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Notes

A TAXING TALE: UNCONSTITUTIONAL CONDITIONS AND ABORTION SUBSIDY

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INTRODUCTION

FEW TOPICS EXCITE the passions of legal scholars, feminists, and politicians alike. One such subject is legal abortion, a concept which remains unsettled[1] almost twenty years following the Supreme Court decision in *Roe v. Wade.*[2] Since *Roe,* the abortion debate has centered on government funding of abortion. Congress has refused to subsidize abortion through appropriations for over a decade.[3] This has affected access to abortion by indigents,[4] inmates,[5] and military service women.[6] The Supreme Court decision in *Rust v. Sullivange*[7] demonstrates even broader impacts of government funding decisions. The constitutional rights of health care

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1. *See* Michael J. Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae,* 32 STAN. L. REV. 1113, 1114 (1980) ("The Supreme Court's decision in *Roe v. Wade* is one of the most controversial in modern constitutional law. Other decisions were as controversial when handed down but few have been as persistently controversial." (citations omitted)).

2. 410 U.S. 113 (1973) (holding that pre-viability abortion is a privacy right).

3. *See* Harris v. McRae, 448 U.S. 297 (1980) (providing that Hyde Amendment Title XIX Medicaid reimbursement for childbirth expenses but not abortion expenses is constitutional).

4. *Id.* at 298.

5. *See* Gibson v. Mathews, 926 F.2d 532, 535 (6th Cir. 1991). *See also* Pub. L. No. 99-500, § 209, 100 Stat. 1783-56 (statutory bar to federal payment for inmate abortions).

6. *See* Margaret S. v. Edwards, 488 F.Supp. 181, 193 n.25 (E.D. LA 1980); *aff'd,* 794 F.2d 994 (5th Cir. 1986). *See also* 10 U.S.C.A. § 1093 (1984) (providing that "[f]unds available to the Department of Defense may not be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term").

7. 111 S.Ct. 1759 (1991) (upholding the constitutionality of regulations restricting Title X funding to projects which do not perform abortions or abortion counseling).

providers can be implicated by administrative regulations aimed at limiting the approved scope of abortion project funding.

Abortion continues to be "subsidized"[8] by federal tax exemption of organization income and donor deductions. Thirty-one percent of the nation's abortion clinics and thousands of non-profit hospitals providing abortion and abortion counseling[9] (in addition to the usual range of health care services) currently enjoy tax-exempt status under Internal Revenue Code § 501(c)(3).[10] Legislation[11] aimed at denying tax-exempt status to abortion providers has been introduced in Congress.[12] While none of the proposed legislation has been enacted into law,[13] the continuing tax-exempt status of abortion providers promises to be another subject of public contention and political debate.[14]

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8. *See* Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983) (explaining that tax-exemption is tantamount in some respects to funding as government subsidy).

9. *See* 132 CONG. REC. S14860 (daily ed. Oct. 3, 1986) (statement of Rep. Kerry).

10. I.R.C. § 501(c)(3) (West Supp. 1992) defines organizations that can be exempt from taxation:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes.

Taxpayer contributions to § 501(c)(3) organizations are deductible under § 170(c)(2).

11. While legislation is the subject of this paper, administrative regulation also could be subject to similar constitutional challenges. In *Bob Jones Univ. v. United States*, the Court explained that:

> Congress, the source of IRS authority, can modify IRS rulings it considers improper; and courts exercise review over IRS actions. In the first instance, however, the responsibility for construing the Code falls on the IRS. Since Congress cannot be expected to anticipate every conceivable problem that can arise or carry out day-to-day oversight, it relies on the administrators and on the court to implement the legislative will.

461 U.S. 574, 596-7 (1983). *But see id.* at 612-23 (Rhenquist, J., dissenting).

12. For text of legislative proposals introduced in Congress, *see infra* note 89 [hereinafter "Humphrey Amendments"].

13. Past legislative proposals to revoke tax-exempt status to abortion providers have been unsuccessful. While there have been many unsuccessful legislative proposals to limit the tax-exempt status of charitable organizations which perform or counsel patients regarding abortion, some of the most notable include: H.R. 624, 101st Cong., 1st Sess. (1989) (attempting to amend the IRC to deny tax-exempt status to organizations which directly or indirectly perform abortions; the amendment was never advanced beyond the Committee level); 134 CONG. REC. S15013, (daily ed. Oct. 6, 1988) (attempting to amend the IRC through Amendment No. 3499 so as to deny "tax-exempt status to organizations which perform or provide facilities for abortions"; the amendment was tabled and never reconsidered on the Senate floor); 132 CONG. REC. S14844 (daily ed. Oct. 3, 1986) (attempting to amend IRC through Amendment No. 3184 so as "to deny status as a tax-exempt organization, and as a charitable contribution recipient, for organizations which perform, finance, or provide facilities for abortions"; the amendment failed by a vote of sixty-four to thirty-four on the Senate floor).

14. The effects of denying tax-exempt status to organizations that perform abortion and abortion counseling would be dramatic. In one 1986 Congressional study, it was found that legislation would impact:

This paper discusses constitutional limitations to legislation limiting the tax-exempt status of abortion providers. If tax exemption and funding are equivalent, the *Rust* decision implies that organizations involved in abortion or abortion counseling could be denied tax-exempt status. However, a denial of tax-exempt status could be a threat to constitutionally protected rights. If an entire organization is denied tax-exempt status for engaging in a proportion of abortion-related activity, legislation could be seen as an unconstitutional condition[15] or penalty. Requirements that government subsidized projects be separated from unsubsidized activities could also be unconstitutionally burdensome. Therefore, a denial of tax-exempt status to abortion providers may invoke different constitutional barriers than the refusal to fund abortions and abortion-related speech encountered in *Rust* and previous abortion funding cases.[16]

> [N]on profit hospitals, university . . . health maintenance organizations, and philanthropic foundations . . .
>
> [M]any Protestant and Jewish faith groups and agencies could lose their tax-exempt status because of their support for abortion rights and services that often include clergy counseling on abortion.
>
> The types of organizations we know will be at risk are: [t]he Nation's 3,591 nongovernmental, not for profit hospitals; [n]early three-fourths of all health maintenance organizations [HMO's]; [t]hirty-one percent of the Nation's abortion clinics; [m]any of the 90 Blue Cross and Blue Shield plans; [s]tate run medical colleges and universities; [a]nd any voluntary employees' beneficiary societies [VEBA] or labor organizations that provide sickness benefits . . . .

132 CONG. REC. S14860 (daily ed. Oct. 3, 1986).

In response to legislation introduced in the Senate, many organizations expressed their concern regarding the wide reaching effects of legislation denying tax-exempt status to organizations that perform abortions. *See* 132 CONG. REC. S14850-57 (daily ed. Oct. 3, 1986). For example, the American Council on Education found that an amendment of this type "could jeopardize the tax-exempt status of most major public and private universities that operate teaching hospitals." *Id.* at S14852. Likewise, a representative of Kaiser Permanente noted that legislation could effect health care provided to nearly five million members in 16 states. *Id.* at S14851.

15. The unconstitutional conditions doctrine scrutinizes government invitations to forfeit constitutional rights in exchange for the conferral of benefits. The doctrine examines which constitutional rights society considers absolute and which rights may be sacrificed in exchange for funding or subsidy. Government conditions implicate other rights. *See, e.g.*, Lyng v. Int'l Union, 485 U.S. 358 (1988) (freedom of association); Regan v. Taxation With Representation, 461 U.S. 540, 545-46 (1983) (speech); Sherbert v. Verner, 374 U.S. 398 (1963) (religion).

16. *See* Harris v. McRae, 448 U.S. 297 (1980) (upholding conditioning provision of medical services on choice not to have an abortion although the choice to fund childbirth to the exclusion of abortion is actually more costly); Williams v. Zbaraz, 448 U.S. 358 (1980) (holding that Hyde Amendment and Illinois statute which condition Medicaid benefits on choice not to have an abortion are not violative of equal protection clause of 14th Amendment); Maher v. Roe, 432 U.S. 464 (1977) (holding that state payment of medical expenses conditional on choice not to have an abortion is constitutional under the First and Fourteenth Amendments); Poelker v. Doe, 432 U.S. 519 (1977) (validating city policy which pro-

Part I discusses the constitutional rights threatened by legislation to deny tax-exempt status to abortion providers. Part II reviews the general concepts of unconstitutional conditions which may protect abortion providers from discriminatory tax treatment under section 501(c)(3). Part III addresses specific constitutional limitations to legislation aimed at denying tax-exempt status. This analysis demonstrates that some constitutional barriers might prevent a denial of tax-exempt status to hospitals and abortion clinics. Nonetheless, the lack of specificity in analysis by the Court leaves some constitutional limitations open to question.

Part IV proposes an amendment to the Internal Revenue Code that could assuage penalty effects in the allocation of tax-exempt status. This amendment would do little to solve ambiguities of unconstitutional conditions doctrine or remove the potential for coercive government subsidy decisions. Congress will always make political distinctions between types of organizations that will be tax-exempt. The proposed amendment could prevent the most coercive and unconstitutional effects of legislative policy. The proposed changes can also provide greater predictability to organizations which risk losing tax-exempt status for engaging in a small proportion of activity that government refuses to subsidize.

I. PROTECTED RIGHTS: ABORTION AND SPEECH

The debate among Members of Congress, interest groups, and other members of the public reflects a variety of views on the constitutional limitations to discriminatory tax treatment of abortion providers. In general, the government cannot directly infringe on fundamental constitutional rights in the absence of a compelling state interest.[17] Yet, there is no governmental duty to fund the exercise of constitutional rights.[18] Thus, the fundamental medical

vides for publicly financed hospital services without providing for similar services for nontherapeutic abortions); Planned Parenthood v. Agency for Int'l. Dev., 915 F.2d 59 (2nd Cir. 1990) (holding that restricting federal assistance to foreign nongovernmental organizations ["NGO's"] which perform abortions is constitutional); Planned Parenthood v. Arizona, 789 F.2d 1348 (9th Cir. 1986) (withdrawing all funds to nongovernmental organizations that perform abortion related services found unconstitutional where state can monitor and assure that no state funds are used directly for abortion related services); Planned Parenthood v. Arizona, 718 F.2d 938, 944 (9th Cir. 1983) (concluding that Arizona cannot unreasonably interfere with Planned Parenthood's right to perform abortion related services, but the state need not support these activities with funding).

17. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7, at 1454 (2d ed. 1988).

18. *Regan*, 461 U.S. at 545-46 (holding that, while lobbying is a fundamental speech right, the government is not obligated to subsidize it). *See also* Cammarano v. United States,

provider's right to speak about abortion may be threatened by discriminatory tax treatment. This speech right may not be infringed upon without a compelling state interest.[19] This section of the article explores the strength of health care provider rights and the equivalency of tax exemption and funding for the purpose of distinguishing between legitimate government subsidy decisions and legislation which infringes on constitutionally protected rights.[20]

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358 U.S. 498 (1959) (holding that tax deduction of ordinary and necessary business expenses must exclude lobbying expenditures).

19. In the absence of an implicated right, the state must only supply a rational relation between legislation and a legitimate state interest. *See* TRIBE, *supra* note 17, § 16-33 at 1610-1618. This was well understood by the drafters of the Humphrey Amendment legislation as reported in a Republican Committee memorandum:

> There is no right to a tax exemption, and other fundamental rights are searched for, but not found .... [T]herefore, the Court will apply the rational basis test which is highly deferential to a legislative judgment.

Republican Policy Committee Memorandum, 133 CONG. REC. S2607, S2609 (daily ed. Feb. 26, 1987) (authored by Lincoln Oliphant, Legislative Counsel).

20. It can be argued that legislation to deny tax-exempt status of health care providers would impinge on the health care provider's right to practice medicine. The existence of such a right is subject to debate. On one hand, the right to practice medicine has been claimed to fall under the First, Fourth, Fifth, Ninth and Fourteenth Amendments. Roe v. Wade. 410 U.S. 113, 121 (1973); Doe v. Bolton, 410 U.S. 179, 197 (1973) ("The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by [the Georgia statute requiring abortion committee oversight prior to performance of abortion]"). In *Roe*, the Court first recognized the physician's right to "administer medical treatment according to his professional judgment up to the points where *important* state interests provide *compelling* justifications for intervention." *Roe*, 410 U.S. at 165 (emphasis added). The Court has underscored the importance of this right in subsequent decisions. Thornburgh v. American College of Obstetrics & Gyneology, 476 U.S. 747, (1986), *partially overruled on other grounds by* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2816-17 (1992) (overruling those portions "inconsistent with *Roe*'s statement that the state has a legitimate interest in promoting the life or potential life of the unborn"); Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416, 445 (1983), *partially overruled on other grounds by Casey*, 112 S. Ct. at 2816-17 (overruling those portions "inconsistent with *Roe*'s statement that the state has a legitimate interest in promoting the life or potential life of the unborn").

Yet, the Court has explained that the physician's right to practice medicine is wholly derivative from patients' rights. Whalen v. Roe, 429 U.S. 589 (1977) (holding that the doctors' claim that the statute requiring prescriptions written for certain drugs to be reported to the state impairs the doctors' right to practice medicine free of unwarranted state interference is derivative from the patient's claim). In another context, the Court refused to recognize the provider's medical practice rights:

> The question of what rights the doctors may assert in seeking to resolve [the] controversy is more difficult. The Court of Appeals adverted to what it perceived to be the doctor's own "constitutional rights to practice medicine." We have no occasion to decide whether such rights exist. Assuming that they do, the doctors, or course, can assert them.

Singleton v. Wulff, 428 U.S. 106, 113 (1976) (citation omitted).

Commentators argue that there is no fundamental right to practice medicine. *See* James Bopp, Jr., *Protection of Disabled Newborns: Are There Constitutional Limitations?*, 1 ISSUES L. & MED. 173, 199 (1985) ("[T]here is no independent physician's right to practice medicine

The First Amendment mandates that content-neutral speech distinctions be used in subsidy determinations.[21] In *Arkansas Writers' Project, Inc. v. Ragland*,[22] a state statute was annulled which taxed general interest magazines but exempted newspapers and religious, professional and trade magazines "because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its *content*."[23] The Court determined that the Arkansas statute was unconstitutional because it conditioned tax exemption on content-based speech distinctions, inhibiting First Amendment speech rights.[24]

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protected by the Constitution"); Thomas W. Mayo, *Constitutionalizing the Right to Die*, 49 MD. L. REV. 103, 120 (1990) ("The Court's discussion of the physician-patient aspect of abortion should not be misconstrued; it does not signal the recognition of a constitutional right to practice medicine . . . ."). *See also* Thomas L. Jipping, *Informed Consent to Abortion: A Refinement*, 38 CASE W. RES. L. REV. 329, 351 (1988) ("In summary, then, the federal courts no longer recognize an independent constitutionally significant 'right to practice medicine' free from government interference. The Supreme Court provides no justification for apparently resurrecting this notion within the abortion context while maintaining its burial outside that context.")

If the physician's right to practice medicine does exist, it could likewise be threatened by coercive government funding decisions. *See infra* note 94 (discussing constitutional significance of funding decisions that implicate the provider's right to practice medicine).

21. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (holding that content-based prohibition on monthly bill inserts by a government-regulated monopoly infringes on First and Fourteenth Amendment rights). The *Consolidated* Court held that:

> A restriction that regulates only the time, place, or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disprove of the speaker's views."

Id. at 536 (citation omitted).

See also F.C.C. v. League of Women Voters of California, 468 U.S. 364 (1984); Clark v. Community for Creative Non-Violence, 468 U.S. 289, 295 (1984) (holding that park service permit prohibiting sleeping, as a form of free speech in a demonstration for the homeless, is reasonable and does not violate the First Amendment); Regan v. Taxation with Representation, 461 U.S. 540 (1983) (refusing to allow government subsidy of lobbying activities of organization); Perry v. Sindermann, 408 U.S. 593 (1972) (holding that renewal of non-tenured public school teacher's one-year contract cannot be conditioned on exercise of First and Fourteenth Amendment rights); Cammarano v. United States, 358 U.S. 498 (1959) (holding that deduction of ordinary and necessary business deductions cannot include expenditures for lobbying purposes); Speiser v. Randall, 357 U.S. 513 (1958) (Black, J., concurring). *But see contra* American Comm. Ass'n. v. Douds, 339 U.S. 382 (1950) (holding that conditioning National Labor Relations Act benefits on the completion of "non-Communist" affidavits by officers of labor organizations is constitutional).

22. 481 U.S. 221 (1987) (holding that content-based tax scheme of magazines and newspapers is unconstitutional under the First Amendment).

23. *Id.* at 229 (emphasis in original).

24. *See also* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (holding that "special use" tax on paper and ink products used in newspaper publishing is unconstitutional burden under the First Amendment).

However, the concept of content-neutrality in *Arkansas Writers'* is deceptively complicated. " 'Content neutrality' is an umbrella term that covers three different varieties of neutrality: viewpoint neutrality, quality neutrality, and subject matter neutrality."[25] While the state must always be viewpoint-neutral under the First Amendment,[26] the Constitution does not always require subject-matter neutrality.[27] The government may not interfere with constitutional rights but there is no governmental duty to fund the exercise of constitutional rights.

In *Maher v. Roe,*[28] the Court explained that a government funding decision must: 1) disadvantage a suspect class, 2) impinge on a fundamental right, or 3) lack rational relation to a constitutionally

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25. Quality-based distinctions in grant allocation are similarly analyzed in cases challenging subsidy limitations in the arts. Lionel S. Sobel discussed that:

> Artistic quality, of course, cannot be objectively measured; and there is a risk that viewpoint considerations might influence- or even be disguised as -quality judgments . . . . [However] the First Amendment permits subsidies to be awarded on the basis of artistic quality . . . .

Lionel S. Sobel, *First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Scalia and Renquist,* 41 VAND. L. REV. 517, 527 (1988). *See also id.* at 524.

26. Sobel explains the concept of "viewpoint neutrality" in a helpful manner:

> [I]f the Corporation for Public Broadcasting were to award grants for the production of documentaries about Central America, it could not constitutionally adopt as a criterion for awarding such grants the requirement that funded documentaries support, rather than criticize, President Reagan's opposition to the Nicaraguan Sandinistas.

Id. at 525. *See also* F.C.C. v. League of Women Voters, 468 U.S. 364, 381-84 (1984), (invalidating § 399 of the Public Broadcasting Act of 1967 which forbids television and radio stations which received grants to "engage in editorializing").

Because speech on public issues lies "at the heart" and "on the highest rung" of First Amendment issues, any viewpoint-based ban on editorializing is unconstitutional. *Id. See also* Perry v. Sindermann, 408 U.S. 593 (1972). In *Perry,* the Court considered the First Amendment right of a state college teacher who was terminated because he publicly criticized the college administration. The Court explained that the government could not mandate a sacrifice of free speech rights with a threat of loosing tenure:

> For at least a quarter-century, this Court has made clear that 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, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.

Id. at 597. The Court reinstated the plaintiff because his discharge comprised a viewpoint-based unconstitutional threat to his exercise of First Amendment speech rights. *Id.*

27. Subject matter distinctions are constitutional when tailored to advance compelling state interests. *See, e.g.,* F.C.C. v. Pacifica Found., 438 U.S. 726 (1978), (upholding a prohibition of obscene broadcast language because after applying strict scrutiny, a social interest in morality outweighed broadcaster's First Amendment rights). *See also* Young v. American Mini Theaters, Inc., 427 U.S. 50, 70 (1976).

28. 432 U.S. 464 (1977).

permissible purpose to be declared unconstitutional.[29] The *Maher* Court found that a Connecticut statute which denied funding for indigent nontherapeutic abortions was constitutional because indigent women do not comprise a suspect class, and there is no fundamental constitutional right to obtain an abortion.[30] Further, the Court held that the government is permitted to make value judgments in allocating public funds.[31] Funding childbirth to the exclusion of abortion is constitutional as a rational means of promoting a legitimate state interest in preserving the life of a fetus.[32]

Harris v. McRae[33] provided the Court with another opportunity to respond to Constitutional challenges to Congressional refusal to fund abortions. *Harris* involved funding of certain medically necessary abortions[34] for indigent women under the Hyde Amendment to Title XIX. In response to the contention that Medicaid funding limitations interfered with a woman's Fifth Amendment due process right to terminate her pregnancy, the Court identified a difference between "direct prevention" of a constitutionally protected right to abortion and mere "encouragement of childbirth" through funding choices.[35] The Court underscored the rational relation be-

29. *Id.* at 470 (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).

30. The *Maher* court interpreted *Roe* as preserving the right to make certain kinds of decisions, free from government compulsion, not as establishing a fundamental right to abortion. *Id.* at 473. While *Maher* exhibits the prevailing view, some maintain that *Roe* did establish a fundamental right to abortion. *Id.* at 484-85 (Brennan, J. dissenting). *See also* Harris v. McRae, 448 U.S. 297, 329-30 (1980) (Brennan, J., dissenting).

31. *Maher*, 432 U.S. at 479.

32. The state interest in preserving the life of a fetus was identified in *Roe v. Wade*, 410 U.S. 113 (1973). Note that Fifth Amendment Equal Protection arguments usually fail with respect to subsidy matters when a fundamental right is not involved. In *Maher*, an Equal Protection argument failed because a discriminatory impact of the government funding decisions was not established:

> [a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth . . . . The indigence that may make it difficult - and in some cases, perhaps, impossible - for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.

Maher, 432 U.S. at 474.

33. 448 U.S. 297 (holding constitutional severe limitations to Title XIX medicaid reimbursement for abortion procedures, including many medically necessary procedures under the Hyde Amendment).

34. Petitioner's distinguished *Harris* (decision not to fund some medically necessary abortions) from *Maher* (decision not to fund non-therapeutic abortions only) because an indigent woman would have a more significant health interest in obtaining an abortion which is medically necessary. Nevertheless, the Court held that a woman's freedom of choice does not result in constitutional entitlement to a full range of medical resources. *Id.* at 317 n.19. Further, the Court held that the Hyde Amendment did not violate Equal Protection guarantees by reimbursing all medical services except medically necessary abortions. *Id.* at 297.

35. *Id.* at 314.

tween legitimate government interests in promoting childbirth and the funding priority of childbirth to the exclusion of abortion.

The most recent case involving abortion funding is *Rust v. Sullivan.*[36] *Rust* raises more unique constitutional questions because the constitutional rights of abortion providers as well as indigent recipients were at issue before the Court. The case challenged the constitutionality of Department of Health and Human Services ("HHS") regulations prohibiting use of Title X funds for several purposes including referral or counseling for abortion services,[37] encouraging, promoting, or advocating abortion.[38] The regulations also mandated that Title X projects be physically and financially separate from activities which are prohibited by the regulations.[39]

The *Rust* Court rejected the argument that the HHS regulations violated the First Amendment speech rights of Title X grantees by conditioning receipt of Title X funds on the sacrifice of protected speech activity.[40] The Court extended the reasoning used in *Harris* and *Maher,* finding the government entitled to define the scope of a program funded with appropriated public funds.[41] Because of the distinction in scope between a Title X grantee[42] and a Title X project,[43] project funding limitations involving abortion-related speech

36. 111 S. Ct. 1759 (1991).

37. *Id.* at 1765 (citing 42 C.F.R. 59.8 (1988)).

38. *Id.* (citing 42 C.F.R. § 59.10 (1988)).

39. *Id.* at 1466 (citing 42 C.F.R. § 59.9 (1988)).

40. 111 S.Ct. at 1774-76.

41. *Id.* at 1773. The scope of the Title X project was limited exclusively to "family planning". *Id.* at 1765. " 'Family planning' means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved." Grants for Family Planning Services, 42 C.F.R. § 59.2 (1988). Family planning services include a broad range of acceptable and effective methods to limit or enhance fertility; however, "family planning" does not include pregnancy, prenatal care, or abortion services. *Id.* Although "it is clear that the Title X project must facilitate obtaining the prenatal care necessary for a health pregnancy" referral for abortion is expressly prohibited because it is not a method of "family planning." Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Services Projects, 53 Fed. Reg. 2922, 2926-27 (1988) (to be codified at 42 C.F.R. § 59.2). The HHS regulations do not proscribe abortion referrals when "emergency" circumstances dictate that a client be immediately referred to an "appropriate provider of emergency medical services." *Id.* at 2945.

42. A "grantee" is an organization which receives an award of funds from the government. 42 C.F.R. § 59.2.

43. A program or project is a coherent assembly of plans, activities and supporting resources contained within an administrative framework. 42 C.F.R. § 59.2. "The Department believes that it is not supportable, in light of the legislative history . . . to read the term 'program' . . . as relating to the funded organization as a whole." Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion is a Method of Family Planning; Standard of Compliance for Family Services Projects, 53 Fed. Reg. 2922, 2927 (1988).

leave grantees "unfettered" in the exercise of constitutionally protected speech rights.[44]

The entire line of abortion funding cases demonstrates that the courts are accommodating to state and federal spending powers. By refusing to recognize indigent women as a suspect class or government funded abortion as a fundamental right, minimal scrutiny applies and government refusal to fund abortion is permitted when "rationally related" to a constitutionally permissible goal.[45]

Legislation to deny tax exemption to organizations which perform abortion may merit the same minimal degree of scrutiny as applied in government funding decisions. In *Regan v. Taxation With Representation,*[46] the Court upheld IRS regulations denying section 501(c)(3) tax exemption to organizations which engage in substantial lobbying. The Court explained that tax exemption and funding are equivalent.[47] By stating that, "[t]his Court has never held that Congress must grant a benefit such as TWR [Taxation with Representation] claims here to a person who wishes to exercise a constitutional right,"[48] the Court established that tax exemption enjoys no more constitutional protection than Congressional funding decisions.[49]

The tension between the government's constitutional duty to refrain from interfering with constitutional rights and the lack of duty to subsidize constitutional rights has resulted in a unique body of constitutional precedent. These concepts of unconstitutional conditions can challenge Humphrey Amendment legislation on constitutional grounds. Under some circumstances, unconstitutional conditions analysis is more stringent than the "rational relation" test used in abortion funding cases. Even if tax exemption is equivalent to funding, some constitutional limitations apply to the

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44. The *Rust* Court found that:

> The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; *they merely require that the grantee keep such activities separate and distinct from Title X activities.* Title X expressly distinguishes between a Title X *grantee* and a Title X *project.* The grantee, which normally is a health care organization, may receive funds from a variety of sources for a variety of purposes . . . . The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities.

111 S.Ct. at 1774 (emphasis added).

45. Maher v. Roe, 432 U.S. 464, 478 (1977) (citations omitted).

46. 461 U.S. 540 (1983).

47. In *Regan,* the court explained that "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system." *Id.* at 544.

48. *Id.* at 545.

49. *See* Leathers v. Medlock, 111 S. Ct. 1438, 1443-44 (1991) (holding that strict scrutiny was not triggered by content-neutral tax scheme).

allocation of tax-exempt status under section 501(c)(3). These unconstitutional conditions cases are discussed in the following section.

II. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

No single method has been used by the courts to distinguish between unconstitutional conditions on government benefits and legitimate government funding decisions.[50] Several general concepts emerge from the Court's analysis of constitutional challenges to government subsidy distinctions. First, government cannot penalize organizations beyond a mere refusal to fund a sphere of activity in the absence of a compelling state interest.[51] Second, government mandated segregation of subsidized and non-subsidized activities within organizations can avert an unconstitutional penalty effect.[52] Third, the segregation of government funded and non-funded activities may comprise a further unconstitutional burden on the exercise of constitutionally protected rights. The specific standard that distinguishes constitutional segregation burdens from unconstitutionally burdensome segregation is difficult to identify precisely. Several cases provide some parameters.

Rust and *Maher* demonstrate that the government is free to make funding decisions which are rationally related to a constitu-

50. *See* William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243, 244 (1989). Marshall explained the lack of "formula" to unconstitutional conditions analysis by denying the existence of an unconstitutional conditions doctrine. He wrote that:

> [b]ecause the government's remedial programs have touched virtually all areas of social and economic life, the problem of unconstitutional conditions arises in a myriad of contexts and affects the full spectrum of constitutional rights. Any attempt to fashion a comprehensive theory of unconstitutional conditions would be quite far-reaching. It would literally suggest a unifying theory cutting across all of constitutional law. It is my conclusion that despite, or perhaps because of, its ambition the search for a comprehensive theory of unconstitutional conditions is ultimately futile.

Id. (citation omitted).

51. However, the state may burden rights through subsidy distinctions when a compelling state interest is advanced. Grove City College v. Bell, 465 U.S. 555 (1984) (conditioning federal assistance on the execution of an Assurance of Compliance with Title IX's nondiscrimination provision constitutional under the First Amendment because of compelling interest); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (recognizing compelling state interest where tax exempt status is conditioned on adherence to racially non-discriminatory policy); United States v. Lee, 455 U.S. 252 (1982) (holding that commercial activity conditioned on payment of Social Security contribution (violating religious belief) advanced a compelling interest and was constitutional).

52. *See* Harris v. McRae, 448 U.S. 297, 317 n.19 (1980).

tionally permissible goal. The distinction between a refusal to fund and a penalty[53] was recognized by the *Harris* Court. While a refusal to subsidize abortion was a constitutional funding decision, "[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 the constitutionally protected freedom to terminate her pregnancy by abortion* . . . [b]ut the Hyde Amendment . . . does not provide for such a broad disqualification from receipt of public benefits."[54]

An unconstitutional penalty reaches beyond the scope of a funding decision to deter the exercise of constitutionally protected activities.[55] The courts have characterized withdrawal of all benefits for

53. *See* Kathleen M. Sullivan, *Unconstitutional Conditions,* 102 HARV. L. REV. 1415, 1499 (1989) ("Cases drawing a distinction between permissible 'nonsubsidies' and impermissible 'penalties' often miss the point [that the government uses subsidy in ways that are coercive to constitutional rights].").

54. *Harris,* 448 U.S. at 317 n.19 (emphasis added). A similar mode of analysis was applied in *Sherbert v. Verner,* 374 U.S. 398 (1963), which held that the state may not withhold all unemployment benefits from an otherwise eligible claimant who refused to work on the Sabbath.

55. This view was supported by Laurence Tribe (who argued before the Supreme Court on behalf of Title X recipients in *Rust v. Sullivan*) in opposing early legislation to deny tax-exempt status to organizations which perform abortion:

> Senators should be aware that the amendment would, in all likelihood, violate the Due Process clause of the Fifth Amendment . . . . Although Congress is free to withhold federal subsidy from the exercise of fundamental rights . . . and accordingly may act to prevent institutions from using tax-deductible contributions to fund such exercise . . . it is equally well settled that "the government may not deny a benefit to a person because he exercises a constitutional right" . . . . [T]he Humphrey amendment would not contain a proviso permitting hospitals and other institutions to retain tax benefits for their other activities so long as they confine the ineligible activities (i.e. performing or financing abortions) to controlled but distinct affiliate entities.

132 CONG. REC. S14852 (daily ed. Oct. 3, 1986) (citations omitted).

Concern about the unconstitutional penalties that Tribe describes might have influenced legislators to narrow the scope of legislation. Earlier legislation did not attempt to distinguish between organizations by the amount of total organizational activities that included abortion. *See infra* note 96. Under early legislation, the denial of tax-exempt status would apply equally to organizations which performed abortions exclusively and organizations which provide abortion as a minuscule proportion of other health-related business. *Id.* This could exclude from coverage many large hospitals and universities. By contrast, later legislation attempted to limit the application of a denial of tax-exempt status to organizations receiving more than one percent of gross receipts from abortions. *Id.* These changes could be interpreted as a response to a powerful lobby of tax-exempt hospitals and universities. A number of organizations expressed opposition to the earlier Humphrey Amendment including: the Association of American Medical Colleges, the American Medical Association, the Health Care Financial Management Association, Kaiser Permanente, the American Association and Community and Junior Colleges, the Association of American Universities, Blue Cross Blue Shield Association, the Volunteer Trustees of Not-For-Profit Hospitals, and the American Psychological Association. 132 CONG. REC. S14850-57 (daily ed. Oct. 3, 1986). While the one percent limitation might have satisfied lobbyists, Congressional legislation

engaging in unrelated protected activity as an unconstitutional penalty under other circumstances. In *Speiser v. Randall,*[56] the court invalidated an oath[57] prerequisite for a veterans' property tax exemption. Justice Brennan explained that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech."[58]

Two cases demonstrate that a government condition exceeding the scope of a government subsidy can also be construed as an unconstitutional penalty.[59] In *F.C.C. v. League of Women Voters,*[60] the Court considered a ban on editorials by federally funded public broadcasting stations.[61] Public television stations were only partially federally funded but the government ban applied to all activities (including those that were privately funded).[62] The ban did not provide for segregation of government funds and private funds, and

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would be subject to an unconstitutional penalty challenge if applied to an organization that receives greater than one percent of gross receipts from providing abortion.

56. 357 U.S. 513 (1958).

57. The oath read " 'I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities.' " *Id.* at 515.

58. *Id.* at 518.

59. *See also* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (holding that, under the First Amendment, unemployment compensation cannot be denied to Seventh Day Adventists who refuse to work on the Sabbath); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981) (holding that, under the First Amendment, unemployment compensation cannot be denied to a Jehovah's Witness who refuses to participate in the production of armaments because it violated his religious beliefs); Perry v. Sindermann, 408 U.S. 593 (1972) (holding that the renewal of a nontenured public school teacher's one-year contract cannot be conditioned on exercise of First and Fourteenth Amendment rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that conditioning receipt of welfare benefits on length of residence impinges on the fundamental right of interstate travel); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that, under the First Amendment, unemployment compensation cannot be conditioned on Seventh Day Adventist's refusal to work on the Sabbath). *See generally* Sullivan, *supra* note 53.

60. 468 U.S. 364 (1984).

61. *Id.*

62. When the federal government attempted to justify limitations on editorializing with an argument that conditions were constitutional under the Spending Power, the Court noted that:

> In this case, however, unlike the situation faced by the charitable organization in *Taxation With Representation* [*Regan v. Taxation With Representation*], a noncommercial educational station that receives only 1% of its overall income from [Federal] grants is barred absolutely from all editorializing. Therefore, in contrast to the appellee in *Taxation With Representation*, such a station is not able to segregate its activities according to the source of funding. The station has no way of limiting the use of its Federal funds to all noneditorializing activities, and more importantly, it is barred from using even wholly private funds to finance its editorial activity.

Id. at 400.

it was invalidated as an unconstitutional condition on speech rights of broadcasters.[63]

Similarly, in *Planned Parenthood v. Arizona,*[64] family planning organizations in Arizona challenged the constitutionality of a provision in a state appropriations bill which prohibited the use of state welfare funds to support organizations that perform abortions and engage in abortion related activities.[65] The court found that Arizona's legislation was unconstitutional because the regulation encompassed a condition broader in scope than the state subsidy.[66] While the state need not support abortion and abortion related activities with subsidy, the state may not unreasonably interfere with an organization's right to engage in abortion or abortion related speech.[67] The language in the state legislation was too broad to be held constitutional:

> The statute withheld all state funds from nongovernmental entities offering "abortions, abortion procedures, counseling for abortion procedures or abortion referrals." A more narrowly drawn statute, which would accomplish the stated purpose of ensuring that state funds not be spent on activities the state legislature disfavors, would simply forbid entities receiving state funds from using those funds for abortions and the related activities listed above.[68]

The court held that the legislation imposed a penalty, as in *Speiser,* on constitutionally protected rights.[69] However, *Planned Parenthood* dicta suggests that more narrowly tailored legislation

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63. *Id.* at 400, 402.

64. 718 F.2d 938 (9th Cir. 1983).

65. *Id.*

66. *Id.* at 944-45.

67. *Id.* The court rejected the state's argument that state funding could be denied because state funding of activities not related to abortion would "free up" private or federal funds for abortion activity. *Id.* at 945. The court concluded that a state cannot justify withdrawing all state funds from otherwise eligible entities because non-state funds might be reallocated to less preferred activities. *Id.* A denial of funding for all activities constitutes an unconstitutional penalty to organizations which perform constitutionally protected activities. The court further stated that:

> It can be argued that by providing welfare benefits to a pregnant indigent woman, a state would be freeing up whatever other funds she may have at her disposal for use in paying for an abortion. Thus, the freeing-up argument, when coupled the holding in *Maher* . . . would lead to the conclusion that a state could refuse all medicaid benefits to an otherwise eligible applicant because she had exercised her right to have an abortion. Although the Supreme Court has never addressed such a situation, the Court . . . implied that such a statute would impose an unconstitutional penalty on the Medicaid recipient.

Id. (citations omitted).

68. *Id.* at 945.

69. *Id.* (holding that statutes which withdraw all funding from otherwise eligible entities, such as Medicaid, may infringe upon constitutionally protected rights).

would survive constitutional scrutiny.[70]

Unconstitutional penalty effects have been upheld when rationally related to a legislative goal. In *American Communications Ass'n. v. Douds,*[71] the Court upheld a provision in the National Labor Relations Act denying certain benefits to labor organizations whose officers do not file "non-communist" affidavits with the National Labor Relations Board. The Court held that:

> [w]hen particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented . . . . Legitimate attempts to protect the public, not from the remote possible effects of noxious ideologies, but from present excesses of direct, active conduct, are not presumptively bad because they interfere with and, in some of its manifestations, restrain the exercise of First Amendment rights.[72]

While *Douds* arguably resulted from cold war culture rather than thorough unconstitutional conditions analysis, it presents an example of permissible penalty effects in the allocation of government benefits.[73] When the penalty effect on an activity is either attenuated or partial, perhaps a "rational relation" to constitutional goals or a "balancing" of constitutional rights and legislative rationale may suffer to justify an otherwise unconstitutional penalty. Thus, the constitutionality of penalty effects may depend on whether or not a penalty effect is considered substantial, as in *League of Women Voters,*[74] or merely attenuated, as in *Douds.*

What might appear to be an unconstitutional penalty could be avoided if it is possible to segregate subsidy used for preferred and unpreferred activities. *Planned Parenthood* and *League of Women Voters* suggest that the ability to segregate government funded activities from non-funded activities is critical to the state's ability to attach conditions to subsidy, while avoiding forbidden conditions on private funds.[75] This concept was explored by the Court in

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70. *Id.* (suggesting that a statute could be drawn which permits state funds to go to nongovernmental organizations which perform abortion-related services if the funds do not subsidize abortions and other related activities).

71. 339 U.S. 382 (1950).

72. *Id.* at 399.

73. While *Douds* has not been explicitly overruled, the Court has grown more protective of speech rights in recent decades. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

74. 468 U.S. 364 (1984).

75. *See id.* When segregation of preferred and unpreferred activities is not possible, the public policy and compelling state interests can allow a denial of subsidy which is larger in scope than an unpreferred activity. In *Bob Jones Univ. v. United States,* 461 U.S. 574 (1983),

Regan v. Taxation With Representation.[76] In *Regan,* the Court upheld IRS regulations prohibiting organizations with tax-exempt status under section 501(c)(3) from engaging in substantial lobbying, a right guaranteed by the First Amendment. By allowing organizations to maintain an affiliate for lobbying, which could be tax-exempt under section 501(c)(4), Congress merely "chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare."[77] One commentator surmised that:

> Had Congress denied Taxation With Representation tax benefits for its nonlobbying activities on account of its lobbying, the Court might well have invalidated the condition by analogy to *Speiser,* but section 501(c)(4) prevented that result. Without that section, nonprofit organizations that exercised their constitutional right to lobby would have been penalized for their lobbying by losing all tax benefits for their nonlobbying activities. In other words, withholding subsidies of nonlobbying activities on account of lobbying activities is constitutionally forbidden, but *Taxation With Representation* [*Regan v. Taxation With Representation*] held that the tax code did not impose such a penalty.[78]

In *Rust,* the Court upheld regulations prohibiting abortion counseling within the scope of the Title X activity funded by the federal government.[79] Because the federal funding was "project based," a refusal to fund abortion-related speech was not an unconstitutional penalty.[80] The court stated, "Title X expressly distinguishes between a Title X *grantee* and a Title X *project.*"[81] While a Title X grantee may engage in abortion related speech, the grantee must conduct that speech separately from projects that receive Title X funds.[82] The court distinguished unconstitutional conditions cases from *Rust* because, "our 'unconstitutional conditions' cases involve situations in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging

racially discriminatory admissions policies and school rules which forbade interracial marriage could not be segregated from the tax-exempt activities of the University. While the Court did not consider any argument that the IRS ruling comprised a penalty on otherwise eligible activities, the decision may suggest that especially egregious violations of public policy may be subject to larger penalty effects. *See id.*

76. 461 U.S. 540 (1973).

77. *Id.* at 544.

78. Sullivan, *supra* note 53 at 1465 (citations omitted).

79. *Rust,* 111 S.Ct. 1759.

80. *Id.*

81. *Id.* at 1774. *See supra* notes 46-48.

82. *Id.*

in the protected conduct outside the scope of the federally funded program."[83] The severability of operations in a Title X project from other grantee activities allows a government "funding" decision to escape constitutional limitations under the First or Fifth Amendments.

While the government may mandate segregation of activities, mandated segregation of subsidized and unsubsidized activities could be unconstitutionally burdensome. The permissible boundaries of unconstitutional and constitutional segregation are roughly sketched in two recent cases. In *Regan,* the Court mandated segregation of lobbying and non-lobbying activities into separate organizations. This segregation was approved by the Court because Taxation With Representation ["TWR"] was originally formed by fusing two separate organizations:

> One, Taxation With Representation Fund, was organized to promote TWR's goals by publishing a journal and engaging in litigation; it had tax-exempt status under 501(c)(3). The other, Taxation With Representation, attempted to promote the same goals by influencing legislation; it had tax-exempt status under 501(c)(4).[84]

The segregation of lobbying and non-lobbying activities in order to maintain tax-exempt status merely required TWR to return to the dual structure which it used in the past.[85]

By contrast, in *F.E.C. v. Massachusetts Citizens For Life, Inc.,*[86] the Court identified factors that can make segregation so burdensome that it infringes on constitutionally protected speech rights. Massachusetts Citizen For Life (MCFL) challenged F.E.C. guide-

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83. *Id.* (citations omitted).

84. 461 U.S. 540, 543 (footnote omitted). The court continued by explaining that:

> For purposes of our analysis, there are two principal differences between § 501(c)(3) organizations and § 501(c)(4) organizations. Taxpayers who contribute to § 501(c)(3) organizations are permitted by § 170(c)(2) to deduct the amount of their contributions on their federal income tax returns, while contributions to § 501(c)(4) organizations are not deductible. Section 501(c)(4) organizations, but not § 501(c)(3) organizations, are permitted to engage in substantial lobbying to advance their exempt purposes.

Id.

85. *Id.* at 544. Note that the "dual structure" of 501(c)(3) and (4) organizations has been subject to Congressional criticism. *Lobbying and Political Activities of Tax-exempt Organizations: Hearings before the Subcomm. on Oversight of the House Comm. on Ways and Means House of Rep.*, 100th Cong., 1st Sess. 1-10, 64-70 (1987) (statements of Chairman J.J. Pickle and Mr. Hopkins).

86. 479 U.S. 238 (1986) (holding that Federal Election Campaign Act § 316, 2 U.S.C. § 441b (1988), prohibiting corporations from using treasury funds to make an expenditure "in connection with" any federal election unless financed by voluntary contributions segregated into a separate fund, was an unconstitutional burden on First Amendment speech rights).

lines which imposed additional organizational and reporting requirements on campaign funds generated by incorporated organizations.[87] The court found that additional regulations created unconstitutional disincentives to political speech because, "[d]etailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage."[88] The segregation guidelines advanced no compelling government interest in the context of non-profit organizations.[89] The minority concluded that:

> Thus, while § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses.

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87. The Court explained that the differential treatment of incorporated and unincorporated organizations under the FEC rules was not inconsequential:

> If it were not incorporated, MCFL's obligations under the Act would be those specified by § 434(c) . . . [they would need to] (1) identify all contributors who contribute in a given year over $200 in the aggregate in funds to influence elections; (2) disclose the name and address of recipients of independent expenditures exceeding $200 in the aggregate, along with an indication of whether the money was used to support or oppose a particular candidate; and (3) identify any persons who make contributions over $200 that are earmarked for the purpose of furthering expenditures . . . [b]ecause it is incorporated, however, MCFL must establish a "separate segregated fund" if it wishes to engage in any independent spending whatsoever. Since such a fund is considered a "political committee" . . . all MCFL independent expenditure activity is, as a result, regulated as though the organization's major purpose is to further the election of candidates. This means that MCFL must comply with several requirements in addition to those mentioned. Under § 432, it must appoint a treasurer; ensure that contributions are forwarded within 10 or 30 days of receipt, depending on the amount of the contribution; see that its treasurer keeps an account of every contribution regardless of amount, the name and address of any person who makes a contribution in excess of $50, all contributions received from political committees, and the name and address of any person to whom a disbursement is made regardless of amount, and preserve receipts for all disbursements over $200 and all records for three years. Under § 433, MCFL must file a statement of organization containing its name, address, the name and address of its custodian of records, and its banks, safety deposit boxes, or other depositories; must report any change in the above information within 10 days; and may dissolve only upon filing a written statement . . . .
>
> Under § 434, MCFL must file . . . monthly reports with the FEC . . . . [t]hese reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions. . . . In addition, MCFL may solicit contributions for its separate segregated fund only from its "members" . . . .

Id. at 252-54 (citations omitted).

88. *Id.* at 254-55.

89. *Cf.* Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (comparing non-profit status of Massachusetts Citizens for Life against Michigan Chamber of Commerce).

> The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities.[90]

Varying degrees of burdensome segregation exist between extremes presented in *Regan* and *Massachusetts Citizens For Life.* For example, in *Austin v. Michigan Chamber of Commerce,*[91] state fund segregation requirements similar to those invalidated in *Massachusetts Citizens For Life* were upheld. The Court distinguished the state interest in segregation of campaign funds in *Austin* and *Massachusetts Citizens For Life* on three factors: MCFL was a voluntary political organization rather than a business firm like the Michigan Chamber of Commerce (MCC), MCFL was a narrowly focused organization[92] whereas MCC had a wide organizational focus,[93] and MCC received a majority of contributions from businesses as opposed to private citizens who provided the majority of financial support to MCFL.[94] Thus, state campaign fund segregation requirements were less burdensome on MCC and more justifiable given compelling state interests against corruption and distortion of the political process.[95]

While the *Rust* case presented ample opportunity to address further the degree of burdensome segregation between subsidized and unsubsidized activities which may be imposed without violating the constitution, the Court neglected to address this issue with any degree of specificity. The HHS regulations upheld in *Rust* stated that, "[a] title X project must be organized so that it is physically and financially separate . . . from activities which are prohibited under . . . the Act . . . and regulations" and that physical and financial separateness includes "objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds

90. *Massachusetts Citizens For Life, Inc.,* 479 U.S. at 255.

91. 494 U.S. 652 (1990).

92. According to MCFL by-laws the focus of the organization was " '[t]o foster respect for human life and to defend the right to life for all human beings.' " *Id.* at 656 (quoting *Massachusetts Citizens for Life, Inc.,* 479 U.S. at 241-42).

93. The articles of incorporation of MCC set forth that the organization was intended "to promote economic conditions favorable to private enterprise; to analyze, compile, and disseminate information about laws of interest to the business community". *Id.* at 656. The comparitively narrow focus of MCFL allowed for a finding that none of the compelling interests set forth by the legislature applied to MCFL. By contrast, challenges to legislation based on unconstitutional penalty attempt to demonstrate a wide organizational focus (including a variety of charitable activities) which are penalized by a denial of total organizational tax-exempt status.

94. *Id.* at 664.

95. *Id.* at 666-69.

from other monies is not sufficient."[96] It is certain that the HHS regulations require some greater degree of segregation than mandated by the Court in *Regan*. But, these vague regulations avoid unconstitutional conditions issues encountered in *Massachusetts Citizens For Life* because the appointment of officers, detailed record-keeping, and other activities which increase costs beyond what a small organization could bear are not specifically required.

The question of what degree of stringency will be constitutionally tolerated is one for future debate and commentary. Unconstitutional conditions challenges to mandated segregation of subsidized and unsubsidized activities would address these unresolved issues. In the next part, the concepts of unconstitutional conditions will be applied to the Humphrey Amendments and similar legislation.

III. UNCONSTITUTIONAL CONDITIONS AND ABORTION SUBSIDY

While Congressional legislation has been introduced to limit the tax-exempt status of abortion providers,[97] there have been no spe-

96. 42 C.F.R. § 59.9 (1988).

97. One early amendment to the 1987 appropriations bill is typical of early legislation. Amendment No. 3183 read in relevant part:

> SEC. . DENIAL OF TAX BENEFITS FOR ORGANIZATIONS WHICH PERFORM, FINANCE, OR PROVIDE FACILITIES FOR ABORTIONS.
>
> (a) DENIAL OF TAX-EXEMPT STATUS.-Section 501 (relating to exemption from tax on corporations, certain trusts, etc.) is amended by redesignating subsection (m) as subsection (n) and by inserting after subsection (l) the following new subsection:
>
> "(m) DENIAL OF EXEMPTION FOR ORGANIZATIONS WHICH PERFORM, FINANCE, OR PROVIDE FACILITIES FOR ABORTIONS.-An organization shall not be treated as described in subsection (a) if such organization performs, finances, or provides facilities for any abortion, *except where the life of the mother would be endangered if the fetus were carried to term.*"
>
> (b) DENIAL OF ELIGIBILITY FOR CHARITABLE CONTRIBUTION.-
>
> (1) INCOME TAX.-Section 170(c) (defining charitable contribution) is amended by adding at the end thereof the follwoing: "For the purposes of this section, such term does not include a contribution or gift to or for the use of any organization which performs, finances, or provides facilitites for any abortion (within the meaning of section 501(m))."

132 CONG. REC. S14844 (daily ed. Oct. 3, 1986) (emphasis added) (proposal of Amendment No. 3184 by Sen. Hatfield). Later legislation is exemplified by S.1513 which read in relevant part:

> SECTION 1. DENIAL OF TAX BENEFITS FOR ORGANIZATIONS WHICH PERFORM OR PROVIDE FACILITIES FOR ABORTIONS.
>
> (a) DENIAL OF TAX-EXEMPT STATUS.-Section 501 of the Internal Revenue Code of 1986 (relating to exemption from tax on corporations, certain trusts, etc.) is amended by redesignating subsection (n) as subsection (o) and inserting after subsection (m) the following new subsection:
>
> "(n) DENIAL OF EXEMPTION FOR ORGANIZATIONS WHICH PERFORM OR PROVIDE FACILITIES FOR ABORTIONS.-

cific proposals to deny tax exemption to organizations that perform abortion counseling. Any legislation limiting tax-exempt status of organizations involved in abortion services can be challenged with unconstitutional conditions theories. The success of unconstitutional conditions challenges depends on two variables. The first variable is the scrutiny triggered by the threatened constitutional right.[98] The second variable is the type of organization affected by the legislation. The existence of an unconstitutional penalty effect will depend on organizational attributes such as organizational history, size, and the proportion of abortion-related activity compared to nonabortion charitable activity performed. This analysis demonstrates few predictable outcomes of judicial scrutiny in unconstitutional conditions cases.[99]

Legislation which denies tax-exempt status to organizations that

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"(1) IN GENERAL.-An organization shall not be treated as described in subsection (a) for any taxable year *if for such year such organization received more than 1 percent of its gross receipts from performing abortions or providing facilities for abortions.*

"(2) RECEIPTS FROM CERTAIN ABORTIONS EXCLUDED.-In determining gross receipts under paragraph (1), gross receipts from abortions performed *when the life of the mother would be endangered if the fetus were carried to term shall not be considered.*".

(b) DENIAL OF ELIGIBILITY FOR CHARITABLE CONTRIBUTION.-

(1) INCOME TAX.-Section 170(c) of the Internal Revenue Code of 1986 (defining charitable contribution) is amended by adding at the end thereof the following: "For purposes of this section, such term does not include a contribution or gift to or for the use of any organization which is not treated as an organization described in section 501(a) by reason of section 501(n).".

S.1513, 101st Cong., 1st Sess. § 1 (1989) (emphasis added).

The evolution of the scope of activities contemplated by this legislation demonstrates an understanding of the constitutionally protected rights of health care providers. If a provider's right to practice medicine is recognized, it would most clearly be infringed by a prohibition of abortions necessary to preserve the life of the mother. Legislation limiting abortion subsidy has historically made exceptions for endangered mothers' lives. The regulations upheld in *Rust* included exceptions to general rules of non-subsidy in life threatening cases. Regulations did address abortion which threatens the life of the mother, "[i]n cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services." 40 CFR 59.8 (1988). In *Rust*, the court noted that they did not read the regulations to bar abortion referral in the case that a woman's pregnancy places her life in "imminent peril." 111 S.Ct at 1773. The Court further noted that, "Section 59.5(b)(1) also requires Title X projects to provide necessary referral to other medical facilities when medically indicated." *Id.*

98. *See supra*, Part I and Part II.

99. This argument assumes that both speech and abortion rights will continue to be defined as charitable activity under section 501(c)(3). Section 501(c)(3) is designed to subsidize charitable activity. If any activity is inherently uncharitable, tax-exempt status may be constitutionally denied.

In general, organizations that engage in illegal activity are excluded *per se* from tax exemption under § 501(c)(3)-(4). In a 1975 Revenue Ruling, the IRS considered the tax exempt status of an anti-war protest organization which urged demonstrators to "deliberately block

vehicular or pedestrian traffic, disrupt the work of government, and prevent the movement of supplies." Rev. Rul. 75-384, 1975-2 C.B. 204. The ruling concluded that:

> Illegal activities, which violate the minimum standards of acceptable conduct necessary to the preservation of an orderly society, are contrary to the common good and general welfare of the people in the community and thus are not a permissible means of promoting the social welfare for purposes of Section 501(c)(4) of the code.

Id. See also Gen. Couns. Mem. 39,800 (Nov. 6, 1989) (finding that an organization described under 501(c)(3) did not violate the fundamental federal public policy of the Establishment Clause); Gen. Couns. Mem. 38,264 (Jan. 30, 1980) (finding that a section 501(c)(4) organization will lose its exemption if it engages in illegal activities); Gen. Couns. Mem. 38,251 (Dec. 31, 1979) (finding that an organization, whose primary activity is the promotion of social welfare, will affect its exempt status under section 501(c)(4) if it engages in political campaigns for public office); Gen. Couns. Mem. 36,153 (Jan. 31, 1975) (finding that "an organization that plans and supports acts of civil disobedience" does not qualify for exempt status under sections 501(c)(3) or 501(c)(4)). *Cf.* Gen. Couns. Mem. 38,415 (June, 1980) (finding that an organization which educates the public on environmental issues and which also engages in nonviolent confrontation activities relating to the hunting of endangered species can retain its exempt status under section 501(c)(3)) (organizations are not accountable for the unauthorized illegal acts of members).

Activities which are contrary to public policy are also generally not tax-exempt. In *Bob Jones Univ. v. United States,* 461 U.S. 574 (1983), the Court upheld an IRS ruling which denied tax-exempt status to a school with racially discriminatory policies. The Court found that:

> Section 501(c)(3) . . . must be analyzed and construed within the framework of the Internal Revenue Code and against the background of congressional purposes. Such an examination reveals unmistakable evidence that, underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common-law standards of charity - namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.

Id. at 586. The court also quoted century-old precedent that "it has now become an established principal of American law, that courts of chancery will sustain and protect . . . a gift . . . to public charitable uses, *provided the same is consistent with local laws and public policy* . . . ." *Id.* at 588 (quoting Perin v. Carey, 24 How. 465, 501, 26 L. Ed. 701 (1861) (emphasis added by the Court). In *Bob Jones Univ.*, the long history, compelling public policy, and law against racial discrimination sufficed as justification for a denial of tax-exempt status which burdened religious freedom. The court stated that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . . [t]hat governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioner's exercise of their religious beliefs." *Id.* at 604. The compelling public policy against racial discrimination in education justified a denial of tax-exempt status despite the of resulting burden on constitutionally protected religious beliefs.are denied exemption under § 501(c)(3).

If abortion were made illegal, or viewed as contrary to public policy, these rationales could support denying tax-exempt status to abortion providers. In the future, barriers to discriminatory tax treatment of organizations which engage in abortion counseling could hang in the balance an increasingly conservative Court and legality of abortion. The effect of the overruling of *Roe* on public policy regarding abortion may well depend on the thoroughness of the Court's denouncement and subsequent reaction within state legislatures. *See also* Cynthia Gorney, *Endgame,* WASH. POST, Feb. 23, 1992, at w6. If *Roe* is overruled and a substantial number of states criminalize abortion, "public policy" could be swayed against abortion. For the moment, abortion and abortion counseling have not been classified as either illegal or uncharitable activities. *See* Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992).

perform abortion counseling could be found unconstitutional[100] because different tax treatment of speech favoring and opposing abortion would be a viewpoint-based distinction triggering strict scrutiny.[101] A subject-matter prohibition on all abortion-related speech[102] could be viewed as permissible if legislation were narrowly drawn to advance a compelling state interest.[103] However, a statute which conditioned tax-exempt status on a subject matter prohibition could be broad enough to survive strict scrutiny. The state has no compelling interest in burdening speech rights of health care providers who discourage abortion. If the Court defined advocating abortion as a distinct subject matter, a denial of exemption could be upheld on the grounds that it advances the compelling state interest in protecting fetal life.[104]

Nonetheless, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes."[105] Victor

100. It is interesting that legislation introduced in Congress (aimed at limiting tax-exempt status of organizations which perform abortion) was clearly drafted to avoid First Amendment issues. The following passage from the Senate debate reads:

> Mr. STEVENS . . . . In other words, if it is to be tax justice, should the Right to Life Committee and all those churches and others who oppose abortions similarly be denied their tax-exempt status?
>
> Mr. Armstrong . . . the Humphrey Amendment was has been carefully crafted, let me say to my friend, not to go to the question of advocating abortion. You can advocate abortion 24 hours a day, 7 days a week without losing your tax-exempt status. And, in exactly the same way, people who are against abortions enjoy a tax-exempt status in some cases . . . .

132 CONG. REC. S14848 (daily ed. Oct. 3, 1986).

A Republican Policy Committee memorandum of Legislative Counsel also demonstrates that an aversion to legislation which would deny tax-exempt status for abortion-related speech. 133 CONG. REC. S2607-10 (daily ed. Feb. 26, 1987). While the memo concludes that legislation which limits the exemption of abortion providers would be unconstitutional, "were Congress to attempt to revoke the tax-exemption of a group for its lawful, abortion-related speech, serious-and probably insurmountable-First Amendment problems would arise." *Id.* at S2610.

101. *See* Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987); F.C.C. v. League of Women Voters, 468 U.S. 364 (1984). *See supra* pp. 11-13.

102. The protection afforded to the right of an abortion provider to freely practice medicine, if recognized, would enjoy a lesser degree of constitutional protection than speech rights. The physician's right to practice medicine does not enjoy the weight of precedent given the right of free speech. See *supra* note 20.

103. This "subject matter prohibition" could be seen as analogous to the government refusal to subsidize lobbying with tax-exemption illustrated in Regan v. Taxation With Representation, 461 U.S. 540 (1983).

104. *See* Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding Missouri law which conditioned use of public employees, facilities, and funds to perform, assist, or "counsel and encourage" upon the choice not to have an abortion); Roe v. Wade, 410 U.S. 113 (1973). Compelling interest could be justified as a "moral" interest, as exhibited in Bowers v. Hardwick, 178 U.S. 186 (1986).

105. *Regan*, 461 U.S. at 547.

Rosenblum[106] maintains that legislation to deny tax-exempt status to organizations that perform abortion is constitutional.[107] According to Rosenblum, Congressional discretion is nearly limitless in the absence of an implicated fundamental right:

> Although it is established constitutional doctrine that a Congressional penalty on constitutionally protected acts is not sustainable, the Justices . . . concluded that refusal to fund or subsidize abortions did not constitute such a penalty . . . . The applicable tax cases seem to me entirely compatible with this view. Tax exemptions have been treated as subsidies, not as penalties . . . and the discretion of Congress in formulating tax policy has, if anything, been deemed greater than in formulating other legislative policies.[108]

American Communications Ass'n. v. Douds[109] provides a similarly sobering warning. In *Douds*, the Court found that a content-based distinction resulting in attenuated or partial effect on constitutional rights only required "rational relation" of legislation to constitutional goals.[110] Under *Douds* analysis, even viewpoint-based distinctions in tax treatment could be upheld.

Unconstitutional conditions doctrine is integral to the analysis of legislation implicating organizations that engage in either abortion counseling in addition to other tax-exempt activities. A denial of tax-exempt status under these circumstances could be invalidated as an unconstitutional penalty. Tax exemption differs from funding because it applies to an entire organization, rather than a smaller "project." If organizations are denied tax-exempt status for all activities rather than ineligible activities, a denial of tax-exempt status could amount to a penalty on constitutionally protected speech rights.

The ultimate success of this argument could rest on two factors. Primarily, the relative strength of the speech right as compared with the Congressional latitude to formulate tax policy could make a speech penalty repugnant to the courts. Secondly, the specific ratio of abortion-related speech and other charitable activity that an

106. Rosenblum is a Law Professor at Northwestern University who argued in support of the Hyde Amendment before the Supreme Court in *Harris v. McRae,* 448 U.S. 297 (1980). 132 CONG. REC. S14845 (daily ed. Oct. 3, 1986).

107. 132 CONG. REC. S14845 (daily ed. Oct. 3, 1986).

108. *Id.*

109. 339 U.S. 382 (1950).

110. *Id.* Title X regulations considered in *Rust* were not completely viewpoint neutral. The HHS regulations permitted project family planning funds to be used for referral for prenatal care, but not referral for abortion. 42 CFR 59.8 (1988). This argument apparently was not advanced by the appellees or considered by the Court.

organization performs would be integral to a court's finding. A penalty effect may be viewed as attenuated or insignificant if legislation only penalizes a small percentage of charitable tax-exempt activity.[111] By contrast, the most recent Humphrey Amendments exempts organizations which derive less than one percent of gross receipts from performing or providing facilities for abortion.[112] To avoid the unconstitutional penalty effect, legislation should be limited to organizations which perform a small percentage of unrelated, charitable, tax-exempt activity, rather than a small percentage of abortion related activity.

As exemplified in *Regan v. Taxation With Representation,*[113] the government could establish a procedure for affiliate organizations to avoid an unconstitutional condition on the allocation of the subsidy.[114] By confining ineligible activities to a separate project or affiliate organization (denied tax-exempt status under section 501(c)(3)), legislation would no longer impose an unconstitutional penalty effect.[115]

The organizational scope of tax exemption makes segregation of subsidized and unsubsidized activity inherently more complex. If segregation is impossible, and the penalty effect is substantial, legislation would trigger strict scrutiny by the Court, and would likely be invalidated as an unconstitutional condition under *F.C.C. v. League of Women Voters.*[116] If the penalty effect is attenuated or partial, *American Communications Ass'n. v. Douds* would require a mere "rational relation" of legislation to constitutionally permissible purposes.[117] Unfortunately, the critical distinction between a substantial and partial penalty effect may be a matter of political

111. *See Douds,* 339 U.S. at 397-400 (holding that legislation which impacts First Amendment freedoms will be upheld if the effect is relatively small and the public interest at issue is substantial).

112. *See infra* note 97.

113. 461 U.S. 540 (1983).

114. *See Rust,* 111 S.Ct. 1759 (upholding equivalent segregation). *See also* 48 C.F.R. § 59.9 (1988) (mandating segregation of funded activities from unfunded activities); *Regan,* 461 U.S. 540.

115. The procedure for affiliate organizations discussed in *Regan* has been subject of congressional inquiry and criticism. *See generally, Lobbying and Political Activities of Tax-exempt Organizations: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means,* 100th Cong., 1st Sess. (1987); SUBCOMMITTEE ON OVERSIGHT OF THE COMM. ON WAYS AND MEANS U.S. HOUSE OF REPS.; REPORT AND RECOMMENDATIONS ON LOBBYING AND POLITICAL ACTIVITIES BY TAX-EXEMPT ORGANIZATIONS, 100TH CONG., 1ST SESS. (Comm. Print June 8, 1987).

116. 468 U.S. 364 (1984). See *supra* notes 59-63 and accompanying text.

117. 339 U.S. 382 (1950). See *supra* notes 71-73 and accompanying text.

influence rather than law.[118]

The remaining question is exactly how burdensome the segregation of activities must be before segregation of abortion-related activities and other charitable activities becomes an infringement of constitutionally protected rights. A variety of analyses could apply to determine the threshold burden which is constitutionally permitted. The burdensomeness of segregation may depend on the degree of segregation between abortion related and other activities prior to regulations, as exemplified by *Regan.*[119] Due to the nature of speech, the functional segregation of abortion-related speech may be oppressive.

Under *Austin v. Michigan Chamber of Commerce,*[120] segregation requirements will be upheld if justified by compelling state interests against funding abortion related activity. Recall that *Austin* was distinguished from *F.E.C.V. Massachusetts Citizens For Life*[121] by virtue of organizational attributes which increased the burden of compliance with legislation. Therefore, the type of organization

118. "The men wear white coats, like those worn by doctors or scientists .... [E]ach has a placard hung around his neck to show why he has been executed: a drawing of a human foetus. They were doctors, then, in a time before, when such things were legal." MARGARET ATWOOD, A HANDMAID'S TALE 42 (1985). *Cf.* Floor Statement of Senator Humphrey, 135 CONG. REC. S9952 (daily ed. Aug. 3, 1989)("Abortion is just plain wrong. Let's cut out the sophistry. Abortion kills human beings. That's why its wrong. The offspring of human beings are human beings, and abortion kills human beings . . . the debate isn't about religion at all, its about biology. And you don't have to hold a Ph.D. to know the offspring of human beings are human beings.")

119. In Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State,* 132 U. PA. L. REV. 1293 (1984), the author focuses on the fact that returning to historical past practices may be less burdensome than forcing organizations to establish unprecedented organizational structures. Kreimer distinguishes between offers and threats to determine if a condition on government subsidy is unconstitutional. *Id.* at 1300-01. Kreimer hypothesizes that the available range of choices expanded by offers or limited by threats depends on how the range of choices is originally defined. *Id.* Three baselines demonstrate the distinctions between unconstitutional threats and offers. *Id.* at 1352. The historical baseline focusses on the difference between past and present benefits schemes. *Id.* at 1361. In the same manner, changing past practices is perceived as less coercive than other interference. *Id.* at 1362. To exemplify this theory he writes that "[i]f for each of the last twenty years the mayor has provided city patronage to the advertising department of a newspaper, the threat to stop doing so unless the newspaper changes its editorial policy would legitimately be viewed as coercion."

In Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent,* 102 HARV. L. REV. 5 (1988), the author criticizes Kreimer's approach by explaining that, "Kreimer's inability to offer a single baseline for assessing conditional government benefits renders his account problematic." *Id.* at 13. Epstein continued by stating that one of Kreimer's baselines can make certain conditions seem acceptable whereas another baseline, when applied to the same issue may make the condition unconstitutional. *Id.*

120. 494 U.S. 652 (1990).

121. 479 U.S. 238 (1986). See *supra* notes 86-95 and accompanying text.

challenging burdensome segregation might affect the Court's determination of penalty effects.[122] By attempting to reconcile the conflicts presented by cases addressing the unconstitutional burdens of mandated segregation of tax-exempt and nonexempt functions, the Court will have a significant role in clarifying the hierarchy of constitutional rights for decades to come.[123] In the meantime, tax-exempt organizations face uncertainty of future outcomes.

A number of prominent legal scholars have attempted to give these concepts of unconstitutional conditions more definition and clarity. Some authors find a critical difference between an "offer" of government benefits and a "threat" to withdraw benefits conditioned on engaging in or refraining from a certain activity.[124] Others find that the germaneness of a condition to an allocated ben-

122. Segregation requirements could be more coercive to small organizations funded by private contributions, as compared to larger organizations with more developed administrative structures. This idea is reflected in another Kreimer "baseline," that of equality, which accounts for the disparate effects of conditions on benefit allocation on different organizations; "[e]ven if there were no history of public advertising, the mayor's decision not to place advertising in one paper while placing it in all the others looks significantly different from a decision not to place ads." Kreimer, *supra* note 119, at 1363.

Kreimer's equality baseline reflects similar concerns expressed in Sullivan's distinctions between horizontal and vertical social relationships. Sullivan and Kreimer both argue that discriminatory subsidies should be invalidated because its negatively effects equality between viewpoints and individuals. Sullivan would contend that legislation denying tax-exempt status would change the distribution of rights among right holders:

> Unconstitutional conditions inherently classify potential beneficiaries into two groups: those who comply with the condition and those who do not . . . . Which constitutional rights entail such obligations of government evenhandedness? Speech is the paradigm example. If government could freely use benefits to shift viewpoints in a direction favorable to the existing regime, democratic self-government would be undermined. The view that government must treat speakers evenhandedly underlies the Court's consistent statements in unconstitutional conditions challenges that benefit conditions predicated on viewpoint discrimination are void.

Sullivan, *supra* note 53, at 1496 (citations omitted). The relative position of benefit recipients who elect to exercise their rights compared to those who elect to relinquish their rights can indicate an unconstitutional threat to constitutionally guaranteed rights. The range of options available to one person who engages in constitutionally protected activity is compared to the range of options generally available. *See* Kreimer, *supra* note 119, at 1359.

123. A number of cogent arguments can be advanced for applying the Sullivan and Kreimer analysis to mandated segregation of tax-exempt and nonexempt activities. Applying the same degree of scrutiny to the effects of mandated segregation as direct regulation would provide continuity and predictability in an unsettled area of the law. As a simple matter of logic, the government should not be permitted to deal organizations a "double whammy": rights are burdened by the selective offer of benefits that penalize, but to avoid the penalty effect, government mandates burdensome segregation with the same coercive effect.

124. Kreimer, *supra* note 119 at 1354. Kreimer characterizes the difference between an offer and a threat in an original manner, "[i]f freedom is choice, a reduction of the range of options associated with speech can be said to abridge freedom of speech in a way that an offer to increasing the range of choices can not." *Id.*

efit can determine whether a condition is coercive.[125] Some argue that the standard of review which applies to direct regulation should also apply to disparate tax treatment which implicates protected constitutional rights.

Richard Epstein gives a wide overview of the doctrine of unconstitutional conditions,[126] calling it a "second-best" alternative to an imaginary free-market constitutional regime.[127] Epstein theorizes that the government conditions should be subject to the same scrutiny as direct regulation:[128]

> If direct regulation proceeds largely without constitutional interference, then there is no reason to subject taxation to any higher level of review. The situation is quite the opposite when speech is affected. Here taxation and exemptions have the same effect as they do in other contexts, and are subject to the same high levels of scrutiny imposed on direct regulations generally.[129]

Therefore, the strength of the right which is threatened by a condition will ultimately determine whether a condition to a benefit is unconstitutional.

Kathleen Sullivan denounces traditional analysis of the unconstitutional conditions and introduces a "systemic approach" to unconstitutional conditions which "recogniz[es] that constitutional liberties regulate three relationships: the relationship between government and rightholders, horizontal relationships among rightholders, and vertical relationships among rightholders. . . . rights-pressuring conditions on government benefits potentially skew all three."[130]

All three of these relationships can be affected by benefit alloca-

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125. *See, e.g.*, Sullivan, *supra* note 53, at 1457. Sullivan writes that:

> At first glance, "germaneness" in this context might seem to refer simply to the standard means-ends rationality review characteristic of all claims of violation of a constitutional right. But that is not the case; the two inquiries serve different functions . . . . Unconstitutional conditions cases have used the germaneness inquiry to resolve a different, prior question: does attachment of the condition to the benefit burden a constitutional right?

Id.

126. *See* Epstein, *supra* note 119.

127. *See generally id.* at 15-28.

128. *Id.* at 26-7. Epstein writes that "[i]f the direct use of government coercion is subject to serious constitutional scrutiny, then the government bargains should be subject to a similar level of scrutiny." *Id.* at 26.

129. *Id.* at 74-75.

130. Sullivan, *supra* note 53, at 1491. Sullivan continues by distinguishing between "horizontal" and "vertical" relations between rightholders. Whereas horizontal government evenhandedness examines the differences between those who accept conditional benefits and those who do not, vertical government evenhandedness involves equality differences between members of different classes. *Id.* at 1496-99.

tion, so any alteration in the three relationships should trigger strict scrutiny by the courts. Sullivan also suggests that the same degree of scrutiny applies to direct regulation as conditions to benefit allocation.[131] "Government may not directly command or forbid actions protected by individual rights . . . because these decisions belong in the realm of private ordering rather than government control."[132]

The Sullivan and Epstein standards for identifying unconstitutional conditions would obviously be preferable to an organization faced with a denial of tax-exempt status. These standards provide greater protection to constitutional rights threatened by government benefit allocation. Furthermore, the academic proposals provide tax-exempt organizations with a simpler and more predictable constitutional standard.

The Court is not poised to adopt the more protective academic standard to protect constitutional rights and invalidate funding decisions that infringe on constitutional rights. The best interim solution is to amend the Internal Revenue Code to avoid unconstitutional penalty effects resulting from a denial of tax-exempt status to an entire organization that engages in a small proportion of activity that the government refuses to fund. The parameters of this type of amendment are discussed in the following part.

IV. INTERNAL REVENUE CODE AMENDMENT

If an entire organization is denied tax-exempt status for engaging in a proportion of abortion-related activity, legislation to deny tax-exempt status could be seen as a penalty for engaging in constitutionally protected rights. Requirements that government subsidized projects be separated from unsubsidized activities could also be unconstitutionally burdensome. Because of the organizational scope of tax exemption, a denial of tax-exempt status to abortion providers may invoke different constitutional barriers than the refusal to fund abortions and abortion-related speech encountered in

131. Sullivan writes that "[c]urrent law in this area undoubtedly would invalidate all three provisions [the *Rust* regulations, *see, supra* notes 37-39 and accompanying text] under the first amendment had they been imposed directly—the first two [*see* Regulations, *supra* notes 37 and 38 and accompanying text] as impermissible viewpoint censorship the third [*see* Regulation, *supra* note 39 and accompanying text] as an impermissible administrative burden on speech." *Id.* at 1466 (citations omitted).

132. *Id.* at 1492.

Rust v. Sullivan[133] and previous abortion funding cases.[134]

An amendment to the Internal Revenue Code could solve the unconstitutional conditions issues arising from penalty effects of the allocation of tax exemption. This amendment cannot clear the ambiguities of unconstitutional conditions doctrine or remove the potential for coercive government subsidy decisions. But, if Congress is given unremitting wide latitude in distinguishing between organizations that receive the benefits of tax exemption, the amendment could prevent the most coercive and unconstitutional legislative conditions. This amendment allows for segregation of organizational activities for tax purposes. Thus, organizations can maintain organizational tax-exempt status and donor deductions while Congress avoids subsidy of legislatively unpreferred activities, like abortion.[135] The proposed changes can also provide greater predictability to organizations which risk losing organizational tax-exempt status for engaging in a small proportion of activity that the government refuses to subsidize.

An amendment to the Internal Revenue Code could provide for differing tax treatment of distinct organizational activities.[136] Such an amendment could begin by identifying general types of organizations by the ratio of activities not preferred by the legislature (and not subject to tax exemption) to activities that would normally be identified as charitable and tax-exempt. Organizations would be de-

133. 111 S.Ct. 1759 (1991).

134. *See supra* note 16.

135. This argument presupposes that Congress will continue to allow hospitals to enjoy tax-exempt status under § 501(c)(3). The tax-exempt status of hospitals has been the subject of Congressional inquiry and debate. *See Hospital Charity Care and Tax Exempt Status: Restoring the Commitment and Fairness: Hearing Before the House Select Comm. on Aging*, 101st Cong., 2d Sess. 31 (1990) ("One option would be to reestablish the link between tax exemption and the level of charity care provided by hospitals . . . . On the other hand, those that do not provide a reasonable level of charity care or other services to the poor would have it [tax exemption] withdrawn."); U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN; SELECT COMMITTEE ON AGING, HOUSE OF REPRESENTATIVES; NONPROFIT HOSPITALS: BETTER STANDARDS NEEDED FOR TAX EXEMPTION 5 (May 1990) ("If the Congress wishes to encourage nonprofit hospitals to provide charity care to the poor and uninsured and other community services, it should consider revising the criteria for tax exemption."); H.R. Rep. No. 413, 91st Cong., 1st Sess., pt.1, at 43 (1969) ("Such obligations to serve those who cannot pay are indefinite under existing law.") While none of these legislative proposals has been successful, and a Select Committee lacks the power to sponsor legislation, a full denial of hospital tax exempt status is not outside the realm of possibility. *See generally* Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption*, 66 WASH. L. REV. 307 (1991).

136. *See generally, Developments in the Law of Nonprofit Corporations*, 105 HARV. L. REV. 1581, Part IV, 1654-56 (1992) (suggesting modification of federal tax incentives to limit contingent-fee fund raising).

fined as engaging in 1) a less than substantial amount of charitable activity, 2) an insubstantial amount of unpreferred activity, or 3) a substantial amount of unpreferred activity. Tax-exempt status would vary according to these categories.

Tax-exempt status may be constitutionally denied to an organization engaging in any less than a substantial amount of charitable activity. Here, any penalty effect on tax-exempt activities would be attenuated and constitutionally permissible.[137]

By contrast, any constitutionally permissible amendment must allow full tax exemption for organizations that engage in an insubstantial amount of unpreferred activity. This standard is borrowed from I.R.C. section 501(c)(3) itself which applies to "Corporations, and any community chest, fund, or foundation. . .*no substantial part* of the activities of which is carrying on propaganda, or otherwise attempting to, to influence legislation."[138] With proper enforcement mechanisms, the substantiality standard can practically guarantee that the government will not subsidize any significant amount of legislatively unpreferred activity. Most importantly, the substantiality standard incorporates constitutional limitation to penalty effects that exceed the scope of government subsidy.[139]

The "substantial part test" has been criticized for ambiguousness and difficulty of application.[140] Yet, companion provisions allowing specific statutory dollar limits on the organization's expenditures on unpreferred activity could also be enacted. Presently, section 501(h) and section 4911 allow election of more spe-

137. *See* American Communications Ass'n v. Douds, 339 U.S. 382, 397-400 (1950).

138. I.R.C. § 501(c)(3) (emphasis added). *See also* Regan v. Taxation With Representation, 461 U.S. 540, 543 (1983) (explaining that a 501(c)(3) organization is not permitted to lobby substantially to further their exempt purposes). *See generally* Laura B. Chisholm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201 (1987).

139. *See* F.C.C. v. League of Women Voters, 468 U.S. 364 (1984). *See also supra* notes 54, 55, 59-63.

140. In 1987, the Subcommittee an Oversight of the House Committee on Ways and means held hearings on the lobbying and political activities of tax-exempt organizations. A Joint Committee Print discussed the ambiguity of I.R.C. § 501(c)(3) which "does not explain the meaning, in this context, of the term 'substantial.' There is no precise mechanical rule for determining the substantiality of an organization's lobbying activities in relation to other activities." STAFF OF THE JOINT COMM. ON TAXATION, 100TH CONG., 1ST SESS., LOBBYING AND POLITICAL ACTIVITIES OF TAX-EXEMPT ORGANIZATIONS 3-4 (Joint Comm. Print, March 11, 1987).

The courts have held that flat percentage determinations are not outcome-determinative. *See* Seasongood v. Comm'r, 227 F.2d 907 (6th Cir. 1955) (less than 5 percent of organizational activity was not considered substantial); Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974) (where between 16.6 and 20.5 percent of expenditures were for political lobbying no deduction allowed, but court nevertheless rejected percentage test as "not appropriate"), *cert. denied*, 419 U.S. 1107 (1975).

cific definition of section 501(c)(3) disqualifying activity.[141] An excise tax and revocation of tax-exempt status, similar to current provisions in section 4912 could be imposed on organizations that violate the substantiality standard.[142]

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141. *See* I.R.C. § 501(h) (providing election for more precise arithmetical test of impermissible amount of lobbying under 501(c)(3) rather than the more general "substantiality" test); § 4911 (defining the amount of lobbying which an organization with 501(h) election can engage without penalty). The Tax Reform Act of 1976 added sections 501(h) and 4911 to the Internal revenue Code in order that organizations could replace the substantiality test with an expenditure-based limitation. *See* SUBCOMM. ON OVERSIGHT OF THE COMM. ON WAYS AND MEANS, REPORT AND RECOMMENDATIONS ON LOBBYING AND POLITICAL ACTIVITIES BY TAX-EXEMPT ORGS., 100TH CONG., 1ST SESS. 20 (Comm. Print 1987). The preamble of the IRS regulation explained:

> An organization will lose its tax exempt status under section 501(c)(3) if a substantial part of its activities is lobbying. This is known as the "substantial part test." Before the Tax Reform Act of 1976, there was uncertainty about what constituted a "substantial part" of an organization's activities. Congress was aware both of the severity of loss of tax exemption as a sanction and of the belief that the vague standards of the substantial part test tended to create uncertainty and allow subjective and selective enforcement. . . .
>
> Because of its concerns about the "substantial part test," Congress enacted, in 1976, an alternative to the substantial part test. Under sections 501(h) and 4911, which were added by section 1307 of the Tax Reform Act of 1976, certain publicly supported section 501(c)(3) organizations may elect to spend up to a certain (declining) percentage of their "exempt purpose expenditures" to influence legislation without incurring tax or losing qualification for tax-exempt status. Thus, if an eligible organization elects the "expenditure test" of sections 501(h) and 4911, specific statutory dollar limits on the organization's lobbying expenditures apply. Under the expenditure test, there are limits both upon the amount of the organization's grass roots lobbying expenditures and upon the total amount of the organization's direct and grass roots lobbying expenditures. In contrast to the substantial part test, the expenditure test imposes no limit on lobbying activities that do not require expenditures, such as certain unreimbursed lobbying activities conducted by bona fide volunteers.

55 Fed. Reg. 35,579 (1990). These concerns would be as applicable in the context of determining the level of unpreferred activity that an organization can engage in without loosing tax-exempt status altogether. Companion provisions, allowing election of more specific guidelines, improve the specificity and predictability of the substantiality standard.

142. An excise tax could be modeled after I.R.C. § 4912. Subsequent to the Tax Reform Act of 1976, Congress enacted § 4912 in the Omnibus Budget Reconciliation Act of 1987. That section imposes an excise tax on the lobbying expenditures of public charities, other than churches and certain church affiliated organizations, whose tax exempt status is revoked for violating the "substantial part test". Federal regulations determined that:

> In general, if either or both of the expenditure test limits are exceeded, section 4911 imposes a 25 percent excise tax upon the greater of: (1) the amount by which the organization's grass roots lobbying expenditures exceed its grass roots lobbying limit, or (2) the amount by which an organization's total direct and grass roots lobbying expenditures exceed its total lobbying limit. Additionally, if an organization's grass roots expenditures or total lobbying expenditures normally exceed 150 percent of the applicable limitation on its lobbying expenditures, the organization will cease to be described in section 501(c)(3), and, therefore, will no longer be exempt from income tax or be eligible to receive tax deductible charitable contributions.

55 Fed. Reg. 35579, 35579-80. These parameters could be applied to a tax scheme designed to limit tax-exemption to preferred charitable activities.

When an organization engages in a substantial amount of unpreferred activity, the Internal Revenue Code should allow for segregation of legislatively preferred and unpreferred activities. The Supreme Court has referred to this as "fragmentation" of taxable and tax-exempt income in a different context.[143] This could be achieved with a provision similar to unrelated business income tax (UBIT).[144] For example, section 513(c) of the UBIT allows charitable organizations to fragment payments received in connection with the performance of services (such as advertising by a tax-exempt organization) which may be subject to taxation. Payments unrelated to taxable services maintain their separate character and deductibility.[145] A provision similar to IRC § 513(c), designed to permit fragmentation of an exempt organization's constituent parts would provide for taxation of income (and donor contributions) derived from unpreferred activities.

The ability to fragment income from legislatively preferred and unpreferred activities avoids unconstitutional penalties in two ways. First, by allowing fragmentation, a penalty effect on preferred charitable activities of organizations performing both preferred and unpreferred activities, as in *Planned Parenthood of C. & N. Ariz. v. State*[146] and *F.C.C. v. League of Women Voters*[147] is avoided. Recall that in *Regan v. Taxation With Representation*,[148] the ability to segregate government funded activities from non-funded activities under sections 501(c)(3)-(4) was critical to the government's ability to attach conditions to subsidy, while avoiding forbidden conditions on private funds.[149]

Secondly, if the tax structure mandates the segregation of preferred and unpreferred activities, regulations and requirements could be unconstitutionally burdensome. A scheme to fragment or-

143. The Supreme Court has discussed the process of "fragmentation" in the context of unrelated business income tax ("UBIT"). *See* United States v. American Bar Endowment, 477 U.S. 105 (1986); United States v. American College of Physicians, 475 U.S. 834 (1986).

144. I.R.C. §§ 511-14 (Law Co-op 1993) (determining when income received by a section 501 organization will be taxable income from an unrelated trade or business).

145. BRUCE HOPKINS, THE LAW OF TAX EXEMPT ORGANIZATIONS § 41.2 at 862 (6th ed. 1992).

146. 718 F.2d 938 (9th Cir. 1983).

147. 468 U.S. 364 (1984).

148. 461 U.S. 540 (1983).

149. *See Id.* In *Bob Jones Uni. v. United States,* 461 U.S. 574 (1983), racially discriminatory admissions policies and school rules which forbade interracial marriage could not be segregated from the tax-exempt activities of the University. While the Court did not consider any argument that the IRS ruling comprised a penalty on otherwise eligible activities, the decision may suggest that especially egregious violations of public policy may be subject to larger penalty effects. *See id.*

ganizational tax-exempt status could be drafted to avoid burdensome activity segregation requirements. The likely standard for acceptable segregation burdens lies somewhere between *F.E.C. v. Massachusetts Citizens For Life, Inc.* (invalidating detailed record-keeping and disclosure obligations, obligation to appoint a treasurer and custodian of the records, and high administrative costs)[150] and *Regan* (upholding a return to a dual corporate structure used in the past).[151] In either case, it is likely that the court would protect organizations from regulations unrelated to insuring that tax-deductible contributions are not used to further unpreferred activities.[152] The same severability of operations in a government funded project that allows a government "funding" decision to escape constitutional limitations under the First or Fifth Amendments can be achieved through fragmentation of tax-exempt and unpreferred organizational activity.[153]

Unconstitutional conditions analysis might provide protection against coercive government benefit allocation. Yet, the malleability of unconstitutional conditions protection[154] extends beyond the

150. 479 U.S. 238, 254-55. (1986). *See supra* note 86.

151. In *Regan,* the Court mandated segregation of lobbying and non-lobbying activities into separate organizations. 461 U.S. at 544 n.6, 551. This segregation was approved by the Court because TWR was originally formed by fusing two separate organizations:

> One, Taxation With Representation Fund, was organized to promote TWR's goals by publishing a journal and engaging in litigation; it had tax-exempt status under § 501(c)(3). The other, Taxation With Representation, attempted to promote the same goals by influencing legislation; it had tax-exempt status under § 501(c)(4).

Id. at 543.

152. In *Regan,* the court upheld segregation requirements that required organizational division:

> TWR and some *amici* are concerned that the IRS may impose stringent requirements that are unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying . . . . [n]o such requirement in the Code or regulations has been called to our attention, nor have we been able to discover one. The IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax deductible contributions are not used to pay for lobbying. This is not unduly burdensome.

Id. at 543 n.6.

153. The *Rust* case presented a fertile opportunity for the court to address the degree of burdensome segregation between subsidized and unsubsidized activities that can be imposed within the boundaries of the constitution. Nonetheless, the Court neglected to address this issue with any degree of specificity. The HHS regulations upheld in *Rust* stated that, "[a] title X project must be organized so that it is physically and financially separate . . . from activities which are prohibited under . . . the Act . . . and regulations" and that physical and financial separateness includes "objective integrity and independence from prohibited activities. Mere bookkeeping separation of title X funds from other monies is not sufficient." 42 C.F.R. § 59.9 (1988). The HHS regulations may require some greater degree of segregation than mandated by the Court in *Regan.* But the Court approved these vague regulations without looking more specifically as what "objective integrity" might require.

154. *See* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitu-*

context of abortion subsidy to other areas of the law. In an era of growing government entitlement, a lack of specific constitutional guidelines to benefit allocation encourages an inconsistent, nearly haphazard constitutional policy to develop and gain acceptance through the courts.[155] The proposed amendment to the tax code has the distinct advantage over unconstitutional conditions protections because it provides a clear, predictable, codified standard to organizations that engage in a proportion of unpreferred activity of all types.

The intricacies of subsidy choices and their effect on the relationship between the state and the citizenry have been oversimplified by the courts, the legislatures, and the populace so far. Because rights-altering conditions to government benefits have potential for sweeping effects on the conventional relationship between a government and its citizens, there is no time like the present for reassessment and clarification of the limitations to unconstitutional conditions.

The courts are not poised to adopt a more protective stance toward constitutional rights that are threatened by government subsidy distinctions. In the context of organizations providing preferred charitable services as well as unpreferred activity, tax code amendment could prevent the most coercive, unconstitutional penalty effects of burdensome segregation of activities. If Congressional interference is unavoidable, it had better not impose unconstitutional burdens on tax-exempt organizations.

In the broader sense, Congressional micromanagement of specific activities that receive tax exemption thwarts the critical policy rationale of tax exemption. Tax exemption of charitable organizations is often justified by a public policy favoring pluralism:

> Charitable organizations are regarded as fostering . . .pluralism in the American social order. That is, society is regarded as benefitting not only from the application of private wealth to specific purposes in the public interest but also from the variety of choices made by individual philanthropists as to which activities to further. This decentralized choice making is arguably more efficient and responsive to public needs than the. . .less flexible

tional Conditions, 75 CORNELL L. REV. 1185, 1987 (1990) ("The Court has provided no coherent explication of when and how it will apply the doctrine in this area, and commentators' attempts to make sense of these cases have produced only expressions of despair . . . ."). *See generally*, Leathers v. Medlock, 111 S.Ct. 1438 (1991) (upholding state tax provisions that exempted newspapers and magazines, but not cable television, from sales tax).

155. Note that equal protection arguments relating to disparate tax treatment are generally insufficient to invalidate legislation. *See* Regan v. Taxation With Representation, 461 U.S. 540, 547-49 (1983). *See also supra* notes 37 and 39.

allocation process of government administration.[156]

When Congress decides which preferred activities receive tax exemption, pluralism is defeated rather than encouraged. As John Stuart Mill wrote, "Government operations tend to be every where alike. With individuals and voluntary associations, on the contrary, there are varied experiments, and endless diversity of experience."[157] As government conditions on subsidy increase, a brave new world may bring an end to diversity. In the mean time, a revision of the tax code provides the best interim solution to protect tax-exempt organizations from burdensome and discriminatory tax treatment.

CONCLUSION

This paper discusses constitutional limitations to legislation limiting the tax-exempt status of abortion providers. If an entire organization is denied tax-exempt status for engaging in a proportion of abortion-related activity, legislation could be seen as an unconstitutional condition or penalty on constitutionally protected rights. Requirements that government subsidized projects be separated from unsubsidized activities could also be unconstitutionally burdensome. An amendment to the Internal Revenue Code could solve the limited unconstitutional conditions issues arising from penalty effects in the allocation of tax exemption. This amendment would not solve ambiguities of unconstitutional conditions doctrine or remove the potential for coercive government subsidy decisions in hundreds of other contexts. Nonetheless, the proposed changes avoid the most burdensome penalty effects of legislation and provide predictability to organizations at risk of losing organizational tax-exempt status for engaging in a proportion of unpreferred activity.

156. HOPKINS, *supra* note 145, § 1.3 at 10 (citations omitted).

157. JOHN S. MILL, ON LIBERTY 213 (2d ed. 1863).