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Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion

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Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion

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I. INTRODUCTION

In 1990, Wyeth-Ayerst Laboratories introduced Norplant, a five-year contraceptive consisting of six capsules that release contraceptive hormones when inserted in a woman's arm.¹ Soon after the introduction of Norplant, a Philadelphia Inquirer editorial column stirred tremendous controversy when the author suggested that Norplant could solve the welfare problem if states would offer welfare mothers incentives to

1. *Physicians' Desk Reference*, 2598-2601 (Medical Economics Data, 47th ed. 1993).

use the device.² Tremendous outrage and cries of racism, fascism and genocide prompted the Inquirer's Editor, Maxwell King, to apologize publicly and retract the editorial.³

Despite the fury, some states have introduced welfare reform bills that would do exactly what the Inquirer editorial so boldly suggested.⁴ In a nutshell, the typical law would offer female welfare recipients a cash incentive of \$500 if they allow the state to insert Norplant at its own expense. If passed, such a law would not only generate a wave of criticism but also would present a most perplexing constitutional anti-mony. Essentially, a law offering cash for Norplant insertion would bring two unresolved and arguably unsolvable constitutional doctrines—the doctrine of unconstitutional conditions and the doctrine of certain “privacy rights” as fundamental constitutional rights—to bear on the same issue.

The unconstitutional conditions doctrine states that the government cannot bribe people with benefits and privileges to forego rights with which the government could not interfere directly. For example, the government could not pay people \$100 a week not to go to church or pay them to worship one religion but not another.⁵ The counterargument, based on the premise that the government has no duty to give benefits, suggests that the right not to give a benefit includes the lesser right to offer it conditionally.⁶ In addition to this inquiry, the next challenge is to define the right with which the government is interfering and to determine whether that right is fundamental. Since the right to procreate is not specifically listed in the Constitution, the issue is whether it is included in the bundle of “privacy” rights enunciated in cases such as *Roe v. Wade*.⁷ Finally, one must determine the level of scrutiny the Court would apply to a constitutional analysis of the Norplant statutes. That determination hinges in large part on whether the Court considers the right to be fundamental.

This Note places moral issues aside and concentrates on the constitutional implications of these welfare statutes. Part II outlines the proposed Norplant legislation and develops an ideal constitutional argument against such statutes. Part III analyzes the current state of the unconstitutional conditions doctrine and demonstrates the difficulty

2. *Poverty and NORPLANT: Can Contraception Reduce the Underclass?*, Philadelphia Inquirer A18 (Dec. 12, 1990).

3. *An Apology, the Editorial on Norplant and Poverty was Misguided and Wrongheaded*, Philadelphia Inquirer C4 (Dec. 23, 1990).

4. See notes 8-15.

5. See notes 19-22 and accompanying text.

6. See notes 45-46 and accompanying text.

7. 410 U.S. 113 (1973) (holding that the right to obtain an abortion is fundamental and any restriction on the right deserves strict scrutiny).

in predicting where a hypothetical Norplant case would fall in light of recent Supreme Court decisions. Part IV defines the spectrum of privacy rights and determines which right is implicated by the proposed Norplant statute and which standard of scrutiny should apply. Part V offers some solutions to the current confusion in the unconstitutional conditions context. This Note concludes by predicting how the Court would respond if a Norplant law were passed and challenged and recommends changes in the proposed Norplant statutes so as to avoid a constitutional confrontation altogether.

II. THE PROPOSED NORPLANT STATUTES AND THE CONSTITUTIONAL ARGUMENT AGAINST THEM

A. *The Proposed Statutes*

Since the introduction of Norplant, several states have proposed, introduced, or passed legislation that incorporates Norplant into welfare reform.⁸ These laws vary in their level of intrusiveness upon civil liberties. For example, Union County, North Carolina started a pilot program where the county provides Norplant to welfare mothers who want it.⁹ Similarly, California has passed a law that will provide information and Norplant insertion for AFDC mothers who desire it.¹⁰ While these two laws apparently raise no constitutional concerns,¹¹ other state proposals are raising eyebrows. For example, Kansas has introduced a bill that would offer a \$500 welfare bonus to mothers who receive Aid For Families with Dependent Children ("AFDC") if they agree to Norplant insertion.¹² Tennessee originally introduced an identical bill that was later amended to offer \$500 "scholarships" to welfare women who choose Norplant and welfare men who agree to vasectomies.¹³ David Duke drafted similar legislation in Louisiana that would have offered an extra \$100 a month for Norplant recipients, but the

8. See notes 91-95 and accompanying text.

9. Gene Stowe, *Mother, 20, First For Union's Norplant Program*, Charlotte Observer 2B (July 13, 1991).

10. Ilana DeBare, *Poor Waiting For Norplant Aid Delayed While State, Maker Fight Over Cost*, Sacramento Bee A3 (Oct. 17, 1991).

11. These laws presumably pass muster because no cash or other incentive exists to encourage women to participate; therefore, no interference with a liberty is present. For a more thorough discussion of what constitutes an interference with liberty, see generally Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185, 1202-05 (1990).

12. 1991 Kansas House Bill No. 2089, 74th Legis., 2d Reg. Sess. (1992).

13. The bill originally was introduced as 1991 Tennessee Senate Bill No. 2452, 97th General Assembly and offered cash instead of scholarships. The bill later was amended to change the cash to scholarships, limiting the use of the money for further education at any level and to give males the option of vasectomy. *Bill Will Give School Funds if Poor Use Birth Control*, Detroit Free Press 3A (Apr. 17, 1992). Although this bill was recently defeated in the state senate, Representa-

cash incentives were eventually removed, primarily because the measure would have cost an estimated \$40 million.¹⁴ Mississippi has introduced a bill that would require Norplant insertion for some welfare recipients, and Washington state senator Scott Barr is backing a law offering \$10,000 bonuses to welfare mothers who agree to a tubal ligation after their first child is born.¹⁵

Although none of the more coercive bills have passed, this Note focuses on the type of law considered in Kansas and Tennessee whereby women are not required to receive Norplant but are offered financial incentives to do so. This type of law presents the most difficult constitutional analysis but is important because these laws represent the gray area between a constitutionally permissible law like California's, which encourages voluntary use of Norplant, and a more intrusive law like Mississippi's, which requires Norplant insertion in certain situations. Furthermore, because the proposed Tennessee statute contains politically palatable amendments, it is likely to survive the legislation process and represents the most evenly matched struggle, constitutionally speaking, between welfare reform and individual civil rights. This Note refers to statutes like Tennessee's with the generic term "Norplant statute." To avoid confusion and constant comparison of the differences between the Tennessee and Kansas statutes, this Note categorizes the suspect statute as one that offers a \$500 cash incentive for welfare mothers who submit to Norplant insertion.

B. The Ideal Argument—Finding an Interference With Liberty

If the Norplant statute or a similar version passes, standing requirements would narrow potential challengers primarily to female AFDC recipients, either individually or as a class.¹⁶ The first step in challenging a Norplant law under substantive due process is identifying an interference with some right or liberty or, alternatively under the Equal Protection Clause, some type of impermissible classification.¹⁷ Normally, due process interference is obvious if the law is directly prohibitive, but the interference created by the Norplant statute is not so clear since the statute would neither require nor prohibit any type of

tive Steve McDaniel plans to revive the bill next session. *The Norplant Debate*, Newsweek 37-38 (Feb. 15, 1993).

14. Maralee Schwartz, *Duke Presses Louisiana Birth Control*, Wash. Post A14 (May 29, 1991).

15. See 1992 Mississippi Senate Bill 2895 and Jim Simon, *Heavy Hand of Welfare Reform Legislators Planning to Get Tough*, Seattle Times B1 (Jan. 31, 1992).

16. See, for example, *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (holding that standing requires that one challenging a law must have some "injury in fact" and "cannot rest his claim to relief on the legal rights or interests of third parties").

17. See Baker, 75 Cornell L. Rev. at 1202-05 (cited in note 11).

activity. Therefore, the challenging party would have to base her interference argument on the doctrine of unconstitutional conditions.

Under the unconstitutional conditions doctrine, the challengers would argue that the state cannot use benefits and privileges to encourage the surrender of constitutional rights which the state could not seize directly.¹⁸ For instance, in *Frost Trucking Co. v. Railroad Commission*,¹⁹ the United States Supreme Court struck down a California law that conditioned highway privileges on submission to common carrier status, a submission that California concededly could not have required directly.²⁰ In so doing, the Court held that it would be illogical to allow a state to buy rights using valuable privileges as an incentive when the Constitution would prohibit that same state from any direct interference with that right.²¹

The Supreme Court rephrased this doctrine in *Sherbert v. Verner*.²² In *Sherbert*, the Court ruled that denying unemployment compensation to a Seventh-Day Adventist applicant who refused to work on her Sabbath Day was unconstitutional.²³ The Court recognized that the applicant was forced into a choice between following her religion and foregoing benefits²⁴ and likened the denial to a fine or penalty for going to church.²⁵

Along these same lines, welfare mothers initially could argue that a state could not directly *require* indigent women to have Norplant inserted since this would constitute a blatant interference with an arguably fundamental right.²⁶ Then, these mothers could import the rule set forth in *Sherbert* and argue that conditioning the \$500 bonus on the

18. See, for example, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that South Carolina could not deny unemployment benefits because applicant, a Seventh-Day Adventist, refused to work on her Sabbath Day); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (holding that California could not condition a veteran's tax exemption on the stipulation that he pledge loyalty to the government).

19. 271 U.S. 583 (1926).

20. *Id.* at 592.

21. The Court stated:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Id. at 593.

22. 374 U.S. 398 (1963).

23. *Id.* at 410.

24. *Id.* at 404.

25. *Id.*

26. In the unlikely event that a state would refute this assumption, the plaintiffs could rely on *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which stands for the proposition that the state cannot forcibly deny the right to procreate.

forbearance of their right to procreate would, in essence, act as a fine for exercising or holding onto this right. In other words, if most welfare women chose the \$500, then the minority of women that did not would be penalized \$500 as compared to the status quo. In fact, the Norplant statute lends itself quite readily to an analysis under the doctrine of unconstitutional conditions—even more so than did the statute in *Sherbert*. In *Sherbert*, the condition or choice was created by happenstance and was not the original intent of the unemployment law. The state did not set out to deprive those who chose Saturday worship of their right to observe their Sabbath.²⁷ Contrarily, a Norplant statute would be a direct attempt to coerce welfare women to forbear their right to procreate. Therefore, a Norplant case arguably would be more deserving of an analysis under the unconstitutional conditions doctrine than was the statute in *Sherbert*. The Norplant statute embodies the classic unconstitutional condition situation in its purest form and, as such, unconstitutionally interferes with the right to have children.²⁸

Challengers of the statute also could employ an equal protection analysis and assert that the statute facially and invidiously discriminates against women by subjecting them to a coercive choice to which men are not subjected. Furthermore, as a gender classification the law deserves a heightened scrutiny.²⁹ Alternatively, they could argue for strict scrutiny since the classification arguably involves a fundamental right.³⁰

A potential equal protection challenge raises a question regarding which gender would bring an action. Women would bring the argument outlined above. Interestingly, however, indigent men also could attack the law by arguing that it unfairly gives indigent women an opportunity that men do not have to increase their benefits by \$500. This twist reveals the paradox of unconstitutional conditions in the context of equal protection. Deciding which gender the state is treating unfairly depends on whether one views a conditioned benefit as an opportunity or a threat.

While this dichotomy is interesting, an equal protection argument is not the strongest plan of attack. First, a facial gender classification, if proven, only provides for, at most, an intermediate level of scrutiny.³¹

27. See *Sherbert*, 374 U.S. at 399-401. The unemployment law was designed to deny benefits to all those who refused to work without good cause. An intent to discriminate against religion is not apparent from the statute. In any event, the Court stated that if the law's purpose or effect was to burden religion, it deserved strict scrutiny. *Id.* at 399-401.

28. For a complete discussion of this right, see Part IV.

29. See, for example, *Craig v. Boren*, 429 U.S. 190 (1976).

30. See *Skinner v. Oklahoma*, 316 U.S. 535 (1942). This argument also would depend on the classification of the right to procreate as fundamental, as discussed in Part III.

31. See, for example, *Caban v. Mohammed*, 441 U.S. 380 (1979).

Second, an equal protection argument adds nothing that a pure substantive due process argument cannot offer. The argument that an impermissible and inequitable interference with a fundamental right exists is necessarily nested within the unconstitutional conditions framework and fundamental right analysis already required under a substantive due process claim. Finally, a state could circumvent an equal protection attack by including a similar provision for indigent males as Tennessee has done with its proposed bill. For these reasons, the better reasoned argument, and that with the greater chance for success, relies not on equal protection theory but on substantive due process.

C. *The Right to Procreate Is Fundamental*

If a potential plaintiff convinces the Court that the law does interfere with a right by creating an unconstitutional condition, she then must convince the Court that the right in question is fundamental and deserves strict scrutiny.³² First, she must decide how broadly or how narrowly to phrase the right in question. For example, she could argue that the law interferes with her general right to privacy or more specifically with her right to procreate or to use contraception.³³ The ideal argument probably would assert one of the latter claims.

A potential plaintiff could rely on *Meyer v. Nebraska*³⁴ for support of the proposition that the right to procreate is fundamental. *Meyer* stated that the right to start a family and raise children is clearly protected by the liberty element of the Due Process Clause.³⁵ More on point is the seminal case of *Skinner v. Oklahoma*.³⁶ In *Skinner*, a criminal law that provided for sterilization of some recidivists but not others was found unconstitutional.³⁷ The Court applied the Fourteenth Amendment Equal Protection Clause and held that the classification of criminals deserved strict scrutiny because it involved the fundamental right to procreate.³⁸

32. While the stages of the argument have been separated here for clarity, the two steps of the unconstitutional conditions argument are interdependent. The Court has never applied the unconstitutional conditions doctrine to strike down a law that only interfered with a nonfundamental or garden variety right.

33. The significance of this choice is discussed further in Part III.

34. 262 U.S. 390 (1923).

35. *Id.* at 399-400. In holding a law unconstitutional that forbade the teaching of foreign languages, the Court declared that the rights "to marry, establish a home and *bring up children* . . . [are] essential . . . [and] this liberty may not be interfered with." (emphasis added).

36. 316 U.S. 535 (1942).

37. *Id.* at 543.

38. *Id.* at 541 (stating that "[m]arriage and procreation are fundamental to the very existence and survival of the race").

The Supreme Court confirmed and expanded this right in *Carey v. Population Services International*.³⁹ In *Carey*, the Court overturned a ban on the sale of contraceptives to minors by nonpharmacists. In so doing, Justice Brennan, writing for the Court, applied a strong compelling interest test because "whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices."⁴⁰ *Carey* is strong evidence that the Court considers the right to procreate to be on its list of unlisted fundamental rights.

A potential plaintiff could argue that the Norplant case mirrors *Griswold v. Connecticut*.⁴¹ In *Griswold*, the Court overruled a ban on the distribution of contraceptives because the right to choose whether to have a child is fundamental. The instant case involves the converse of a ban on birth control in that the Norplant law would, in essence, force one to use birth control. Intuitively, the right to use birth control necessarily includes the right not to use birth control. Therefore, a Norplant case deserves the same strict scrutiny that the Court applied in *Griswold* and *Carey*. In other words, the choice whether to use birth control—not merely access to birth control—is the protected liberty involved in these cases. Consequently, state governments cannot interfere with either side of that choice either by banning or by requiring birth control.

D. *The Level of Scrutiny and the Governmental Interest*

The above line of reasoning provides strong support for the proposition that the right to choose birth control or to procreate is fundamental under the Constitution. If the Supreme Court agrees, then a Norplant case would deserve the same strict scrutiny the Court applied in *Griswold*. Arguably, this scrutiny should be the same strict scrutiny or compelling interest test that the Court applies when any fundamental right is implicated. This strict scrutiny test requires first that the law in question promote a compelling governmental interest, and second, the test requires that no less intrusive alternatives be available to serve the same purpose.⁴²

Since the government has the burden of proving that the statute meets the test, the state probably would argue that it has a compelling economic interest in welfare reform and in reducing the welfare bill. The government then would assert that the Norplant law would serve to reduce the number of dependent children and ultimately the welfare

39. 431 U.S. 678 (1977).

40. *Id.* at 685.

41. 381 U.S. 479 (1965).

42. See, for example, *Roe v. Wade*, 410 U.S. 113, 155 (1973).

bill as a whole. In response, the plaintiff could argue that no empirical evidence that the law would be economically productive exists. Perhaps the state would spend large amounts of money providing relatively expensive birth control to women who would have used their original benefits to achieve the same end. Even if the government could show that using Norplant provides an economic advantage, this interest is not paramount to individual liberty. Whenever a purely economic interest collides with a fundamental liberty central to the essence of life in a democratic society, the economic interest must yield.⁴³

Additionally, the government would argue that the Norplant law is the least intrusive alternative. However, plenty of less intrusive ways to lower welfare costs exist. For example, removing the cash incentive would give indigent women the option to use Norplant without the impermissible pressure on the right to procreate. Even better, this option would save \$500 more for every participant. Another alternative would be to cap benefits regardless of family size. In other words, the state could set an absolute level of welfare per household and mothers who choose to have more children would have to make ends meet with the same amount of income. The Court approved such a reform in *Dandridge v. Williams*,⁴⁴ which held that ceilings on welfare payments do not interfere with the right to have children. For these reasons, a Norplant law should fail the compelling interest prong of the strict scrutiny test.

In sum, a potential challenger to the Norplant law would first assert an interference with her right to procreate because the law unconstitutionally conditions a welfare bonus on forbearance of the right to bear children. Next, the right to bear children is considered fundamental under the analysis in *Griswold* and demands strict scrutiny. Under the strict scrutiny test, the government clearly cannot meet the two-tiered burden. For these reasons, the Norplant statute should be overturned because it would violate the substantive Due Process Clause of the Fourteenth Amendment.

III. THE CAVEATS OF UNCONSTITUTIONAL CONDITIONS

While the above constitutional argument seems air-tight, many countervailing considerations exist. The crux of the counter argument lies in Oliver Wendell Holmes's statement that the right not to offer a

43. See, for example, *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (holding that fiscal considerations did not serve a compelling interest worthy of burdening the fundamental right to interstate travel).

44. 397 U.S. 471 (1970). Whether a ceiling is a commendable approach does not alter the fact that it is a less intrusive alternative.

benefit includes the lesser right to offer the benefit conditionally.⁴⁵ In fact, some legal commentators question whether the unconstitutional conditions doctrine still exists at all.⁴⁶

A. A Doctrine of Inconsistency

The unconstitutional conditions doctrine first emerged at the turn of the century when states tried to condition privileges such as the right to use highways on acceptance of common carrier liability.⁴⁷ Since then, the doctrine has narrowly, but nonetheless, survived.⁴⁸ A consistent application of the doctrine would hold any law unconstitutional that conditioned government benefits on forbearance of or intrusion on a constitutional right. However, unconstitutional conditions cases arise in a variety of contexts, and apparently similar cases have been decided differently.

In the free speech context, for example, the Supreme Court has used the unconstitutional conditions doctrine in cases such as *Perry v. Sindermann*⁴⁹ and *Speiser v. Randall*.⁵⁰ In *Speiser*, the Court struck down a California tax law that required veterans to sign a pledge of loyalty to the United States government and the State of California before they could receive a tax exemption. The Court found that this tax law unconstitutionally conditioned the exemption on forbearance of the fundamental right to free speech.⁵¹ Conversely, in *American Communications v. Douds*,⁵² the Court upheld a nearly identical loyalty pledge that required union leaders to denounce Communist ties and promise loyalty to the United States government in order to get National Labor Relations Board privileges.⁵³

45. See *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes dissenting) (arguing that the government has no duty to offer someone a government position; therefore, it can justifiably offer the position conditionally).

46. See, for example, Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 San Diego L. Rev. 337 (1989).

47. See, for example, *Frost Trucking Co. v. R.R. Commission*, 271 U.S. 583 (1926) and *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922) (holding a law that conditioned the right to do business on forbearance of a right to invoke diversity jurisdiction in federal court unconstitutional).

48. Recent examples include *Arkansas Writer's Project v. Ragland*, 481 U.S. 221 (1987) (holding that an Arkansas tax exemption to publishers based upon the subject matter of the written material is unconstitutional) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (holding that a building permit conditioned upon a landowner's donation of a public beachfront easement was an unconstitutional subversion of the takings clause).

49. 408 U.S. 593 (1972) (in which an untenured professor successfully challenged a decision not to extend his contract which was based on his exercise of the right to free speech).

50. 357 U.S. 513 (1958).

51. *Id.* at 528-29.

52. 339 U.S. 382 (1950).

53. *Id.* at 415.

In two more recent cases, the Court applied the unconstitutional conditions doctrine. In *FCC v. League of Women Voters*,⁵⁴ the Court struck down a law that prohibited publicly assisted broadcasters from using public funds for editorializing. In another case, however, the Court upheld an IRS restriction conditioning tax exemption status on whether a nonprofit organization engages in substantial lobbying.⁵⁵ Both laws involved a government benefit conditioned on some forbearance of free speech, but one was constitutional and the other was not.

In *Sherbert v. Verner*, the Court overturned a South Carolina unemployment benefit scheme that denied payments to appellant because she would not work on her Sabbath Day.⁵⁶ The Court found that this law unfairly conditioned the benefit of unemployment payments on the forbearance of the free exercise of religion. However, the Court later upheld a similar law in *Bowen v. Roy*.⁵⁷ In *Bowen*, the Pennsylvania welfare program denied benefits to a Native American family who refused to provide a social security number for their two year old daughter. The family's religious beliefs dictated that an identifying social security number would interfere with the child's unique spiritual development. For this reason, they were denied welfare.⁵⁸ In both cases, receipt of benefits was conditioned on the sacrifice of religious principles, but one passed muster and the other did not.

The Court followed the unconstitutional conditions doctrine in one right to marry case and struck down a Wisconsin law that required fathers with non-custodial children to prove that support payments were up to date before they could get remarried.⁵⁹ The Court found that this condition interfered with the fundamental right to marriage since it discouraged or even prevented indigent fathers from getting married.⁶⁰ Yet, the Court refused to employ the unconstitutional conditions doctrine in *Califano v. Jobst*.⁶¹ In *Califano*, the Court upheld a Social Security regulation that terminated benefits to disabled dependent children if they chose to get married, even if the spouse was disabled but not receiving Social Security. The law in *Califano* did allow the continuation of benefits if the new spouse also was receiving Social Se-

54. 468 U.S. 364 (1984).

55. *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

56. 374 U.S. 398 (1963). The Court recently affirmed this ruling in the similar case of *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

57. 476 U.S. 693 (1986).

58. *Id.* at 696.

59. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

60. *Id.*

61. 434 U.S. 47 (1977).

curity.⁶² While both laws financially burdened the choice of whether to marry, one was constitutional and the other was not.

The last significant area of unconstitutional conditions cases involves privacy rights. The Court has applied the unconstitutional conditions doctrine and found that forced maternity leave without pay unconstitutionally interferes with the choice to get pregnant.⁶³ Also, a circuit court has held that states cannot condition employment on forgoing the private right to breast-feed.⁶⁴ On the other hand, the Supreme Court also has held that the state can offer a disability insurance plan covering all disabilities except those incident to childbirth.⁶⁵ Furthermore, the Court has ruled that the government can fund childbirth, but not abortion, without any unconstitutional interference with an indigent woman's fundamental right to choose between abortion and having the child, even if the law puts the abortion option financially out of reach.⁶⁶ In fact, the state's ability not to fund abortion extends to most medically necessary abortions as well.⁶⁷ These cases clearly allow the government to bribe the indigent pregnant female to choose birth over abortion, a result that flies in the face of the unconstitutional conditions doctrine.

Perhaps the most intrusive example of this tendency is the recent case of *Rust v. Sullivan*⁶⁸ which involves the federal abortion "gag rule." In a five to four decision, the Court upheld a Department of Health and Human Services regulation that forbade Title X projects from counseling, suggesting, or in any way recognizing or advocating abortion as a viable option for pregnant women.⁶⁹ In other words, it is constitutionally permissible for the government to condition the receipt of federal funds on a public clinic's forbearance of its right to counsel abortion as a method of family planning. While this holding directly implicates First Amendment speech, including the doctor-patient relationship, it also indirectly affects an indigent woman's right to an abortion. If indigent women rely on these public clinics for prenatal advice, they will not be fully informed of their abortion rights. The net effect is that fewer women will have abortion as a viable alternative to preg-

62. *Id.* at 51.

63. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) and *Turner v. Dept. of Emp. Sec. of Utah*, 423 U.S. 44 (1975).

64. *Dike v. School Bd. of Orange County*, 650 F.2d 783 (1981).

65. *Geduldig v. Aiello*, 417 U.S. 484 (1974). Congress overturned *Geduldig* by passing the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1988).

66. *Maher v. Roe*, 432 U.S. 464 (1977) (upholding a Connecticut welfare statute that funded childbirth and first trimester abortions which a doctor deemed medically necessary).

67. See *Harris v. McRae*, 448 U.S. 297 (1980).

68. 111 S. Ct. 1759 (1991).

69. *Id.* at 1764-65.

nancy. The government has interfered with the fundamental right to choose abortion⁷⁰ by eliminating a primary, if not the only, source of information regarding abortion that is available to indigent women. *Rust v. Sullivan* is significant because it involves both abortion and First Amendment free speech issues. Therefore, *Sullivan* is difficult to reconcile with other First Amendment cases such as *Speiser* and *League of Women Voters*.

All of these examples illustrate how inconsistently the Court has applied the doctrine of unconstitutional conditions. From these conflicting cases, two questions naturally arise: 1) how can the Court reconcile these cases? and, the threshold question 2) how can one predict when the Court will invoke the unconstitutional conditions doctrine and when it will not?

B. *The Court's Malleable Rhetoric*

In each of these contradictory cases, the Supreme Court heard arguments stemming from the previous countervailing decision. For example, the Native American plaintiffs in *Bowen v. Roy* made the same arguments that previously had persuaded the Court in *Sherbert v. Verner*. In ruling for the defendants in each of these cases, the Court was forced to reconcile its holding with that of a previous opposite decision. The Court's explanations in these cases are worth mentioning because they shed some light into the Court's reasoning (or lack thereof) and they help clarify why the unconstitutional conditions doctrine is so unsettled.

In the context of the First Amendment, the Court broadly held in *Perry v. Sindermann* that, although no one has a right to a government benefit and the government may deny a benefit for a number of reasons, a benefit may not be denied on a basis that infringes constitutionally protected speech.⁷¹ In *Perry*, the Court ordered a university to reinstate a professor's employment contract which previously had not been renewed because he spoke out against the state university. The Court subsequently introduced a new restrictive variable in *Douds*, where it determined that the law requiring union leaders to pledge loyalty was not "aimed at the suppression of dangerous ideas"⁷² and apparently deserved only a rational basis test.⁷³ Therefore, the Court upheld the law.⁷⁴ The *Speiser* Court then used the exact same language

70. *Roe v. Wade*, 410 U.S. 113 (1973).

71. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

72. *Douds*, 339 U.S. at 402.

73. *Id.* at 390-91.

74. *Id.* at 415.

to strike down a similar California condition that required veterans to pledge loyalty when seeking a tax exemption. The Court found that "the denial [of the tax exemption] is frankly aimed at the suppression of dangerous ideas."⁷⁵ Then the Court went on to apply traditional unconstitutional conditions language by likening the law to a fine that coerced the claimants to refrain from free speech.⁷⁶ Although the Court relied on the judicially created "aimed at suppression of dangerous ideas" distinction in deciding *Speiser* and *Douids*, the ideas conditionally suppressed in each case appear identical. In each case, the dangerous ideas being suppressed were hostile feelings or beliefs towards the United States government. Therefore, it is difficult to discern how one set of ideas was more dangerous than the other.

The Supreme Court continued to apply the "dangerous ideas" test in the lobbying case of *Regan v. Taxation With Representation*.⁷⁷ The Court found no interference with liberty in this case, but in dicta recognized that "[t]he case would be different if [Congress had intended] 'the suppression of dangerous ideas.'"⁷⁸ Therefore, the Court created a new variable in First Amendment cases, at least in those involving unconstitutional conditions: the law must aim at the suppression of dangerous ideas to be considered an interference with liberty. Since an interference must be present in order for the Court to continue the constitutional analysis, those statutes that the Court considers not to be aimed at the suppression of dangerous ideas are, under the Court's new test, necessarily constitutional. As *Taxation With Representation*, *Speiser*, and *Douids* indicate, the relativity of what is a "dangerous idea" and what exactly constitutes an "aim to suppress" reserves to the Court considerable discretion in deciding unconstitutional condition cases.⁷⁹

The *Taxation With Representation* Court also introduced another line of confusing rhetoric. At the start of its analysis, the Court stated that the government had not infringed on any First Amendment right simply because it had chosen not to "subsidize" *Taxation With Representation's* First Amendment right to lobby.⁸⁰ Therefore, the Court found no interference with liberty. Interestingly, this language echoes the Holmesian statement that the right not to offer a benefit includes the lesser right to offer it conditionally.⁸¹ In other words, the govern-

75. *Speiser*, 357 U.S. at 519.

76. *Id.* at 518.

77. 461 U.S. 540, 548 (1983).

78. *Id.* at 548 (quoting *Cammarano v. United States*, 358 U.S. 498 (1959)).

79. This is exactly the type of inalleable rhetoric referred to previously.

80. *Taxation With Representation*, 461 U.S. at 546.

81. See, for example, *Myers v. United States*, 272 U.S. 52, 177 (1926).

ment can give nonprofit organizations tax exempt status provided they forgo their right to lobby because the government does not have to give tax exemptions in the first place. The same argument could just as easily apply in *League of Women Voters* because the State of California simply chose not to subsidize editorializing; however, the Court rejected this very argument.⁸² Instead, the Court seemed to differentiate the cases on the facts. The Court pointed out that Taxation With Representation, Inc. could more easily separate its lobbying activities from its general nonprofit work than radio stations could separate funds used for editorializing and those used for general radio programming. Incidentally, the Court failed to analyze whether California was intending to suppress dangerous ideas.⁸³

Similarly, in *Sherbert v. Verner*, the Court revived classic unconstitutional conditions language and determined that to condition benefits on forbearance of religious activity "penalizes" the exercise of religion.⁸⁴ The Court then applied a compelling interest test to find the benefit program unconstitutional.⁸⁵ The Native American plaintiffs in *Bowen v. Roy* also were forced to choose between Social Security benefits and a firm religious conviction, but the *Roy* Court refused to apply the rule in *Verner* and found no penalty burdening religious views.⁸⁶ In fact, the Court hinted at a Holmesian approach when it called attention to the fact that appellees were not being persecuted but were only seeking a benefit. The *Roy* Court concluded that the standard for government conduct is less for conditioned benefits than for direct prohibitions of religious activity.⁸⁷ In other words, the *Roy* Court treats conditions on benefits more deferentially than it does direct interferences with First Amendment liberties. Consequently, the *Roy* Court applied a rational basis test and upheld the law.⁸⁸

The Court did make a jaded effort to distinguish *Sherbert* based on the language of the statutes in question. The South Carolina statute in *Sherbert* stated that those who "without good cause" declined work would not be eligible for unemployment,⁸⁹ while the Social Security law in *Roy* demanded that all who apply must provide a Social Security

82. *League of Women Voters*, 468 U.S. at 399-401.

83. See *League of Women Voters*, 468 U.S. 364.

84. Conditioning "the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert*, 374 U.S. at 406.

85. *Id.*

86. 476 U.S. at 703.

87. *Id.* at 703-07.

88. *Id.* at 710.

89. 374 U.S. at 400 n.3.

number.⁹⁰ The Court suggested that the "without good cause" phrase in *Sherbert* allowed the Court to consider exceptions or to review what is "good cause," but that the absolute nature of the Social Security law left no such room for interpretation.⁹¹ Furthermore, the fact that the state in *Sherbert* had the option to decide what was good cause and had determined that religion was not, suggested a hostile attitude towards religion.⁹² But if the distinction between the wording of the two statutes was truly controlling, then the original *Sherbert* decision should have reflected the importance of wording. In *Sherbert*, the Court could have stated that the statute left room to interpret what constitutes "good cause" and that the state wrongly decided what was "good cause." Then, *Sherbert* truly would be limited to its specific facts. However, under the "penalty" explanation offered in *Sherbert*, the South Carolina unemployment law would create the same penalty whether it was absolute or discretionary. In other words, even if the statute read "no one who declines work" instead of "no one who declines work *without good cause*," the choice, and therefore the penalty, is the same for the plaintiff in *Sherbert*. By using an interpretation of statutory language, the Court effectively skirted the issue of why the option given the *Sherbert* plaintiff created a penalty, whereas the option facing the *Roy* plaintiff did not. The interesting point is that the Court found a "penalty" on religion in *Sherbert* but did not in *Roy*. This "penalty" language again provided the Court substantial discretion in deciding these unconstitutional conditions cases. From these two cases, it appears difficult for any scholar or practitioner, save the Justices of the Court themselves, to determine what constitutes a penalty and what does not.

The Court chose a different phraseology with regard to the right to marry cases to decide whether a benefit scheme interfered with the right to marry. In *Califano v. Jobst*, where the plaintiff lost Social Security benefits if he married another disabled person who was not receiving benefits, the Court applied a rational basis test to uphold the law regardless of whether some people were deterred from marriage or burdened by the law if they did marry.⁹³ The Court never admitted that the right to marriage was fundamental.⁹⁴ Conversely, in *Zablocki*, the Court spent the first three pages arguing how fundamental the institution of marriage really is. Then it applied "critical examination" scrutiny to strike down the Wisconsin law that required deadbeat fa-

90. 476 U.S. at 708.

91. *Id.*

92. *Id.*

93. *Jobst*, 434 U.S. at 53-54.

94. *See id.*

thers to pay past due child support before they could remarry.⁹⁵ The Court then distinguished *Zablocki* from *Jobst* by averring that the critical difference was the “directness and the substantiality of the interference with the freedom to marry.”⁹⁶ The Court felt that the Wisconsin law in *Zablocki* could serve to prohibit some of the poorest fathers from marrying, while the *Jobst* law just would have made marrying financially ill-advised. In reality, the amount lost by losing otherwise lifetime benefits could easily surpass the amount of debt owed by certain fathers. Whether the distinction is meritorious is incidental to the fact that the Court has inserted yet another malleable phrase, “direct and substantial interference,” that provides leeway for future Court determinations, thereby inserting uncertainty in future similar cases.

The Court relied on similar phrases in deciding the female privacy rights cases as well. In *Cleveland Board of Educ. v. LaFleur*⁹⁷ where unpaid maternity was required, the Court, using the compelling interest test, overruled the statute because it placed a “heavy burden” on the private right to bear children or remain employed.⁹⁸ Stated in terms of a condition, the statute conditioned the benefit, continuous employment, on not becoming pregnant. The Fifth Circuit used similar language in striking down the “undue interference” of regulating breast feeding in the *Dike* case.⁹⁹ In *Maher v. Roe*, the Supreme Court found no “undue burden” on a fundamental right when states chose to fund childbirth but not abortion.¹⁰⁰ Therefore, no fundamental right was “impinged” upon and only the rational basis test was required.¹⁰¹ Interestingly, statutes such as the one in *Maher* can serve to eliminate completely the abortion option for indigent women, thereby financially forcing them to choose birth. The forced maternity leave cases, on the other hand, do not effectively bar childbirth; they merely make it economically taxing. This point indicates how tenuous and discretionary such phrases as “undue interference” can be.

The *Maher* Court also returned to the non-subsidy rhetoric used in *Taxation With Representation*. The Court employed another version of the Holmesian argument that the conditioned benefit does not create any obstacle that was not already there.¹⁰² Additionally, the state can

95. *Zablocki*, 434 U.S. at 383.

96. *Id.* at 387 n.12.

97. 414 U.S. 632 (1974).

98. *Id.* at 640.

99. *Dike v. School Bd. of Orange County*, 650 F.2d 783, 785 (5th Cir. 1981) (stating that “[t]he Constitution protects from undue state interference with citizens’ freedom of personal choice in some areas of marriage and family life”).

100. 432 U.S. 464, 473-75 (1977).

101. *Id.* at 474, 478.

102. *Id.* at 474.

offer benefits in ways that encourage socially desirable behavior. The Court extended this argument even to statutes in which the state refuses to fund certain medically necessary abortions.¹⁰³ In *Harris v. McRae*, the Court reasoned that the courts cannot create obstacles to abortion but have no duty to remove obstacles that it did not create.¹⁰⁴ In fact, the indigent woman is in no worse position than if the state did not fund any obstetric expenses. The government does not have to subsidize rights. According to this argument, the government could offer welfare only to Republicans or Catholics since the others are no worse off than if the government offered no benefit and since the government has no duty to subsidize rights. Intuitively, if this is the rule, the unconstitutional conditions doctrine no longer exists.

Rust v. Sullivan employed nearly all of the new ambiguous catch phrases in addressing the "gag rule." It first extended the non-subsidy argument and rejected the "penalty" argument in cases involving speech as well as abortion.¹⁰⁵ The Court then refused to find any suppression of a "dangerous idea."¹⁰⁶ The Court even found no "discrimination on the basis of viewpoint."¹⁰⁷ Furthermore, the Court found that the law does not "impermissibly burden" an indigent woman's right to an abortion.¹⁰⁸

The Court made a groping effort to preserve its prior unconstitutional conditions cases by distinguishing *Sullivan*. The Court stated that the "gag rule" only places a condition on a program, and not on any recipient, and that outside the program employees are free to advise patients of anything they wish.¹⁰⁹ This language ties in with the *Taxation With Representation* separation argument—that the law is permissible because employees can exercise their freedom to speak about abortion elsewhere. This argument essentially says that the government can take away a fundamental right in certain situations so long as the person can find another outlet for expression of that right. Therefore, the state could theoretically pass a law that says all employees in state funded program X must believe in God or pray while at

103. 448 U.S. 297 (1980).

104. *Id.* at 314-16.

105. 111 S. Ct. 1759, 1772 (1991).

106. *Id.* at 1772-73.

107. *Id.* at 1773. This was another catch phrase used in *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987). This Note did not previously develop a discussion of this phrase because it lacked an inapposite case for comparison. *Ragland* held that a tax on special interest magazines, but not newspapers, was an unconstitutionally conditioned tax based on what a publisher chose to print.

108. *Rust v. Sullivan*, 111 S. Ct. at 1777.

109. *Id.* at 1774.

work since they can practice atheism on their own time.¹¹⁰ *Sullivan* exemplifies the lack of uniformity among unconstitutional conditions cases. It demonstrates the way the Court can use its discretionary threshold terms to uphold laws that create seemingly textbook unconstitutional conditions.

C. Some Proposals

The erratic nature of these decisions has led many legal commentators to study, analyze, and laboriously dissect the unconstitutional conditions cases in search of a workable doctrine or explanation.¹¹¹ The culmination of these efforts reveals just how unexplainable and troublesome the doctrine is.

In an exhaustively thorough and insightful article, Kathleen Sullivan approached the problem of understanding the unconstitutional conditions doctrine from several angles.¹¹² Her article starts with the Court's use of a "coercion" framework to indicate when conditions become unconstitutional.¹¹³ Implicitly, she argues that the Court finds conditions unconstitutional when they reach the level of coercion. Coercion principles presumably determine whether a condition is a penalty or a nonsubsidy.¹¹⁴ Sullivan concedes that this explanation necessarily fails mainly because coercion is a relative concept that depends on where one draws a baseline for comparison.¹¹⁵

110. The argument given by the Court in *Sullivan* ties into the related argument that the government has not paid for abortion counseling, they have paid only for birth counseling. Supporters of this argument believe that this situation is no different from hiring an algebra teacher to do nothing but teach algebra. While this argument is creative and clever, it ignores the real purpose and effect of the law. The purpose of the law is to prevent women who rely on government clinics from having abortions. While the method—targeting employees of the clinics—is indirect, the effect is the same as if the government had directly paid indigent women not to have abortions. In essence, money was spent, a benefit distributed, and fewer abortions performed, assuming a gag rule would work to prevent some women from having abortions. Under this reasoning, states could achieve the same results with a Norplant law that targeted social workers, government clinics, and any other government employee who dealt with indigent women. Such a law could require all government employees to advise, whenever possible, that Norplant is the greatest breakthrough and all women should have it inserted. The caveat on this argument is that it ignores the indirect burden that such advocacy puts on constitutional rights or choices. While there is no professed fundamental right to learn algebra or any other subject, there is a fundamental right to an abortion that state governments should take into account when allocating resources in ways that advocate one choice but not another.

111. For a complete list of notable works see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory Of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185, 1187 n.6 (1990).

112. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989).

113. *Id.* at 1428-56.

114. *Id.* at 1436-39.

115. *Id.* at 1440-42.

Next, Sullivan analyzes condition cases from a "corruption" viewpoint.¹¹⁶ The corruption theory suggests that the unconstitutional conditions doctrine provides the Court a tool or check on corrupt legislative procedure.¹¹⁷ Within this framework, she suggests that germaneness or relatedness of a condition to the legitimate governmental interest targeted in the statute or policy as a whole controls its constitutionality. In other words, if the condition is unrelated to the aim of the law then it is suspect and probably unconstitutional.¹¹⁸ She then casts this theory within three philosophic theories of legislative process: interest-group pluralism, civic republicanism, and public choice.¹¹⁹ Although the inquiry was academically stimulating, she once again conceded that germaneness is a relative concept and thus ineffective for accurately explaining unconstitutional conditions.¹²⁰

Sullivan then addressed unconstitutional conditions cases from a standpoint of "commodification."¹²¹ This economic-based theory assumes that certain rights are inherently inalienable and that unconstitutional conditions cases serve as a judicial vehicle to prevent alienation of inalienable rights. Sullivan seeks to justify philosophically an inalienable rights theory by incorporating inalienable arguments within socio-economic theories of paternalism, John Stuart Mill's efficiency, distribution and personhood.¹²² These explanations also fail since they address private transactions and do not adequately address the issue when government is a party to the transaction.¹²³

Sullivan does recommend a novel approach to unconstitutional conditions cases whereby statutes should meet the compelling interest test anytime a "preferred constitutional liberty" is pressured.¹²⁴ Sullivan points out that it could still be difficult, or discretionary, for a Court to determine when a right is "pressured," and she recommends that when in doubt one should err on the side of overinclusiveness in the protected category. The point is that while this suggestion would be an improvement from the current state of affairs, no workable guideline to explain the present cases or, more importantly, to predict the outcome of future cases exists.

116. *Id.* at 1456-76.

117. *Id.* at 1456.

118. *Id.* at 1457.

119. *Id.* at 1468-73.

120. *Id.* at 1474.

121. *Id.* at 1476-89.

122. *Id.* at 1479-86. The technical inquiries of Sullivan's article are provided here to emphasize the depth of research and thought that have been spent explaining why unconstitutional conditions cases are unexplainable.

123. *Id.* at 1489.

124. *Id.* at 1499-1505.

Kenneth Simons also attempts to explain when conditions should pass muster and when they should not.¹²⁵ His article claims that the cases should turn on whether the condition is an "offer" or a "threat."¹²⁶ He further adds a germaneness factor when he distinguishes between "pure threats" and "impure threats."¹²⁷ He defines an offer as when the government condition would improve one's status quo and a threat as when the condition would decrease one's status quo.¹²⁸ In other words, a tax break conditioned on a right is less problematic than a tax increase conditioned on a right. The problem with his analysis is that he bases his analysis on a speculation as to what the government would do if the condition were declared void. This reasoning is inherently problematic, as he readily admits.¹²⁹ Another problem is that he disagrees with the fundamental unconstitutional conditions presumption that a benefit or bonus withheld is equivalent to a fine of the same amount even if people do not always perceive it that way.¹³⁰ Whether the government offers a "threat" of \$200 or an "offer" of \$200, the right holder is still out \$200 at the end of the day relative to those who give up their right. Simons eventually concedes that his explanation is

not necessarily determinative of constitutionality. Sometimes both the threat and the corresponding offer are constitutional; sometimes neither are; sometimes, indeed, the threat is constitutional but the corresponding offer is not. The threat/offer distinction might only be one element in a complete unconstitutional conditions analysis.¹³¹

Although Simons's article provides an interesting intellectual inquiry and some advice to the Court on what level of scrutiny should apply to various rights, it still lacks a plausible method of classifying and predicting unconstitutional conditions cases.

Other commentators have suggested abandoning the doctrine altogether, and still others have recommended new positive theories that the Court could use by separating the cases into subgroups based on the subject matter involved.¹³² While pages could be written pointing out the shortcomings of prior efforts to unravel this most twisted legal

125. Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 San Diego L. Rev. 289 (1989).

126. *Id.* at 290.

127. *Id.* at 292.

128. *Id.* at 291.

129. *Id.* at 325.

130. See Part II.B.

131. Simons, 26 San Diego L. Rev. at 325 (cited in note 125).

132. For a proposal to drop the doctrine altogether, see Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism*, 70 B.U. L. Rev. 593 (1990). For a new positive theory, see Baker, 75 Cornell L. Rev. 1185 (cited in note 111).

problem, the point is that no rule currently exists that practitioners can apply to analyze future cases.

D. So Where Does the Instant Case Fall?: A Practical Approach

Although many commentators provide several insightful solutions or alternative methods of deciding unconstitutional conditions cases, a recommendation, unless the Court up and explicitly adopts it, offers little guidance in a particular case. The reason that no commentator has found a workable solution is not lack of competence or diligence, but rather that no solution exists to explain the erratic myriad of unconstitutional conditions cases. Even if a commentator found a rule that coincidentally explained why all of the cases are decided as they are, this rule would do nothing to advance the ultimate goal of predicting the outcome of a new case. This proposition is true because any rule that the Court did not actually employ would have little correlation to future outcomes, mainly because such a rule would be nothing more than a coincidence.

To demonstrate this proposition, if a commentator noticed that all winning parties so far had worn red ties, that would not necessarily mean that all future wearers of red ties would win unless the Court actually used a red-tie rule. Also, if the Court did rely on some rule, it follows that the court would share this rule with practitioners in the dicta of its cases. That no rule exists is a necessary conclusion from the nearly complete randomness of the outcomes. While commentators have delved into the annals of philosophy in search of an answer, it seems highly improbable that our Supreme Court Justices spend their free time poring over Kantian or Millsian philosophy in search of hidden undercurrents to weave inconspicuously into unconstitutional conditions cases.

Therefore, the search for how the Court would treat a Norplant statute has, so far, uncovered three options. One could take the Court's discretionary buzzwords at face value and undertake the inherently impossible task of predicting whether this law would be a "penalty," a "nonsubsidy," an "undue burden," or an "aim at the suppression of dangerous ideas." Or, one could turn to the secondary sources consisting of articles and treatises and then either give up or hope that the Court expressly adopts one of the suggested alternatives. Or finally, one could try to determine what factors really determine a holding. In other words, one could try to figure out what leads the Court to hand down opposite holdings on similar facts in the area of unconstitutional conditions.

In fact, a more practical inquiry into exactly how the Court does reach a particular decision may be the best method, if any such method

exists, of predicting future outcomes. It appears from the inconsistency of opinions that the Court must treat each case as a separate fact pattern and side with the party with whom it sympathizes most. That is to suggest that the Court reaches its decision based purely or primarily on the particular facts and retrospectively tailors its opinion to comport with this first conclusion. Assuming for the moment that this hypothesis may be the best explanation absent any alternative, one would then want to know which factors the Court favors in a case and which factors the Court finds unfavorable.

In an effort to support this hypothesis, twenty-nine unconstitutional conditions cases were dissected¹³³ and seven pragmatic factors were examined to see if there were any patterns or similarities in cases that were won and lost. The factors considered were 1) germaneness or relatedness of the condition to the purpose of the law itself;¹³⁴ 2) coercion or how restrictive the condition was; 3) the type of benefit involved (e.g., was it a government monopoly or were there other markets for the benefit); 4) status of the plaintiff or challenger (e.g., state, person, male, female, AFDC recipient); 5) what fundamental right was implicated; 6) whether the law in question was state or federal; and 7) what year the Court's opinion was written and who wrote it.

The first two categories, germaneness and coercion, eventually sifted out of the analysis because they were inherently too relative. In other words, there is no way to quantify with any certainty whether a condition is related to the law or whether a condition is coercive. For example, withholding a unique privilege such as the right to use highways is definitely coercive because this privilege cannot be obtained anywhere else. However, welfare benefits can cut both ways. No one else is giving away sustenance income, but people can arguably choose

133. These cases included: *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926); *Speiser v. Randall*, 357 U.S. 513 (1958); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Wyman v. James*, 400 U.S. 309 (1971); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Califano v. Jobst*, 434 U.S. 47 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Califano v. Aznavorian*, 439 U.S. 170 (1978); *Beal v. Doe*, 432 U.S. 438 (1977); *Bowen v. Roy*, 476 U.S. 693 (1986); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Employment Div. v. Smith*, 494 U.S. 872 (1990); *FCC v. League of Women Voters*, 468 U.S. 364 (1984); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Lyng v. International Union*, 485 U.S. 360 (1988); *Poelker v. Doe*, 432 U.S. 519 (1977); *Posadas de Puerto Rico Assoc's v. Tourism Co.*, 112 S. Ct. 2791 (1992); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707 (1981); *Turner v. Dept. of Emp. Sec.*, 423 U.S. 44 (1975); *United States Dept. of Agric. v. Moreno*, 413 U.S. 528 (1973); *Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040 (1989); *American Communication Ass'n v. Douds*, 339 U.S. 382 (1950); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); and *Geduldig v. Aiello*, 417 U.S. 484 (1974).

134. This same characteristic was analyzed in Sullivan, 102 Harv. L. Rev. 1413 (cited in note 112).

to work and not depend on the government support. Similarly, the type of government benefit did not offer much assistance because it was tied to how coercive a particular benefit was. Furthermore, nearly all government benefits are arguably monopolistic since there are very few competitors for free services so this category dropped out as well.

The fourth category, the status of the plaintiff, was more easily quantifiable and did offer some insight. In general, indigent plaintiffs lost sixty-nine percent of the cases they brought. Of the indigent losers, forty-four percent were mothers seeking federal funding for abortion. In fact, indigent mothers asserting abortion rights never won. Similarly, government-funded health care workers wanting to provide abortions lost both times they brought suit.¹³⁵ Interestingly, Native Americans lost both cases where they asserted religious rights, and union members were also zero for two.¹³⁶ Of the prevailing plaintiffs, Seventh Day Adventists always won as did deadbeat fathers.¹³⁷ Working pregnant women who planned to carry to term went two for three.¹³⁸ These statistics possibly suggest that indigent pregnant women seeking abortion protection, Native Americans, and union members are not classes that the Court actively seeks to protect.

A related category is what right was conditioned in cases where the law was either upheld or overturned. Cases involving conditions that affect the right to abortion were always upheld.¹³⁹ Laws affecting free speech in the context of commercial speech and lobbying generally were sustained.¹⁴⁰ Also, laws affecting First Amendment assembly rights were usually upheld.¹⁴¹ Contrary to the specific categories of free speech cases, general First Amendment free speech conditions usually were overturned and free exercise challenges won, provided the religion was not Native American.¹⁴² Regarding miscellaneous fundamental rights such as the right to freedom from unreasonable searches, there were not enough examples to indicate patterns. From this data, one conclusion emerges: abortion rights and certain forms of free speech are not likely to receive unconstitutional condition protection from the Court.

135. See *Webster*, 109 S. Ct. 3040, and *Rust*, 111 S. Ct. 1759.

136. *Employment Division v. Smith*, 494 U.S. 872 (1990) and *Roy*, 476 U.S. 693 (both involving Native American plaintiffs).

137. See *Sherbert*, 314 U.S. 398; *Hobie*, 480 U.S. 136; and *Zablocki*, 434 U.S. 374.

138. See *LaFleur*, 414 U.S. 632; *Turner*, 423 U.S. 44; and *Geduldig*, 417 U.S. 484.

139. See *Webster*, 109 S. Ct. 3040; *Rust*, 111 S. Ct. 1759; *Maher*, 432 U.S. 464; *Poelker*, 432 U.S. 519; *Beal*, 432 U.S. 438; *Harris*, 448 U.S. 297.

140. See *Posadas*, 112 S. Ct. 2791; *Regan*, 461 U.S. 540.

141. See *Douds*, 339 U.S. 382; *Lying*, 485 U.S. 360. But see *Moreno*, 413 U.S. 528.

142. See *Speiser*, 357 U.S. 513; *League of Women Voters*, 468 U.S. 364. See also notes 136-37.

Whether the law was a state law or federal law seemed to have a great empirical impact. In fact, twelve of the thirteen, or ninety-two percent, of the laws struck down were state laws.¹⁴³ Of the sixteen laws upheld, the cases were divided about evenly between state and federal laws. If most of the abortion laws had not been state laws, this ratio would not be so close—that is, the disparity between federal laws and state laws that were upheld would not have been so great. Of the eight state laws upheld, six involved state laws concerning abortion. The ninety-two percent state law failure rate could indicate that the Court is more willing to overturn a state law than a federal law. Alternatively, it could mean that states are more likely to pass unconstitutional laws or that the Court thinks that state laws are unconstitutional more often than federal laws.¹⁴⁴ The fact that several interpretations are possible emphasizes that one should be very careful about drawing conclusions from this data. The point is that the Court overrules state laws more often than it overrules federal laws.

The last category combines the year of the decision with the author and supporters of the opinion because these elements are inherently dependent. These determinations are important because they illustrate a chronological trend to these decisions over time. Because the Court's members change over time, so does its enthusiasm for the unconstitutional conditions doctrine. A chronological trend away from unconstitutional conditions currently exists. The peak date of successful unconstitutional conditions challenges (that is, cases where the law was overturned) is 1971.¹⁴⁵ On the other hand, the peak date of cases where the law in question was upheld is 1979.¹⁴⁶ Stated another way, of the significant unconstitutional condition cases since 1985, six plaintiffs lost and only two prevailed. Hence, the trend is not to apply the doctrine.

This trend indicates a tipping of the doctrinal balance from active review of legislation to a more deferential approach, from liberal to conservative, and from penalty analysis to non-subsidy. To clarify, the arguably more conservative justices, led by Justice Rehnquist, despise the unconstitutional conditions doctrine and nearly always espouse a version of the Holmesian greater-includes-the-lesser philosophy. To the contrary, the historically more activist or liberal justices, led primarily

143. *Moreno*, 413 U.S. 528, was the only case to strike down a federal law.

144. Also, the Court could be weary of separation of powers concerns regarding the other two branches.

145. The peak represents the total of the years of each successful challenge divided by the number of such cases. In other words, 1971 represents the peak of the unconstitutional conditions cases.

146. This peak was computed the same way. These two peak dates suggest that the more recent the case, the more likely that the law will be upheld.

by Justice Brennan, struggled to maintain the doctrine. In fact, ten of eleven, or ninety-one percent, of the law-reversing opinions issued while Justice Brennan was on the Court were either written or supported by Justice Brennan.¹⁴⁷ Furthermore, Justice Brennan dissented in twelve of the fourteen cases where the unconstitutional conditions doctrine was not invoked. In contrast, Justice Rehnquist, since his appointment, has dissented in eight of the nine cases where the Court employed the unconstitutional conditions doctrine to overturn a law. Furthermore, Justice Rehnquist wrote or supported all of the fourteen cases where unconstitutional conditions challenges lost.

This doctrinal conflict within the Court probably contributes most to the inconsistency of unconstitutional conditions opinions. Whether the case succeeds or fails must be decided by the moderate Justices, whose votes determine the closer cases. For this reason, the fact scenario of the case before the Court carries more weight than perhaps it should in a pure constitutional analysis. This reasoning is intuitive. If this were not true and if all of the Justices had firm doctrines but varying viewpoints, the decisions involving similar rights and similar conditions all would be consistent. One might argue that each Justice between the poles may have a firm but different version or criteria for implicating the doctrine. But this still would not explain why similar, but not identical, cases produce different results.

This analysis provides the most realistic, pragmatic supposition of what occurs when the Court is faced with a classic conditioned benefit situation. Justice Rehnquist makes the Holmesian argument, Justice Brennan or one from his camp makes the unconstitutional conditions argument, and the other justices side with the party in the case that they think should prevail for whatever reason.¹⁴⁸ Absent any firm conceptual convictions, this decision of which side to take will be purely discretionary. Once the Court votes and finds for one side or the other, they must then creatively and carefully slip this new decision into the bottom of a delicately balanced stack of previous decisions. Inserting new inconsistent decisions within this teetering stack engenders the vague discretionary terms and unconvincing distinctions that spark criticism and confusion among constitutional scholars.

147. Incidentally, Justices Marshall and Blackmun almost always vote with Brennan in each of these cases.

148. It will be interesting to see the effect of Justices Brennan's and Marshall's absence from the Court on the unconstitutional conditions doctrine. The only notable case since Justice Brennan's absence is *Rust v. Sullivan*, 111 S. Ct. 1759 (1991). In that case, Justices Blackmun, Marshall, O'Connor, and Stevens dissented. Since Justice Marshall has been replaced by Justice Thomas, there may be few Justices left who will defend the unconstitutional conditions doctrine. However, Justices Thomas, Kennedy, and Souter have yet to establish a trend one way or another, although it is unlikely that any of these Justices will become a strong advocate of the doctrine.

E. How Well Does This Pragmatic Approach Explain the Close Cases?

Applying this pragmatic theory to the aforementioned cases offers some logical explanation of how these cases were decided. In *Perry v. Sinderman*, the Court was faced with a school teacher whom the state university had fired, or at least not rehired, for speaking out against the school administration.¹⁴⁹ In *Perry*, it would be easy for a Supreme Court Justice to sympathize with a scholarly man who was mistreated by the system, especially when that system is state and not federal. This set of facts led to the broad ruling that states cannot condition benefits on forbearance of fundamental rights.

Then in *Douids*, the Court was faced with union organizers whom Congress suspected were communist sympathizers. Thus, the Court, during the McCarthy era, upheld a federal condition that these leaders pledge an oath of loyalty to receive federal union benefits. The Court in *Douids* simply could not find any "suppression of dangerous ideas." One year later, however, veterans were charged with nearly the same condition in order to receive state tax exemptions in *Speiser*.¹⁵⁰ This case pitted a poor veteran, defender of his country, against the State of California. The Court found enough "suppression of dangerous ideas" to protect the veteran from the encroaching state.

Years later, the lobbyists of *Taxation With Representation* came to court in search of judicial protection for their right to lobby against the IRS. Not surprisingly, the Court, as members of the District of Columbia establishment, did not sympathize with the lobbyists standing before them. Therefore the Court determined that no dangerous ideas were suppressed and that the Congress had no duty to subsidize lobbying activity.

In *FCC v. League of Women Voters*, the next unconstitutional conditions case before the Court, the small public radio stations in California, beacons of progressive ideas, were being pressured by a state bribe prohibiting any editorializing.¹⁵¹ The Court found an unconstitutional condition. A common theme emerges. Likable plaintiffs challenging state laws tend to fare better than less favorable plaintiffs challenging federal laws.

Subsequently, cases like *Sherbert* appeared where poor unemployed women were forced by the state to choose between their Sab-

149. 408 U.S. 593 (1972).

150. 357 U.S. 513 (1958).

151. 468 U.S. 364 (1984).

bath or unemployment insurance.¹⁵² In these sympathetic cases, the Court found a penalty on the exercise of religion even though the state did not intend to create one. The Court required South Carolina to carve out an exception for Saturday Sabbath observers like the plaintiff. The Court, however, perhaps understandably but not excusably, did not have the same sympathy for the Roys, whose Native American beliefs were jeopardized by the Social Security system. The only important differences between *Sherbert* and *Roy* are the religious sect in question and the creator of the law. It is easy to see that the Court could sympathize more easily with a Saturday Sabbath interference than with a fear of spiritual contamination induced by Social Security numbers. This distinction, however, should be irrelevant when undertaking a constitutional analysis. There is nothing to suggest that the Roys' religious conviction was any less important or less genuine than Sherbert's. Therefore, the Roys should be given the same consideration and constitutional protection as Seventh Day Adventists, but they apparently do not have the same right.

Similar considerations drive the two marriage cases, *Jobst* and *Zablocki*. On one hand, a federal Social Security law terminates benefits to certain classes who decide to marry.¹⁵³ On the other hand, a state law requires fathers to square their debts before getting married.¹⁵⁴ Although the financial restraints could be the same in a particular case under either statute, the first law is constitutional and the second is not. Interestingly, the *Jobst* Court pointed out that due to the existence of another unrelated aid program, the plaintiff and his new wife would have lost only a net amount of \$20 per month.¹⁵⁵ This coincidental fact certainly would make it easier to justify the decision on the facts and ignore the fact that the same principle should be driving all such cases.¹⁵⁶

The same trends apply to the female privacy rights cases. When school teachers challenge state laws that condition continuous employment on foregoing the right to bear children, the Court finds such laws

152. Actually, if she had submitted to Sabbath Day work, she would have had a job and not unemployment insurance. The whole reason she was seeking unemployment was because she turned down a job that required Saturday work.

153. See *Jobst*, 434 U.S. 47 (1977).

154. See *Zablocki*, 434 U.S. 374 (1978).

155. *Jobst*, 434 U.S. at 57 n.17.

156. The reason that quantitative judgements are undesirable is quite simple. If the Court decided these cases based on how much money was involved, this determination would only add another discretionary variable as to how much money is enough to constitute an interference. This obviously depends on who is affected, and it ignores the principle that Congress supposedly cannot put indirect pressure on rights that it could not attack directly. For example, the Court was not willing to make such judgments in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), where the amount was only \$1.50 but the condition involved voting.

unconstitutional.¹⁵⁷ However, when indigent pregnant women seeking abortion challenge federal and state laws that eliminate this fundamental option,¹⁵⁸ the Court swings the other way, even though the interference, being potentially prohibitive, is arguably greater for the indigents. This result confirms the observation that the Court generally sides with working pregnant women who carry to term and generally sides against indigent women seeking abortion. The fact that *Rust v. Sullivan* presented a classic unconstitutional conditions situation and the Court refused to find any “undue burdens,” “penalties,” or “suppression of dangerous ideas,” supports the conclusion that the Court disfavors abortion rights and refuses to protect those rights in the same way that it protects other fundamental rights.¹⁵⁹ Ample evidence exists that one must look to particular incidental facts of a particular case with these trends in mind to make any sort of prediction as to how the Court would treat that case.

With regard to a Norplant statute, it is significant that the law would be a state one, which the Court seems more predisposed to overturn. However, the plaintiff would be indigent, and the Court seems less sympathetic with indigent plaintiffs than with nonindigent plaintiffs. Intuitively, it may be difficult for elderly, upper class Justices to sympathize with the plight facing poor, young, unmarried, pregnant women. In fact, the Court may adopt the “moral” view that efforts should be made to curb reproduction in the “lower” classes. More often than not, the Court does not overturn conditional laws where the benefit is welfare. Perhaps the most controlling fact in a Norplant case would be how the Court views the right.¹⁶⁰ If the Court considers this law to be an infringement on the right to contraception, it may see the right in the same vein as abortion—a kiss of death for the challenger. If, however, the Court broadens the right in question to procreation, an arguably more favored right, the Court very well may overturn the law.¹⁶¹ Therefore, the right involved could determine the outcome.

Because the Court does not find an interference when it does not like the facts, and the Court’s view of the facts seems at least partially dependent on the right involved, it is nearly impossible to tell whether the Court would apply the doctrine of unconstitutional conditions. If, however, the Court did not apply the doctrine to a Norplant case, in what is arguably a perfect unconstitutional conditions context, the Nor-

157. See, for example, *Cleveland Bd. of Educ. v. Lafeur*, 414 U.S. 632 (1974).

158. See, for example, *Harris v. McRae*, 448 U.S. 297 (1980).

159. There is no need to speculate as to why the Court might disfavor abortion, but the answer could lie in who appointed a particular Justice and for what reason.

160. This point is expanded in Part III.

161. Judging from the case breakdown, any right is more favored than the abortion right.

plant statute could spell the end of unconstitutional conditions analysis. Regardless of the outcome, the Court would be hard pressed to insert a Norplant case in the bottom of the towering stack of inconsistent cases.

IV. THE RIGHT, ITS FUNDAMENTAL NATURE, AND THE LEVEL OF SCRUTINY

If the Court failed to apply the unconstitutional conditions doctrine to a Norplant case, then no interference with any right would exist and a challenge to the law would fail at that point. This section, therefore, presumes that the Court is willing to apply the unconstitutional conditions doctrine and has found an interference with a right. This conditioned interference, once found by the Court, presumably will be equivalent to a direct interference. In other words, one could assume that the law *required* women to implant Norplant for purposes of analyzing the right involved. The next step is to determine what right is implicated, whether it is fundamental, and what level of scrutiny is applicable.

A. Background

While the Constitution and the Bill of Rights only specifically list a handful of fundamental rights, the Court, since the *Lochner* era, has read other rights into the Constitution and its amendments.¹⁶² The Court has categorized these fundamental rights as arising from "penumbras, formed by emanations" of the Bill of Rights that are inherent to individual liberty.¹⁶³ In *Roe v. Wade*, the most famous of these cases, the Court expanded the scope of fundamental privacy rights to those "implicit in the concept of ordered liberty."¹⁶⁴ The problem with this relatively new bundle of privacy rights is predicting which rights are included, what constitutes an interference, and what level of scrutiny applies.

Obviously, the phrase "implicit in the concept of ordered liberty" reveals nothing as to which rights are included in the bundle. It does, however, suggest that more rights are included than just abortion. While many cases include similar loose dicta, the fact that the Court has refused to recognize certain rights that arguably should be included

162. See Gerald Gunther, *Constitutional Law* 491 (Foundation, 12th ed. 1991).

163. See, for example, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

164. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

in this bundle indicates that one should never assume a right is fundamental until a case specifically holds so on its facts.¹⁶⁵

As noted earlier, the right implicated by the Norplant statute can be categorized in different ways, each of which could impact on the outcome of the case. One argument would claim that a Norplant statute would interfere with a woman's right to use birth control, which is within the scope of privacy rights. For support, the plaintiff could rely on *Griswold v. Connecticut*.¹⁶⁶ In *Griswold*, the Court struck down a Connecticut law that forbade married people from using contraceptives. A viable argument would propose that, from a reverse standpoint, the Norplant law impinges on the same right as *Griswold*. In other words, the right to use birth control includes the right to refuse birth control. Nonetheless, substantial counterarguments exist. First, the state could argue that the facts are distinguishable. *Griswold* emphasized that the right to use birth control is enshrouded in the marriage relationship, an association older than the Bill of Rights and "as noble a purpose as any involved in [the Court's] prior decisions."¹⁶⁷ This language suggests that the plaintiffs' marriage status in *Griswold* added to the fundamental aspects of the right that was infringed. The state could argue that this proposed Norplant law does not involve any interference upon the marriage relationship but only involves single women receiving AFDC. Hence, the plaintiffs' side might be better served if a married welfare recipient brings the initial challenge to the law.

Another case may shed some insight on this point. In *Eisenstadt v. Baird*,¹⁶⁸ the Court invalidated a law banning the distribution of contraceptives to unmarried people. While *Baird* has been touted as expansion of the right to contraception to unmarried persons, the *Baird* Court purportedly only applied a rational basis equal protection analysis and avoided the classification of the right as fundamental.¹⁶⁹ Another subsequent case, *Carey v. Population Services*,¹⁷⁰ involved restrictions on contraception advertising and distribution. In *Carey*, the Court declared the right to contraception fundamental and applied the compelling interest test. It declared that "[t]he decision whether or not to beget or bear a child is at the very heart of [the] cluster of constitu-

165. See, for example, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting the argument that the right to consensual sodomy, at least in the homosexual context, is fundamental); *Kelley v. Johnson*, 425 U.S. 238 (1976) (holding that the right of policemen to choose their hair style is not fundamental); *Whalen v. Roe*, 429 U.S. 589 (1977) (holding that there is no fundamental right to restricted government access to medical information).

166. 381 U.S. 479 (1965).

167. *Id.* at 486.

168. 405 U.S. 438 (1972).

169. Gunther, *Constitutional Law* at 504 (cited in note 162).

170. 431 U.S. 678 (1977).

tionally protected choices."¹⁷¹ While this strong statement provides convincing ammunition for the argument that the right to choose contraception generally is a fundamental right, the state still could contend that this dicta is not necessarily dispositive of a Norplant case. In fact, the state could argue that, as a welfare distribution scheme, the state deserves wide latitude in its distribution decisions.¹⁷²

Preferably, the Norplant plaintiff would assert that the underlying right interfered with is the right to procreate, not merely the right to choose contraception. In other words, the real motive of the law is not to ban or to require birth control but to curb the reproduction of the welfare class. For support, the plaintiffs could rely on *Skinner v. Oklahoma*¹⁷³ as holding that the right to procreate is fundamental. The plaintiffs could further point out that the Court made the same assumption in *Roe*, where it cited *Skinner* for the proposition that the right to procreate is fundamental.¹⁷⁴

The state could again refer to factual differences. *Skinner* involved a criminal prosecution where sterilization was a punishment imposed against Skinner's will. Also, the Court treated *Skinner* as an equal protection case and not as a substantive due process case. As an equal protection case, more rights arguably are included as fundamental because classifications generally are more suspect than across the board substantive interferences.¹⁷⁵ In response, the plaintiffs could cite *Meyer v. Nebraska*,¹⁷⁶ where the Court in 1923 held that the right "to marry, establish a home and bring up children" is a central part of the liberty protected by due process.¹⁷⁷ Finally, the "bear or beget" language of

171. *Id.* at 685.

172. The Court has made statements to that effect. See, for example, *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) (stating that "[t]here is no question that States have considerable latitude in allocating their AFDC resources"). The Court added that the "intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." 397 U.S. at 487.

173. 316 U.S. 535 (1942) (holding that sterilizing certain classes of repeat offenders but not others violates the Equal Protection Clause of the Fourteenth Amendment and deserves strict scrutiny because the classification involves the "fundamental" right to procreate).

174. *Roe*, 410 U.S. at 152.

175. The *Skinner* Court applied strict scrutiny because the Court generally is more suspicious of legislative actions that single out groups. In other words, the Court is more likely to apply strict scrutiny when a fundamental right is affected by a classification scheme than when it is an across the board interference.

176. 262 U.S. 390 (1923).

177. *Id.* at 399-400 (emphasis added). This case is especially significant because it predates *Roe* by fifty years and lends support for the proposition that certain nonlisted rights are fundamental.

*Carey*¹⁷⁸ also lends strong support for the proposition that procreation is a fundamental right.

The point is that although the Court has included broad statements in dicta, it never has ruled on the exact facts presented by a Norplant case. Therefore, there is no guarantee that the Court would agree that the right to be free from a conditional Norplant statute's provisions is fundamental.

The distinction between the right to birth control and the right to procreation is indeed a subtle one and one that the Court perhaps does not recognize,¹⁷⁹ but it could prove relevant when one determines the level of scrutiny such a right deserves. The baseline presumption is that any right deemed fundamental by the Court receives the same strict scrutiny test that the Court traditionally has applied to cases involving specifically listed rights. This presumption holds true at least for the early privacy cases such as *Roe* and *Griswold*.¹⁸⁰ If the Court did not find the right to be fundamental, then a lesser scrutiny applied.¹⁸¹ If this presumption always held true, no need to distinguish between procreation and contraception would exist. However, there is some hint that the Court holds some "fundamental" rights in a more favorable light than others.¹⁸² This observation applies not only to privacy rights compared to specifically listed rights but also to certain rights within the sphere of privacy rights.

One of the first examples of this hierarchy of rights was *Shapiro v. Thompson*.¹⁸³ In *Shapiro*, the Court identified a fundamental right to interstate travel, but instead of treating the right as absolute, the Court held that states could not "unreasonably burden" this right.¹⁸⁴ In other words, a certain amount of burden is constitutional until this burden reaches what the Court in its discretion deems an "unreasonable" level. The Court attached similar, familiar, discretionary rhetoric to the *Roe* abortion right in *Maher v. Roe*.¹⁸⁵ In *Maher*, the Court reasoned that

178. 431 U.S. at 685. *Carey*, which overturned a restriction on contraception distribution, held that the right to "bear or beget" a child is fundamental. This implies that the right to contraception includes both the right to use it and not to use it. Furthermore, *Carey* seems to view the right to procreate and the right to use birth control as involving the same fundamental right.

179. Testament to this assertion is the way the Court uses procreation language ("beget or bear a child") in *Carey*, a contraception case. *Id.*

180. Both of these cases applied a compelling interest test to determine if the law passed constitutional muster.

181. See, for example, *Baird*, 405 U.S. at 447; *Maher*, 432 U.S. at 470.

182. See notes 158-62.

183. 394 U.S. 618 (1969).

184. *Id.* at 629. Interestingly, Justice Harlan criticized this approach in his dissent. He disapproved of the arbitrary, ad hoc method of picking out certain activity and calling it fundamental. *Id.* at 662 (Harlan dissenting).

185. 432 U.S. 464 (1977).

Roe "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy."¹⁸⁶ The Court has used this malleable phrase to allow inroads into the supposedly "fundamental" right to abortion.¹⁸⁷ Although *Thompson* proves that the Court is willing to use this phrase in relation to privacy rights other than abortion,¹⁸⁸ the Court seems to employ it most often when the right subject to a challenge is abortion.¹⁸⁹ This fact is reinforced by the similar findings in the case by case breakdown in the unconstitutional conditions analysis.¹⁹⁰

If privacy rights are indeed less protected than specifically listed rights, and abortion is the least protected of the privacy rights, it would behoove the plaintiff to distance her case as far from the abortion cases as possible. Because *Griswold* often is cited along with *Roe* and birth control cases, it could carry some of the same moral stigma as abortion. Perhaps the plaintiff would be better served by contending that the proposed law interferes with the arguably more wholesome right of procreation. On the other hand, the state could argue by analogy that the right to choose birth control can be regulated up to the point of an "undue burden" and that the Norplant statute, as a welfare program, creates no obstacle to contraception that was not already there.¹⁹¹ In fact, the state will argue that the law benefits welfare women because it gives them a new option for birth control that was not previously readily attainable.

This latter argument reflects another concession that the Court has made in recent cases. In more than one instance, the Court has suggested in dicta that the constitutional standard of review for conditions is necessarily more lenient than if the government had directly or prohibitively interfered with the same right.¹⁹² This assertion flies in the

186. *Id.* at 473-74.

187. See Part II and *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

188. Some evidence of this same analysis exists in *Bowen v. Roy*, 476 U.S. 693 (1986). In *Roy*, the Court found the burden relative to the applicable scrutiny and determined that the burden was not equivalent to a burden of "compulsion or prohibition." Thus, only a rational basis test was required.

189. See, for example, *Webster v. Reproductive Health Service*, 109 S. Ct. 3040, 3052 (1989); *Harris v. McRae*, 448 U.S. 297 (1980); *Poelker v. Doe*, 432 U.S. 519 (1977); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976).

190. See Part III.D.

191. For an example of an instance in which the Court accepted this argument, see *Maher*, 432 U.S. at 473.

192. See, for example, *Bowen v. Roy*, 476 U.S. 693, 706-07 (1986) (holding that "[a] governmental burden on religious liberty is not insulated from review simply because it is indirect, but the nature of the burden is relevant to the standard the government must meet to justify the burden") (citations omitted). See also *Maher*, 432 U.S. at 475, in which the Court stated that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."

face of the traditional unconstitutional conditions doctrine, which supposes that a conditioned burden is equivalent to a direct interference. If a lesser scrutiny does apply when the interference is neither direct nor prohibitive, nor "unduly burdensome," then the standard must be a rational basis test. This conclusion follows from the observation that the Court has applied only two standards to privacy rights to date, the compelling interest test and the rational basis test.¹⁹³

This last erosive rule intertwines the unconstitutional conditions doctrine with the elusive privacy right. This rule implies that conditional or lopsided funding deserves a lesser scrutiny (the rational basis test) because such a less-than-prohibitive interference presumably does not reach the level of "unduly burdensome." From this principle, it follows that the state could successfully defend a Norplant law since such a law would be less "burdensome" than the abortion cases, which already have gained approval. In essence, if a law that effectively *denies* indigent women the right to receive an abortion is not unduly burdensome, then a law that only adds an option to the contraception menu and does nothing to *prohibit* either side of the contraception choice must be constitutional as well. In simpler terms, since a Norplant law would not encroach nearly as much as the recent abortion restrictive laws, it probably would fall on the deferential side of the Court's malleable rhetoric.

B. *The Compelling Interest and Rational Basis Tests*

Although the Court most likely would not apply a compelling interest test, it may choose not to expand the reasoning of abortion cases to procreation cases. If it does not do so, then the Court may apply a compelling interest test to the Norplant law. The compelling interest test requires 1) that the law further a compelling governmental interest and 2) that less intrusive alternatives to the law do not exist.¹⁹⁴

If a compelling interest test is applied, the government will argue that it has a compelling interest in reducing welfare costs and that the Norplant law would further this objective. Alternatively, the state could argue that it has a compelling interest in preventing unborn children from being born into the oppression of poverty. This non-economic argument may fare better than a purely economic one.¹⁹⁵ The Court has held that the government does not have a compelling interest in an em-

193. One exception to this observation is *Zablocki v. Redhail*, in which the Court called an apparent compelling interest test a "critical examination." 434 U.S. 374, 383 (1978) (quoting *Mass. Board of Retirement v. Murya*, 427 U.S. 307, 312, 314 (1976)).

194. See, for example, *Roe v. Wade*, 410 U.S. 113, 155 (1972).

195. It may fare better because it pits two human rights interests against each other rather than an economic interest against a human rights interest although it is paternalistic.

bryo until the third trimester.¹⁹⁶ On the other hand, some states are trying to require women who bear crack babies to submit to Norplant in order to protect the interests of future unborns.¹⁹⁷ If these or other preventive measures pass scrutiny, the government could import the same logic to the instant case.

Even if the government can pass the first prong, the challenger still could argue successfully that less intrusive alternatives are available. For example, the states could follow California and North Carolina and merely provide Norplant for those who want it but not attach a coercive benefit to it. In light of the fact that welfare mothers are not the criminals that crack mothers arguably are, this alternative seems much more palatable than the payment schemes.

If the government successfully argues that the recent line of abortion cases should apply to this case, the Court most likely will apply a rational basis test. This test requires 1) that the government have a rational reason for the law and 2) that the law reasonably furthers this objective. The rational basis test has become increasingly deferential in recent years. Laws rarely, if ever, fail this test. The rational basis test guards primarily against arbitrary or capricious governmental acts that escape the compelling interest test.¹⁹⁸ The government could easily meet rational basis scrutiny by asserting that the Norplant law reasonably furthers the rational objective of reforming welfare and cutting costs. Therefore, the level of scrutiny applied will be outcome determinative of a Norplant case.

V. SOLUTIONS

Many possible solutions have been suggested. One commendable approach suggested by Kathleen Sullivan would subject any law to strict scrutiny that "pressures" a fundamental right.¹⁹⁹ Although determining what pressures a right arguably would be no different from separating penalties from non-subsidies, Sullivan also proposes that when in doubt the Court should apply the stricter scrutiny. This approach would be an improvement over the current one, but it touches on another, perhaps overlooked, point—that more cases should face the compelling interest test. The Court, however, with its front line of discretionary phrases, has subverted the normal course of analysis. In

196. *Roe*, 410 U.S. at 164.

197. For example, Governor Pete Wilson wants to require mothers of crack babies to use Norplant in California. *Norplant Plan Irks Right*, Arizona Republic at A17 (May 24, 1991).

198. See, for example, Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 Ohio St. L. J. 161 (1984) (arguing that since the New Deal, the rational basis test has become increasingly difficult for challengers to overcome).

199. See Sullivan, 102 Harv. L. Rev. at 1499-1505 (cited in note 112).

other words, the Court, by finding that a right is not "unduly burdensome" or "penalized" in the first instance, avoids the traditional incremental constitutional inquiry that each challenged law deserves. Perhaps if the Court returned to a traditional approach, this discretion could become obsolete and unnecessary.

More specifically, the Court could approach each case with the assumption that all fundamental rights are equally fundamental and absolute. No need for second guessing the degree of "fundamentalness" or creating a hierarchy of rights would exist. Nor would an initial decision of whether the interference involved was burdensome enough to warrant further analysis be necessary. Under such a method, *any* interference with *any* fundamental right would trigger the constitutional strict scrutiny test. This is not to suggest that the Court cannot inject discretion into constitutional cases. The point is that discretion should be exclusively limited to the balancing stage within the compelling interest test. This approach would capsule discretionary judgments and apply a predetermined inquiry, namely whether the government interest is compelling and whether the Norplant law is the least intrusive approach. With a predetermined set of questions, the Court might be less likely to resort to subjective factors not germane to the outcome. If the Court felt a law was justified, then it could explain how it passes the compelling interest test.

The problem with this system, and perhaps the reason that the Court has not used it, is that many of the laws that the Court has upheld would not fare well against such a rigid analytical framework. For example, if the Court applied a fundamental constitutional analysis to the facts of *Rust v. Sullivan*, the abortion gag rule case, it would ask whether an interference with the right to abortion existed. Since fewer indigent women would have access to information regarding abortion, the assumption follows that the law would, at least indirectly, interfere with this protected choice. Granted, this interference is not as great as an absolute ban to abortion, but making such judgments outcome determinative infects the analysis with discretion where it does not belong. Any interference should promote the analysis to the next question: whether the right is fundamental. According to *Roe*, the right to abortion is fundamental; therefore, the compelling interest test applies.

Only here, in the context of balancing the governmental interest with the intrusion, does the level of interference become relevant. Although the regulation at issue in *Sullivan* was only marginally intrusive on the right to abortion, no palatable governmental interest to justify even this indirect interference can be found. In *Sullivan*, the government, and the Court for that matter, would have a difficult time finding

a compelling governmental interest in preventing indigent women from accessing abortion information. The only viable justification is that either the government simply does not approve of abortion or it does not feel that providing information regarding abortion is in the public's best interest—and this is the type of decisionmaking that judicial review should police. Given the difficulty that the “gag rule” would encounter in facing the compelling interest test, the Court had little choice but to dispose of *Sullivan* through its discretionary rhetoric rather than to apply a traditional constitutional analysis. However, it is this drifting from the course that leads to inconsistent and unpredictable decisions. Returning to a rigid format might produce some unpopular decisions, but it would promote consistency and eventually provide a more workable framework for future cases.

While a new approach may be warranted, the Court most likely will apply the current approach in the Norplant situation. One main consequence of the Court's muddled analysis is that it makes any attempt at using *stare decisis* to predict future outcomes nearly impossible.²⁰⁰ One must pore through all of the considerations, trends, and hierarchy of rights in the aggregate to make any prophetic judgments about the fate of a Norplant case. After an analysis of the arguments advanced in the privacy, or more specifically the abortion cases, it appears that the state would have stronger arguments on why this law is less “burdensome” than some of the abortion legislation already upheld. A challenger must emphasize the distinction between the more “limited” right to abortion and the more absolute right of procreation. Then the plaintiff must hope that the Court is sympathetic enough to weave another turn into the ever-changing tide of unconstitutional conditions cases. Stated another way, the current trend brought about by the abortion funding cases is toward deference to the government in its choice of funding schemes. Striking down the Norplant law would require a change in the current trend and another inconsistent case for academics to criticize. Also, by refusing to extend the reasoning of the abortion cases to procreation cases, the Court would be professing that abortion cases are disfavored. On the other hand, if the Court upholds this classic purchase of a right, it could mark the end of the unconstitutional conditions cases and clear the path for future government purchase of rights.

VI. CONCLUSION

The unconstitutional conditions cases themselves reflect a doctrinal split within the Court that leads to inconsistent decisions ultimately

200. Any hint of cynicism in this note is not aimed at the results or specific outcomes of cases but at the haphazard and inconsistent approach the Court has used.

decided by the policy and sympathy views of the moderate Justices. Justice Rehnquist leads the charge against the doctrine while the Justice Brennan camp struggles to uphold it. Consequently, academic and philosophical attempts to explain the cases have proven futile. To predict what factors appear to influence the Court, one must resort to quantitative statistical trends to "guesstimate" on which side a new case will fall. Such a breakdown suggests a recent trend away from the unconstitutional conditions doctrine but not a complete retreat, since some cases have upheld the doctrine as recently as 1987. Noteworthy determinants include whether the law is state or federal, since federal laws rarely are overturned. Also, the plight and status of the plaintiff seems to play a part in the analysis. Finally, the subject or right involved seems equally determinative, abortion being the right least likely to be found unconstitutionally burdened with a condition.

By allowing the right involved to influence the determination of whether a condition on that right is unconstitutional, the Court has blurred the boundaries of the more rigid incremental structure that a constitutional inquiry ideally should follow. As evidenced by the ideal argument against the Norplant law, an incremental approach separates and clarifies the arguments and issues within each step of a traditional constitutional argument and prevents one result from influencing the other. In practice, however, the Court apparently has softened these distinctions making one result, whether there is an interference, dependent on the answer as to which right is implicated. The Court made this approach possible by leaving its trail of discretionary rhetoric in order to reserve substantial discretionary power in deciding both unconstitutional conditions cases and privacy rights cases. In other words, the Court is able to take an unconstitutional conditions situation, look at the right involved, and determine at the outset that this right is in no way "unduly burdened." The Court thereby avoids the formalities of a true constitutional inquiry. The statute never has to meet the compelling interest test, and the Court never has to declare the right fundamental.

While it seems that a Norplant statute stands a better chance of withstanding a constitutional challenge, this outcome is hardly guaranteed. A state considering the legislation may be better served by adopting the voluntary approaches already operating in North Carolina and California. Even if no state passes a law similar to the one here addressed, the inquiry is still worthwhile. Given the geometric population expansion, the state and the federal governments will find themselves increasingly faced with difficult choices between personal autonomy and the overall social welfare. As resources become more scarce, governments will have to come to terms with how to best balance distribution

of resources and the fundamental liberties protected by the Constitution.

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