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The Powers and the Duties of Government

JOHN H. GARVEY*

The government often tries to control people's behavior by the way it hands out benefits. The most common objection to this practice is that it violates the rights of beneficiaries.¹ I want to make a simple observation about these "rights" cases. We used to treat the violation of rights as a question about the government's *power*. Now we treat it as a question about the government's *duty*. This shift in perspective is an important change. If we attend to it, we will be less perplexed by the problem of unconstitutional conditions.

Though my point is simple, I will go to some length in making it. First, I will explain the old viewpoint — the focus on the powers of government. Next, I will explain the new one — the duties of government. Finally, I will point out how the shift from power to duty helps us solve some issues that arise in benefits cases.

I. THE POWERS OF GOVERNMENT

Throughout the nineteenth century and the first half of this century, the Supreme Court talked a lot about the powers of government. The idea of limited government meant that sometimes the government had no power to act. This was the standard approach to

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1. See, e.g., *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Lyng v. International Union, UAW*, 485 U.S. 360 (1988); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

Some cases, especially the older ones, raise issues of federalism rather than rights. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *Child Labor Tax Case*, 259 U.S. 20 (1922). My argument, that we now focus on the duties of government, does not apply to these cases.

federalism cases. The federal government was one of enumerated powers. Beyond these, it could not go. Consider the example of federal laws imposing conditions on the use of child labor. The Court held that: (i) the federal laws were “void,” because (ii) they went beyond limits set by the Constitution on the “power” of Congress.²

But the focus on power was not limited to issues of federalism. Consider the Court’s treatment of state laws imposing conditions on the right to do local business. Here again the Court would make two points: (i) the state law was “void,” because (ii) constitutional rights limited the “power” to enact it.³

The Court took the same approach to cases where states were charged with abridging first amendment rights. Some of these cases dealt with conditions on largesse, others with outright prohibitions. Some found first amendment violations, others did not. But the interesting thing about all of them is the punch line: “The law is (is not) an unreasonable exercise of the state’s police power.” In the Court’s

2. In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court struck down a law forbidding shipment in interstate commerce of articles produced with child labor. The Court said:

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

Id. at 273-74.

In the Child Labor Tax Case the Court declared “void” a tax on the profits of those who employed child labor. “To give such magic to the word ‘tax’ would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.” 259 U.S. at 38-39.

3. *Western Union Tel. Co. v. Kansas* held “void” a tax on foreign corporations wanting to do local business. 216 U.S. 1, 37 (1910). The law was beyond the state’s “reserved powers” because it asked a company to “surrender rights belonging to it under the Constitution . . .” *Id.* at 33, 48.

Terral v. Burke Constr. Co., 257 U.S. 529 (1922), dealt with another condition on foreign corporations — waiver of the right to use the federal courts:

[T]he Federal Constitution confers upon citizens of one State the right to resort to federal courts in another[.] [S]tate action . . . calculated to curtail the free exercise of the right thus secured is void because the sovereign power of a State in excluding foreign corporations . . . is subject to the limitations of the supreme fundamental law.

Id. at 532-33.

Frost Trucking Co. v. Railroad Comm’n, 271 U.S. 583 (1926), dealt with conditions on the use of public highways by private carriers. The Court again declared the conditions “void” because they conflicted with the due process clause:

There is involved in the inquiry not a single power, but two distinct powers. One of these — the power to prohibit the use of the public highways in proper cases — the state possesses; and the other — the power to compel a private carrier to assume against his will the duties and burdens of a common carrier — the state does not possess . . .

. . . It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.

Id. at 593-95.

mind this was the flip side of the free speech question. If the claimant had a right, the government had no police power, and vice versa.⁴

This fascination with the powers of government also underlay the Court's decision in *Ex parte Young*.⁵ It was not about government largesse, but it was about a law restricting constitutional rights. Minnesota had passed a law reducing railroad rates, and the federal circuit court, finding that the law violated the railroads' due process rights, enjoined Young from enforcing it. Young was then held in contempt for enforcing the law. The issue before the Supreme Court was whether the injunction was proper, or whether it really ran against the state of Minnesota, in violation of the eleventh amendment. The Court held:

The act to be enforced is alleged to be . . . void because unconstitutional. If [it is, the Attorney General is] stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.⁶

Here we see the same themes I mentioned above: If the law violates the railroads' due process rights it is "void." It is as though the law did not exist. In that event, the Attorney General is not exercising any state "power," and he cannot claim the state's immunity from suit.

The theory exhibited in all these cases (federalism, business regu-

4. *Gitlow v. New York*, 268 U.S. 652 (1925), sustained New York's criminal anarchy statute. The Court concluded: "We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality." *Id.* at 670.

Whitney v. California, 274 U.S. 357 (1927), upholding the California Criminal Syndicalism Act, concluded: "We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State . . ." *Id.* at 372.

Fiske v. Kansas, 274 U.S. 380 (1927), held unconstitutional an application of Kansas's criminal syndicalism law. "[T]he Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment." *Id.* at 387.

Adler v. Board of Educ., 342 U.S. 485 (1952), upheld New York's Feinberg Law, whose purpose was to deny public school jobs to members of subversive organizations. Concerning Adler's plight the Court found:

His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly. . . . Certainly such limitation is not one the state may not make in the exercise of its police power

Id. at 493.

5. 209 U.S. 123 (1908).

6. *Id.* at 159-60.

lation, free speech, *Ex parte Young*) is similar to the ultra vires doctrine in corporation law. In the classical view, a corporation is a fictitious person endowed by the state with limited powers enumerated in its charter. Social mistrust of large aggregations of capital led states to restrict both corporate charters and the powers they conferred. Actions taken outside the scope of the charter were simply void: "no one could enforce an ultra vires act against another party."⁷

The "power" theory sees the government as a fictitious person too — one endowed by the people with limited powers enumerated in its charter, the Constitution. Much language in the Constitution reflects that view. Articles I,⁸ II,⁹ and III¹⁰ confer legislative, executive, and judicial power on the government. The tenth amendment says "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States . . . or to the people." We might say that the first amendment carves out from the the general delegation an excepted area: "Congress shall make no law [about freedom of religion, speech, or press]." The fourteenth amendment might do the same thing at the state level: "No state shall make or enforce any law [depriving people of privileges and immunities, due process, equal protection]." This is the reason for the emphasis on "power" (or its absence) in the cases I have referred to. The federal government acts unconstitutionally when it lacks an enumerated power, or when its granted power is limited by some right created by the Constitution. The fourteenth amendment (and parts of the 1787 Constitution) limit the police powers of the states.

According to this view, the government could go through the motions of enacting an anti-speech law, for example, but it would be just wasted motion. The act that resulted would be no more effective than a will made by a child. This is why the Court continually says that an unconstitutional law is "void."

This view of the Constitution and of constitutional rights is a popular one among legal philosophers, who typically translate it into Hohfeldian terms.¹¹ According to Hohfeld, "power" (as a legal

7. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 453 (1973). See generally W. CARY, *CORPORATIONS* 50-69 (1969).

8. "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." U.S. CONST. art. I, § 1. "The Congress shall have Power to lay and collect Taxes . . ." U.S. CONST. art. I, § 8.

9. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1.

10. "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time, ordain and establish." U.S. CONST. art. III, § 1.

11. See, e.g., H.L.A. HART, *ESSAYS ON BENTHAM* 191 (1982); R. FLATHMAN, *THE PRACTICE OF RIGHTS* 154-55 (1976); Lyons, *The Correlativity of Rights and Duties*, 4 *NOUS* 45, 50-52 (1970). Cf. J. BENTHAM, *A FRAGMENT ON GOVERNMENT* ch. 4, ¶ 31 (F. Montague ed. 1891).

term) refers to the ability to change legal relations,¹² as a legislature might do by enacting a statute. "Disability" is the equivalent of "no-power."¹³ The Constitution imposes various disabilities on the government. When the government is unable to act because of such a disability, private citizens are said to have an "immunity" — a "freedom from the legal power or 'control' of another as regards some legal relation."¹⁴ A constitutional right, then, is an immunity. It says the government has no power (or if you prefer, a disability) to enact laws against speech, etc.

II. THE DUTIES OF GOVERNMENT

In the modern cases (after 1960) we find a different perspective. These cases deal with rights of all kinds: speech, search and seizure, due process, just compensation, privacy, and travel. The Court now asks whether: (i) the law, or executive action, "violates" the Constitution — not whether it is "void";¹⁵ (ii) the government has an "ob-

12. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 44 (1913).

13. *Id.* at 55.

14. *Id.*

15. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land use permit alters the outcome."); *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 223 (1987) ("The question . . . is whether a state sales tax scheme that taxes general interest magazines, but exempts newspapers and religious, professional, trade, and sports journals violates the First Amendment's guarantee of freedom of the press."); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 n.3 (1985) ("The Court of Appeals' finding of a constitutional violation was based solely on the deprivation of a property interest."); *Bordenkircher v. Hayes*, 434 U.S. 357, 358 (1978) ("The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to indict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged."); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 253 (1974) (We are charged with "determining whether the challenged durational residence provision violates the Equal Protection Clause"); *Wyman v. James*, 400 U.S. 309, 326 (1971) ("We therefore conclude that the home visitation . . . violates no right guaranteed by the Fourth Amendment.").

I must not overstate the nature of the change. What is new is the Court's emphasis on constitutional "violations." This has supplemented, not supplanted, the idea of "voidness." (We might say that an unconstitutional law is both *ultra vires* and wrong.) In fact, talk of voidness is still common, particularly in first amendment and other void-for-vagueness cases. I think it is revealing, though, that this usage is most prevalent in cases where it is difficult to speak of "violations." In vagueness cases we often cannot be sure that the litigant *has* a first amendment right which the government can be said to have violated. The litigant may be protecting the speech rights of other people. The reason we let him off is that this particular law is void, not that it is wrong to regulate the litigant's behavior (by a better written law). See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*

ligation” to respect the right in question — not just whether it has “power” to act,¹⁶ (iii) the law, or executive action, though it apparently violates the government’s obligations, is “justified” because it pursues some greater good.¹⁷

The modern counterpart to *Ex parte Young* is *Bivens v. Six Unknown Federal Narcotics Agents*.¹⁸ *Young* was about injunctions against government officials. *Bivens* was about damages. It illustrates our new view of what it means to have a right. *Bivens* claimed that federal narcotics agents arrested and searched him without a warrant or probable cause. The agents responded that their actions violated no federal duty. They argued that if they had done anything wrong, it could only be wrong under state tort law. The fourth amendment, in this scheme of things, “would serve merely to limit the extent to which the agents could defend the state law tort suit by asserting that their actions were a valid exercise of federal power.”¹⁹ The Supreme Court disagreed: “power, once granted, does not disappear like a magic gift when it is wrongfully used.”²⁰ The agents’ actions were not only ultra vires, but also wrong under the Constitution. If *Bivens* proved his claim, he was entitled to money damages “to make good the wrong done.”²¹

Let me explain the theory that is exhibited by these cases. The old theory says that the government *cannot* do certain things (interfere with speech or property, for example). The modern theory says that the government *must not* do them. Constitutional rights impose correlative duties on the government. This is why the modern cases speak about “obligation.”²² And when the government acts contrary

§ 12-32 (2d ed. 1988).

16. *Harris v. McRae*, 448 U.S. 297, 318 (1980) (“It cannot be that because government may not prohibit [abortions], government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain [abortions.]”); *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (“the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences”).

17. *Nollan*, 483 U.S. at 837 (“The evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [T]he building restriction is . . . and out-and-out plan of extortion.”); *Arkansas Writers’ Project*, 481 U.S. at 231 (“In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest”); *Bordenkircher*, 434 U.S. at 364 (“the prosecutor’s desire to induce a guilty pleas is [not] an ‘unjustifiable standard,’ . . . like race or religion”); *Memorial Hosp.*, 415 U.S. at 254 (“We agree with appellants that Arizona’s durational residence requirement for free medical care must be justified by a compelling state interest”); *Shapiro v. Thompson*, 394 U.S. 613, 631 (1969) (“the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the constitutionally impermissible”).

18. 403 U.S. 388 (1971).

19. *Id.* at 390-91.

20. *Id.* at 392.

21. *Id.* at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

22. *See supra* note 16.

to its duty it does not just act *ultra vires*. It behaves wrongly. It "violates" rights and ignores its duty. Of course not all action contrary to duty is wrong. (Not all killing is murder.) Such acts can be "justified" by a higher good, or a lesser evil. But that is something the government must show.

To say that the government has a "duty" to respect constitutional rights is a vague assertion. At a minimum it means two things. One is that departures from constitutional standards are treated as occasions for criticism or condemnation of the government's behavior. This is why the modern cases talk about "violations," rather than just "voidness." The other is that such deviations are a reason for imposing sanctions on those responsible for the government's action.²³ This is why *Bivens* creates a damage remedy.²⁴

III. CONSEQUENCES OF THE SHIFT FROM POWER TO DUTY

This shift in the way we look at rights has not been generally recognized. But it has an important bearing on how we analyze problems about government largesse. In this section I will discuss a few of those problems.

A. "The Greater Power Includes the Lesser"

Government benefits often come with strings attached. Those who want to untie the strings must deal with the argument that the greater power includes the lesser: "Everyone agrees that we can absolutely refuse to give you *B* (the greater power). We are not so hard-hearted. We will give you *B* if you will do *C* (the lesser power). How can you complain about that?"

There are several standard responses to this argument. The first is it does not work as a syllogism.²⁵ If I can lift 100 pounds, it does not

23. See Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82, 90 (A.I. Melden ed. 1958).

24. *Monroe v. Pape* created a similar remedy for state cases. 365 U.S. 167 (1961). These duties also bind the government in its corporate persona, not just its individual officials. I cannot sue the United States or the Commonwealth of Kentucky as I can police officers, but that's because they have sovereign immunity. It is nonetheless meaningful to say that they have duties to respect my rights. See R.W.M. DIAS, *JURISPRUDENCE* 60 (1976). The case of cities illustrates the government's underlying duty. Cities are not shielded by a rule of immunity, and they are consequently subject to damage claims for violation of protected rights. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

25. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1310-11 (1984); Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV.

logically follow that I can lift fifty pounds. (Perhaps my muscles only respond to big challenges.) This response is true, but not very satisfactory. The greater-and-lesser argument still works pretty well inductively. It might happen, but it would be really weird, if I could lift 100 pounds but not fifty pounds. The law draws conclusions in this way all the time.²⁶ We need a reason why it should not do so in benefits cases.

The second standard response is to say the greater power exists only in theory, not in practice. The lesser power, on the other hand, is one the government can actually use. (Kentucky might, in theory, forbid all foreign corporations to do local business. But such a law would be too unpopular to pass. Kentucky probably *could* pass a special tax on foreign corporations that do local business.) In the real world, then, the lesser power is actually the greater.²⁷ The greater-and-lesser argument fails because it has the terms mixed up.

The problem with this second response is that it confuses “ought” with “can.” It says: “The government may exercise the greater power, but it cannot. So we do not know whether it may exercise the lesser.” But that does not follow. Think about the ultra vires doctrine again. The charter of *X* Corporation permits it to boycott *Y* Corporation, but *X*’s board of directors would never agree to such a proposal. The board would agree to buy from *Y* only at a lower price. Is this proposal ultra vires? Probably not. If boycotts are OK, less drastic measures probably are too. It is a question of what the charter allows. The board’s approval has no bearing on that question.

I want to propose a third and more convincing response, which follows from recent thinking about the duties of government. Notice that the greater-and-lesser argument is a claim about powers. It does not tell us anything about duties. If the government has a duty not to exercise its lesser power, then the argument falls apart.

Consider this example.²⁸ I own a small business and employ you as my bookkeeper at a decent wage but with no job security. The company is in financial trouble, and I am entitled, under our understanding, to lay you off. I might, though, decide to offer you an alternative: you can stay on, but at half the agreed wage. You find these terms more agreeable than losing your job. Here we might say that my greater power to fire you entails the lesser power to cut your pay.

Suppose, though, that I offer you this alternative: I will keep you

741, 747 n.20 (1981); Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 110-11 (1916).

26. The Social Security disability regulations are built around the assumption that a person who can lift 100 pounds can lift 50 pounds. 20 C.F.R. § 404.1567 (1989).

27. See Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 1, 28-67 (1988); Kreimer, *supra* note 25, at 1313.

28. I have adapted it from Lyons, *Welcome Threats and Coercive Offers*, 50 PHIL. 425, 430 (1975).

on at the agreed wage if you will sleep with me. You might agree here too. You view the prospect as repulsive, but need the money to care for your sick mother. To your mind, the consequences are less grave than losing your job. Here we would say, I think, that it is wrong of me to take advantage of your situation in this way. I ought — I have a duty — to treat you better.²⁹

Notice that it would not be wrong of me simply to fire you. This is a case where I can exercise the greater power, but not the lesser. This seems intuitively correct, but the explanation is not obvious.

My duty to refrain from exercising the lesser power is not a "liberal" sort of duty. You would prefer sleeping with me to losing your job. My proposal gives you another choice, and to your mind a better one. So we respect your right to live your own life in your own way by permitting me to exercise the lesser power. But there are other reasons for forbidding me. One might be utilitarian: if we forbid employers to make lewd proposals, they might make more generous ones. You might, for example, prefer a cut in pay to either losing your job *or* sleeping with me. I too might prefer that alternative to laying you off, though not to taking you as my mistress at your current wage. But a wage reduction might maximize our aggregate satisfaction, so it is morally preferable and we should steer people in that direction. Another kind of reason might be perfectionist: lewd proposals are degrading because they violate our ideals about human excellence (or because they violate the Sixth Commandment). So we should prohibit them and not worry about questions of benefit and harm.³⁰

Suppose, now, that the employer in this scenario is the government and not me. If it wanted to, the government could give its employees no job security. This would be perfectly legal, even after the due process revolution. A person has no entitlement to a government job unless the government creates one by contract, statute, regulation, or some other voluntary act. And when there is no job security the government does not have to give an explanation for its behavior. It can fire you for no reason.³¹

29. Actually, as Dave Bryden has pointed out to me, the minimum wage law makes a similar kind of judgment. Under such a law the greater power to fire does not entail the lesser power to reduce wages, because the legislature has imposed on employers a duty not to exploit their workers.

30. R.M. HARE, *FREEDOM AND REASON* 147 (1963); Feinberg, *Noncoercive Exploitation*, in *PATERNALISM* 201, 231-32 (R. Sartorius ed. 1983).

31. *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); Smolla, *The Reemergence of the Right-Privilege Distinction in Consti-*

This is the greater power. Under these circumstances, if the budget got too tight, the government could offer you the choice of losing your job or taking a cut in pay. The greater power to fire you subsumes the lesser power to keep you on at reduced wages. Suppose, though, that the government makes you a different kind of offer: you can keep your job only on condition that you resign your membership in the Socialist Party. Here the worst that can happen to you is that you will lose your job. Since the government can bring that about in any event, allowing it to make a conditional offer will not increase its power over you. If the greater power includes the lesser, this seems like something the government can do.

And for a long time it could. The courts would say, as Justice Holmes did, that you "have a constitutional right to talk politics, but . . . no constitutional right to be a policeman."³² Today the government may not impose such a condition.³³ We are accustomed to explaining this by saying that government employment is no longer a "privilege" but a "right."³⁴ But we do not really mean that. You still do not have a constitutional right to be a policeman. And you do not have a right under positive law either, unless the government gives you one. The explanation has nothing to do with your right to a job. It lies in your right of free speech.

According to the old way of looking at things, your right of free speech just limited the government's power. The government lacked the power to throw you out of the Socialist Party, even if you were a policeman. At the same time, the government had the power to fire you, so it had the lesser power to make your tenure conditional. But that was seduction, not rape. Rape is an exercise of power. It is forbidden. Seduction is something else. It may be reprehensible, but it does not involve force, so there is no law against it.

Nowadays your rights impose duties on the government. They forbid the government to use its acknowledged powers in wrongful ways. Trading jobs for speech (like trading jobs for sex) is wrong. Exactly why it is wrong is a complicated matter. Forbidding a trade between willing partners is inconsistent with the liberal principle of

tional Law: The Price of Protesting Too Much, 35 STAN. L. REV. 69-82 (1982).

32. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (1892); see also *Adler v. Board of Educ.*, 342 U.S. 485, 492 (1952) ("If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."); *Bailey v. Richardson*, 182 F.2d 46, 59 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) ("The First Amendment guarantees free speech and assembly, but it does not guarantee Government employ.").

33. See, e.g., *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

34. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

letting people run their own lives. One explanation the Court has given is that your speech may benefit other people.³⁵ The government harms them by getting you to trade your speech for a job. Another possibility is that speech — especially political speech — plays an important part in our ideal of human excellence. We should not let people degrade themselves into silence even if they do so willingly.³⁶

In any event my point is clear. The government's greater power to fire its employees does not entail the lesser power to seduce them. The reason is that the government has a duty not to exercise the lesser power.

B. *Positive and Negative Rights*

The greater-and-lesser argument says: (i) The government can deny benefits absolutely, therefore (ii) it can deny benefits unless people meet certain conditions. The argument is that the conclusion (ii), follows from the premise (i); the truth of the premise is assumed. A second familiar argument explains why the premise is true: the government can deny benefits because our constitutional rights are negative rather than positive. "The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them."³⁷ The rights the founders created do not require the government to take any affirmative steps on our behalf. They just protect us against government interference.

This argument proves less than people often suppose. Some rights are positive. The Constitution says point blank that the government must provide certain benefits, like jury trials and compulsory pro-

35. *Pickering*, 391 U.S. at 572 ("[F]ree and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent."); *Whitehill v. Elkins*, 389 U.S. 54, 60 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 602-03 (1967); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287-88 (1961).

36. I need not argue (and I do not mean to) that our rights impose absolute duties on the government. The reasons for recognizing a duty, like the ones given in the text, reach only so far. Under some circumstances a duty will simply not arise. Under others, as I pointed out in section II, government acts contrary to duty can be "justified" by a greater good or a lesser evil. It is not in the least disturbing to my thesis, for example, that the Hatch Act limits political campaigning by government employees. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

37. *Jackson v. Joliet*, 715 F.2d 1200, 1203 (7th Cir.), *cert. denied*, 465 U.S. 1049 (1984).

cess.³⁸ The positive-and-negative argument comes up most often when we talk about freedoms, that is, rights to engage in certain actions (like speech, religious exercise, and procreation). Here the issue is whether the government must help us do things we cannot afford to do on our own.

The terms “positive” and “negative” express two well-known concepts of freedom. They suggest a kind of preconstitutional baseline from which we measure our liberty. The baseline might be set at absolute zero — the arrangements existing in the state of nature, where there is no government intervention at all. Or (and this is the measure courts usually adopt) it might be set at zero Celsius — the arrangements existing at common law, before the Constitution set up our form of government. “Negative” freedom exists below the line, “positive” freedom above. In classical liberal thought, political freedom is negative.³⁹ It means that the government cannot interfere with my actions, that it must let me live my own life as freely as I could at common law. A free man, according to Hobbes, is one who “is not hindered to do what he has a will to.”⁴⁰

Positive freedom, by contrast, refers to our ability to do things above the line. People who are losers at common law might need help in doing what they “have a will to.” If the Constitution guaranteed positive freedom, the government would have an affirmative obligation to provide that help. But, the argument goes, that is not what the Constitution does.

Of course the Constitution does not actually say which concept of freedom it has in mind. But if we focus, as we used to, on the powers of government, we are very likely to interpret it in a “negative” way. Rights, in this scheme, limit the powers of government. They hold it back. To mix my metaphors, the right to freedom is like a Chinese wall along the baseline. The government cannot get by it to invade our protected space. This is the language the Supreme Court used in *Harris v. McRae*,⁴¹ where it decided that the government did not have to pay for medically necessary abortions for poor women. The Court said that the liberty protected by the due process clause simply “affords protection against unwarranted government interference with freedom of choice.” It is a “limitation on governmental power,” not “an affirmative funding obligation.”

Once we accept the view that our rights impose duties on the government, the idea of positive freedom becomes more plausible. Duties are often negative. (Thou shalt not kill.) But they can also be positive. (Honor thy father and thy mother.) If the government has a

38. U.S. CONST. amends. VI & VII.

39. See I. BERLIN, *FOUR ESSAYS ON LIBERTY* 122-31 (1969).

40. T. HOBBS, *LEVIATHAN* 159 (Oakeshott ed. 1962).

41. 448 U.S. 297, 317-18 (1980).

duty to respect our freedoms it might be of the "honor" kind rather than just the "shalt not" kind. This is a fairly radical proposition, and I want to repeat: The government's duty *might* be a positive one. I have not argued that freedoms *do* impose such duties on the government. I only say that it is conceivable under this view, whereas it was not under the "power" view.

As a matter of fact, most of the duties our freedoms impose are of the "shalt not" variety. They tell the government not to prevent,⁴² or punish,⁴³ or deter⁴⁴ protected action. Claims that the government should pay for activities we cannot afford usually fall on deaf ears. A parent is free to send her children to private school, but the government need not help her pay the bills.⁴⁵ Minor party candidates can run for office, but the government need not fund their campaigns.⁴⁶

But there are a few recurring cases in which the Court has imposed a duty of the "honor" kind. First are the public forum cases, holding that governments must open up public spaces for unpopular speakers and religious actors.⁴⁷ Second are the right to travel cases, holding that states must give public benefits to recent immigrants on the same terms as to established residents.⁴⁸ Third are a handful of free exercise cases, holding that the government must provide unemployment compensation to people forced to quit their jobs for religious reasons.⁴⁹

The old "power" view of these problems is nicely captured by the public forum cases. Justice Holmes held that the Massachusetts legislature could authorize the City of Boston to forbid speeches on the Common, saying:

There is no evidence before us to show that the power of the legislature over the common is less than its power over any other park . . . the legal title to

42. *Williams v. Rhodes*, 393 U.S. 23 (1968); *Storer v. Brown*, 415 U.S. 724, 729 (1974); *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

43. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

44. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

45. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

46. *Buckley v. Valeo*, 424 U.S. 1, 94-95 (1976).

47. *Carey v. Brown*, 447 U.S. 455 (1980); *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 96 (1972); *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) (Frankfurter, J., concurring); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951).

48. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Shapiro v. Thomson*, 394 U.S. 618 (1969).

49. *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). *See also Frazee v. Illinois Dep't of Employment Sec.*, 159 Ill. App. 3d 474, 512 N.E.2d 789 (1988), *rev'd*, 109 S. Ct. 1514 (1989).

which is in a city or town For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.⁵⁰

The state had not interfered with the speaker's freedom, because it had not invaded the area secured to the speaker by the common law. The government, like any property owner, had the power to deal as it wished with its own land.

When the Court revised this rule in *Hague v. CIO*,⁵¹ it still stuck to the view that freedom was negative, and that the government could not cross the line drawn by the common law. But the people had a right to speak in public parks because they had acquired a "kind of First-Amendment easement."⁵² An act forbidding speech trespassed on that property interest. Even a limited, negative freedom restricted the government's power to do that: "Thou shalt not steal."

Here the right to freedom depends upon the easement recognized by common law. If the government prevented the easement from arising, by creating "quiet parks," the right to freedom would have nowhere to attach. There is, however, a second theme in these cases with more positive overtones. It is the idea that some channels of communication must be made available to people who cannot afford more expensive alternatives.⁵³ The freedom to speak in public places protected by this right entails a duty to help the lowly, who are losers under the distribution ordained by common law. This is a duty of the "honor," or positive, kind, to make people more free above the line.

We can see the same theme in the right to travel cases. Until 1969 the right provided a kind of "shalt not" protection against laws prohibiting or deterring travel.⁵⁴ But *Shapiro v. Thompson*⁵⁵ held that a state must include needy new residents in its welfare program. And *Memorial Hospital v. Maricopa County* laid down the same rule for medical care:

[M]edical care is as much "a basic necessity of life" to an indigent as wel-

50. *Commonwealth v. Davis*, 162 Mass. 510, 511, 39 N.E. 113, 114 (1895), *aff'd*, 167 U.S. 43 (1897).

51. 307 U.S. 496 (1939).

52. Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13.

53. *Martin v. Struthers*, 319 U.S. 141, 146 (1943); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 987 (2d ed. 1988).

54. *See, e.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964); *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Edwards v. California*, 314 U.S. 160, 181, 183-85 (1941) (Douglas and Jackson, JJ., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Passenger Cases*, 48 U.S. (7 How.) 283, 283 (1849); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1825).

55. 394 U.S. at 622.

fare assistance It would be odd, indeed, to find that the State of Arizona was required to afford [appellant] welfare assistance to keep him from the discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.⁵⁶

The opinions in these cases have a queer look about them, because the Court tried to fit its rules into the old "shalt not" mold. In *Memorial Hospital*, the Court accused insouciant states of "penalizing" needy travelers⁵⁷ — as though the states had robbed them of something they arrived with. But this is hardly a fair description of the reality. It would be more accurate to say that the Court had changed its view of the right to travel; that right now imposes on the state a positive duty to render aid to needy travelers — to be a kind of good Samaritan.⁵⁸

We can see the same phenomenon at work in the free exercise cases. There is an obvious difference between a fine and a refusal to pay unemployment compensation.⁵⁹ The former reduces a person's assets below the baseline established by common law rules of distribution, the latter does not. If freedom only limits government's power to act below the line, it does not apply in the latter case. But since 1963 the Court has found that freedom entails a "positive" duty to help those whose unemployment results from religious scruples.⁶⁰

I will not attempt to argue that there is some unifying explanation for the recognition of "positive rights" in these three groups of cases. I do not even maintain that the Court is right in recognizing them. My objective is descriptive rather than normative. I only contend that it is possible to conceive of positive rights if rights impose duties on the government, whereas it is not if rights only limit the powers of government. Which particular rights are positive depends on what duties the government has, and the source of those duties is beyond the scope of this restatement.

56. 415 U.S. at 259-60.

57. *Id.* at 258-59.

58. The biblical metaphor slightly overstates the nature of the government's duty. A state remains free to abolish its welfare program and give nothing to the poor. The duty created by *Shapiro*, though positive, is contingent. States must help poor immigrants, but only to the extent that they help poor long time residents.

59. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 198-209.

60. *Sherbert v. Verner*, 374 U.S. 398 (1963).

C. *The Role of Purpose*

It is often said that, though the government can withhold benefits for any reason or for no reason, it cannot withhold them for a bad reason; the validity of conditional grants turns on the government's purpose in making them. There is some truth in this claim. But it makes more sense as applied to the duties of government than it does as applied to powers.

According to the old "power" cases, the Constitution made a neat allocation of discrete powers that the government could and could not exercise. It might help to think of the Constitution as a pool table with various kinds of balls. Some balls were divided between the states (striped) and the federal government (solid), and the rule of play imposed by the Constitution was: "Hit your own balls." The federal government had the power to regulate commerce; the state governments had the police power.⁶¹ The federal government had the power to tax local activity; only the states could penalize it.⁶² Some balls (eight-balls) were off limits to both governments. They were protected by the same rule of play: "Hit your own balls." This is one well-known interpretation of the first amendment. The government can regulate conduct,⁶³ but not speech,⁶⁴ and not belief.⁶⁵

A recurring problem for this world view was that the government would hit combination shots. The federal government would regulate child labor by closing the channels of interstate commerce.⁶⁶ State governments would regulate entry to the federal courts by withhold-

61. *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918) ("The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824). The analogy was blurred a little by *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), which let the states sometimes regulate commerce.

62. *Child Labor Tax Case*, 259 U.S. 20, 38 (1922).

63. *United States v. O'Brien*, 391 U.S. 367 (1968); *Cox v. Louisiana*, 379 U.S. 559, 581 (1965) (Black, J., dissenting); *Reynolds v. United States*, 98 U.S. 145 (1879).

64. *Spence v. Washington*, 418 U.S. 405 (1974). Justice Black, the foremost exponent of this theory, put it this way:

To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights . . . make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government all power to act in certain areas — whatever the scope of those areas may be.

Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 874-75 (1960).

65. *Reynolds*, 98 U.S. 145; see also *Cantwell v. Connecticut*, 310 U.S. 296 (1940). As I suggested in section I, this is the constitutional equivalent of the ultra vires doctrine in corporate law. Corporate charters are simpler because there is no division of powers (no analogue to the federal system), and no list of prohibited powers (no analogue to the Bill of Rights). A charter merely contains a list of granted powers, so the shareholders know what they are risking their money on. BALLANTINE, CORPORATIONS § 82 (rev. ed. 1946). The law says to the corporation: "Hit your own balls." A railroad company can not speculate in grain. 1 V. MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 368 (2d ed. 1886).

66. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

ing licenses from foreign corporations.⁶⁷ City governments would restrict speech by limiting the number of demonstrators⁶⁸ or newspaper racks⁶⁹ on the sidewalk.⁷⁰ These cases do not fit the simple model of discrete powers. That model requires a way of classifying complex actions into categories of "striped," "solid," or "eight-ball." Is the Mann Act a regulation of interstate commerce or an exercise of police power? Is a law against burning draft cards a regulation of speech or of conduct?

This is where purpose came in. The Court would often try to classify a complex action according to its purpose.⁷¹ This was not some psychological fact about the legislature — its motive or intention.⁷² What the Court meant when it talked about "purpose" was "the end

67. *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Security Mut. Life Ins. Co. v. Prewitt*, 202 U.S. 246, 256 (1906), *overruled by Terral*, 257 U.S. 529 (1922); *Barron v. Burnside*, 121 U.S. 186, 197 (1887); *Doyle v. Continental Ins. Co.*, 94 U.S. (4 Otto) 535, 541 (1877), *overruled by Terral*, 257 U.S. 529 (1922).

68. *Cox v. Louisiana*, 379 U.S. 559, 563 (1965).

69. *Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988).

70. The same problem afflicted the ultra vires doctrine. The corporate charter would authorize running a railroad. The company would then hit a combination shot: it would open a hotel at the end of the line. Was it using its power to run a railroad, or acting ultra vires? *Jacksonville, M.P. Ry. v. Hooper*, 160 U.S. 514 (1896).

71. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."); *Hague v. CIO*, 307 U.S. 496, 516 (1939) (not a regulation of streets and parks but a regulation of speech); *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 591 (1926) ("It is very clear that the act . . . is in no real sense a regulation of the use of the public highways. It is a regulation of the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are engaged in using them. Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions."); *Lipke v. Lederer*, 259 U.S. 557, 561-62 (1922) (not an exercise of the taxing power); *Hill v. Wallace*, 259 U.S. 44, 66-68 (1922) (not an exercise of the taxing power); *Child Labor Tax Case*, 259 U.S. 20, 36-43 (1922) (not an exercise of the taxing power); *Hammer v. Dagenhart*, 247 U.S. 251, 269-76 (1918) (not an exercise of commerce power); *Barron v. Burnside*, 121 U.S. 186, 197 (1887) ("It is apparent that the entire purpose of this statute is to deprive the foreign corporation . . . of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the state court into the Federal court. . .").

72. *Hammer*, 247 U.S. at 276 ("We have neither authority nor disposition to question the motives of Congress in enacting this legislation."); *United States v. O'Brien*, 391 U.S. 367, 382-85 (1968); *Flemming v. Nestor*, 363 U.S. 603, 612 (1960) (It is "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision"); *Arizona v. California*, 283 U.S. 423, 455 (1931) ("Into the motives which induced members of Congress to enact the [law], this court may not enquire."); *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156, 161 (1920); *Wilson v. New*, 243 U.S. 332, 358-59 (1917); *United States v. Des Moines & Co.*, 142 U.S. 510, 544 (1892); *Doyle v. Continental Ins. Co.*, 94 U.S. (4 Otto) 535, 541 (1877); *Ex parte McCordle*, 74 U.S. 506, 514 (1869). *But see* *Child Labor Tax Case*, 259 U.S. at 38.

or final cause in the Aristotelian sense as distinguished from its efficient or its material cause. So, a razor is something to shave with. . . .”⁷³ Consider *Frost Trucking*.⁷⁴ A private trucking company complained that California had required it, as a condition of using the public highways, to operate as a common carrier. This, Frost claimed, violated the due process clause. The Court saw it as a combination shot (it involved a “stripe” and an “eight-ball”):

There is involved in the inquiry not a single power, but two distinct powers. One of these — the power to prohibit the use of the public highways in proper cases — the state possesses; and the other — the power to compel a private carrier to assume against his will the duties and burdens of a common carrier — the state does not possess.⁷⁵

But the Court had no trouble classifying the shot and agreeing with Frost: “It is very clear that the act, as thus applied, is in no real sense a regulation of the use of the public highways Its primary purpose evidently is to protect the business of those who are common carriers in fact by controlling competitive conditions.”⁷⁶ Nowadays we talk about the *legislature’s* purpose, by which we mean some interior process of thought. In *Frost* the Court refers to the purpose of the *act*, which it finds by seeing the act applied and observing its natural “result.”⁷⁷

This is a natural way of thinking for people preoccupied with the powers of government. The world of powers is governed by a kind of legal naturalism. There is no difference between what government is allowed to do and what it is able to do. (Rights disable the government by taking powers away.) The entire set of concepts — “power,” “ability,” “disability” — is tied to observable results in the physical world. This is why we look at results to decide whether the state has exercised its power over the highways. And when the Court speaks of laws, like razors, as having their purposes, it means what the laws are used to do. In this scheme of things, it does not matter what government actors are actually thinking. A pool player’s state of mind is not relevant to deciding whether he has complied with the rules. We know all we need to know by watching the table. When it talked about purpose the Court looked to see what ball the government sank.

After considerable experience with this approach the Court con-

73. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 875 (1930) (footnote omitted). As Justice Holmes put it, “Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.” *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918).

74. *Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583 (1926).

75. *Id.* at 593.

76. *Id.* at 591.

77. *Id.* at 593.

cluded it did not work very well. The problem was that categories like "commerce," "police," "conduct," and "speech," are not hard, well-defined, and impenetrable like pool balls. Prostitution is commercial vice; flag burning is expressive conduct. We can keep the categories separate in our minds, but in the real world they run together. This makes it impossible to say, just by watching the table, what power the government is exercising. Nor can we say that the purpose (end) of a particular act is the regulation of commerce and not morals, or speech and not conduct. The government typically sinks one ball from each category.

When we turn from the powers to the duties of government, however, "purpose" takes on a different meaning. Here the rule is that the government must not behave wrongly by violating people's rights. But wrongful behavior must be intentional, not accidental. We need to know the government's intentions (its "purpose") in order to decide whether it has acted wrongly (whether it has violated our rights).

As applied to complex actions, this is the principle of the double effect. Suppose I am an oncologist. I know that morphine will relieve the suffering of my patient, but it will also hasten her death. It is not wrong to administer the drug to relieve her present suffering. But it *would* be wrong if my purpose was to shorten her agony by shortening her life. My actions in the two cases are identical. The rightness and wrongness of my behavior depends on my intentions.

This is the rule the Supreme Court announced in *Board of Education v. Pico* for removal of books from school libraries.⁷⁸ That act has the effect of freeing up shelf space, diversifying the collection, and so on, but it can also result in suppressing unorthodox ideas. If the latter effect is intended, the act violates the first amendment.⁷⁹

78. 457 U.S. 853, 871 (1982) (plurality opinion); *id.* at 879-80 (Blackmun, J., concurring); *id.* at 883 (White, J., concurring); *id.* at 907-08 (Rehnquist, J., dissenting).

79. For other examples, see *Regan v. Taxation with Representation*, 461 U.S. 540, 545-50 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Califano v. Asnavorian*, 439 U.S. 170, 177 (1978); *Elrod v. Burns*, 427 U.S. 347 (1976).

Equal protection law might seem to be an even better example of the double effect. A police department literacy test may simultaneously improve job performance and disqualify large numbers of minority applicants. Whether the department can use it depends on which result it intended. *Washington v. Davis*, 426 U.S. 229 (1976). But the usual explanation for this rule is that bad intentions themselves cause a special harm (stigma) that good intentions do not. Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 5-10 (1976). And if this is true, then cases like *Davis* are not really examples of a double effect. There is no harm (no bad effect) when intentions are

I do not mean to suggest that a bad purpose is a necessary condition of a constitutional violation. The Constitution may forbid some harms no matter how innocently the government brings them about. A law against littering, though motivated by the most exquisite of aesthetic sensibilities, may still be bad because it reduces speech to an intolerable degree. But purpose counts for more in cases of largesse, because the simple failure to provide a benefit is not a forbidden harm.

IV. CONCLUSION

I have attempted to make just one point, and it is of the utmost importance in so-called unconstitutional conditions cases. My point is that constitutional rights used to be understood as simple immunities that limited the powers of government. Today we think that rights also impose duties on the government. This focus on duties rather than on powers helps us to deal more sensibly with a number of the claims usually made in largesse cases. One is the claim that the greater power (to withhold largesse) entails the lesser power (to grant it conditionally). The change of focus offers a convincing rebuttal to this claim. It shows that sometimes the government has a duty not to exercise the lesser power. A second claim we often hear is that our constitutional rights are negative rather than positive. Here too the change of focus helps defeat the claim. It is quite natural to think in positive terms about rights that impose duties ("Honor thy father and thy mother") on the government. The third claim made in largesse cases is that the government may not withhold benefits for a bad purpose. The change of focus gives more punch to this claim. Purpose does not count for much when we are measuring powers, but it can be essential when the government is charged with violation of duty.

good.