the benefit in the absence of the condition, the government is precluded from leveraging its power over economics and social welfare into constitutionally protected areas. Germaneness distinguishes conditions that are appended to benefits simply in order to pressure constitutional rights from conditions that are imposed for a purpose connected to the provision of the benefit but that incidentally alter the framework of a constitutionally protected decision.¹⁴⁶

Germaneness, though, is not a completely satisfactory measure for determining the proper level of scrutiny for unconstitutional conditions cases. While it protects against the imposition of conditions intended to pressure constitutionally protected choices, it fails to guard against some germane conditions that are nonetheless illegitimate. Most crucially, the germaneness inquiry does not take into account the degree of governmental neutrality or equality required by the underlying constitutional right. The AFDC program provides an excellent example of the inadequacy of germaneness as a sorting mechanism. One of the purposes of providing AFDC is "to help . . . parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection."¹⁴⁷ Even with empirical support that economic conditions are better in

some art is good in some way and thus deserving of funding. The government would likely not be willing to fund art at all if it could not limit its funds to art it considered worthwhile. See Kreimer, *supra* note 14, at 1374-75. On the other side of the coin, a willingness to fund only art painted by Democrats would not be a germane condition, and thus should be considered no differently than a direct infringement of Republicans' right to create art.

145. See *supra* notes 73-80 and accompanying text.

146. The Court has often distinguished between conditions that " 'directly and substantially' interfere" with a constitutional right, and are therefore subject to strict scrutiny, from conditions that unintentionally or incidentally pressure a constitutionally protected choice as a consequence of a governmental purpose germane to the underlying benefit program. See *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (citing *Zablocki v. Redhail*, 434 U.S. 374, 386-87 & n.12 (1978); *Califano v. Jobst*, 434 U.S. 47, 58 (1977)).

147. 42 U.S.C. § 601 (1988 & Supp. V 1993).

Texas than in California, the government could not condition receipt of AFDC benefits on moving from California to Texas. Though the condition (moving to a state with greater economic opportunity) is related to the purpose behind the benefit (fostering self-support and personal independence), the condition is nonetheless unconstitutional.¹⁴⁸ Thus, if every germane condition were only subjected to rational relations review, some conditions would improperly pass constitutional muster. Germaneness, therefore, cannot be used as a sorting criterion to immunize certain conditions from heightened scrutiny.

The absence of a germane purpose, however, is a very strong indication that a condition should be reviewed as if it were a direct rather than an indirect infringement of a constitutional right. A non-germane condition attached to a benefit almost always represents a governmental attempt to use largesse as leverage for influence over a constitutional right. If a non-germane condition that pressures a constitutionally protected choice is tacked onto a benefit, there is no reason why it should be reviewed differently than if that pressure were applied independently of any benefit.¹⁴⁹

On occasion, however, a non-germane and therefore intentional effort to alter a constitutionally protected choice may not be as constitutionally problematic as a direct infringement of that right. Depending on the nature of the constitutional right and the benefit at issue, it may be proper to permit the government to offer a spoonful of sugar to help the medicine go down. If an individual has no reasonable expectation of receiving a benefit in the normal course of events, and if the right at issue is relatively unconcerned with inequality, then a non-germane condition that burdens a constitutional right may be less problematic than a direct infringement. For example, it is constitutional for state schools to offer lower tuition rates to local residents, but it would likely be unconstitutional to exclude all non-residents in the absence of a compelling

148. See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (holding that although a waiting period to deter the migration of indigents into a state is well suited to achieving that purpose, it is constitutionally impermissible because the Constitution guarantees interstate movement).

149. One potential counterargument is that the government sometimes acts with multiple motives. If the government has a legitimate purpose for placing a condition on a benefit, why must it be the same purpose that would justify denying the benefit entirely? Why must the government only do one thing at a time? The answer is that the government need not do only one thing at a time, but that if one of the things it is doing is intentionally pressuring a constitutional right, it should not necessarily have any lesser burden to justify that pressure simply because it happens to be providing a benefit simultaneously.

justification.¹⁵⁰ This, in effect, is the threat/offer distinction: if no one is made worse off by the offer of a conditioned benefit, then it may be proper to treat that conditioned benefit differently from a direct infringement, even if the condition is not germane. A determination that a conditioned benefit should be treated differently from a direct infringement, however, does not mean that rational relations review is always proper. As explained above in Part III.B.2.c, some constitutional rights require more protection against inequality than others, and as to those rights, unequal subsidization is almost always just as unconstitutional as a direct infringement.¹⁵¹

In sum, neither germaneness nor any other criterion can serve as a reliable sorting process that will, in all instances, accurately identify the level of scrutiny to which a particular conditioned benefit should be subjected. There is simply no way around considering the individual's interest in receiving the benefit and avoiding the condition, and the government's interest in denying the benefit and imposing the condition. Germaneness is ultimately too under-inclusive and too malleable¹⁵² to serve as a sufficiently accurate sorting mechanism for determining the level of scrutiny to be applied. As with the threat/offer distinction, germaneness should not serve as a sorting mechanism, but instead should play a vital role in actually measuring the constitutional propriety of a conditioned benefit.

4. *Shedding the Tiers*

Finally, a few commentators have suggested that courts should abandon any attempt to sort unconstitutional conditions cases into two tiers of review. One option, propounded by Professors Cass Sunstein and William Marshall, is to do away with the unconstitutional conditions doctrine altogether.¹⁵³ Both argue that the reason courts and commentators have had such difficulty arriving at a coherent explication of the doctrine is that it is impossible to do so. Professor Marshall concludes:

[D]espite, or perhaps because of, its ambition the search for a comprehensive theory of unconstitutional conditions is ulti-

150. See *infra* note 170.

151. See *supra* notes 68-71 and accompanying text.

152. See Sullivan, *supra* note 14, at 1474.

153. Sunstein, *supra* note 71; William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989).

mately futile. Rather, whether a governmentally imposed condition upon the receipt of a benefit is unconstitutional depends upon the definition of the particular constitutional protection involved and not upon the application of an independent theory purportedly universal to all unconstitutional conditions analysis.¹⁵⁴

Professor Sunstein has a similar view, although he is more concerned with attacking what he considers to be the fundamental misunderstanding that underlies and undermines the unconstitutional conditions doctrine:

[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. . . . Instead of a general unconstitutional conditions doctrine asking whether there has been 'coercion' or 'penalty,' what is necessary is a highly particular, constitutionally-centered model of reasons: an approach that asks whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting constitutionally protected interests.¹⁵⁵

Although Professors Marshall and Sunstein are correct to argue that there has never been and could never be an entirely coherent unconstitutional conditions doctrine, they are wrong to suggest that previous attempts to arrive at such a doctrine be discarded entirely; there is no reason to throw the bathwater out with the baby. There is much to be gained from retaining the insights of theories predicated upon threats and offers, systemic maldistribution of power and germaneness, and actually applying these insights in analyzing unconstitutional conditions cases. There are recurring issues in unconstitutional conditions cases; it impoverishes the analysis not to acknowledge the congruence of the relevant questions, if not the specific answers.

Other commentators have chosen a different path in rejecting a threshold sorting process for unconstitutional conditions cases. Recognizing that unconstitutional conditions cases straddle the traditional models of rational relations and heightened scrutiny, these scholars argue that unconstitutional conditions cases should

154. Marshall, *supra* note 153, at 244.

155. Sunstein, *supra* note 90, at 595 (footnotes omitted).

be subject to intermediate scrutiny.¹⁵⁶ One such proponent, Judge Wald, argues

that every constitutional right carries within it an equal protection norm and that any governmental program that limits or conditions benefits when a constitutional right is exercised creates a suspect category that must be justified under a heightened standard of review. The state should have to show that the denial of benefits to people who exercise constitutional rights is substantially related to important purposes of the benefit program itself.¹⁵⁷

Similarly, the Supreme Court of New Jersey held, in an unconstitutional conditions case, that an intermediate scrutiny "balancing test is particularly appropriate when . . . the statutory classification indirectly infringes on a fundamental right."¹⁵⁸ Given the unlikelihood that the United States Supreme Court will reject tiered scrutiny, the most promising unconstitutional conditions doctrine that is both coherent and sufficiently flexible must apply intermediate scrutiny to all conditioned benefits.

Intermediate scrutiny is generally understood as requiring the government to justify its actions as substantially related to an important governmental interest.¹⁵⁹ On the surface, this formulation appears to be merely a less stringent form of heightened scrutiny; the challenged governmental action is presumptively improper, but the government has a somewhat lesser burden in justifying its action. In actuality, a deeper examination of intermediate scrutiny reveals that it is applied when it is unclear whether the formal category of government action at issue is presumptively proper or improper. Race is virtually never a valid basis for a governmental classification, and therefore uniformly receives strict scrutiny; distinctions subject to intermediate scrutiny, such as gender and illegitimacy, are sometimes valid and sometimes unconstitutionally discriminatory, depending on the factual context. In intermediate

156. Wald, *supra* note 125, at 256; *see also* Feinerman, *supra* note 122, at 1370 (grounding his justification for intermediate scrutiny in a complex "hybrid model" of substantive and equal protection rights).

157. *Id.* Unfortunately, Judge Wald's brief article does not acknowledge that different constitutional rights carry within them different degrees of equal protection norms, or that the same constitutional right carries within itself different degrees of equal protection norms depending on the factual context.

158. *Right to Choose v. Byrne*, 450 A.2d 925, 936 (N.J. 1982) (construing an abortion funding case under the New Jersey Constitution and striking down New Jersey provisions similar to those at issue in *Maher v. Roe*, 432 U.S. 464 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), under an intermediate scrutiny balancing test).

159. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197 (1976).

scrutiny, then, the requisite level of justification varies in accordance with the considerations relevant to each case.

Intermediate scrutiny thus "has the pragmatic benefit of permitting open balancing of competing interests,"¹⁶⁰ and is therefore akin to Justice Marshall's proposed sliding scale of scrutiny in equal protection cases.¹⁶¹ Intermediate scrutiny does not demand that all conditioned benefits require an intermediate degree of justification to survive; the requisite amount of justification for placing a condition on a benefit must be determined through consideration of all relevant factors rather than through a formalistic sorting process. A reviewing court should not make this threshold decision by invoking a formal description of the conditioned benefit, thereby locking itself into one of two sharply differing, outcome-dispositive modes of review. Instead, the court should carefully examine and balance the interests at stake in the particular context of the case. It should simultaneously solve the equations of the proper scope of review—i.e., the requisite degree of justification and narrow tailoring—and whether the conditioned benefit satisfies that standard.

C. Summary

In sum, the best approach to unconstitutional conditions cases is application of intermediate scrutiny, thereby skipping a preliminary step in which the formal nature of the governmental action triggers either an almost irrebuttable presumption of validity or invalidity. The requisite degree of governmental justification and narrow tailoring should instead be determined through actual examination of the condition and benefit at issue. Proper analysis in unconstitutional conditions cases must include careful attention to the nature of the underlying constitutional right, and in particular to the degree of governmental neutrality that the right requires in the factual context of the case. Moreover, a reviewing court should consider whether an individual should reasonably expect to receive the benefit at issue in the absence of the condition, and in particular whether the benefit provides subsistence and thus cannot reasonably be turned down.¹⁶² Further, the court should examine the

160. Feinerman, *supra* note 122, at 1407; cf. TRIBE, *supra* note 90, § 16-32 (describing the balancing approach under intermediate scrutiny).

161. See *supra* note 129; see also Karen A. Winn, Note, *Justice Marshall and Equal Protection Review: A Spectrum of Standards?*, 64 WASH. U. L.Q. 1251, 1259-60 & nn.24-25 (arguing that Marshall's sliding scale bears a "striking resemblance" to intermediate scrutiny).

162. See *infra* part V.A.

germaneness of the justification for the condition to the reason the government may legitimately deny the benefit in the absence of the condition. This examination will reveal whether the government is leveraging its economic wealth or power in order to influence a constitutionally protected choice. Finally, courts should consider whether those offered the conditioned benefit are better off than they would be in the normal course of events if the government were not permitted to impose the condition. This determination will indicate whether the government is offering a package deal that is in its entirety beneficial to a recipient, even though it imposes some harm in a constitutionally protected area.

V. Welfare Reform and the Unconstitutional Conditions Doctrine

A. Conditioned Welfare Benefits Warrant Careful Scrutiny

AFDC benefits, though quite limited in scale on both an individual and societal level,¹⁶³ provide basic subsistence vital to the recipients' fundamental well-being. The Court, while rejecting wealth as a suspect classification and holding that governmental action denying welfare benefits is only subject to rational relations review,¹⁶⁴ has explicitly recognized the crucial importance of subsistence benefits not only to the plight of individual recipients, but to the nation as a whole:

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . . Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."¹⁶⁵

Although this statement from *Goldberg v. Kelly*¹⁶⁶ was likely the high-water mark of the Court's solicitude for welfare recipients, the Court has repeatedly, if not always consistently, considered the impact of denial of a government benefit in analyzing the constitutionality of that denial, both in unconstitutional conditions cases and elsewhere. As Justice Marshall explained in his dissent in *Dandridge v. Williams*,¹⁶⁷ "whether or not there is a constitutional

163. The national average level of benefits for a family in 1993 was \$373 per month, or \$4476 per year. 1994 GREEN BOOK, *supra* note 35, at 325.

164. See *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970).

165. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

166. *Id.*

167. 397 U.S. 471 (1970).

'right' to subsistence[.] . . . deprivations of benefits necessary for subsistence will receive closer constitutional scrutiny, under both the Due Process and Equal Protection Clauses, than will deprivations of less essential forms of government entitlements."¹⁶⁸ In *Memorial Hospital v. Maricopa County*,¹⁶⁹ Justice Marshall, this time writing for the Court, once again explained 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."¹⁷⁰ This distinction has been dispositive in a number of cases, including those determining the degree of process due in terminating various forms of public assistance,¹⁷¹ and in measuring the propriety of durational residency requirements for differing forms of governmental benefits.¹⁷²

Because of the vital importance of subsistence benefits under the AFDC program, courts should require the government to offer a high degree of justification for imposing conditions on welfare benefits, and to narrowly tailor any such conditions. The potential denial of a subsistence benefit places an enormous burden on the recipient's ability to lead a minimally decent life. Because AFDC benefits are so vital to recipients, they are a powerful tool the government can use to influence recipients' constitutionally protected decisionmaking. AFDC should therefore be more closely guarded

168. *Id.* at 522-23 n.18 (Marshall, J., dissenting).

169. 415 U.S. 250 (1974).

170. *Id.* at 259 (citations omitted).

171. Compare *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (requiring pre-deprivation hearing for termination of welfare benefits, given that wrongful denial of such benefits "may deprive an *eligible* recipient of the very means by which to live while he waits") with *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976) (upholding termination of federal disability benefits without pre-deprivation evidentiary hearing, noting that "[e]ligibility for [such benefits] . . . is not based upon financial need," and distinguishing *Goldberg*, which required a hearing because "welfare assistance is given to persons on the very margin of subsistence").

172. Compare *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (striking down one-year residency requirement for welfare eligibility, characterizing such benefits 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") with *Starns v. Malkerson*, 401 U.S. 985 (1971), *aff'g without opinion* 326 F. Supp. 234, 238 (D. Minn. 1970) (upholding state university regulation requiring one-year residency prior to eligibility for reduced tuition, looking to the absence of "any dire effects," unlike *Shapiro*); see also *Martinez v. Bynum*, 461 U.S. 321, 327-28 n.6 (1983) (upholding residency requirement "in the context of higher education" as distinguishable from cases involving basic necessities of life) (citing *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974)); *Memorial Hospital*, 415 U.S. at 259-60 & n.15 (explaining that whether or not a benefit is a "basic necessity of life" is an appropriate element of the *Shapiro* penalty analysis).

against rights-pressuring conditions than benefits that, even if denied, will cause an individual relatively little harm.

Furthermore, a condition imposed on a subsistence benefit is almost always non-germane. Subsistence benefits are intended to allow recipients to survive and lead minimally decent lives. For a condition attached to a subsistence benefit to be germane, it would have to further those goals by denying the means to survive in certain circumstances. There are few, if any, such conditions. Thus, when the government places a rights-pressuring condition on a subsistence benefit, its intent is generally to influence a constitutionally protected choice. Consequently, courts should review such conditions rigorously.

Finally, a condition placed on a subsistence benefit would be unlikely to impose the sort of unequal subsidization that would suggest a more lenient analysis than that applied to a direct prohibition or fine. Unequal subsidization is less constitutionally problematic only when there is no reasonable expectation of receiving the benefit and when provision of the benefit is largely unrelated to need. Recognizing this distinction, “[i]n *Shapiro*, the Court found denial of the basic ‘necessities of life’ to be a penalty.”¹⁷³ For each of these reasons, conditions placed on AFDC benefits should be subjected to stringent review.

The Personal Responsibility Act (PRA), however, may alter this analysis. The PRA’s conversion of AFDC from a federal entitlement to a gratuitous benefit to be offered at the discretion of each state has important implications in the unconstitutional conditions context. Needy children may no longer have a reasonable expectation of receiving subsistence benefits. In analyzing the propriety of a condition placed on AFDC under the PRA, a court may be more inclined to view the baseline against which to measure the conditioned benefit as no AFDC benefit at all. In other words, the offer of a conditioned AFDC benefit that is not a legal or moral entitlement may be considered a fair deal because it does not make a potential recipient worse off than she would or should have otherwise been. Under the PRA, the normal course of events might be that children who need AFDC to lead a minimally decent life, or even to survive, have no legal or moral claim to those subsistence benefits. Thus, under the PRA, conditions placed on AFDC bene-

173. *Memorial Hospital*, 415 U.S. at 259.

fits, even though necessary for minimal subsistence, may be easier for the government to justify in a world without entitlements.¹⁷⁴

B. The Personal Responsibility Act and the Unconstitutional Conditions Doctrine

The Personal Responsibility Act imposes several conditions on recipients of AFDC benefits that the Constitution forbids the government to impose directly. Various sections of the PRA require that AFDC recipients engage or not engage in certain activities, or deny AFDC applicants eligibility based on certain choices they have made. The PRA thus presents numerous potential constitutional challenges under the unconstitutional conditions doctrine. Several of these possible constitutional infirmities are mentioned below, with two potential challenges discussed in greater detail.

The PRA denies AFDC eligibility to illegitimate children born to mothers under 18, and permits denial of eligibility for AFDC and housing benefits to both illegitimate children and their mothers if the mother was between 18 and 21 when the child was born.¹⁷⁵ Notwithstanding the "Sense of the Congress" articulated in the PRA that "the reduction of out-of-wedlock births is an important government interest,"¹⁷⁶ these provisions are foreclosed by the Supreme Court decision in *New Jersey Welfare Rights Organization v. Cahill*.¹⁷⁷ The Court held that New Jersey's refusal to provide subsistence benefits to needy children based on their illegitimacy violated the Equal Protection clause:

"[V]isiting . . . condemnation on the head of an [illegitimate] infant is illogical and unjust. . . . [N]o child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." . . . [T]here can

174. Although this is a potentially significant blow to the rights of AFDC recipients in unconstitutional conditions cases, courts should not place too much emphasis on whether or not AFDC remains an entitlement at the federal level. First, recipients will very likely continue to reasonably expect some form of subsistence benefits in each state; rights-pressuring conditions will therefore continue to deny subsistence benefits to individuals based solely on a suspect classification or exercise of a constitutionally protected right. Furthermore, the fundamental importance of a benefit that provides the "basic necessities of life" will not change, even if those necessities are no longer guaranteed under federal law. Analysis of conditions placed on AFDC benefits will in substantial part remain the same.

175. H.R. 4, §§ 105, 107.

176. H.R. 4, § 100.

177. 411 U.S. 619 (1973) (holding that a state welfare program's denial of financial assistance to illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment).

be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate.¹⁷⁸

Thus, one of the core ideological components of the Personal Responsibility Act—deterring illegitimacy through AFDC benefits—must fall. There is no valid justification for discriminating against illegitimate children by denying them an otherwise-available subsistence benefit.

Furthermore, the PRA renders virtually all aliens ineligible for AFDC and other benefit programs, whether the aliens are non-legal, nonimmigrant, or in many cases lawfully admitted.¹⁷⁹ States are clearly forbidden from passing such laws.¹⁸⁰ Congress, however, has much more latitude in denying welfare benefits to at least some aliens, given the federal interest in immigration.¹⁸¹

1. *The Right to Travel and Durational Residency Requirements*

Recently, in *Anderson v. Green*,¹⁸² the Supreme Court dismissed as moot a case that might well have set the stage for the next set of unconstitutional conditions cases in general, and for unconstitu-

178. *Id.* at 620-21 (quoting *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972)); *cf.* *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 470 (1981) (upholding statutory rape law against gender bias challenge based in part on strong state interest in preventing illegitimate teen pregnancy) (plurality). *Michael M.* is easily distinguishable because it upheld a penalty placed on adults for their behavior, rather than penalizing illegitimate children by denying them benefits as a consequence of their birth status.

179. H.R. 4, §§ 101, 401-03, 411-13.

180. *See Graham v. Richardson*, 403 U.S. 365 (1975). *Graham* held that states' denial of welfare to aliens was an "inherently suspect" classification subject to heightened scrutiny, and that although a state "may legitimately attempt to limit its expenditures, whether for public assistance [or otherwise, it] may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." *Id.* at 372, 374-75 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

181. *See Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976). It remains to be seen whether Congress has less latitude when it denies benefits to virtually all aliens, or when the brunt of the denial of benefits is borne by children who have no control over their or their parents' alienage. *See Plyler v. Doe*, 457 U.S. 202, 220 (1982) ("Even if the State found it expedient to control the [migratory] conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."); *but see id.* at 224 ("Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens.").

182. 115 S. Ct. 1059 (1995).

tional cases involving AFDC in particular.¹⁸³ It is instructive to look at this case in some detail because it implicates many of the difficult issues in unconstitutional conditions cases, and because the PRA contains a provision permitting states to adopt the same policy.¹⁸⁴

The district court preliminarily enjoined a California regulation limiting the levels of AFDC benefits provided to newly arrived California residents, holding the regulation to violate the right to travel and the Equal Protection Clause.¹⁸⁵ The state, whose AFDC benefit levels are among the highest in the nation, requested and received a section 1315 waiver from HHS authorizing it to restrict the benefit levels of those who had moved into California within the past year to the level of benefits provided by the state where the recipients had formerly resided. The Court of Appeals for the Ninth Circuit summarily affirmed the district court's preliminary injunction.¹⁸⁶

This denial of benefits based on duration of residency is clearly unconstitutional unless well-established equal protection and right to travel precedent can be distinguished. The right of interstate travel prohibits intentional governmental efforts to deter interstate migration of indigents,¹⁸⁷ and "protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents."¹⁸⁸ California's law explicitly violated these proscriptions by disadvantaging new residents.¹⁸⁹

In its brief to the Supreme Court, California only offered in passing its strongest argument in support of the law: "Unlike the plaintiffs in *Shapiro* and *Memorial Hospital*, respondents here have not lost any eligibility to public assistance they enjoyed in their state of prior residence. In other words, California's statute does not pe-

183. *Id.* The case was dismissed as moot because the waiver under 42 U.S.C. § 1315 necessary to implement the durational residency requirement had been revoked on different grounds in *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994).

184. H.R. 4, § 602.

185. *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd* 26 F.3d 95 (9th Cir. 1994), *cert. granted*, 115 S. Ct. 306 (1994), *vacated as moot*, 115 S. Ct. 1059 (1995).

186. 26 F.3d 95 (1994).

187. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

188. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986) (plurality opinion); *see also id.* at 903 ("A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right.'") (citations omitted); *accord id.* at 920-21 (O'Connor, J. dissenting).

189. *See Green*, 811 F. Supp. at 521.

nalize the right to travel."¹⁹⁰ This argument is a veiled form of the threat/offer distinction. By capping benefits at the level the immigrant would have received had she not engaged in interstate travel, California did not make any immigrant worse off than she would otherwise have been. Thus, California could have argued that the proper baseline against which to measure whether its conditioned benefit is a threat or an offer—a penalty or a denial of a subsidy—is not its own benefit level, but the level the recipient would have received in the state from which she moved.

California could not present a colorable argument that it had no intent to deter interstate travel.¹⁹¹ It could have argued, however, that previous interstate migration cases are distinguishable because they did not address situations in which a state only intends to level the playing field between itself and other states, rather than to tilt the playing field away from itself so as to deter immigration by indigents. California's intent to deter migration was limited only to temporary denial of an extra subsidy that a recent immigrant had no right to expect, and thus imposed no constitutionally cognizable harm, the argument would run. Moreover, this sharply limited intent was directly linked to a germane purpose: if California could not make itself less attractive as a "welfare magnet,"¹⁹² it could not afford to continue providing a higher level of AFDC benefits to any of its residents, long-term or otherwise. The statute was therefore necessary to guard against other states' ability to free ride on California's munificence to its own needy residents.

Even this argument, although far more convincing than California's actual contentions, is ultimately unavailing. First, the trial court specifically found that "the cost of living, particularly housing, . . . generally is much higher in California than elsewhere."¹⁹³ Therefore, recent California immigrants in fact *were* worse off than they otherwise would have been. Even though they received the same benefit levels as in their previous state in dollar terms, they did not actually receive the same basic necessities of life.

190. Petitioner's Brief on the Merits, *Anderson v. Green*, 1994 WL 646105 at *11.

191. California did argue that it had no intent to deter travel but rather merely intended to save money, *see* Petitioner's Brief on the Merits, *Anderson v. Green*, 1994 WL 646105 at *5, but this is obviously nonsense: "Stripped of the unconstitutional purpose of deterring migration, the measure lacks a rational design." *Green*, 811 F. Supp. at 522-23.

192. *Green*, 811 F. Supp. at 522 n.14 (citing California's brief in opposition to temporary restraining order).

193. *Id.* at 521.

A more fundamental question would remain, however, even if California had provided benefits at a level reflecting its proportionally higher cost of living, thus disposing of the factual flaw in its position. The case would then turn on the ultimate meaning of the constitutional right to travel, and whether it forbids any intentional deterrence of migration or only "unfair" intentional deterrence. Is it the sort of right, akin to privacy in the abortion funding cases, that permits the government to intentionally alter a constitutionally protected choice, so long as it imposes no affirmative obstacle to exercise of that right?

The proper answer to these questions is that any intent to deter interstate migration should be forbidden "[i]n light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single nation."¹⁹⁴ It would be harmful to the fabric of the country to permit states to intentionally deter interstate migration on the principle that such deterrence is sometimes sufficiently limited and narrowly tailored.

This complex question regarding the nature of the right to travel need not be decided anew, however. *Shapiro v. Thompson*¹⁹⁵ has already definitively established the nature of the underlying constitutional right to travel in the context of a condition placed on subsistence benefits. The right to travel simply prohibits states from intentionally deterring interstate migration of indigents, even those indigents who migrate to a state in order to seek the higher levels of subsistence benefits that state provides:

[A] State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally. Implicit in any such distinction is the notion that indigents who enter a State with the hope of securing higher welfare benefits are somehow less deserving than indigents who do not take this consideration into account. But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others [sic] factors, the level of a State's public assistance.¹⁹⁶

194. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986).

195. 394 U.S. 618 (1969).

196. *Id.* at 631-32; *see also* *Zobel v. Williams*, 457 U.S. 55, 62 n.9 (1982) (stating that a state's objective to inhibit migration into the State would encounter "insurmountable constitutional difficulties.") (citing *Shapiro*, 394 U.S. at 629).

Under settled law, then, California's intentional deterrence of migrants seeking higher welfare benefits violates the constitutional right to travel. For the same reason, the provision of the PRA permitting states to implement rules paralleling California's durational residency statute is also unconstitutional.

2. *The Right to Privacy and the Child Exclusion*

A second AFDC waiver case, *C.K. v. Shalala*,¹⁹⁷ also raises issues at the core of the unconstitutional conditions doctrine. *C.K.* challenged New Jersey's "Child Exclusion" component of its AFDC plan. This provision—sometimes characterized, inaccurately, as a "family cap"—declares a child ineligible for benefits if she is born to or conceived by a woman receiving AFDC benefits.¹⁹⁸ The PRA contains a parallel provision, imposing the Child Exclusion nationwide.¹⁹⁹

The Constitution ordinarily requires heightened scrutiny whenever the government impinges on a person's fundamental privacy right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²⁰⁰ For better or worse, the Child Exclusion is clearly intended to deter childbirth among AFDC recipients.²⁰¹ Thus, the government would ordinarily have to demonstrate that the Exclusion is narrowly tailored to serve a compelling governmental interest if it is to survive a constitutional challenge, unless the government can substantiate that the unconstitutional conditions context warrants a more lenient scope of review.

197. 883 F. Supp. 991 (D.N.J. 1995).

198. *Id.* The district court granted summary judgment to the Defendants on all counts, holding as to the constitutional claims that "the Family Cap does not infringe plaintiffs' procreative rights" and is therefore subject to rational relations review, and that "New Jersey's welfare reform efforts are rationally related to the legitimate state interests of altering the cycle of welfare dependency that it has determined AFDC engenders in its recipients as well as promoting individual responsibility and family stability." *Id.* at 1015. An appeal is currently pending.

199. See H.R. 4, § 101 (proposed codification at 42 U.S.C. § 405(a)(5)). The Child Exclusion contained in the PRA, unlike the Child Exclusion in New Jersey's AFDC plan, contains an exception for children born of rape or incest.

200. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (substantive due process); see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) (equal protection).

201. As with California's durational residency requirement, the Child Exclusion is irrational on its face unless intended to influence the constitutionally protected choice. Furthermore, the sponsor of the legislation, in an introductory statement, specifically stated that "[t]his bill is intended to discourage AFDC recipients from having additional children during the period of their welfare dependence" Statement of Assemblyman Bryant to Assembly Bill 4703, The State of New Jersey, Bill Text, Statenet, 1990 NJ A.B. 4703.

The government has an extremely difficult task in justifying the Child Exclusion. Unlike the government's compelling interest in *protecting* the potential life of a fetus, no court has recognized a state interest in deterring potential life, whether through discouraging conception or encouraging abortion. Courts have consistently held that the government has no interest in deterring procreation, even when those seeking to exercise their procreational rights are, as New Jersey asserts, not in a position to support a child.²⁰² A state may not "restrict a woman's right . . . to carry pregnancy to term . . . to further [] state interests in population control" ²⁰³ Nor is a state's interest in saving money compelling: "The saving of welfare costs cannot justify an otherwise invidious classification."²⁰⁴ Nor is the Child Exclusion adequately narrowly tailored to pass heightened constitutional review.²⁰⁵

The government defendants in *C.K.* could have attempted to justify the Child Exclusion by arguing that a lowered scope of review should apply, as with the abortion-funding cases, because the Exclusion is a condition applied to a gratuitous benefit rather than a direct burden on the right to procreate. The defendants, however, made only a passing attempt to do so.²⁰⁶ In addition, the government could have argued more strenuously that the Child Exclusion

202. See *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (recognizing a "fundamental right . . . to bring [a] child into life to suffer the myriad social, [and] economic, disabilities that the status of illegitimacy brings.").

203. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2811 (1992) (plurality) (citing *Roe v. Wade*, 410 U.S. 113 (1973)). Casey's "undue burden" test should not apply to the Child Exclusion because the Casey standard is intended to balance women's fundamental right to privacy against the state's compelling interest in protecting potential human life, *id.* at 2820-21, an interest New Jersey cannot advance to support the Child Exclusion.

204. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); see also *id.* ("[A] State . . . may legitimately attempt to limit its expenditures [] for public assistance . . . [b]ut . . . may not accomplish such a purpose by invidious distinctions between classes of its citizens."); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) (holding that "conservation of the taxpayers' purse is [] not a sufficient state interest to [] sustain" a penalty imposed for exercise of a constitutional right).

205. For example, New Jersey's Child Exclusion is imposed without exception, even as to births that could not have been deterred because they occurred following rape, incest, or failed contraception. Furthermore, neither the New Jersey nor PRA Exclusion contains an exception for multiple births. Two of the plaintiffs in *C.K.* gave birth to excluded children through rape, and one was the mother of triplets; all of these children were denied eligibility for AFDC benefits. See Brief in Support of Plaintiffs' Motion for Summary Judgment, *C.K. v. Shalala*, No. Civ. A. 93-5354(NHP) (on file with the *Fordham Urban Law Journal*).

206. See Briefs of State and Federal Defendants in Support of Motion For Summary Judgment, *C.K. v. Shalala*, No. Civ. A. 93-5354(NHP) (on file with the *Fordham Urban Law Journal*).

constitutes only a decision not to subsidize the choice to procreate, rather than to levy a penalty for exercising that right. In other words, the Child Exclusion imposes no obstacle to procreation, and does not make AFDC recipients worse off than they would otherwise be; it merely denies a gratuitous benefit that happens to make a decision to procreate more appealing.

This argument, though superficially appealing, is ultimately unavailing. First, New Jersey's Child Exclusion is not germane to the purposes of the AFDC program. AFDC is intended to support needy and dependent children within their families, and to foster self-support and personal independence of adult recipients, consistent with continuing parental care and protection.²⁰⁷ In *King v. Smith*,²⁰⁸ the Court construed the purposes of the AFDC program, including the "paramount goal" of protecting needy dependent children, as incompatible with a state's disqualification of a child based on the state's belief that the parents' decision to bear the child was improper:

Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that the protection of such children is the paramount goal of AFDC. . . . [I]t is simply inconceivable . . . that [a state] is free to discourage [parental] immorality and illegitimacy by the device of absolute disqualification of needy children. [Such disqualification] plainly conflicts with the Act.²⁰⁹

The Court relied in part on an official ruling of the federal agency responsible for administering AFDC, which stated:

[W]hen a needy child who otherwise fits within the [AFDC] program of the State is denied the funds that are admittedly needed to provide the basic essentials of life itself, because of the behavior of his parent or other relative, the State plan imposes a condition of eligibility that bears no just relationship to the AFDC program.²¹⁰

Thus, the Child Exclusion should be understood not as an effort to implement the AFDC program in a manner that incidentally burdens a constitutional right, but as a non-germane, stark desire to deny certain needy children subsistence benefits so as to influence their parents' constitutionally protected right to procreative

207. 42 U.S.C. § 601 (1988 & Supp. V 1993).

208. 392 U.S. 309 (1968).

209. *Id.* at 325-27.

210. HEW Ruling, *supra* note 26.

choice free from governmental interference. *King* establishes that the paramount purpose of the AFDC program is to protect needy children, and that this purpose is incompatible with an intent to alter parental behavior by denying the children of "irresponsible" or "unworthy" parents the basic necessities of life.

The threat/offer baseline also presents a critical element of the proper analysis. If the baseline is no receipt of AFDC benefits, then indigents are unharmed by the government's decision to offer them AFDC benefits only under certain conditions. By denying gratuitous benefits, the government would arguably not interfere with or penalize indigents' ability to exercise their right to procreate; it would merely decline to subsidize a constitutionally protected choice to procreate.²¹¹ If the relevant baseline—what would normally be expected in the absence of the condition—were receipt of subsistence benefits, however, then the absolute denial of AFDC benefits to excluded children because their parents chose to procreate while receiving AFDC would constitute a severe penalty.

At least while AFDC remains an entitlement, or even if it becomes a reasonable expectation solely under state law, receipt of AFDC is the proper baseline.²¹² The abortion funding cases are readily distinguishable, even accepting their reasoning as valid. Medicaid creates no explicit or implicit expectation that payment will be provided to permit exercise of any procreative choice, even if the government could not directly forbid that choice. Consequently, in the abortion funding cases, the Court reasoned that the challenged provisions did not erect an obstacle to procreative decisionmaking because it did not make indigent women worse off than they would have otherwise been. The Child Exclusion, however, does make indigent women and children worse off than they otherwise would have been. Under the eligibility criteria set forth in the Social Security Act, excluded children unquestionably would have received subsistence benefits in the absence of the Child Exclusion. The Child Exclusion therefore constitutes a penalty for exercise of a constitutionally protected choice.²¹³

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

212. See *supra* part V.A.; cf. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (government denial of subsistence benefit based on exercise of constitutionally protected choice constitutes a penalty, not a refusal to subsidize); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (same); but see *Maher*, 432 U.S. at 480 (government Medicaid payment for childbirth but not abortion is denial of subsidy, not penalty).

213. Indeed, it is a penalty imposed on children for their parents' exercise of a constitutionally protected choice. In *C.K.*, plaintiffs brought a separate constitutional claim, in addition to the privacy claim, contending that the penalty imposed on ex-

Moreover, the abortion funding cases are distinguishable as to both the nature of the underlying constitutional right and the nature of the benefit at issue. First, the abortion funding cases are predicated on the understanding that the government can “favor[] childbirth over abortion by means of subsidization,”²¹⁴ but they do not support the notion that the government can favor contraception and abortion over childbirth. The legitimate governmental interests supporting the Child Exclusion—if any, beyond saving money—are far less weighty than the governmental interest the Court has found in potential human life. Thus, the Child Exclusion does not present the legal context of competing compelling interests that authorized the government in the abortion funding cases to put its thumb on the scale in favor of childbirth.

Second, the abortion funding cases themselves anticipate and distinguish measures that deny benefits as broadly as the Child Exclusion. Much like the challenged provisions in *Shapiro v. Thompson*²¹⁵ and *Sherbert v. Verner*,²¹⁶ the Child Exclusion concerns “a broad disqualification from receipt of public benefits” as a consequence for having exercised a constitutional right.²¹⁷ In contrast, the abortion funding cases addressed a government decision not to pay the medical costs for a one-time act of abortion. Both *Maher v. Roe*²¹⁸ and *Harris v. McRae*²¹⁹ explicitly stated that the result would very likely have been different if the government had “denied general welfare benefits” rather than “dec[iding] not to fund elective abortions” as a one-time act.²²⁰ The issue in the abortion funding cases would be parallel to that in *C.K.* if the challenged provisions had denied *all* Medicaid benefits to children born to mothers receiving Medicaid at conception or birth. Instead, these cases upheld the refusal to subsidize a single act of abortion, a

cluded children for their parents' behavior is unconstitutionally irrational under *Weber*, 406 U.S. 164 and *Plyler*, 457 U.S. 202. See Plaintiffs' Brief, *supra* note 205, at 49-52.

214. *Harris v. McRae*, 448 U.S. 297, 315 (1980).

215. 394 U.S. 618 (1969).

216. 374 U.S. 398 (1963).

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

218. 432 U.S. 464 (1977).

219. 448 U.S. 297 (1980).

220. *Maher*, 432 U.S. at 474 n.8; accord *Harris*, 448 U.S. at 317 n.19 (“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.”) (citing *Sherbert*, 374 U.S. 398).

harm that the Court understood to be of lesser significance than an enduring disqualification from subsistence benefits.

In sum, the Child Exclusion is a non-germane, intentional, and absolute disqualification of general welfare benefits imposed on children solely to deter their parents from engaging in a constitutionally protected procreative choice which the government has no compelling interest in discouraging. It is therefore constitutionally insupportable.

VI. Conclusion

The unconstitutional conditions doctrine is ultimately best regarded as a general approach toward an extraordinarily complex category of cases, rather than a traditional doctrine that has a specified number of prongs and a fixed burden of proof. The doctrine is intended to ensure that offers of conditioned benefits that burden constitutional rights requiring governmental neutrality do not harm the recipients of these offers, and to ensure that the government does not leverage its sweeping power to enact economic and social welfare legislation into areas in which the Constitution protects individual rights and liberties.

It is counterproductive, if not impossible, to attempt to craft a single rubric that will resolve all cases involving a conditioned benefit that burdens a constitutional right. Most vitally, courts' current formalistic sorting process into distinct tiers of minimal or heightened scrutiny should be replaced by intermediate scrutiny encompassing careful consideration of the following factors: (i) the nature of the underlying constitutional right, and in particular the degree of neutrality and equality it requires in the context of unequal subsidization; (ii) the nature of the underlying benefit, and the harm that denial of the benefit will impose—a harm that is greatest, and thus deserving of more stringent protection, when the benefit at issue provides basic subsistence; (iii) the germaneness of the condition to the reason the benefit can legitimately be denied in the absence of the condition; (iv) whether the offer of the conditioned benefit places an individual in a position that is better or worse off than she otherwise would have been in the absence of the condition; and finally, (v) whether the government's interest in imposing the condition outweighs the individual's interest in avoiding the constitutional infringement and receiving the benefit.

There is no magical formula for applying these considerations, nor is there any guarantee that different courts applying these considerations will arrive at the same conclusions to any greater de-

gree than in other complicated constitutional cases. Indeed, given the complexity of these cases and the necessity for a highly contextualized analysis, there is good reason to think there may be less agreement. Nonetheless, courts must attempt to resolve these cases as carefully and openly as possible. The only other options are untenable. Courts should not simply permit the legislature to impose a rights-pressuring condition on a benefit because the legislature has the power to deny the benefit entirely. Such a deferential approach eviscerates the constitutional safeguards that protect individual rights and liberties against unwarranted government encroachment. Nor should courts continue to decide unconstitutional conditions cases by invoking a formal, bi-polar mode of analysis that masks and thwarts examination of relevant considerations. Increasingly, the judiciary will be required to resolve complex issues concerning the constitutionality of conditioned benefits. Like matter and anti-matter, when the modern welfare state collides with the negative constitution, the results are explosive and uncertain. This Article has attempted to illustrate the problematic rigidity of current analysis and to illuminate the set of factors that courts should apply in deciding cases under the unconstitutional conditions doctrine.

