Denver Law Review

Volume 72
Issue 4 *Symposium - Doctrine of Unconstitutional Conditions*

Article 9

January 2021

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BARGAINING FOR PUBLIC ASSISTANCE

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What conditions may the government constitutionally impose on the receipt of "public assistance"?[1] The Supreme Court first considered this question in 1963 in *Sherbert v. Verner*,[2] and by 1989 had decided twenty-three such "unconstitutional conditions" cases.[3] No pattern was readily visible in the results of these cases,[4] however, and commentators' attempts to make sense of them yielded only expressions of despair and normative proposals.[5]

In 1990, I offered a positive theory of the unconstitutional conditions doctrine in those twenty-three Supreme Court decisions.[6] The theory proposed that the Court invalidated only those challenged conditions that required persons unable to earn a subsistence income, and otherwise eligible for the perti-

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This essay was prepared for the symposium on the doctrine of unconstitutional conditions, held at the University of Denver College of Law on March 17-18, 1995. I am grateful to Dean Dennis Lynch, the Denver law faculty, and the editors of the *Denver University Law Review* for providing a stimulating and enjoyable environment for revisiting the unconstitutional conditions paradox, and to Julie Nice for her thoughtful commentary. I presented a preliminary version of some of the arguments contained in this essay at a conference on "Bargaining with the State," held at the Law and Economics Center of the George Mason University Law School in March 1994, and I am grateful to Richard Epstein for his comments on that occasion. My colleagues, Toni Massaro and Ted Schneyer, as always, provided insightful comments on an earlier draft.

1. By "public assistance" I mean all government-provided "necessities of life," whether in the form of a cash grant or in-kind aid. Such benefits include food stamps, medical care, and cash grants to those unable for various reasons to *earn* a subsistence income. I mean, therefore, to include not only "welfare," but also non-need-based income maintenance insurance schemes such as Unemployment Compensation and Social Security, which provide cash grants to the unemployed, some of whom might have savings and other assets sufficient to provide them a subsistence income even in the absence of paid employment.

2. 374 U.S. 398 (1963).

3. For a complete list of these cases, see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1200 n.49 (1985).

4. *See id.* at 1201-02.

5. The principal recent commentaries on unconstitutional conditions which discuss these cases at greatest length are RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); and Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

Some of the earlier unconstitutional conditions scholarship also discussed the (then-existent) public assistance cases, but similarly failed to provide a positive theory of the Court's holdings. *See, e.g.*, Frederick Davis, *Veterans' Benefits, Judicial Review, and the Constitutional Problems of "Positive" Government*, 39 IND. L.J. 183 (1964); Hans Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10 (1964); Robert M. O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CAL. L. REV. 443 (1966); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

6. *See* Baker, *supra* note 3.

nent benefit, to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income.[7]

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

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

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

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

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

I. A TALE OF TWO THEORIES

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

7. *Id.* at 1188, 1213-20.
8. 494 U.S. 872 (1990).
9. 500 U.S. 173 (1991).
10. 413 U.S. 528 (1973).
11. 397 U.S. 471 (1970).

public assistance benefits.[12] The first prong asks whether the challenged condition impinges on a constitutionally protected activity. If not, the condition is sustained. If so, however, the second prong then asks whether the effect of the challenged condition is to require persons unable to earn a subsistence income and otherwise eligible for the pertinent benefit to pay a higher price to engage in that constitutionally protected activity than similarly situated persons earning a subsistence income. Only if the answer to this question is also affirmative will the Court overturn the challenged condition. My examination of the twenty-three challenges to conditions on public assistance benefits that the Court heard between 1963 and 1989 revealed this two-prong test to be both easily applied and a consistently good predictor of outcome, notwithstanding the fact that the decisions spanned the Warren, Burger, and Rehnquist Courts.[13]

Implicit in this test is a baseline not previously considered by commentators: the Court compares the position of individuals unable to earn a subsistence income and otherwise eligible for the pertinent benefit, with the position of *other*, similarly situated individuals whose source of a subsistence income is employment.[14] And the Court conducts this comparison with reference to the price the two groups are required to pay to exercise their constitutional rights. The baselines traditionally discussed in the unconstitutional conditions context, in contrast, would have the Court compare the position of individuals otherwise eligible for a conditioned public assistance benefit with *their own* position in either a world in which that benefit is made available without the attached condition or a world in which that benefit is not made available at all.[15]

Underlying this positive theory is an appreciation that the equality in the Constitution's allocation of rights is merely a formal one.[16] Although we indeed share equally in the protection from various types of government interference which the Constitution promises, the exercise of many constitutional rights carries a price for the individual. And ours is fundamentally a market economy. Within our economy, we each have in equal measure the freedom to spend our (vastly unequal) resources as we choose. But the notion of "price," so central to both our economy and my positive theory, simultaneously perpetuates an unspoken inequality of costs: the same price is always a smaller proportion of the total resources of a wealthy person than of a poor one. Thus, by ensuring that persons unable to earn a subsistence income and otherwise eligible for the pertinent benefit are not required to pay a higher price to exercise their constitutional rights than persons earning such an income, the Court guarantees a certain non-wealth-dependent equality of constitutional rights within the constraints of our essentially market economy.[17]

Richard Epstein, in contrast, has claimed an inability to see any desirable,

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12. Baker, *supra* note 3, at 1217.
13. *Id.* at 1187-88, 1220-46.
14. *Id.* at 1217.
15. *See id.* at 1190-93 and sources cited therein; *see also* EPSTEIN, *supra* note 5, at 6-16.
16. Baker, *supra* note 3, at 1188, 1246-55.
17. *Id.* at 1197.

large patterns in the Court's decisions in cases involving unconstitutional conditions,[18] and has therefore offered a normative proposal for deciding all of these cases regardless of the government benefit at issue.[19] He would have the Court review challenged conditions on public assistance benefits (and seemingly any other enactments) with the single goal of maximizing Kaldor-Hicks efficiency.[20] Unlike the Pareto test of efficiency, which requires that any social change make at least one person better off and leave no one worse off regardless of the relative sizes of any gains and losses, the Kaldor-Hicks measure requires only that "the winners could *in principle* compensate the losers and still remain better off by their own lights."[21] And because this compensation need not actually be paid, the Kaldor-Hicks test spares society the "transaction costs drag" of the administrative burdens that would be incurred operating a just compensation requirement.[22]

Epstein acknowledges that the courts may have difficulty evaluating legislation under the Kaldor-Hicks test: "Social legislation is ordinarily exceedingly complicated, especially when its indirect effects have to be taken into account, and the ability to marshall either theoretical or empirical evidence of the overall desirability of a social scheme is usually well beyond the competence of any court."[23] Thus, he proposes that courts use a "disproportionate impact" or "pro rata" test as an "indirect means to determine whether the targets of legislation have been compensated by the state" and whether the legislation therefore increases aggregate social welfare.[24] Where there is no "clean market solution" and government action is therefore necessary, the pro rata test enables the courts, first, to "choose that allocation of the surplus [from collective action] that maximizes the likelihood that the beneficial social change will be brought about by the legislature in the first place"[25] and, second, to "minimize the administrative costs associated with the operation of the system."[26]

In the context of challenges to conditions on government benefits, Epstein would have the courts sustain only those conditions that (1) advance the wel-

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18. EPSTEIN, *supra* note 5, at 17-24.
19. *Id.* at 98-103.
20. *Id.* at 81.
21. *Id.* (emphasis added).
22. *Id.* at 81, 83-84.
23. *Id.* at 86.
24. *Id.* at 87, 94-98.
25. *Id.* at 94-95. Epstein contends that:

> Faced with an all-or-nothing choice [of providing the government benefit without the problematic condition or not providing the benefit at all], all participants [in the legislative process] will prefer to adopt the desirable outcome because they know that there is no solution available to them which allows them to garner the benefits of the legal change while simultaneously denying it to their adversaries. Since there is no way to obtain private gain by defecting from the social solution, there will be widespread support of the measure. In addition there will be no factional efforts to impose conditions whose effect is to reallocate (and thereby diminish) the surplus created by legislation.

Id. at 97.

26. *Id.* at 95. Because Epstein's pro-rata test does not ever take into account the *subjective* gains obtained by anyone, it may allow legislation that is not Kaldor-Hicks efficient to pass muster in cases where the legislation results in some increase in market value but a larger decrease in subjective value. *Id.* at 96-97. But Epstein contends that "[t]he admitted allocative distortion is less dangerous than the administrative peril that replaces it." *Id.* at 92.

fare of all affected groups,[27] and (2) do so in equal proportions.[28] Thus, the question is not whether a potential benefit recipient (or even the entire class of these individuals) prefers the world with the conditioned benefit to a world in which the benefit is not available at all. Rather, "[t]he question is whether the condition advances *overall social welfare*, and there is no guarantee that this will happen just because it is consented to by the individual actor."[29]

Epstein would have the courts use as their baseline "not the status quo ante,"—that is, a world in which the government does not make the benefit available at all—"but a *best achievable* state of affairs in which the program is put forward without the conditions attached."[30] When a condition is challenged by a benefit claimant who is "aggrieved relative to the world as it might have been," Epstein would have the courts first "establish some use of monopoly power by the state, as with its control of access to public highways."[31] He would then have the court examine the challenged condition to determine whether it yields pro rata gains and is therefore permissible, or "reduces the total size of the social surplus [resulting from the government action] by allowing it to be redistributed through factional intrigue," and is therefore impermissible.[32]

In order better to understand how Epstein's proposed test differs from the test that my positive theory suggests the Court implicitly has applied in unconstitutional conditions cases involving public assistance benefits, it may be useful to apply both tests to some actual cases. In the next two sections, I examine two of the Court's most recent unconstitutional conditions decisions involving public assistance benefits, *Employment Division, Department of Human Resources v. Smith*[33] and *Rust v. Sullivan*,[34] in light of my positive theory and as Epstein has applied his normative theory to each.

II. *EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES V. SMITH*

In *Smith*, two members of the Native American Church (hereinafter "respondents") were fired by their employer, a private drug rehabilitation organization, because they ingested peyote for sacramental purposes at a church ceremony.[35] Oregon law prohibits the knowing or intentional possession of any listed "controlled substance," including peyote, unless it has been pre-

27. *Id.* at 98. Unfortunately, "for the sake of simplicity" Epstein's hypotheticals all involve only "Group A" and "Group B," and it is therefore never clear how he would determine which groups or individuals are "affected" by a particular conditional offer of a government benefit. *Id.*

28. *Id.*

29. *Id.* at 101 (emphasis added).

30. *Id.* at 102 (emphasis in original).

31. *Id.*

32. *Id.* In the end, it is far from clear that Epstein has resolved the problem he identifies of "fashion[ing] a test that can distinguish good conditions from bad ones," given the "complex inquiry" aimed at "maximiz[ing] the total cooperative surplus from the government action" which he would have the courts undertake. *Id.*

33. 494 U.S. 872 (1990).

34. 500 U.S. 173 (1991).

35. *Smith*, 494 U.S. at 874.

scribed by a medical practitioner,[36] and the Oregon Supreme Court read this prohibition to make no exception for the sacramental use of the drug.[37] The respondents' subsequent applications for unemployment compensation were denied by the State of Oregon under a statutory provision disqualifying from unemployment benefits anyone discharged for work-related "misconduct."[38] Respondents challenged the denial of unemployment benefits on the ground that it violated their rights under the Free Exercise Clause of the First Amendment.[39]

The *Smith* majority understood the case to require a decision only on the question of whether the Free Exercise Clause "permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug."[40] For if Oregon's prohibition on peyote use, including religiously motivated use, "'is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon,' and 'the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation.'"[41]

The *Smith* majority explicitly framed the issue precisely as my two-prong test predicts. If the challenged condition does not impinge on a constitutionally protected activity—if there is no First Amendment right to use peyote for sacramental purposes—the condition will be sustained. In the absence of any "contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs," the majority declined to hold that "when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation."[42] That is, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[43] Failing to find the sacramental use of peyote to be protected by the First Amendment, the *Smith* majority, consistent with my positive theory, readily sustained Oregon's denial of unemployment compensation to the respondents whose dismissal resulted from such use.[44]

Richard Epstein, too, finds *Smith* an easy case—but in the other direction.[45] He appears to agree that the denial of unemployment benefits to respondents must be sustained—that is, that respondents have no unconstitution-

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36. *Id.*

37. *Id.* at 876 (citing Smith v. Employment Div., Dep't of Human Resources, 763 P.2d 146, 148 (Or. 1988)).

38. *Id.* at 874.

39. *Id.*

40. *Id.*

41. *Id.* at 876 (quoting Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660, 672 (1988)).

42. *Id.* at 882.

43. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

44. *Id.* at 890.

45. EPSTEIN, *supra* note 5, at 265-68.

al conditions claim—if the sacramental use of peyote is not constitutionally protected.[46] In contrast to the *Smith* majority, however, Epstein would find Oregon's criminalization of peyote use in religious services invalid under the Free Exercise Clause.[47] Considering "[t]he troubled line between action and expression that explains so little in ordinary First Amendment law [to be] of still less help in this context," Epstein would have the Court "ask for some special justification for the restriction of the state criminal law in this context, wholly without regard to government intention or singling out."[48] And he believes such justification is lacking in *Smith*: respondents' "use of peyote in religious observance poses no threat of harm to others" and "is sharply limited by time, place, and circumstance and carries with it none of the risks normally associated with general drug use."[49]

Thus, Epstein's difficulty with *Smith* appears to lie not in the Court's application of the "unconstitutional conditions doctrine," but rather in its interpretation of the Free Exercise Clause of the First Amendment. And this highlights a larger problem with Epstein's own applications of his normative theory. Although he claims to lack interest in declaring the New Deal unconstitutional,[50] and indeed seems willing to accept welfare benefits as a fixture of the modern state,[51] the focus of his reformist energies is scarcely limited to a new theory of the conditions that the state should be permitted to attach to the various benefits it offers.

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

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46. *Id.* at 268. Epstein states that "[i]f the criminal prosecution should fail, so too should the state's effort to use conduct (now lawful, and indeed protected) to deny unemployment benefits otherwise required by state law." *Id.*

47. *Id.* at 267-68.

48. *Id.* at 267.

49. *Id.* at 267-68.

50. *Id.* at xiv. Epstein devoted an earlier book to that project. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) [hereinafter TAKINGS].

51. Epstein devotes Chapter 17 of *Bargaining with the State* to a discussion of welfare benefits, Chapter 16 to unemployment benefits, and a total of 76 pages to "Positive Rights in the Welfare State."

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

III. *RUST V. SULLIVAN*

Although the regulations at issue in *Rust v. Sullivan*[52] have been rescinded by the Clinton Administration,[53] the unconstitutional conditions question that they presented remains important, both as a jurisprudential matter and because equivalent regulations might be imposed in the future. In *Rust*, Title X grant recipients and doctors who supervise Title X funds (hereinafter "petitioners") challenged, on behalf of themselves and their patient-clients, regulations interpreting a provision of Title X of the Public Health Service Act which specified that "'[n]one of the funds appropriated [to voluntary family planning projects] under this subchapter shall be used in programs where abortion is a method of family planning.'"[54]

These regulations imposed three related conditions on any "project" receiving Title X funds: (1) it "'may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning'";[55] (2) it may not engage in "activities that 'encourage, promote or advocate abortion as a method of family planning'";[56] and (3) it must be "'physically and financially separate' from prohibited abortion activities."[57] Petitioners argued that the regulations violated the First Amendment free speech rights of Title X projects' clients and health providers by discriminating on the basis of viewpoint, and the Fifth Amendment right of the projects' clients to choose whether to terminate their pregnancy.[58]

Before we can apply the test suggested by my positive theory to this case, we must ascertain what benefit and attached condition are at issue. If one understands the benefit offered the clients of Title X projects[59] to be free family planning counseling other than abortion referrals or counseling concerning the use of abortion as a method of family planning,[60] there is no attached condition. If one instead understands the benefits offered Title X projects' clients to be *free family planning counseling*, the attached condition is that these indigent women forego receiving information concerning abortion during their meetings with Title X counselors.

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

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52. 500 U.S. 173 (1991).

53. 58 Fed. Reg. 7,462 (1993) (suspending rules issued at 53 Fed. Reg. 2,922 (1988) and codified at 42 C.F.R. §§ 59.2, 59.7-.10) (1994).

54. *Rust*, 500 U.S. at 178 (quoting 42 U.S.C. § 300a-6 (1970)).

55. *Id.* at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)).

56. *Id.* at 180 (quoting 42 C.F.R. § 59.10(a) (1989)).

57. *Id.* (quoting 42 C.F.R. § 59.9 (1989)).

58. *Id.* at 181, 192, 201.

59. The analysis under my positive theory focuses solely on the concerns of recipients of public assistance, not the concerns of its providers.

60. *See Rust*, 500 U.S. at 179 (quoting 42 C.F.R. § 59.8(a)(1) (1989)) (emphasis added).

such a First Amendment right.[61] And the challenged condition therefore arguably impinges on a constitutionally protected activity.

Under the second prong of the test suggested by my positive theory, we must now ask whether the effect of the challenged condition is to require persons unable to earn a subsistence income and otherwise eligible for the pertinent benefit to pay a higher price to receive family planning information concerning abortion than similarly situated persons earning a subsistence income. And it seems clear that the condition does *not* have this effect. As the *Rust* majority observed, "a woman's right to receive . . . information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered."[62] The condition simply leaves clients of Title X projects to pay the same, unsubsidized price for abortion information that those not eligible for Title X-funded counselling must pay. Thus, my positive theory predicts that the Court would sustain the condition challenged in *Rust*, as it in fact did.[63]

Richard Epstein, in contrast, contends that *Rust* was wrongly decided, and he would strike down "either a prohibition or a requirement on [abortion] counseling."[64] Although he begins by asserting that the answer to the "key question" of "whether there is any reason to be concerned with a uniform state position on the subject [of abortion counselling], either way" depends on an assessment of "the relative strength of the bargaining and takings risks" in this context, his subsequent inquiry occupies only six sentences.[65]

In appraising the "bargaining risks" posed by the Title X scheme, Epstein inquires whether "the state wield[s] monopoly power in this area—in which case both uniform rules, you can't speak or you must speak, should be struck down."[66] Although he contends that "there are no obvious barriers to entry that impede setting up rival programs to pick up the slack or to counteract the impression of the desirable options that government creates," he also speculates that "the menu of alternatives to government programs may be far greater in New York or San Francisco than it is in Amarillo or Fargo."[67] And, apparently considering further investigation (or elaboration) unnecessary, Epstein concludes that the bargaining risks are unacceptably large in this context.[68]

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

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61. *See, e.g.*, Board of Education v. Pico, 457 U.S. 853 (1982) (plurality decision); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 to -4, § 15-6 to -7, at 1320-26 (2d ed. 1988).

62. *Rust*, 500 U.S. at 203. The *Rust* majority acknowledged that "[i]t would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information." *Id.*

63. *Id.*

64. EPSTEIN, *supra* note 5, at 300.

65. *Id.* at 299-300.

66. *Id.* at 300.

67. *Id.*

68. *Id.*

because some citizens will necessarily be forced to fund programs with which they are in strong philosophical or intellectual disagreement."[69]

It is informative to compare Epstein's discussion of *Rust* with his analysis of *Harris v. McRae*,[70] a related, earlier case whose "irreducible tension" he believes "carries over to [*Rust*]."[71] At issue in *Harris* was the Hyde Amendment to the Medicaid Act, which prohibits the use of any federal funds to reimburse the cost of abortions under the Medicaid program except under certain narrowly specified circumstances, although federal Medicaid funds may be used to provide other medical services, including those incident to pregnancy and childbirth.[72] Plaintiffs sought to enjoin enforcement of the Hyde Amendment under the Fifth Amendment's Due Process Clause and the religion clauses of the First Amendment.[73]

The Medicaid Act after the Hyde Amendment can be construed as offering each otherwise eligible pregnant woman free pregnancy-related medical care on the condition that she not have an abortion and instead carry the pregnancy to term. Under the test suggested by my positive theory, we must first inquire whether this condition impinges on a constitutionally protected activity. And it clearly does: under *Roe v. Wade*, the government cannot constitutionally prohibit a woman from terminating her pregnancy during the first trimester.[74]

Under the second prong of the test, we must now ask whether the effect of the challenged condition is to require women unable to earn a subsistence income and otherwise eligible for Medicaid benefits to pay a higher price to exercise their constitutional right to an abortion than similarly situated women whose source of a subsistence income is employment.[75] And it seems clear that the condition does *not* have this effect. The Hyde Amendment did not, as it might have, require that all Medicaid, food stamps, or other public assistance be withheld from otherwise eligible women who choose to exercise their constitutional right to an abortion.[76] It simply declined to subsidize the exer-

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69. *Id.* Epstein's preferred solution is not that the condition challenged in *Rust* be invalidated, but that the government "[g]et out of the counseling and referral business, save by charitable deduction." *Id.* at 302. For Epstein, "the combined bargaining and takings risks doom any [government-funded] program that seeks to provide [reproductive] counseling and referral, at least so long as *Roe* is on the books." *Id.* at 301.

70. 448 U.S. 297 (1980).

71. EPSTEIN, *supra* note 5, at 300.

72. *Harris*, 448 U.S. at 301-03.

73. *Id.* at 301.

74. Roe v. Wade, 410 U.S. 113, 163, 164 (1973). The *Roe* majority held that prior to

> approximately the end of the first trimester . . . the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Id. at 163. The majority also held, however, that "[f]or the stage subsequent to approximately the end of the first trimester [but prior to "viability"], the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." *Id.* at 164.

75. Whether the women, their spouses, or both are employed is irrelevant to this analysis.

76. Under this hypothetical law, the cost of an abortion to a claimant is the market price for that service *plus* the loss of a statutory benefit (*e.g.*, other medical care or food stamps) for which she would have been eligible had she not exercised the pertinent constitutional right. Thus, the

cise of that right, leaving Medicaid-eligible women to pay the same market price that other women must pay if they choose to obtain an abortion. Thus, my positive theory predicts that the Court would sustain the condition challenged in *Harris*, as it in fact did.[77]

Epstein, too, would find the Hyde Amendment constitutional,[78] but his view that *Harris* was correctly decided is difficult to reconcile with his conclusion that *Rust* was not.[79] At the center of his analysis in both cases appears to be a reading of *Roe* to require some sort of "government neutrality" on issues of reproductive choice.[80] Epstein is correct that "*Roe* works a double transformation at a single leap: abortions move from the status of criminal acts into 'fundamental rights.'"[81] And in subsequent cases the Court has in fact invalidated a variety of *non-wealth-dependent* restrictions on abortion, other than criminalization, which it found to "unduly burden" that right.[82] But neither in *Roe* nor in any subsequent case did the Court mandate the sort of government neutrality on reproductive choice that Epstein seems to envision. Indeed, the Court in *Roe* explicitly held that its "decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests."[83] Even during the first trimester, when the State's constitutional authority to regulate abortions is at its nadir, *Roe* mandates only that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."[84]

That a constitutional right is declared "fundamental" has never meant that the government must subsidize the exercise of that right either in every instance or whenever it chooses to subsidize the exercise of legitimate alternative activities. The fundamental right of parents to send their children to private schools, recognized in *Pierce v. Society of Sisters*,[85] has never been interpreted to mean that the government must fund those schools if it chooses to

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claimant, an individual unable to earn a subsistence income, would be required to pay a higher price than a similarly situated person earning a subsistence income in order to exercise her constitutional right to an abortion.

> In both *Harris* and *Maher*, the Court explicitly discussed this hypothetical:
>
> A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. . . . But the Hyde Amendment, unlike the statute at issue in *Sherbert*, does not provide for such a broad disqualification from the receipt of public benefits. Rather, the Hyde Amendment, like the Connecticut welfare provision at issue in *Maher*, represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a "penalty" on that activity.

Harris, 448 U.S. at 317 n.19; *see also* Maher v. Roe, 432 U.S. 464, 475-76 n.8 (1977).

77. *Harris*, 448 U.S. at 326-27.

78. EPSTEIN, *supra* note 5, at 285-94.

79. *Compare id.* at 285-94 *with id.* at 297-302.

80. *See id.* at 286-90, 299-302.

81. *Id.* at 289; *see also Roe*, 410 U.S. at 152-56.

82. *See, e.g.*, Baker, *supra* note 3, at 1231 n.170; *see also* TRIBE, *supra* note 61, § 15-10, at 1341-45 and cases cited therein.

83. *Roe*, 410 U.S. at 165.

84. *Id.* at 164.

85. 268 U.S. 510 (1925).

provide public schools. Nor has the fundamental right to reproduce, first recognized in *Skinner v. Oklahoma*,[86] ever been construed to require that the government hand out a voucher good for "one free childbirth" with each free condom it chooses to distribute.

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

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

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

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

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86. 316 U.S. 535 (1942); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972); TRIBE, *supra* note 61, § 15-10.
87. EPSTEIN, *supra* note 5, at 286-90, 299-302.
88. *Id.* at 289-91. *Compare id.* at 297-302.
89. *Id.* at 290 (footnote omitted).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 290-91.
94. *Id.* at 291.
95. *Id.* at 294.

create exceptions to the usual rule against taxpayer standing.[96] The Establishment Clause simply grants all taxpayers the right not to subsidize *religion*; it affords no taxpayer the right not to subsidize *abortion*.[97] Thus, although the restrictions on abortion funding at issue in *Harris* may coincide with the tenets of the Roman Catholic faith,[98] for example, the Court has never held that a statute violates the Establishment Clause just because it "happens to coincide or harmonize with the tenets of some or all religions."[99] If an enactment "has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive governmental entanglement with religion," it does not contravene the Establishment Clause.[100] And, as the majority observed in *Harris*, the Hyde Amendment "is as much a reflection of 'traditionalist' values towards abortion, as it is an embodiment of the views of any particular religion."[101]

Nor has the Court been sympathetic to individual taxpayers' free exercise claims for exemptions from generally applicable taxes. Given the federal government's great interest in both the maintenance of, and uniform participation in, the tax system, the Court has held that the government must accommodate claims for exemptions only if doing so will not "unduly interfere with fulfillment of the governmental interest."[102] And fearing that a slippery slope would result, the Court has been reluctant to require such exemptions:

> If, for example, a religious adherent believes war [or abortion] is a sin, and if a certain percentage of the federal budget can be identified as devoted to war- [or abortion-] related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function.[103]

It is not a coincidence that Epstein finds so much of basic religion clause doctrine wrongheaded, nor that the unconstitutional conditions cases involving public assistance benefits that he chooses to discuss are, to a highly disproportionate extent, ones in which he contends the religion clauses are implicated.[104] In our post-New Deal world, the religion clauses constitute the stron-

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96. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968) (Establishment Clause); United States v. Lee, 455 U.S. 252 (1982) (Free Exercise Clause); *see also* TRIBE, *supra* note 61, § 3-16, at 118-19, § 14-13, at 1260-62.

97. On this point, compare Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 210-11 (1992), with Michael M. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 164, 168-69 (1992), and with Michael M. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989, 1006-14 (1991).

98. This was in fact a claim raised by the appellees in *Harris*, and acknowledged by the Court to be a plausible view of the challenged funding restriction. *See Harris*, 448 U.S. at 319-20.

99. *Id.* at 319 (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

100. *Id.* (quoting Committee for Public Educ. v. Regan, 444 U.S. 646, 653 (1980)).

101. *Harris*, 448 U.S. at 319; *see also Roe*, 410 U.S. at 138-41.

102. United States v. Lee, 455 U.S. 252, 259 (1982); *see also* TRIBE, *supra* note 61, § 14-13, at 1260-63.

103. *Lee*, 445 U.S. at 260. Epstein, not surprisingly, considers the Court's analysis in *Lee* to be "seriously defective," not least because "the Court is surely wrong when it writes as though there were a slippery slope problem." EPSTEIN, *supra* note 5, at 268, 269-70. Thus, Epstein persists in advocating that the government create separate "risk pools" in various contexts, notwithstanding his awareness that the Court implicitly, but no less clearly, rejected this solution in *Lee*. *Id.* at 262 n.28.

104. Of the 25 unconstitutional conditions cases involving public assistance benefits which the

gest—perhaps the only—constitutional barrier to income redistribution that remains.[105] Because Epstein precommitted not to devote *Bargaining with the State* to declaring the New Deal unconstitutional,[106] but nonetheless believes that "a constitutional order that imposed restrictions upon redistribution through taxation and state welfare benefits" has much to recommend it,[107] the religion clauses are his last, best hope. It is therefore not surprising that he systematically (mis)reads those clauses with an eye toward maximizing their coverage, or that he is most eager to discuss cases in which his expansive reading of these clauses could be deployed to curtail redistribution and thereby, he believes, increase aggregate social welfare. Indeed, Epstein himself observes that "[o]nce general takings and public trust arguments are no longer sufficient to forestall all forms of redistribution, whether covert or overt, between A and B, then additional pressure is placed upon the religion clauses to forbid redistribution both from or to any religious group."[108] He might have added that he, at least, would also comfortably place additional pressure on the notion of a "religious group."

In the end, Epstein's discussions of *Rust* and *Harris* are likely to leave the reader unsatisfied for at least two reasons. First, he never explains why his analysis of the takings risks at issue in *Rust* does not track his decisive analysis of those risks in *Harris*. Why doesn't *Rust*, too, come down to the opposing free exercise and establishment claims of taxpayers which so trouble Epstein in *Harris*? As in *Harris*, the free exercise argument in *Rust* would be made by those who oppose abortion for religious reasons, but who nonetheless could be forced, in the absence of the challenged Title X regulations, to pay through their taxes for speech promoting what they consider to be the murder of unborn children.[109] And taxpayers opposed to the Title X regulations would, as in *Harris*, argue that since many who favor the "gag order" imposed by the regulations do so on religious grounds, when they "turn their preferences into law, they have [unconstitutionally] established, at least in part, their religious beliefs under [federal law]."[110] Thus, one would expect Epstein to sustain the Title X regulations at issue in *Rust* if, as in *Harris*, he finds the Establishment Clause argument in this context "more strained" than its free exercise alternative.[111]

Court has heard since 1963, only 11 (44%) implicate the religion clauses, even under Epstein's expansive reading of those clauses. In *Bargaining with the State*, Epstein discusses 9 of these 25 cases, 7 (78%) of which he contends implicate the religion clauses.

105. Unlike the U.S. Constitution, nearly all state constitutions include explicit restrictions on "special legislation," which may preclude some forms of forced redistribution. *See* Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 642-57 (1994); *see also* Lyman H. Cloe & Sumner Marcus, *Special and Local Legislation*, 24 KY. L.J. 351 (1936).

106. *See supra* note 51.

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

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

109. *Id.* at 290.

110. *Id.* at 290-91.

111. *Id.* at 291.

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

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

IV. *UNITED STATES DEPARTMENT OF AGRICULTURE V. MORENO* AND *DANDRIDGE V. WILLIAMS*

Given his penchant for both constitutional revisionism and unconstitutional conditions cases that lend themselves to analysis under the religion clauses, Epstein's discussion of cases such as *Smith*, *Rust*, and *Harris* sheds little light on the many unconstitutional conditions cases involving public assistance benefits that he does not discuss. Thus, before passing final judgment on Epstein's theory, it might be informative to attempt to apply it to cases such as *United States Department of Agriculture v. Moreno*[112] and *Dandridge v. Williams*,[113] which he does not discuss and which do not involve the religion clauses, even under Epstein's expansive reading of them.

At issue in *Moreno* was a federal statutory provision that disqualified for food stamps any otherwise eligible persons who lived in a household containing any unrelated individuals.[114] This statute arguably required some persons otherwise eligible for food stamps to choose between receiving that public assistance or exercising their First Amendment freedom of association.[115]

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112. 413 U.S. 528 (1973).

113. 397 U.S. 471 (1970).

114. *Moreno*, 413 U.S. at 529.

115. Although the First Amendment states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble," this freedom of association has never been understood to include an absolute right to live with an unrelated person under any and all circumstances. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding village ordinance restricting land use to one-family dwellings and defining "family" as not more than two unrelated persons). Beginning with Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), reasonable zoning laws bearing a substantial relation to the public health, safety, or general welfare have been held to be valid exercises of the states' police power. *See also* TRIBE, *supra* note 61, § 15-17.

If I read Epstein correctly, he would have us inquire whether this combination of government largesse plus condition maximizes social welfare relative to other possibilities, including making the benefit available without the challenged condition.[116] To begin, it is not clear that anyone gains from this particular condition on the receipt of food stamps. Some persons eligible for food stamps will likely forego living in households containing any unrelated individuals in order to receive this needed benefit. In doing so, however, they may give up not only the exercise of their First Amendment freedom of association, but also important economies of scale in their necessary living expenses. Nor would this condition appear to make the taxpayers who fund the food stamp program—or anyone else—better off. A small number of otherwise eligible persons may choose to forego food stamps and live in a household with unrelated individuals. But the ultimate savings, if any, to taxpayers from this tiny decrease in the total dollar amount of food stamps distributed will surely be outweighed many times over by the increased administrative and monitoring costs that will attend the imposition of this condition.[117]

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

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

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

116. EPSTEIN, *supra* note 5, at 98-103.

117. In addition to the increased administrative and monitoring costs, taxpayers may ultimately bear an increase in the cost of providing health care for those whose nutrition suffers as a result of their decision to forego food stamps.

118. EPSTEIN, *supra* note 5, at 99, 101.

119. *Moreno*, 413 U.S. at 538.

120. EPSTEIN, *supra* note 5, at 101.

121. *See supra* note 115.

stamps must pay to exercise their First Amendment rights. And my theory therefore predicts that the Court would invalidate the condition, as it in fact did.[122]

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

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

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

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122. *Moreno*, 413 U.S. at 538.

123. Dandridge v. Williams, 397 U.S. 471, 473-75 (1970).

124. *Id.* at 490-91 (Douglas, J., dissenting).

125. The pertinent federal statutory provisions do not restrict AFDC benefits to single-parent families. *See* 42 U.S.C. § 607(a)-(c) (1988). The vast majority of claimants, however, have historically been female-headed, single-parent households. *See* SAR A. LEVITAN, PROGRAMS IN AID OF THE POOR 30-39 (3d ed. 1976).

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

The regulation at issue in *Dandridge* also arguably burdened the claimant parent's freedom of association insofar as it provided a financial incentive to limit the resident family to six or fewer persons. But no more than in the case of the right to procreate does the challenged condition require those unable to earn a subsistence income, and otherwise eligible for AFDC benefits, to pay a higher price to exercise that constitutional right than similarly situated persons whose source of a subsistence income is employment. If a family of seven, for example, has one child live elsewhere in order to reduce the size of its AFDC claimant unit to six, the family does not thereby increase its total monthly amount of benefits. The family's per capita income may now be greater than if all seven family members were living at home, but only if the family is not providing the nonresident child financial support. This state of affairs is the same for a family whose source of a subsistence income is employment rather than AFDC benefits.

127. EPSTEIN, *supra* note 5, at 98-103.

128. *Dandridge*, 397 U.S. at 473-75.

computed need? Or should eligible families of six or fewer persons receive 100% of their computed need, while families with seven or more persons receive only 80% or less of theirs (the exact percentage decreasing as family size increases)?

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

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

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

130. *See Dandridge*, 397 U.S. at 486-87.

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

132. *See Dandridge*, 397 U.S. at 473-75.

133. The underlying assumption, consistent with current and past law, is that parents are responsible for the financial support of their minor children in AFDC-recipient families as well as in families whose sole source of income is the parent(s)'s employment. For discussion of parents' legal duty to provide support for the maintenance of their children, see, *e.g.*, ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 177-228 (2d ed. 1989).

134. This is a reasonable assumption since the total dollar amount of one's monthly earnings through employment is, in any case, not usually related to family size. That is, a private employer is not typically expected to provide an employee a pay increase upon the birth of a child in order to ensure that the per capita income of the employee's family remains constant.

non-indigent parents pay, my theory predicts that the *Dandridge* Court would sustain the challenged "maximum grant regulation," as it in fact did.[135]

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

I expect that Epstein, in contrast, would find this hypothetical scheme neither better nor worse than the actual Maryland scheme at issue in *Dandridge*. For this hypothetical scheme, too, fails Epstein's pro rata test:[136] the social gains induced by the hypothetical scheme relative to a scheme that would give all AFDC-eligible families 95% of their state-computed need are gains that accrue solely to eligible families of six or fewer members.

In the *Dandridge* context, Epstein's requirement that the Court assess whether the combination of government largesse plus challenged condition will maximize social welfare relative to other possibilities seems at first to pose an intractable measurement problem. It is not that courts are obviously less competent than the state legislature to assess the effect of the Maryland scheme on both larger and smaller families' incidence of malnutrition, illness, homelessness, illiteracy, and death. Rather, we doubt that any institution could accomplish the task.[137] But this potentially fatal weakness in Epstein's proposed standard of judicial review appears largely obviated by its "pro rata" component. At least in the *Dandridge* context, it seems remarkably easy to identify any deviation from formal equality in the allocation of the social gains that the challenged benefit scheme generates.

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

135. *Dandridge*, 397 U.S. at 486-87.
136. EPSTEIN, *supra* note 5, at 96-103.
137. I also query how and whether we could assess the accuracy of any proffered results.

elevates procreation by these indigent parents from the constitutional right that all others have to a kind of constitutional entitlement.[138]

V. CONCLUSION

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

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

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

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

139. TAKINGS, *supra* note 50, at 306.

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

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

Id.

141. *Id.* at 329.

142. At least one reviewer has expressed frustration, however, that "the reader never learns why an indeterminate social improvement standard is better, for example, than an indeterminate

lenged condition on a government benefit advances overall social welfare relative to other possibilities takes the form of applying Epstein's "pro rata" test, it does not seem obviously more onerous or beyond the competence of the courts than established judicial tasks such as ascertaining the "best interests of the child" in custody disputes[143] or deciding when police activity constitutes an "unreasonable search."[144] Indeed my attempts above to apply Epstein's test to *Moreno* and *Dandridge* are evidence that the task is often quite readily performed.[145] Nonetheless, as that analysis of *Dandridge* also reveals, his test yields results in some cases which appear perverse, at least within our current constitutional culture. More study is necessary to determine whether such results are the product of some larger deficiency in the substance of Epstein's theory, or merely of easily avoidable errors in its application.

By seeking to apply Epstein's central theory to cases that he has not directly addressed, I hope to have demonstrated my conviction that his approach to the paradox of unconstitutional conditions at a minimum forces us to consider these cases in a new and interesting way. That reasonable people might nonetheless disagree with Epstein's selection of baselines,[146] or dispute whether a unitary standard can or should govern judicial review of cases raising unconstitutional conditions questions,[147] should suggest the difficulty of the unconstitutional conditions paradox, not the inadequacy of Epstein's ambitious and thoughtful contribution.

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system of historically and institutionally respectful criteria." Jonathan D. Hacker, Book Note, 92 MICH. L. REV. 1855, 1860 (1994) (reviewing RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993)).

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

144. *See, e.g.*, United States v. Dunn, 480 U.S. 294 (1987); WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987) (4 volumes).

145. *See supra* Part IV.

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

147. *See, e.g.*, William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989 (1995); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337 (1989).