And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries

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A Fable

Once upon a time, in a land far away, there was a swamp. This swamp was dank, dismal, and infested with crocodiles, poisonous snakes and other vermin. A whirlpool pulled people unfortunate enough to fall into the swamp deeper and deeper into its vortex, until they drowned or were destroyed by the vermin. This was not a place into which any sane person would wish to venture. Unfortunately, every so often a hapless traveller would stumble by and find herself pulled into the quagmire.

Not far from the swamp there lived a man. The man, having grown up near the swamp, knew its eddies and currents, its ebbs and flows, its pitfalls and escape routes. He knew how to save hapless travellers who might stumble into the swamp. However, he was also an ideologue. His mission in life was to reform the world according to his personal vision of morality and right. He considered each traveller who stumbled by a page onto which he might write his particular vision of morality and justice. Each time he heard the horrified screams of a traveller in distress, he thought, "Aha, someone I can save." However, his rescue always had a price. The price was that the traveller agree to forfeit her freedom, to live within the rescuer's homestead, and to abide by his moral requirements. If she did not agree, or if at any later time she departed from the ethical code, she was simply thrown back into the swamp. Indeed, these rescue rejects were the primary source of nourishment for the vermin within.

Was this Samaritan good?

Introduction

A recent political rallying cry has been welfare reform.[1] Policymakers, including President Clinton[2] and the United States

1. *See, e.g.*, David Whitman, *War on Welfare Dependency*, U.S. NEWS AND WORLD REP., Apr. 20, 1992, at 34; Kitty Dumas, *Can the Welfare System be Reformed*, BLACK ENTERPRISE, July 1992, at 27; James Barnes, *Waiting for Clinton*, THE NAT'L J., Mar. 5, 1994, at 516. Of course, the concept of welfare reform is not new. As a political football, post-war-on-poverty welfare reform has a long history. *See, e.g.*, Linda E. Demkovich, *Moynihan on Welfare from FAP to the Carter Plan*, THE NAT'L J., Jan. 28, 1978, at 146 (discussing Nixon and Carter Administration welfare reform plans); *The $60 Billion Welfare Failure: What Carter Could Do*, BUS. WK., Jan. 17, 1977, at 48; Julie Kosterlitz, *Reexamining Welfare*, THE NAT'L J., Dec. 6, 1986, at 2926 (discussing the Reagan Administration and welfare reform).

2. *See generally* DEP'T OF HEALTH AND HUMAN SERVICES, DETAILED SUMMARY, WORK AND RESPONSIBILITY ACT OF 1994, 35-36 (Proposed Act) [hereinafter SUMMARY, WORK & RESPONSIBILITY ACT].

Congress,[3] have advocated revamping, or in some instances dismantling, the American welfare system. Many reform programs link welfare benefits to behavioral changes by welfare recipients. For example, programs such as *Workfare* and *Learnfare* require welfare recipients to do community service or enter educational programs as a condition of receiving benefits.[4] Other programs reward welfare recipients who marry. Some of these proposals are intended to help welfare beneficiaries become self-sufficient and independent of the welfare system.[5] However, other proposals appear designed to punish welfare recipients for violating state-favored behavioral norms or values and to manipulate recipients into complying with these norms.[6]

Recent moves by several states,[7] the Clinton Administration,[8] and now the Republican 104th Congress,[9] to place a ceiling upon

3. *See* The Personal Responsibility Act of 1995, H.R. 4, 104th Cong., 1st Sess. (1995) [hereinafter Personal Responsibility Act]; *see also* 141 CONG. REC. H3790 (1995). This bill was passed by the United States House of Representatives on May 24, 1995, and is currently under consideration by the United States Senate as the Family Sufficiency Act of 1995, S. REP. No. 104-96, 104th Cong., 1st Sess. (1995). The bills generally would convert several federal welfare programs, including Aid for Families with Dependent Children (AFDC), into block grants to the states.

4. *See generally* Joanna K. Weinberg, *The Dilemma of Welfare Reform: "Workfare" Programs and Poor Women*, 26 NEW ENG. L. REV. 415 (1991) (discussing mandatory work requirements imposed as a condition of receiving public assistance and their impact on women); Rhoda Schulzinger & Paula Roberts, *Welfare Reform in the States: Fact or Fiction?, Part I*, CLEARINGHOUSE REV., Dec. 1987, at 695 (discussing the use of work incentive programs in the welfare arena); Marc Stuart Gerber, *Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited*, 81 GEO. L.J. 2141 (1993) (discussing the welfare requirement of mandatory school attendance for certain AFDC recipients).

5. *See, e.g.*, Paula Roberts & Rhoda Schulzinger, *Towards Reform of the Welfare System: Is Consensus Emerging?*, CLEARINGHOUSE REV., May 1987, at 3, 11-15 (discussing recent welfare reform proposals and state experiments).

6. *See, e.g.*, Gloria Negri & Anthony Flint, *States Take Hard Line on Dependency: Punitive Actions Gaining Favor*, BOSTON GLOBE, May 16, 1994, at A1 (discussing state welfare programs intended to change behavior by punishing non-compliant recipients). Even the proposals designed to be helpful often contain punitive aspects. For example, Clinton's welfare reform plan seeks to restructure welfare to make it less dependency-fostering; however, it also contains many punitive measures that use the club of welfare benefits to enforce behavioral choices promoted by the plan. The Clinton plan thus promises "tough sanctions" including loss of welfare eligibility for persons who refuse to stay in school, look for work, or attend job training programs. *See* SUMMARY, WORK & RESPONSIBILITY ACT, *supra* note 2, at 2, 15.

7. The first states that have received a federal waiver to implement these plans include Wisconsin, New Jersey, Georgia, and Arkansas. Subsequently, several other states have adopted or are considering legislation to adopt such plans, contingent upon receipt of a federal waiver. *See infra* notes 28-33, 37-53 and accompanying text.

8. *See* SUMMARY, WORK & RESPONSIBILITY ACT, *supra* note 2, at 35-37.

9. *See* Personal Responsibility Act, *supra* note 3. The bill would generally prohibit states from disbursing federal welfare grants to children born to mothers receiving welfare. The House bill would also prevent states from using federal funds to

welfare benefits awarded to mothers who give birth to additional children while receiving welfare are pernicious examples of value-intrusive welfare reform. These so-called *family cap* proposals deny additional benefits for children over a certain number who are born to welfare recipients. However, such benefits would have been awarded if the child had been born or conceived before the family began receiving welfare. Typically, such plans provide that a welfare family of two children that has a third child cannot count the third child for computing benefit levels. However, a family with three children newly entering the welfare rolls can count all three children for computing benefit levels.[10] The proposals thus give welfare recipients who decide to bear children less in future benefits than non-welfare recipients who decide to bear children. Accordingly, the procreative choices of welfare recipients are expressly disfavored over those of non-welfare recipients in determining welfare benefit levels.[11]

The usual stated rationale for family cap or *child limitation* proposals is to discourage welfare recipients from having additional children.[12] The proposals generally reflect the value that it is poor

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provide cash welfare benefits to unwed mothers under 18 years of age, except in cases of rape or incest. The Senate version of the bill neither forbids nor requires states to deny aid to children born to welfare recipients and thus would leave this issue for the states to decide.

10. *See, e.g.*, N. J. STAT. ANN. § 44:10 - 3.5 (West 1992) (providing that the "Commissioner of Human Services shall . . . [eliminate] the increment in benefits under the program for which that family would otherwise be eligible as a result of the birth of a child during the period in which the family is eligible for AFDC benefits . . . .").

11. The first court to address the legality of such plans upheld New Jersey's plan against constitutional and statutory challenges. C. K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995); *see* discussion *infra* note 22. There has been some critical scholarly analysis of these proposals as well as much public comment. *See, e.g.*, Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (arguing that these plans are poor policy largely motivated by the public perception of welfare recipients as "others" who are to blame for their own poverty); Martha F. Davis, *The New Paternalism: Welfare's War on Women*, 49 GUILD PRAC. 97 (1992) (arguing that these plans coerce procreative rights); Robert D. Bomersbach, Note, *New Jersey's Bryant Amendment: Is This Welfare Reform?*, 15 WOMEN'S RTS. L. REP. 169 (1994) (questioning the legality of the New Jersey family cap plan under the New Jersey Constitution and international human rights law). *See also* Barbara Vobejda, *Hot Debate on Welfare Children: Movement Would Limit Benefits when Mothers Have More Babies*, S.F. CHRON., June 7, 1994, at A6; Dorothy Roberts, *Exploding the Myths Behind New Jersey Welfare Reform*, N.J. L.J., Jan. 25, 1993, at 21.

12. For a discussion of family cap plans, see *infra* part I. The proposals also might be viewed as seeking to ameliorate some of the social costs to the general public and welfare recipients of children born and raised in poverty. However, if this is so, the proposals are a notoriously poor way to reduce the social costs of child poverty. First, there is little evidence that denying benefits significantly deters childbearing by welfare recipients. Indeed, it seems unlikely that a welfare recipient would have an additional child simply to get additional welfare benefits since the cost of supporting a child probably significantly exceeds whatever increase in bene-

planning, bad judgment, an irresponsible lifestyle choice, or generally immoral behavior for poor persons to have children they cannot support. By refusing to "reward" welfare recipients for their disapproved childbearing choices, the proposals use the club of welfare benefits to impose this value choice upon them. The state, not the parent, determines whether a welfare recipient should have additional children.[13] The welfare child limitation proposals thus raise

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fits would occur, causing a net financial loss to the family. Second, the proposals actually increase the social costs of child poverty by denying needed welfare benefits to poor children born to welfare recipients. Third, the proposals do not help children of poor, non-welfare recipients and thus do not affect those social costs of poverty at all. *See, e.g.*, Williams, *supra* note 11, at 736-741; Melinda Henneberger, *State Aid Is Capped, But To What Effect*, N.Y. TIMES, Apr. 11, 1995, at A1 (discussing lack of clear evidence that New Jersey welfare plan has reduced births to welfare mothers). *See also* Vobejda, *supra* note 11, at A6. *Cf. New Jersey Experiment Sharply Cuts Illegitimate Births among Welfare Mothers*, HERITAGE FOUND. REP., Feb. 9, 1995 (stating that illegitimate births among New Jersey AFDC recipients dropped 29% after New Jersey imposed family cap; however, others argue that early New Jersey numbers showing a 16% drop reflected delays in reporting new births by welfare recipients no longer entitled to increases on new births, and since few welfare recipients give birth, even a substantial percentage drop does not reflect significantly lower numbers of births). In any event, even if these proposals do not aim to override poor people's procreative value choices, they have that effect.

Some analysts argue that the best societal response to child poverty would be to remedy structural economic problems that mire poor persons in poverty, e.g., increasing the minimum wage and providing child care and health insurance for poor persons. In contrast, these child limitation proposals merely divert public attention from needed structural poverty reforms. *See, e.g.*, Lucie E. White, *No Exit: Rethinking Welfare Dependency from a Different Ground*, 81 GEO. L. J. 1961 (1993) (discussing the failure of welfare reform programs to address the true systemic causes of welfare); Paula Roberts, *Why Don't We Do it Right this Time? Redefining the Welfare Reform Debate*, CLEARINGHOUSE REV., Apr. 1988, at 1305 (arguing that reforming the welfare system will not help the vast majority of the poor).

13. Moreover, under these plans the state frequently makes this judgment without regard to the welfare mother's individual circumstances. For example, plans often reduce aid even when the child is conceived by rape or incest; exceptions to this rule are the Arkansas and Georgia plans. *See* ARKANSAS DEP'T OF HUMAN SERVICES, ARKANSAS WELFARE DEMONSTRATION PROJECT FINANCIAL ASSISTANCE MANUAL § 10111 (1) (1994) [hereinafter ARK. FAMILY ASSISTANCE MANUAL]; GA. CODE ANN. § 49-4-115 (1994). Some plans also reduce aid when the child is conceived because of failed contraception; one exception is the Arkansas plan which provides that the recipient may avoid the family cap limits by providing medical verification to the state that she used a reliable (96% or better) method of contraception. ARK. FAMILY ASSISTANCE MANUAL, *supra*, § 10111(4). The Arkansas policy seems to require use of medically installed methods of birth control, i.e., Norplant, IUDs, or sterilization, given that a welfare recipient would not be able to obtain medical verification that other types of contraception, such as birth control pills or condoms, had been properly used.

In other cases, the pregnancy may be caused, in part, by emotional pressure from would-be fathers. This may particularly be a concern with teenage pregnancies, which may often be linked to sexual abuse by older males. *See, e.g.*, Mike Males, *Poverty, Rape, Adult/Teen Sex: Why 'Pregnancy Prevention' Programs Don't Work*, 75 PHI DELTA KAPPAN, Jan. 1994, at 407-408 (stating that current data indicates that the large majority of children born to teen mothers are fathered by adult males rather than by fellow teens; reporting California data that shows 77% of

the issue of whether government may constitutionally use its economic power over welfare benefit allocations to leverage welfare recipients' exercise of their constitutionally protected right to procreative choice. Legally, the personal choice of whether to bear or beget children is committed to an individual's private judgment by the constitutional fundamental right to procreate.[14] This fundamental right to procreate provides that these essential value choices are committed to the discretion of the individual, not the discretion of the state.[15] Government burdens on the right are subject to heightened scrutiny.

The Supreme Court has repeatedly affirmed the importance of the right to procreative choice.[16] Nevertheless, current Supreme Court doctrine, loosely known as the *unconstitutional conditions doctrine*, generally holds that only a government *prohibition* of, *burden* on, or *penalty* for the exercise of a fundamental right violates the right, triggering strict scrutiny.[17] Moreover, the Supreme

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births by high school age girls, and 51% of births by girls of junior high school age or younger, and national data that shows 71% of births to teenagers involved an adult partner over age twenty). Similarly, teenage pregnancy may be correlated with child sexual abuse. Mike Males cites a Washington study that found that two-thirds of a study of five hundred adolescent mothers had, before their pregnancy, been sexually victimized by men whose ages averaged twenty-seven years, an abuse statistic that is at least twice as large as that for the general population. *Id.*

It is also irrelevant to the state plans whether the mother decided to complete her family before her biological clock ticked to a stop; nor do the state plans seem to consider that, to a welfare mother living a life of abject poverty in which simply surviving from one day to the next in environments plagued by violence and victimization requires a triumph of the soul, children are her single most important value, her only real source of hope for the future. *See, e.g.*, Abi Berger, *Young, Poor, and Pregnant*, THE LANCET, Nov. 13, 1993, at 1224 (suggesting that the poor adolescent girl often becomes a mother because this role "fits with her 'internal sense' of who she is, what she can do, and how she can best fit into her own community and family").

None of these considerations are generally relevant to child limitation plans. Instead, the only relevant consideration is that the state, with its complement of hard-working, middle-class taxpayers, made the collective political decision that such childbearing choices are, at best, "improvident" for those persons poor enough to need welfare assistance, and consequently refused to "reward" such choices with future subsistence support for the resulting children. *See, e.g.*, WISCONSIN DEP'T OF HEALTH AND HUMAN SERVICES, AFDC BENEFIT CAP (ABC) DEMONSTRATION PROJECT 2 (1995) (stating that denying cash benefits to additional children conceived on welfare would emphasize responsible behavior in family planning decisions, encourage employment, and focus on dedication to family).

14. *See* discussion *infra* part II.A.

15. This fundamental right to procreative choice clearly includes the right to decide whether to bear or beget children. Whether the Constitution protects broad procreative choices, such as the right to choose the method of procreation, is unclear. *See generally* John Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 420-36 (1983) (discussing the scope of reproductive freedom in light of new conceptive techniques).

16. *See infra* part II.A.

17. *See infra* note 91 and accompanying text.

Court limits its definition of a burden or penalty to government deprivation of a constitutional, common law, or statutory entitlement to the exercise of the right.[18] In contrast, a mere government *refusal to subsidize* the exercise of a fundamental right does not infringe upon the right and is subject only to the minimal *rational relations* constitutional scrutiny ordinarily accorded government economic action.[19] The Supreme Court considers a simple government decision not to pay for the individual's exercise of the fundamental right as a rights-neutral exercise of legitimate governmental discretion to distribute scarce societal resources.[20]

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18. *See* discussion of the Supreme Court's negative rights approach to constitutional rights *infra* part II.B. *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 68-92 (1993) (arguing strongly against this "deprivation of an entitlement" approach to defining rights, which Professor Sunstein calls "status quo neutrality").

19. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 471-74 (1977); Harris v. McRae, 448 U.S. 297, 315-18 (1980); Rust v. Sullivan, 500 U.S. 173 (1991); Dandridge v. Williams, 397 U.S. 471, 478-80, 486-87 (1970); Webster v. Reproductive Health Services, 492 U.S. 490, 507-11 (1989) (holding in part that the state may constitutionally prohibit abortions at publicly funded hospitals on the ground that such a prohibition is not a burden on the right to an abortion, even though it may significantly reduce the number of facilities at which women may obtain abortions).

20. Classic examples of this view are the Supreme Court's contrasting decisions in Sherbert v. Verner, 374 U.S. 398 (1963), and the Medicaid abortion funding cases, Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). In each case, the Supreme Court addressed state decisions that denied benefits to individuals because of their exercise of a constitutional right. However, the Supreme Court's resolution of these cases differs sharply. In *Sherbert*, the Supreme Court held that a state decision to exclude a Seventh Day Adventist from eligibility for unemployment compensation because she refused to work on Saturday, her religious sabbath, was unconstitutional because it burdened or penalized her First Amendment right to free exercise of religion by depriving her of unemployment compensation, which she otherwise would have been entitled to, as the cost for following her faith. 374 U.S. at 403-06. In contrast, in *Harris* and *Maher* the Supreme Court held that a statute that excluded abortion, but not childbirth, from Medicaid funding did *not* burden or penalize a Medicaid recipient for exercising her constitutional right to choose abortion, but was merely a government decision not to fund the abortion, to which she had no preexisting entitlement. *See Harris*, 448 U.S. 297 (upholding Hyde Amendment which excluded medically necessary abortions from Medicaid funding); *Maher*, 432 U.S. 398 (upholding Connecticut regulation which excluded non-medically necessary abortions from Medicaid funding). The Court in *Harris* and *Maher* distinguished *Sherbert* on the ground that in *Sherbert* the claimant had been denied eligibility for all unemployment compensation if she refused to violate her sabbath, whereas the conditions in *Harris* and *Maher* had simply refused to fund the Medicaid recipient's abortion, but had not denied her eligibility for other Medicaid funding. The latter, the Court stated, would have been a burden or penalty on the right analogous to that in *Sherbert*; the former was simply a refusal to pay for the exercise of the constitutional right. *Harris*, 448 U.S. at 317 n.19. The fact that the government's refusal to fund her exercise of the constitutional right, as a practical matter, deprived her of the ability to obtain an abortion was irrelevant. The state had no positive constitutional obligation, the Court held, to fund her exercise of her constitutional right to choose to have an abortion. *Id.* at 318. Thus, the Supreme Court's view, as reflected in these cases, sharply distinguishes state benefit policies that the Court determines "penalize" or "injure" someone for exercising a constitutional right

As applied to family cap plans, this view suggests that because these plans only refuse to support additional children, they are merely rights-neutral government decisions not to "pay for" a procreative choice to have a child. The plans do not deprive welfare recipients of any pre-existing property rights or disqualify them from eligibility for other welfare benefits.[21] Nevertheless, they are effectively government oversight of a welfare recipient's procreative choices through the simple expedient of reducing subsistence welfare payments for state-disfavored procreative choices.[22]

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from those in which the state simply decides not to "fund" or "pay for" the exercise of a right.

21. *See supra* note 20.

22. A recent district court decision that is apparently the first decided case to address the legality of family cap plans supports this conclusion. C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995). The court held that the New Jersey plan was constitutional after it concluded that the New Jersey family cap did not unduly burden or penalize welfare recipients by, for example, reducing aid to welfare recipients on the birth of a child. *Id.* at 1014-15. The court also held that the New Jersey plan complied with federal statutes and that the Department of Health and Human Services waiver necessary to circumvent contrary federal law was properly granted. *Id.* at 1005-08.

Scholars have extensively criticized the Supreme Court's formulation of the unconstitutional conditions doctrine, in particular its burden/subsidy approach to determining whether government benefit and funding conditions violate constitutional rights. *See* discussion of scholarship *infra* part III. Formulated first at the turn of the century to assess governmental conditions on the extension of benefits to business and corporate interests and later used to assess conditions on federal grants to states and local authorities, in recent years the unconstitutional conditions doctrine has most often been used to address the constitutionality of government funding and benefit conditions that affect the exercise of individual rights. *See generally* 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); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (critiquing the history of, and traditional justifications for, the unconstitutional conditions doctrine). Recent individual rights decisions have been most controversial. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980); Lyng v. International Union, 485 U.S. 360 (1988); Rust v. Sullivan, 500 U.S. 173 (1991). A subcategory of the unconstitutional conditions doctrine is the question of selective funding. The unconstitutional conditions doctrine generally concerns whether the state can condition government benefits on the surrender of a constitutional right; the selective funding issue addresses specifically whether government funding may discriminate against the exercise of a constitutional right. The absolute form of the unconstitutional conditions doctrine would forbid government to ever award a benefit on a condition that, if directly imposed, would violate a constitutional right. However, this absolute position is never defended in the scholarly literature and has never been the law. *See generally* discussion *infra* part III; Sullivan, *supra*, at 1415-1417. Adherence to the "absolute" position would invalidate most government benefit programs, which generally include a host of conditions that potentially infringe constitutional rights. *See generally* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987). For example, a government decision to fund prenatal care arguably disadvantages the procreative rights of those who choose not to bear children or who choose to adopt children, because the funding benefits only those who exercise their constitutional choice to bear a child and thus need prenatal care. Thus, the judicial and scholarly challenge is to distinguish between permissible and

This article, in the context of welfare family cap or child limitation proposals, addresses whether, once the government undertakes a subsistence welfare program, it may constitutionally exclude welfare families from available funding on the basis of their constitutionally protected procreative choices. This article argues that such rights-based exclusions from funding harm the welfare recipient solely because she has exercised her constitutional right in a manner disfavored by government. Such express rights-based government harm to an individual should presumptively violate her right to procreate, just as would government harm by a direct fine or penalty for the exercise of the right.[23]

Accordingly, this article criticizes Supreme Court doctrine that categorically immunizes from constitutional scrutiny rights-based government-imposed harm, by treating it as a government refusal to subsidize or fund a constitutional right. This Supreme Court approach is inherently unprincipled and improperly opens a back door to the use of unbridled government power to attack important constitutional rights that otherwise would be strongly protected. Ordinarily, the Court protects persons from rights-based government harm when that harm is a so-called fine, burden, or penalty on the procreative choice. In contrast, the Supreme Court, by permitting government funding which conditions benefit levels on recipients' abandonment of their constitutional rights, irrationally permits government to similarly harm those dependent upon government aid and thus jeopardizes their procreative choices.

Instead, such government harm by refusal to subsidize a constitutional right should violate the right if the refusal to subsidize is defined by rights-based, rather than rights-neutral, criteria. There is no principled reason for treating express rights-based harm by denial of funding differently than express rights-based harm by fine or penalty. In both cases the government attacks the constitutional

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impermissible rights-disadvantaging benefit conditions. That the benefit condition disadvantages a right does not necessarily mean that the condition is unconstitutional.

23. This article does not seek to resolve the general debate about the wisdom of the Supreme Court's unconstitutional conditions doctrine in toto. This article also does not address the related question of whether the Constitution provides a "positive right" to government funding of certain subsistence human needs. An example of this argument, that the Constitution may include some "positive" rights to government funding, is set forth in SUNSTEIN, *supra* note 18 (arguing that the Constitution should be interpreted to provide a constitutional right for government funding of abortions for indigent women who become pregnant as a result of rape or incest). *See also* Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985) (arguing that the Constitution should be interpreted to provide Constitutional rights to funding for some essential subsistence needs).

right by harming individuals because of their exercise of the right.[24] Accordingly, such harm by denial of aid should be equally violative of the constitutional right.[25] Because these welfare family cap proposals do not satisfy this standard, they should be held unconstitutional.[26]

This article argues that constitutional analysis of welfare benefit conditions should take into account harm imposed upon welfare recipients by rights-based denial of funding. Part I details current family cap plans. Part II examines the constitutionality of these plans under current doctrine by examining the right to decide to bear or beget children and the Supreme Court's distinction between negative and positive rights. Scholarly commentary on the unconstitutional conditions doctrine is outlined and critiqued in Part III. Part IV argues for a new harm-based analysis of government funding decisions based on the exercise of constitutional rights. Finally, Part V applies the proposed analysis to family cap proposals.

I. Current Welfare Child Limitation Plans

Family cap plans are an increasingly popular form of so-called *welfare reform*. The plans generally deny new birth benefit increases for children born or conceived while the mother is receiving Aid for Dependent Children (AFDC).[27] Arkansas,[28] Georgia,[29] New Jersey,[30] and Wisconsin[31] were the four earliest states to

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24. *See* discussion *infra* part IV.C.

25. An exception would be if government must make rights-based funding allocations because of the nature of the funding decision or if the rights-based funding decision is otherwise justified by a compelling governmental interest. *See* discussion *infra* notes 173-75 and accompanying text.

26. *See* discussion *infra* part V.

27. Such programs currently require federal waivers of current AFDC requirements by the United States Department of Health and Human Services (HHS). These states all received federal waivers before December 1, 1994. Subsequently, Arizona, Delaware, Indiana, and Nebraska have also received federal waivers for welfare reforms including family caps. *See* ADMIN. FOR CHILDREN AND FAMILIES, DEP'T OF HEALTH AND HUMAN SERVICES, WELFARE REFORM: SECTION 1115 WAIVER AUTHORITY, at 1, 3, 17, 18 (June 1, 1995).

28. *See* ARK. FAMILY ASSISTANCE MANUAL, *supra* note 13, §§ 10000, 10110 (1994).

29. *See generally* GA. CODE Ann. § 49-4-115 (1994); GEORGIA DEP'T OF HUMAN RESOURCES, GEORGIA PERSONAL ACCOUNTABILITY AND RESPONSIBILITY PROJECT, Application for Waiver, Research and Demonstration Project [hereinafter GA. WAIVER REQUEST], II-4, 5 (June 14, 1993).

30. *See, e.g.*, N.J. STAT. ANN. §§ 44:10-3.5, 3.6 (West 1992). This New Jersey plan was recently upheld by the Federal District Court for the Northern District of New Jersey. C.K. v. Shalala, 883 F. Supp. 991 (D.N.J. 1995). *See supra* note 22.

31. *See generally* STATE OF WISCONSIN, SUMMARY, WISCONSIN WELFARE REFORM (June, 1994).

adopt such welfare programs. Subsequently, several other states have passed[32] or introduced[33] legislation to do the same.

Currently, the state plans require a waiver of existing federal welfare statutes.[34] However, legislation currently proposed in the United States Congress could make family cap plans a requirement of federal law.[35] President Bill Clinton's federal welfare reform

32. Several states have adopted statutes that provide for AFDC family caps. To become effective, these provisions require federal waivers of conflicting federal law. *See* ARIZ. REV. STAT. ANN. § 46-292(C) (Supp. 1994) (denying AFDC benefits not only to additional children born to welfare recipients, but also to former recipients' children born up to five years after the family had voluntarily left welfare); 1995 Ind. S. Enrolled A. 478, in part adding Ind. Code 12-14-2.53 (approved by Governor, May 4, 1995) (Indiana would deny cash benefits to children born more than 10 months after the family qualifies for AFDC); 1995 Ill. S. 110, 89th General Assembly, in part adding 305 Ill. C. S. 5:4.2 (F) (approved by Governor, Mar. 6, 1995) (Illinois would deny AFDC recipients any increase for a child born while the family was receiving aid); 1995 Mass. Adv. Legis. Serv. 5, § 110 (approved by Governor Feb. 10, 1995) (Massachusetts would deny any incremental assistance for additional children born to AFDC recipients); 1995 Texas H. R. 1863, amending in part Texas H.R.C. § 31.3003 (approved by Governor, June 13, 1995) (Texas would deny to welfare recipients with two or more children additional cash assistance for any child whose paternity has not been established or who was born more than ten months after the recipient's date of eligibility; however, the recipient would be able to retain more earned income); *see also* 1995 Neb. Adv. Legis. Serv. 455; 1994 Miss. Adv. Legis. Serv. 22; 1994 Kan. Adv. Legis. Serv. 359; 1995 Md. Adv. Legis. Serv. 491; 1995 Va. Adv. Legis. Serv. 450.

33. Other states have introduced family cap legislation. *See, e.g.*, 1994 Colo. H. R. 1237; 1993 Del. H. R. 366; 1993 Fla. H. R. 1023, § (a)(1); 1993 La. H.R. 759; 1995 Pa. H. R. 2; 1993 S.C. H. R. 3207; 1994 Utah S. 294. California included such a proposal in a general voter ballot initiative which was defeated in the November 1992 election. *See* MARCH FONG EU, SECRETARY OF STATE OF THE STATE OF CALIFORNIA, CALIFORNIA BALLOT PAMPHLET 46-50, 72-79 (1992). This proposal would have refused to increase eligible family size "for a child who was conceived while either the father or the mother of the child was receiving aid." *Id.* at 74. *See also* Carla Rivera, *Coalition Opposes Welfare Cutback*, L.A. TIMES, Apr. 4, 1992, at B2.

34. *See generally* 42 U.S.C. § 1315 (1994).

35. *See* Personal Responsibility Act, *supra* note 3. The bill, which was passed by the House of Representatives on March 24, 1995, would convert most federal welfare entitlements into "block grants," i.e., lump sums, which the states could distribute under their own welfare program. The House bill expressly prohibits a state from using any portion of the federal grant to provide "cash benefits for a minor child born to a recipient of benefits" who "received such benefits at any time during the ten month period ending with the birth of the child." The provision would not apply to children born as the result of rape or incest. The Act would additionally deny aid to unwed mothers under eighteen years of age. The bill specifically states that its purpose is to "promote work and marriage" and to "discourage out-of-wedlock births." *Id.* § 101. The bill also requires states to take action to "reduce the incidence of out-of-wedlock pregnancies" and "reduce teenage pregnancies." *Id.* § 101 (adding § 402 (a)(1)(F), (G) to Title IV of the Social Security Act). The House legislation additionally provides an incentive to states to reduce the numbers of illegitimate births by increasing the amount of block grants to states that do so. The Senate version of the bill, which was passed by the Senate on September 19, 1995, expressly permits, but does not require states to deny aid to children born to welfare recipients and thus leaves this decision to the states. *See* The Work Opportunity Act of 1995, § 406(c), H.R.4 (Senate), 104th Cong., 1st Sess. (1995).

proposal, the proposed Work and Responsibility Act of 1994, also would have expressly authorized states to "limit welfare benefit increases when children are conceived by parents on AFDC."[36]

Of the four states that first adopted such plans, the Arkansas, Wisconsin, and New Jersey family cap requirements are currently at least partially in effect.[37] The Georgia family cap is scheduled to go into effect in 1996 and applies to persons receiving welfare for at least twenty-four months after January 1, 1994.[38] The first Wisconsin program was a five year pilot program called the Parental and Family Responsibility Demonstration Project (PFR), which applied only to a limited target population (primarily teenage parents) in certain Wisconsin counties.[39] Wisconsin has subsequently adopted a "Work Not Welfare" proposal that also includes a child limitation proposal.[40] Most recently, Wisconsin adopted a statewide AFDC Benefit Cap program, which would eliminate the additional birth increment for children born to welfare recipients on or after November 1, 1996.[41]

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36. SUMMARY, WORK & RESPONSIBILITY Act, *supra* note 2, at 35-36. The proposal would require states to permit welfare recipients to earn back the reduced benefits through increased work income.

37. The Arkansas plan went into effect July 1, 1994. *See* ARK. FAMILY ASSISTANCE MANUAL, *supra* note 13, § 10100. The Wisconsin plan was scheduled to go into effect as a pilot program in four counties on July 1, 1994. *See* WISCONSIN DEP'T OF HEALTH AND SOCIAL SERVICES, PARENTAL AND FAMILY RESPONSIBILITY DEMONSTRATION PROJECT, APPLICATION FOR FEDERAL ASSISTANCE 64-67 (Mar. 31, 1993) [hereinafter WISC. DEMONSTRATION PROJ.]. The New Jersey plan began on October 1, 1992. *See* BULLETIN, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, DIVISION OF FAMILY DEVELOPMENT, FAMILY DEVELOPMENT PROGRAM (Jan. 1993) [hereinafter N.J. FAMILY DEV. PROJ.] (eliminating the automatic entitlement to incrementally increased public assistance benefits as a result of the birth of a child in accordance with the statutory provision of P. L. 1991, c.526); PROPOSED AMENDMENTS, DIVISION OF ECONOMIC ASSISTANCE, PUBLIC ASSISTANCE MANUAL, FAMILY DEVELOPMENT PROGRAM, EXCLUSIONS FROM THE ELIGIBLE UNIT, STEPPARENTS, AFDC-N PAYMENT STANDARD EQUALIZATION, 24 N.J.R. 2147, §§ 10:81-3.8(a), (c), 14.18(a)1i4, (e)1iii (June 15, 1992) [hereinafter N.J. PROPOSED AMENDMENTS TO FAMILY DEV. PROJ.].

38. *See* GA. CODE ANN. § 49-4-115 (1994). The elimination of the benefit increment does not apply to children conceived as a result of rape or incest.

39. *See* WISC. DEMONSTRATION PROJ., *supra* note 37, at 11-14. The Wisconsin Parental And Family Responsibility Initiative Project (PFR) began July 1, 1994, as a pilot program in Juneau, Milwaukee, Oneida, and Rock Counties in Wisconsin. *Id.* at 57-67.

40. *See* WISCONSIN DEP'T OF HEALTH AND SOCIAL SERVICES, WORK NOT WELFARE DEMONSTRATION PROJECT 8, 13-14 (July 12, 1993) (amended Nov. 1993) [hereinafter WISC. WORK NOT WELFARE PROJ.]. This program went into effect January 1, 1995.

41. *See* WISCONSIN DEP'T OF HEALTH AND SOCIAL SERVICES, AFDC BENEFIT CAP (ABC) DEMONSTRATION PROJECT 10-13 (Jan. 31, 1994) [hereinafter WISC. ABC PROJ.]. A waiver for this project was awarded by HHS in June of 1994. *See* Letter from Mary Jo Bane, Assistant Secretary for Children and Families, to Gerald Whitburn, Secretary, Wisconsin Department of Health and Social Services (June 24, 1994) (on file with the *Law & Inequality Journal*). The cap was recently approved by the Wisconsin state legislature and applies to children born on or after November 1,

According to the State of Wisconsin, the PFR plan is designed to promote families by removing disincentives in the welfare system that may discourage young couples from marrying and working.[42] The Wisconsin PFR plan reduces the normal benefit increase for additional children by half when a second child is born and eliminates the increase entirely for the third child and subsequent children.[43] The plan permits working welfare recipients to "earn back" some of the lost benefits by increasing the "earned income disregards."[44] The earned income disregard provides that certain limited amounts of earned income may be disregarded in calculating welfare recipient income for purposes of determining welfare eligibility, and thus permits working recipients to earn more money yet still remain eligible for welfare. Thus, if a person whose income exceeds $6,000 per year is ineligible for welfare, the "income disregard" permits the recipient to "disregard" certain earned income in determining whether her total income exceeds $6,000.

In contrast to the limited geographical applicability of the Wisconsin PFR pilot program, the New Jersey plan is a legislative revision of the New Jersey AFDC program that applies state-wide. The New Jersey statute eliminates any increase in benefits that would otherwise be paid on the birth of an additional child, if the child is born while the family is receiving AFDC.[45] Like the Wisconsin pilot program, the New Jersey act attempts to offset the recipients' loss in income from the family cap requirement by increasing the earned income disregards for eligible AFDC families.[46] However, earned income disregards benefit only families in which members are able to find work. If the recipient cannot find work or is unable to work, e.g., because of inability to get adequate

1996. *See* 1995 Wis. Adv. Legis. Serv. 12, §§ 4, 5 (West) (enacted May 15, 1995). The cap exempts cases of rape or incest, children conceived while the family was temporarily not receiving benefits, the first child of a dependent child, and children not residing with their biological parents. The statute also authorizes additional exemptions by administrative rule.

42. WISC. DEMONSTRATION PROJ., *supra* note 37, at 1-2. In addition to expanding eligibility for welfare to include married teenage couples, the plan increases the earned income disregard for pilot couples and requires teen parents to participate in comprehensive education and employment related services. *Id.* at 20.

43. Under this program, the maximum monthly benefit payment for single parents subject to the program would be $440 for a one-child family and $479 for a two or more child family, as opposed to a previous monthly maximum benefit of $517 for two children and $617 for three children; a similar policy applies to two-parent families, but has higher maximum benefit levels. *Id.* at 19. The proposal does permit AFDC recipients to keep additional work income. *Id.*

44. *Id.* at 20-22.

45. N. J. REV. STAT. § 44:10-3.5 (1993).

46. *Id.* § 44:10-3.6 (1993).

child care, she has no earned income to offset the reduction in subsistence welfare payments.[47]

The Arkansas and Georgia welfare family cap requirements are less developed than the Wisconsin and New Jersey proposals. The Arkansas plan would exclude from eligibility for additional cash AFDC benefits, otherwise payable on the birth of an additional child, any child conceived or born while the mother is receiving AFDC benefits.[48] The plan excludes children born as a result of rape, incest, or failed contraception, although the child is included in the family unit for other allocation purposes, including Medicaid coverage, child support enforcement requirements, and resource or income eligibility.[49] The Georgia plan also excludes births due to verifiable rape or incest. The plan applies only to long-term welfare recipients, defined as any family that has received AFDC cash benefits for a total of twenty-four months after January 1, 1994.[50] Such families cannot receive an incremental increase in AFDC cash benefits because of the birth of an additional child, although the excluded child remains eligible for child support and Medicaid payments.

In each state, family cap policies are part of general packages labelled welfare reform. The particular policies are specifically designed to influence the childbearing and lifestyle choices of women who are on welfare, which are otherwise constitutionally protected.[51] For example, the Wisconsin PFR pilot program specifically states that two of its goals are to reduce the number of children born to teenage welfare mothers and to promote marriage among pregnant teenagers.[52] Similarly, the New Jersey program is expressly designed to influence the moral and value choices of welfare recipients. The New Jersey proposal's stated goal is to encourage "responsible choices" by welfare recipients and change welfare policy to be more consistent with "mainstream values."[53]

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47. Both New Jersey and Wisconsin do provide limited child care allotments. *See* NEW JERSEY FAMILY DEVELOPMENT PROGRAM (FDP) MANUAL, § 10.86-10, 1-2 [hereinafter N.J. FAMILY DEV. PROGRAM MANUAL]; 1995 Wisc. Adv. Legis. Serv. 8, § 49.193(8)(a) (providing approximately $100 per week); 1995 Wis. Adv. Legis. Serv. 8, §§ 46.98(4)(d), 49.193(8)(a) (authorizing counties to set rate at an amount no less than that charged by at least 75% of the child care providers in the county).

48. ARK. FAMILY ASSISTANCE MANUAL, *supra* note 13, §§ 10110, 10111(1). Unlike the other states, this proposal appears to exclude only children of mothers receiving AFDC and not of fathers receiving AFDC.

49. *Id.* §§ 10110, 10112, 10113, 10116.

50. GA. CODE ANN. § 49-4-115 (1994).

51. *See infra* part II.A.

52. *See* WISC. DEMONSTRATION PROJ., *supra* note 37, at 1.

53. *See* WAIVER REQUEST, STATE OF NEW JERSEY, FAMILY DEVELOPMENT PROGRAM 6-11. The rhetoric of the New Jersey plan emphasizes breaking the cycle of poverty

The proposed federal legislation adopting family caps is also based upon moral and value judgments about procreative choices. For example, the express purpose of the bill passed by the House of Representatives is to promote marriage and reduce illegitimacy. The welfare reform bill states that marriage is "the foundation of a successful society" and an "essential social institution," and that a goal of the welfare program is "promoting work and marriage and discourag[ing] out of wedlock births."[54]

These policies handicap welfare recipients by denying their children eligibility for welfare, even though the children would have been eligible if born to non-recipients. Family cap policies substitute the government's own model of appropriate behavior for that of the welfare recipient, and accordingly substitute the government's value choice concerning childbearing for that of the individual. The question that thus arises is whether it is appropriate for the government to intrude into the childbearing choices of poor women merely because they are dependent upon government aid.

II. The Constitutionality of Family Cap Plans under Current Doctrine

Family cap proposals are probably constitutional under current Supreme Court doctrine. The primary argument against constitutionality is that the plans violate welfare recipients' fundamental constitutional right to procreative choice because they condition welfare benefit levels on the recipients' childbearing choices.[55] That is, the plans expressly give proportionately more

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and encouraging recipient choice. However, the methods that it uses seem designed neither to reduce poverty nor to enhance recipient choice, but to manipulate recipient choice by penalizing recipient choices unacceptable to the program planners. *See* N.J. FAMILY DEV. PROGRAM MANUAL, *supra* note 47, § 10:86-8.1-8.10. Similarly, the Georgia program states as a goal encouraging "wise" child-bearing decisions, GA. WAIVER REQUEST, *supra* note 29, at II-1, and seeks to test whether the benefit cap enhances "parental responsibility," and whether parents who are subject to benefit caps are less likely to have children than those who are subject to the family cap. *Id.* at III-3. Likewise, the objective of the Arkansas plan is to "examine factors affecting individual choice and family self-sufficiency" including evaluating whether removing the AFDC benefit increment for additional births will reduce the number of births. *See* Letter from Mary Jo Bane, Assistant Secretary for Children and Families, to Thomas Dalton, Director of Arkansas Department of Human Services (Apr. 5, 1994) (on file with the *Law & Inequality Journal*), at p. 7.

54. *See* Personal Responsibility Act, *supra* note 3, §§ 100 (1), (2), 101.

55. *See generally* Davis, *supra* note 11 (arguing that these proposals are unconstitutionally coercive); Bomersbach, *supra* note 11 (challenging the legality of the New Jersey family cap plan under the New Jersey State Constitution and international human rights law). For discussions of the related issue of Norplant welfare bonuses, see Jeanne L. Vance, *Womb for Rent: Norplant and the Undoing of Poor Women*, 21 HASTINGS CONST. L. Q. 827 (1994) (arguing that proposals to pay welfare recipients to use Norplant unconstitutionally coerce and penalize their exercise of

future welfare benefits to parents who postpone childbearing until they leave the welfare rolls than to those who have children while receiving welfare.[56] Nevertheless, although the Supreme Court has clearly held that the decision to bear or beget children is part of a defined fundamental right to privacy protected by the Constitution,[57] under current doctrine the Supreme Court would probably hold that these plans do not violate a recipient's constitutional right because they do not prohibit, burden, or penalize that right, but rather constitute permissible government refusals to subsidize the right.[58]

A. The Constitutional Right to Decide Whether to Bear or Beget Children

The Supreme Court has clearly established that the right to decide whether to bear or beget children is part of an individual's constitutionally protected fundamental right of privacy. The Court grounded the right in the general due process protection of the freedom to make intimate decisions concerning family life, including decisions regarding contraception, abortion, and childbearing.[59] Accordingly, government intrusions upon the right are traditionally subject to strict scrutiny and are thus permissible only if narrowly

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rights to bear children and to choose their method of contraception); Linda M. Merritt, *Birth Control Incentives for Welfare Mothers*, 3 KAN. J.L. & PUB. POL'Y 171 (1993-94) (arguing that government financial incentives to welfare recipients to use Norplant coerce their procreative rights and should be subject to strict scrutiny); Laurence C. Nolan, *The Unconstitutional Conditions Doctrine and Mandating Norplant for Women on Welfare Discourse*, 3 AM. U. J. GENDER & L. 15 (1994) (arguing that the unconstitutional conditions doctrine should apply to legislation that mandates Norplant use as a condition of receiving welfare benefits).

An argument that these plans violate the Equal Protection Clause because they discriminate against different classes of welfare recipients, i.e., those who have children while receiving welfare and those whose children were born while the family was not receiving welfare, is likely precluded by *Dandridge v. Williams*, 397 U.S. 471 (1970), which held that legislative welfare benefit allocations were subject generally to the minimal judicial scrutiny accorded economic regulation. *See infra* notes 81-85 and accompanying text.

56. *See supra* notes 9-10 and accompanying text.

57. *See* discussion *infra* part II.A.

58. The decision of the first case to address the legality of these plans is consistent with this conclusion. In *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995), a New Jersey federal district court judge upheld New Jersey's child limitation cap against both constitutional and statutory challenges. *See* discussion *supra* note 22.

59. *See, e.g.*, Meyers v. Nebraska, 262 U.S. 390, 399 (1923) (defining protected liberty interest under the 14th Amendment Due Process Clause to include individual's interest in private matters such as marriage and child rearing); Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating state law which authorized the forced sterilization of "habitual criminals"); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating state law outlawing contraception); Roe v. Wade, 410 U.S. 113 (1973) (outlawing government prohibition of abortion "pre-viability").

tailored to further a compelling state interest.[60] The Supreme Court has struck down state statutes authorizing forced sterilization of criminals,[61] banning or restricting access to contraception,[62] and prohibiting abortion.[63] The Supreme Court has upheld state restrictions on the right to decide whether to bear or beget children primarily in the abortion cases based upon the state's considerable interest in protecting life. Yet even here the Supreme Court upheld only limited government restrictions on the right to an abortion.[64]

60. *See, e.g.,* Carey v. Population Services, 431 U.S. 678, 684-91 (1977) (holding that state contraceptive restrictions were not supported by compelling governmental interest and thus violated constitutional privacy right of prospective contraceptive users); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to privacy included the right of pregnant women to abortion, subject to strict scrutiny). *Cf.* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), in which a majority of the Justices of the Supreme Court, while affirming *Roe*, rejected its traditionally formulated strict scrutiny standard as applied to the right to have an abortion. Instead, the most rights-protective justices in this majority group substituted a lesser standard that permitted the state to constitutionally regulate abortion to protect the state's "important and legitimate interests" provided that the state did not unduly interfere with the right to abortion by imposing an "undue burden" or "substantial obstacle" that would impede the woman's right to an abortion. *Id.* at 2818-21. This decision might be read broadly to substitute this significantly more liberal "legitimate interests" standard for strict scrutiny analysis of rights to privacy, including not only abortion rights, but other procreative rights such as the right to bear and beget children. However, a narrower interpretation of *Casey* seems warranted by the peculiar milieu surrounding abortion rights discourse, including the strength of the state's interest in protecting human life and, in particular, the volatility of the divisive social battle concerning abortion. Accordingly, *Casey*'s formulation of the "undue burden" test might be read to strategically steer a middle course through the abortion thicket by protecting the essential right to abortion formulated in *Roe*, while leaving room for the state to, as Justice O'Connor stated, "express profound respect for the life of the unborn" provided that the state does not erect a "substantial obstacle" to the woman's exercise of the right to choose. *Id.* at 2821. Under this view of the case, the state's "pre-viability" interest, although not sufficiently compelling to support prohibition of abortion, can be seen as sufficiently strong to support moderate regulation of the right to abortion. Read in this tactical light, *Casey* is much easier to reconcile with the long line of fundamental rights cases outside of the abortion context, which have consistently applied a strong standard to analyzing burdens on the right to bear or beget children. *See, e.g., Carey*, 431 U.S. at 684-91; Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See also* Reno v. Flores, 113 S. Ct. 1439, 1447-49 (1993) (refusing to extend "family privacy" fundamental rights to include right of juvenile aliens to non-institutionalized care in the custody of those other than parents or legal guardians, but acknowledging that traditional strict scrutiny's "compelling interest" standard applied to such fundamental rights).

61. *See, e.g., Skinner*, 316 U.S. 535 (1942) (holding state statute unconstitutional that authorized forced sterilization of "habitual criminals"). *Cf.* Buck v. Bell, 274 U.S. 200 (1926) (permitting forced sterilization of mental patients).

62. *See, e.g., Eisenstadt*, 405 U.S. 438 (1972); *Carey*, 431 U.S. 678 (1977).

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

64. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (upholding, *inter alia*, 24-hour waiting period prior to abortion, while striking husband notification rule); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding state law requiring physicians to test for viability prior to performing abortion); Ohio

In circumstances other than the decision to abort, the Court has rarely recognized any state interest as sufficient to justify restricting the individual's childbearing decisions.[65] Obviously, the state's interest in protecting life would not justify governmental restrictions on an individual's decision to bear children. Government restrictions on decisions to bear children burden rather than advance the state interest in protecting life. Other lesser government interests, such as the state's interests in protecting security and deterring crime, are sometimes asserted to support sterilization or contraception restrictions.[66] However, these interests also rarely pass muster, except in the context of persons considered to have less constitutional protection, such as convicted persons,[67] prisoners,[68] or in some cases the mentally incompetent.[69]

Accordingly, a government welfare plan that simply forbids welfare mothers to have children while receiving welfare would violate welfare mothers' fundamental constitutional right to bear children. Such a plan might not be as intrusive as forced sterilization of welfare recipients and would only apply during the limited duration of a mother's status as a welfare beneficiary, yet even such a limited prohibition on the childbearing rights of a welfare mother would infringe upon her fundamental right to decide whether to bear children. Such a plan would be subjected to heightened scrutiny, under which the supporting interests that the government might assert, such as an interest in lowering welfare costs or in enforcing the government's standards of moral decency or responsibility, would not justify the plan's impairment of welfare mothers' right to bear and beget children.[70]

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v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding parental notification requirement for minors who wish to have abortions); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (striking down various regulatory abortion control requirements).

65. Childbearing restrictions are distinguishable from government restrictions on the right to rear children, where the protection of the right may be weaker. *See* Reno v. Flores, 113 S. Ct. 1439 (1993).

66. *See, e.g.*, People v. Negrete, 629 N.E.2d 687 (Ill. App. Ct. 1994) (invalidating criminal sentence where sentencing judge had extended jail term to prevent defendant from becoming pregnant).

67. *See, e.g.*, Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back*, 16 HARV. WOMEN'S L.J. 139 (1993) (addressing use of Norplant as a condition of probation).

68. *See, e.g.*, Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990) (upholding the authority of prisons to refuse an inmate permission to artificially inseminate his wife).

69. *See, e.g.*, Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806.

70. Similar state interests failed to justify even lesser restrictions on procreative rights, such as the right to purchase or sell contraceptives. For example, in *Carey v. Population Services*, the Court refused to recognize arguments that state interests in

Moreover, even as to funding decisions, the government probably could not constitutionally eliminate welfare recipients' right to all benefits or even reduce recipients' prior entitlement on the birth of an additional child. Supreme Court doctrine provides that the government may not burden or penalize the exercise of a fundamental right, even if the government does not prohibit the exercise of the right altogether. For example, the state may not impose improper regulatory requirements upon the right,[71] or, as applied to funding decisions, completely deny persons eligibility for government entitlements because of the exercise of the right.[72] Under this

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health, potential life, or deterring illicit sexual activity by minors justified burdens on the right of the public, including minors, to purchase contraceptives, which at best only weakly advanced these interests. 431 U.S. at 686-90. *Accord* Eisenstadt v. Baird, 405 U.S. 438 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1971) (holding that given the individual's strong interest in marriage and procreation, the state's interest in deterring crime did not justify a sterilization statute that authorized sterilization of habitual larceners, but not embezzlers, particularly where there was no scientific basis to conclude that larceners were more likely to have criminal children than embezzlers). These cases establish the principle that the mere assertion of a government interest in impairing the right to bear or beget children does not justify government regulation. Rather, the interest must be compelling and strongly advanced by the particular provision at issue. Obviously, governmental interests in lowering welfare costs or, worse yet, simply deterring childbearing by poor women, would not justify outright government prohibition of childbearing by welfare recipients. Neither economic, cost-saving interests nor hostility to the right itself justify infringing upon constitutional procreative rights. An argument might be made that some of these statutes that apply to teenage welfare mothers may be justified by a governmental purpose to deter pregnancy by teens who may have lesser procreative rights than adults. However, the Constitution also protects the right of teens to make procreative decisions. *See* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) (affirming line of cases recognizing minors' constitutionally protected abortion rights, although permitting limited parental notification or consent requirements, with judicial bypass provisions); Hodgson v. Hodgson, 497 U.S. 417 (1990) (striking down two-parent abortion notification requirement).

71. *See, e.g., Carey*, 431 U.S. 678 (1977) (overturning a state statute which permitted only licensed pharmacists to sell contraceptives). The Supreme Court argued that the requirement limited public access to contraception and thus imposed an unconstitutional burden on the right to use contraceptives, even though the statute did not prohibit use of contraceptives. *Id.* at 689. Similarly, in *Casey*, the Supreme Court acknowledged that undue burdens, short of outright prohibition of the right to bear or beget children, are constitutionally problematic. 112 S.Ct. at 2819.

72. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding one-year residency requirement for welfare eligibility to be unconstitutional burden on the right to travel); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that state's denial of unemployment compensation to Seventh Day Adventist who refused to work on Saturday, her sabbath, violated her First Amendment free exercise rights). The Court in these cases concluded that the denial of government benefits constituted an unconstitutional burden or penalty on the right. However, in subsequent cases such as *Maher v. Roe*, the Court limited these earlier decisions to apply to deprivation of recipient's entitlement benefits. 432 U.S. at 474 n.8. In contrast, the Court held that the denial of benefits to which the recipient was not otherwise entitled, i.e., a so-called refusal to subsidize, was not an unconstitutional burden or penalty. *See* discussion *infra* part II.B.2.

view, depriving welfare recipients of eligibility for all support or reducing benefit payments upon the birth of a child would burden the exercise of the right, and thus would violate the right.[73]

B. Negative versus Positive Procreative Rights

1. The Supreme Court's Concept of Negative Rights

Under traditional fundamental rights analysis, the government could not constitutionally forbid people, whether welfare recipients or not, from having children or otherwise penalize them for having additional children by eliminating or reducing their welfare entitlement. However, current Supreme Court doctrine suggests that the government may indirectly influence or encourage the welfare recipient to choose not to have additional children by refusing to fund the additional child.

The Supreme Court considers the Bill of Rights to be primarily a charter of *negative rights*, that is, rights *against* government action, rather than *positive rights,* or rights *to* particular government benefits.[74] That is, the Constitution *prohibits* government action that violates rights such as free speech or procreative choice, but does not *require* the government to affirmatively protect, fund, or provide the means to exercise the right. Under this view, although the government constitutionally cannot prohibit, burden, or penalize an individual's constitutional rights, the government is not required to affirmatively bankroll the rights. Thus, as the Supreme Court has stated, although an individual may have a fundamental right to travel, the government does not have to purchase the bus ticket.[75] Of course, the negative rights view does not prohibit the

73. The "undue burden" analysis of *Casey*, 112 S. Ct. 2791 (1992), should not alter this analysis since even if *Casey* applies outside the abortion context, its analysis still recognizes that government burdens upon a fundamental constitutional right violate the right. *See* discussion *supra* note 60.

74. This negative rights view of the Constitution has been subject to considerable criticism with many persons arguing for a more humane interpretation of the Constitution to provide rights to certain minimal, basic human needs such as food, shelter and education. *See, e.g.*, Frank I. Michelman, *Welfare Rights in a Constitutional Democracy* 1979 WASH. U. L.Q. 659 (1979); Dorothy Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587 (1993) (arguing for positive constitutional right to "information necessary to self-determination"). *But see* David P. Currie, *Positive and Negative Rights and the Constitution*, 53 U. CHI. L. REV. 864 (1986) (arguing against the interpretation of the Constitution to include negative rights). My article does not argue that the Constitution includes positive as well as negative rights, but rather argues that regardless of whether the government is constitutionally required to fund a particular level of benefits, the Constitution should still police to some extent the particular distribution of that level of benefits and, more specifically, the distribution of that level of benefits in a manner that harms individuals because of the exercise of a constitutionally-protected right.

75. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

government from funding the constitutional rights; rather, the government has the discretion to fund or not to fund.

The government can therefore use its funding discretion to influence individuals' exercise of their constitutional rights by selectively funding some constitutionally protected choices while refusing to fund others. Thus, the government may give the individual a financial incentive to exercise the right in a government-favored way. Under the Supreme Court's negative rights interpretation of the Constitution, such selective funding is a permissible decision to subsidize favored activity and refuse to subsidize disfavored activity, rather than an impermissible burden on, prohibition of, or penalty on the individual's exercise of constitutional rights.[76] For example, in terms of procreative choice, the government generally may neither prevent an individual from procreating nor require an individual to procreate, but the government may constitutionally influence the individual's procreative choice by selectively funding government-favored procreative choices.[77] As applied to family cap plans, since the government has no constitutional obligation to support any child, this view permits the government to deter childbearing by welfare recipients by refusing to fund their additional children, even though the government funds children born to non-recipients.

The apogee of the negative rights view of the Constitution, at least in the context of governmental decisions to selectively fund welfare recipients' exercise of procreative rights, is a trilogy of cases—*Dandridge v. Williams*,[78] *Maher v. Roe*,[79] and *Harris v. McRae*[80]—in which the Court applied this negative rights view to uphold government allocations of welfare benefits in a way that clearly discouraged welfare recipients' free exercise of rights to procreative choice. The Court held that the benefit allocations were constitutional in that they were mere refusals to subsidize the exercise of a constitutional right.

In *Dandridge v. Williams*, the Supreme Court upheld a Maryland welfare provision that capped welfare benefits at a maximum lump sum of $250 per month, regardless of family size.[81] Families

76. Although this theory has been widely criticized, the Supreme Court has continued to affirm it, as recently as the 1991-1992 term. *See* Rust v. Sullivan, 500 U.S. 173 (1991); Planned Parenthood v. Casey, 112 S. Ct. 2791, 2820 (1992).

77. This appears to be an argument that the government's moral interest in enforcing ethical values concerning the means used to create life might be a compelling interest that would justify restricting methods of procreation.

78. 397 U.S. 471 (1970).

79. 432 U.S. 464 (1977).

80. 448 U.S. 297 (1980).

81. 397 U.S. 471, 486 (1970).

with ten children thus received the same level of benefits as families with only three children. Petitioners primarily argued that the plan violated the equal protection rights of, first, younger children in a family who received proportionately lesser benefits than older children in the same family, and second, children in larger families who received lower per capita benefits than children in smaller families.[82]

The Court, relying upon the negative rights view of the Constitution, concluded that because the government was not obligated to fund any level of welfare, its decision to allocate proportionately larger levels of benefits to smaller families than to larger families was simple economic regulation subject to minimal rational basis scrutiny and not the deprivation of any constitutional rights, whether to receive minimal or equal levels of subsistence or to bear additional children.[83]

Although *Dandridge* was argued and decided primarily as an equal protection case, in *Maher v. Roe* and *Harris v. McRae* the Supreme Court extended the negative rights view of the Constitution to sanction government allocations of benefits that clearly disadvantaged the exercise of a fundamental right, i.e., the woman's fundamental right to abortion. In both cases the Court held that

82. The *Dandridge* Court concluded that the poor are not a suspect class. 397 U.S. at 485. Accordingly, the only limitation on the government's allocation of welfare benefits was the minimal rational-basis scrutiny generally accorded economic regulation. *Id.* Applying this standard, the Court upheld the Maryland welfare benefits cap as reasonably related to the state's legitimate interest in encouraging employment, on the view that members of larger families whose economic need was not fully satisfied by the $250 per month welfare benefit would be encouraged to work. *Id.* at 486. (The Maryland policy permitted these families to retain excess earnings. *Id.* at 474-75 and n.4). Neither the lack of employable members in many families nor the obvious discrimination between larger families and smaller families, whose needs would be more adequately met and thus who would not be subject to the incentive, troubled the Court, which concluded that the State could legitimately decide to attack part of the problem without "attacking it all." *Id.* at 486-87.

83. The Maryland statute in *Dandridge* clearly implicated welfare recipients' procreative rights by establishing a disincentive for the recipient to have additional children. By refusing to fund the actual need of larger families, the benefit cap as a practical matter discouraged larger family sizes. However, the *Dandridge* Court analyzed the Maryland welfare benefits cap as an equal protection problem and did not explicitly address the argument that the welfare cap improperly burdened the welfare recipients' exercise of procreative rights by discouraging them from having larger families or by encouraging them to have smaller families. 397 U.S. at 483-87. The Maryland cap was not specifically justified as a limitation on the size of welfare families. Nevertheless, even if this argument had been made it likely would not have succeeded. The Court's view, articulated in *Dandridge*, was clearly that the government had no constitutional obligation to fund the welfare recipients' additional children and thus was free to refuse funding given merely a plausible reason for doing so. It is not likely that the Court's view would have changed even if the Court had considered the argument that the consequence of the government's funding decision was to discourage welfare recipients' free exercise of procreative rights.

Congress could, without violating the Constitution, selectively fund childbirth expenses for Medicaid recipients without also funding abortions. The Court argued that since under *Dandridge* the government had the "greater" power, namely to deny any Medicaid benefits to poor women, the government also had the "lesser" power to distribute those benefits in a manner that disadvantaged the woman's exercise of a right to abortion.

The Court ignored the fact that such a policy disfavored a woman's constitutionally protected right to have an abortion rather than carry the child to term.[84] The Court held that selectively excluding abortion from Medicaid coverage while funding childbirth expenses was not unconstitutional direct government regulation or burdening of a woman's right to abortion. It was merely a government refusal to subsidize abortions which, like the welfare cap in *Dandridge*, was constitutionally permissible. The fact that the government funded one procreative choice, childbirth, while refusing to fund the other, abortion, was immaterial. The State was free to use its benefit disbursing authority as a "carrot" to "encourage" activities that it found "in the public interest" while discouraging other activities, even constitutionally protected ones.[85]

2. Impermissible Burdens and Permissible Refusals to Subsidize

The Court's distinction between benefit allocations that are impermissible burdens or penalties and those that are permissible refusals to subsidize is fairly clear. The Supreme Court considers a government benefits allocation to be a burden or penalty on the exercise of a constitutional right if the benefit allocation permits individuals to exercise the constitutional right only by forfeiting either another constitutional right, a property right,[86] or a statutory entitlement to something other than direct funding of the constitutional right at stake. If, in contrast, the government simply "refuses" to extend funding to the particular constitutional right at stake and

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

85. *Harris*, 448 U.S. at 315.

86. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (holding that a state statute that imposed special use tax on large-scale consumption of newsprint and ink was an unconstitutional discriminatory tax on newspapers that burdened their First Amendment rights); Arkansas Writers' Guild v. Ragland, 481 U.S. 221 (1989) (holding that a state statute that discriminatorily exempted various publications, such as newspapers and religious journals and trade journals, but not general interest magazines, from sales tax unconstitutionally burdened the magazines' First Amendment rights).

does not otherwise require a forfeiture[87] by the individual as a cost of exercising the right, the allocation is not a penalty or a burden on the right, but is merely a permissible refusal to subsidize.[88] The

87. The Court excepts government benefits decisions that condition complete eligibility for benefits on the surrender of a constitutional right; thus, the Court apparently concedes that government cannot entirely "cut-off" benefits to welfare recipients who choose, for example, to have abortions. This, the Court would apparently argue, would "penalize" the exercise of a fundamental right by causing recipients to completely lose eligibility for benefits because of their exercise of a constitutional right. *See, e.g.,* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974) (striking down a one-year residency requirement for indigents to receive service in a county hospital). The *Maricopa* Court held that the denial of *all* hospital care to new residents "penalized" their constitutional right to travel). *See also* Sherbert v. Verner, 374 U.S. 398 (1963); Shapiro v. Thompson, 394 U.S. 618 (1969).

88. *See, e.g.*, Lyng v. International Union, 485 U.S. 360 (1988); Regan v. Taxation with Representation, 461 U.S. 540 (1983); Rust v. Sullivan, 500 U.S. 173 (1991). Contrast these cases, in which the Court upheld government selective funding of speech as permissible refusals to subsidize, with Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel), and Sherbert v. Verner, 374 U.S. 398 (1963) (right to free exercise of religion), where the Court struck down government withholding of all benefit allocations from persons who exercised the constitutional right as a burden on the right. In the Court's view, the latter cases involved burdens or penalties because the individual was required to sacrifice an entitlement—eligibility for all workmen's compensation benefits, *Sherbert*, 374 U.S. at 403-06, or welfare benefits, *Shapiro*, 394 U.S. at 642—to exercise the right. In contrast, cases such as *Lyng*, *Regan*, and *Rust* were permissible refusals to subsidize the right because, unlike *Sherbert* and *Shapiro*, the individual who exercised the right only lost direct government funding of the right, not government benefits available for other items. Thus, the only harm to the individuals, in the Supreme Court's view, was having to pay for their own constitutional right, a responsibility that, the Court concluded, was the individuals' anyway. Thus, in *Lyng*, the Supreme Court held that the legislature's refusal to give food stamps to striking workers was merely a failure to subsidize their decision to strike; in *Regan*, the denial of a tax exemption to organizations engaged in lobbying was a failure to subsidize lobbying; and in *Rust*, the denial of funding to family planning organizations which distributed abortion information was a failure to subsidize the provision of information about abortion.

Although the Court's standard is fairly clear, its application of that standard to particular cases has been less than consistent. *Compare* FCC v. League of Women Voters of California, 468 U.S. 364 (1984) (striking down as a prohibition of constitutionally protected speech a federal statute which forbade publicly funded television stations from editorializing as a condition of receiving federal funds) *with* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding as a permissible refusal to subsidize constitutionally protected speech a federal law which forbade federally-funded family planning clinics from dispensing information about abortion) *and* Regan v. Taxation with Representation, 461 U.S. 540 (1983) (upholding as a permissible refusal to subsidize constitutionally protected speech a federal law that forbade federally tax-exempt nonprofit corporations from lobbying).

In *League of Women Voters* the Court distinguished the *League of Women Voters* public broadcasting statute from the policy at issue in *Regan* because the *League of Women Voters* statute did not expressly permit the federally-funded entities to create alternative "alter egos" that could speak in other venues. *League of Women Voters*, 468 U.S. at 400. In contrast, the *Rust* and *Regan* policies both expressly permitted the recipients of the federal funds to speak in non-federally funded outlets, and thus merely refused to subsidize the speech rather than prohibited it. The court thus concluded in *League of Women Voters* that the statute burdened speech whereas the *Rust* and *Regan* policies simply refused to subsidize it. However, this

Supreme Court's position, pursuant to its negative rights view of the Constitution, is that the Constitution places few—if any—limits on government's ability to refuse to subsidize the exercise of a constitutional right, even if government expressly excludes the constitutional right from otherwise available government funding.[89] Such refusals to subsidize may in fact substantially harm a recipient because of her exercise of a constitutional right, but the Court concludes that such programs are permissible as long as the funding allocation does not penalize or burden the right.

Under this analysis welfare plans that refuse to fund children born to welfare recipients while funding children born to non-welfare recipients are constitutionally valid legislative allocations of government welfare benefits among different classes of welfare recipients. They are subject only to the minimal rational relations

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distinction seems non-existent. Because the *League of Women Voters* statute did not expressly permit the station owners and employees to create new corporations which could editorialize in some other venue, it seems illogical to interpret the statute to *prohibit* them from doing so. Obviously, owners and employees of federally funded broadcasting stations, like any one else, can editorialize in other outlets such as newspapers or other television stations, just as the owners and employees of the federally funded family planning clinics and nonprofit organizations in *Rust* and *Regan* could speak about abortion or lobby elsewhere. If the availability of alternative venues for speech saves the *Rust* and *Regan* speech restrictions, it is unclear why the equivalent availability of alternative editorializing venues for editorializing in *League of Women Voters* did not save the editorializing restrictions. Of course, the alternative venues to public broadcast stations may have been less adequate substitutes than the alternative venues to family planning clinics or nonprofit organizations. For example, public broadcasters were unlikely to find other broadcast outlets to editorialize in, given the relative scarcity of available radio and television stations. However, the alternative speech venues in *Rust* and *Regan* were also arguably lesser substitutes for the established federally supported *Rust* family planning clinics and *Regan* nonprofit organizations, since these existing structures provided both established credibility and access to a preexisting audience (clinic clients in *Rust*, and organization supporters in *Regan*).

89. The Court's recent decision in *Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995), may signal a slight retreat from this position. In that case, the Court held that the University of Virginia could not constitutionally exclude a student organization Christian newspaper from funding which the university extended to other student organization publications. The Court held that the university was operating a forum for the promotion of diverse viewpoints, and thus could not discriminate in that forum on the basis of content. This decision, on its face, seems inconsistent with *Rust v. Sullivan*, where the Court held that the government could exclude speech about abortion from a government funded family planning clinic. The Court in *Rosenberger* attempted to distinguish *Rust* on the ground that in *Rust* the government was subsidizing speech to promote its own point of view and therefore could make content based restrictions, *Rosenberger*, 115 S.Ct. at 2518-19, whereas in *Rosenberger* the university was subsidizing diverse viewpoints and thus could not make content based restrictions. *Id.* at 2521, 2524-25. However, it is unclear why this distinction would matter. In both cases, the government's funding criteria discriminated against particular speech. It is unclear why the *Rosenberger* content discrimination was any worse than the *Rust* content discrimination (except perhaps because of free exercise of religion considerations).

scrutiny accorded economic regulation[90] and not to the strict scrutiny otherwise applicable to government intrusions on childbearing choices. The fact that such plans would obviously influence, or even be designed to influence, the childbearing choices of welfare recipients would be immaterial on the ground that the plans merely refused to subsidize rather than penalized the woman's childbearing choices.[91]

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90. *See* discussion of *Dandridge supra* notes 81-85 and accompanying text.

91. Such plans would likely survive rational basis scrutiny since the government could legitimately argue that it may, in allocating welfare, constitutionally distinguish between families with children born before the children became welfare recipients and families with children born after the families became welfare recipients, on the grounds that such a classification is reasonably related to the government's interest in encouraging welfare recipients to have fewer children, and thus advances the government's moral choice to encourage better family planning by welfare recipients.

There is an additional argument that these welfare benefit plans reflect racial and gender discrimination since the plans are more likely to apply to women and persons of color, who are more likely to be AFDC recipients or long-term welfare recipients, and thus more likely to have children born during the period of welfare dependency. In contrast, whites, and in particular white males, can obtain jobs more easily and thus are less likely to be dependent upon welfare, in part because of employment discrimination against women, blacks, and other persons of color. Also, once dependent, whites are more likely to quickly leave the welfare rolls than are persons of color. *See* Richard Polangin, *Employment and Demographic Characteristics of AFDC and Food Stamp Recipients: Executive Summary of a Three-Year Longitudinal Study*, CLEARINGHOUSE REV., Apr. 1986, at 140-48. This three-year study of Florida AFDC and Food Stamp recipients found that "long-term" AFDC and Food Stamp recipients (those continually receiving assistance for three years or longer) were more likely to be black and female, as compared to both "cyclical" recipients (those who periodically went on and off public assistance), and short-term recipients. Similarly, the cyclical public assistance recipients were more likely to be black and female than the one-shot, short-term recipients, who were more likely to be white and male. *Id.* at 1404. Also, long-term public assistance recipients were more likely to have spottier employment histories than either the cyclical or the short-term recipients. *Id.*

Also, historically, the family cap proposals cover only AFDC recipients and not other public assistance programs such as Food Stamps. However, AFDC recipients are more likely to be people of color than are recipients of other public assistance programs such as Food Stamps and Supplemental Social Security (SSI). *See* REPORT FROM CARMEN D. SOLOMON, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS (July 13, 1993) (summarizing Social Security Administration data which indicates that as of 1991, over 60% of AFDC recipients were non-white as compared to SSI and Food Stamp recipients, of which almost 50% were white (49% for SSI and 46% for Food Stamps in 1991)). This disparity between AFDC recipients and other public aid recipients is also historically true. *Id.* (examining data from 1961-1991 which indicates that, historically, AFDC recipients have consisted of proportionately more minorities than recipients of Food Stamps and SSI).

However, this is a separate analytical issue—whether family cap plans constitute constitutionally invalid race or gender discrimination. Under current doctrine these plans would probably be analyzed as facially neutral provisions that happen to disproportionately affect racial minorities, and thus would be unconstitutional only if one could prove discriminatory legislative intent to disadvantage racial minorities. *See* Washington v. Davis, 426 U.S. 229 (1976). *See generally* David R. Baron, *The Racially Disparate Impact of Restrictions on the Public Funding of Abortion: An*

3. A Harm-Based Critique of the Supreme Court's Approach

The very fact that under current doctrine child limitation proposals appear to be constitutional as refusals to subsidize does not end the inquiry but rather begins it. The facile acceptance of proposals that are specifically designed to sway a dependent welfare recipient's constitutionally-protected choice to have children, and that impose substantial losses on welfare recipients for making disfavored choices while leaving intact the procreative choices of others, is troubling and raises serious questions concerning the Supreme Court's view of the appropriate relationship of the welfare state to poor women and other disfavored groups within the society. Under its constitutional view, the Supreme Court subjects direct government regulation of constitutionally protected rights to strict judicial scrutiny but fails to scrutinize government use of benefit allocations for regulatory purposes that significantly harm or injure persons who make disfavored choices.[92] Instead, the Supreme

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Analysis of Current Equal Protection Doctrine, 13 B.C. THIRD WORLD L.J. 1 (1992) (arguing for a race-based equal protection "anti-subjugation" analysis of abortion funding restrictions).

More broadly, however, some argue that the genesis of these "behavioral modification" plans are racial and gender biases which give rise to expectations about the propriety of the exercise of control over poor persons who are often presumed to be disproportionately minority. *See, e.g.*, Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class and Gender*, 9 BERKELEY WOMEN'S L.J. 9 (1994); Williams, *supra* note 11, at 737-41; White, *supra* note 12; Roberts, *supra* note 74; Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205 (1992); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992).

To a large extent, the concept that poor persons' procreative rights are "grist" for regulation by persons who are not poor seems hauntingly similar to ideas prevalent during slavery when the procreative rights of slaves were legally subject entirely to the will of slaveowners who used slave women as breeders for economic benefit. *See, e.g.*, Karen A. Getman, *Sexual Control in the Slaveholding South: The Implementation and Maintenance of a Racial Caste System*, 7 HARV. WOMEN'S L.J. 115 (1984); Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. J. 187 (1987). Thus, these proposals can be viewed as representing a view that the economic power of the state over those dependent upon public assistance includes the concomitant right to control procreative rights. Perhaps not so coincidentally, many of the Court's decisions upholding benefit conditions that affected procreative rights involved the procreative rights of welfare recipients. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1976).

92. The exceptions to this rule are benefit allocations that employ suspect classifications or can be classified as penalties. The Court's recent decision in *Rosenberger* might be seen in this light. *See supra* note 89. In that case, the Court held that the University of Virginia could not constitutionally exclude a student organization's

Court, based upon its doctrine of negative rights,[93] sanctions virtually any minimally rational governmental distribution of benefits as legitimate. It does so under the supposition that since the government was not constitutionally required to provide the benefit, the Constitution does not limit the government's power to distribute or allocate the benefit.

Thus, in the context of welfare benefits, because any provision of welfare benefits by the government is more than the government is obligated to grant, the government essentially has carte blanche to decide how to allocate such benefits.[94] Whether the motivation for the particular benefit allocation is eleemosynary, despotic, beneficent, compassionate, punitive, or oppressive is immaterial. Rather, under the Court's analysis the Constitution gives the legislature plenary authority to allocate welfare benefits to the poor. The Court creates no floor beneath the legislature's decision, not even when the government intentionally uses the benefits to influence the recipients' exercise of constitutional rights.[95]

This view fails to recognize the harm inflicted by government decisions to exclude constitutional rights from funding. Family cap plans eliminate assistance for the increased need that results from the birth of an additional child and consign poor families to an even more desperate existence than they otherwise would have.[96] This constitutional structure, with its privileging of regulatory government benefit allocations, unleashes the power of the legislature to oppressively control the constitutional rights of the poor who depend upon government largesse for survival. In contrast, the constitutional rights of those fortunate enough not to depend upon government benefits for their subsistence are protected because, to

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Christian newspaper from funding that the university extended to other student organization publications. 115 S. Ct. at 2524-25. There, the religious-based funding restriction might be viewed as warranting higher scrutiny on equal protection grounds.

93. *See* discussion *supra* part II.B.1.

94. This is generally true, except in the case of benefit allocations that employ suspect classifications or can be classified as penalties. *See* discussion *supra* note 92.

95. Cass Sunstein argues that there is no distinction between regulation and benefits for legislative purposes because all regulation has a redistributional economic effect by imposing costs on the regulated party. *See generally* Sunstein, *supra* note 22. By corollary, one could also argue that all benefit decisions have a regulatory effect in that they encourage or discourage individuals to modify their behavior to obtain a benefit. However, even if all regulation is redistributional and all benefit allocations are in effect regulatory, legislative decisions differ as to their regulatory or benefits allocating purposes. Thus, the legislature's primary intent with respect to certain benefits decisions may be regulatory and with respect to other regulatory decisions may be primarily allocative, even though the effect of the decision in both cases may be characterized as either regulatory or benefits-allocative.

96. *See* discussion *infra* part IV.B.

inflict harm upon them, the government cannot merely refuse to give to them but instead must take away something that they have. This confiscation constitutes an unconstitutional burden or penalty on the constitutional rights. Consequently, the rights of the "haves" are protected because the government lacks constitutional weapons to affect their rights. In contrast, the rights of the "have-nots" are jeopardized because the government constitutionally retains weapons to affect their rights, namely, the deprivation of subsistence government aid.

Government use of benefits to attack constitutional rights is also more likely to pass legislatively when it affects only a small and unpopular segment of the population, such as the poor or other disfavored classes.[97] For example, child limitation proposals would probably never pass if applied to the general public. Imagine the uproar if the government were to condition dependent-child tax exemptions on passing a means test to prove that taxpayers were able to adequately support their children, or a parenting test to prove that they were capable parents, were lawfully wed, or could provide a stable two-parent home. The public furor would almost certainly defeat any such proposal. In contrast, child limitation proposals are actually popular when applied to the poor who have considerably less legislative clout.[98] Additionally, Lucy Williams suggests the motivation behind these child limitation proposals is grounded in race, sex, and class bias, which lead the majority society to view the poor as "others" who are less entitled to the equal benefit of societal rights.[99]

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97. Joel F. Handler, *The Transformation of AFDC, The Family Support Act in Context*, 26 REV. L. & SOC. CHANGE 457 (1987).

98. *See generally* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993) (arguing that the poor are generally disadvantaged in the legislative process).

99. *See* Williams, *supra* note 11 (arguing that welfare benefits plans are legislatively possible only because they prey upon racist, classist, and sexist ideologies of the society which classify poor persons of color as the "other" and thus facilitate adverse political action concerning them).

These family cap proposals may also be popular because they are easy tax saving devices since states can cut back on humanitarian aid to the poor and blame the poor's irresponsible behavior (having children while receiving welfare assistance) for these decisions. Thus legislatures can reduce welfare *and* claim sympathy for the deserving poor. An additional aspect of these particular AFDC plans is that they often do not require federal legislation to implement them but rather mere regulatory or state legislative approval. For example, federal approval is obtained through a Social Security Act § 1115 waiver process which permits Department of Health and Human Services (HHS) to approve a variance for federal AFDC requirements for state demonstration projects. *See* 42 U.S.C. § 1315 (1994); Beno v. Shalala, 30 F.3d 1057 (9th Cir. 1994) (reversing HHS grant of § 1115 waiver of certain AFDC benefit conditions in California "workfare" welfare reform program). Additionally,

A proper view of the Constitution should see this type of government action as at least problematic and thus subject to heightened constitutional scrutiny. In particular, decisions of legislative majorities to use benefit-allocating authority to prey upon the poor—to use poverty itself as leverage to affect constitutionally protected behavior and value choices—should not be an automatically legitimate use of government power.

Heightened scrutiny would not mean that the government could not seek to influence individuals, including poor people, to make beneficial reproductive choices that would help them to become more economically self-sufficient or that would generally benefit the community.[100] Rather, heightened scrutiny would recognize that the *means* the government uses to accomplish these goals may be problematic, even if the goal itself is not. While some means of encouraging socially productive behavior may be appropriate, e.g., public information campaigns or educational programs, harmful and oppressive means are not.

Additionally, heightened scrutiny would not constitutionally obligate the government to provide minimum levels of benefits. Rather, once the government decides to award benefits, the Constitution should place fairness limits on the government's distribution of those benefits and restrain government from using benefits to harm persons because of their exercise of their constitutional rights. Government denials of funding of an individual's constitutional right expressly because the individual exercised it in a government-disfavored way, and particularly government use of funding decisions to influence constitutionally-protected value and lifestyle choices, are not merely minimally-rational legislative distributions of public resources. Rather, government use of benefits as a club to harm the individual because of her exercise of constitutional rights is as much a burden or penalty on the exercise of the constitutional right as a direct prohibition or fine would be. In both cases, government harms the individual because of her exercise of a constitutional right. Although the government goal of reducing the number of children born into poverty may be laudable,[101] the

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even though state legislative approval is required by statute, some states, such as Arkansas, have acquired waivers with only state executive approval.

100. *See, e.g.*, Felicia R. Lee, *On a Harlem Block, Hope Is Swallowed by Decay*, N.Y. TIMES, Sept. 8, 1994, at A1 (observing that poor childbearing choices may cause impoverished people to remain mired in poverty, even though they think that such childbearing choices are a way out).

101. The government's goal could also be viewed as genocidal, depending upon one's view. For example, some argue that these plans are attempts by legislatures to reduce the population of minority poor who disproportionately have more children and disproportionately receive welfare. *See* Vobejda, *supra* note 11. When combined

means used to achieve that goal must not impair the right of benefit recipients to autonomous constitutionally-protected value choices. Otherwise, the government violates basic, underlying constitutional limits on government power, which are the essence of constitutional protection for fundamental rights.[102]

III. Scholarly Critiques of the Supreme Court's Unconstitutional Conditions Doctrine

During the last two decades, scholars have substantially criticized the Supreme Court's approach to analyzing the constitutionality of government funding conditions that adversely affect constitutional rights. The Supreme Court's analysis occurs mostly under the rubric of the unconstitutional conditions doctrine or the selective funding problem.[103] The unconstitutional conditions question is whether the government may require an individual to relinquish a constitutional right as a "condition" for receipt of government benefits. The selective funding question is whether the government may fund state-favored exercises of a right but deny funding to state-disfavored exercises of the right.[104]

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with the disproportionate number of minority males who are incarcerated and the denial of procreative rights to incarcerated persons, *see, e.g.*, Goodwin v. Turner, 908 F.2d 1395 (8th Cir. 1990) (holding that prisons constitutionally could refuse an inmate permission to artificially inseminate his wife), these plans, if successful, may significantly reduce the population of the poor who are disproportionately minority. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1926) (permitting forced sterilization of mental patients; the sterilization laws of many states were part of the broader eugenics movement of the early 20th century).

102. *See infra* part V.A.

103. *See, e.g.*, Sullivan, *supra* note 22; Rosenthal, *supra* note 22.

104. Family cap plans are arguably different in form than both the classic unconstitutional conditions case in which the government denies an individual who exercises a right an "otherwise available" government benefit and, alternatively, the related "selective funding" problem in which the government funds persons or activities differently on the basis of the exercise of a constitutional right. A classic example of the former is a plan that conditions a foreign corporation license on the company's agreement not to seek federal court jurisdiction. *See generally* Sullivan, *supra* note 22. Here, the government grants the benefit, e.g., the license, only upon the condition that the company give up its constitutional right to access federal courts. An example of "selective funding" would be a government decision to deny NEA grants to those whose art depicts prurient, but not obscene, material. Unlike unconstitutional conditions, which broadly covers any government benefit, the selective funding problem specifically addresses the government decision to fund one exercise of the right without funding alternative exercises of the right. *See generally* Rosenthal, *supra* note 22. With the family cap plans the government technically neither "conditions" welfare on a recipient's decision to have an additional child, nor does it "selectively fund" her decision to have a child over a decision not to have a child. Instead, the government merely refuses to extend additional benefits if the child is born. Thus, a welfare recipient who has a child "over the limit," say two children, does not *lose* welfare on the birth of the additional child. She simply does not get additional welfare. As the welfare recipient would also not get any additional

Scholars almost unanimously reject the Supreme Court's approach to unconstitutional conditions and, in particular, the Court's burden/subsidy distinction.[105] However, these scholars diverge widely on alternative approaches for determining when, if ever, the government may use its benefits allocating authority to affect an individual's exercise of otherwise constitutionally-protected rights. Some argue that rights-affecting benefit conditions are invalid if they improperly "coerce" or "threaten" the recipient's exercise of a constitutional right. Thus, the key is to determine which benefit conditions "coerce" or "threaten" the exercise of a constitutional right and which do not.[106] Other authors retain the emphasis on penalties but seek to identify a better baseline than the Court's entitlement baseline from which to ascertain whether the government had "penalized" the exercise of a constitutional right.[107] Still

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welfare if she decided not to have a child, one could argue that the funding decision is independent of the welfare mother's procreative choices. This is one of the arguments, for example, of the federal district court in *C.K. v. Shalala*, 883 F. Supp. 991 (D.N.J. 1995). *See supra* note 22.

However, family cap plans condition eligibility for welfare on the timing of a recipient's decision to have children. If she has an additional child while receiving welfare, she gets only $X in benefits. If she has an additional child while not receiving welfare and later qualifies for welfare, she will get $X in benefits plus an additional $Y for the additional child. Thus, a welfare recipient is eligible for additional benefits only if she forgoes her constitutional right to decide *when* she will bear children. It is this limit on the timing of her choice that implicates her constitutional right to procreative choice.

105. *See, e.g.*, Sullivan, *supra* note 22. *See also* discussion *supra* part III.

106. *See, e.g.*, Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984). Kreimer argues that an unconstitutional condition on a government benefit is one that can be characterized as a "threat" or a "coercive" condition rather than a non-coercive offer. Kreimer defines a coercive government benefit condition as one that makes the individual worse off than he would have been in the normal course of events. *See also* Rosenthal, *supra* note 22. Rosenthal argues that government benefit conditions should be invalidated if they threaten or are as "destructive" of individual rights as direct regulation. In contrast, benefit conditions are permissible if they "expand" liberty by increasing the options available to individuals. *Cf.* Sullivan, *supra* note 22 (arguing against these coercion arguments); Charles R. Bogle, Note, *"Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193 (1994). Bogle argues that government conditions on welfare benefits are improperly coercive if the benefit condition is likely in fact to cause the person to forfeit the constitutional right in order to obtain the benefit. Such conditions, he argues, are "unconscionable" because they require the recipient to pay too high of a "price" for the benefit. *Id.* at 232-36.

107. *See, e.g.*, Kreimer, *supra* note 106. Kreimer advocates three possible "baselines" from which to determine what a coercive condition would be: (a) history (in which a "coercive" condition would be one where the government previously has provided the benefit, only to threaten to withdraw it if the individual exercises her constitutional right); (b) equality (in which a "coercive" condition is one that threatens to make the individual worse off than other similarly situated people who are receiving benefits); and (c) a predictive baseline (in which coercive offers are those that make the individual worse off than she would have been if the government had not im-

others argue that benefit conditions are problematic if they disadvantage recipients as compared to other similarly-situated persons.[108]

Recent scholarship mounts a frontal attack on the underlying foundation of the Supreme Court's approach. Kathleen Sullivan, Richard Epstein, and Cass Sunstein have written the most comprehensive and thoughtful recent analyses of unconstitutional conditions.[109] Both Kathleen Sullivan and Richard Epstein seek to

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posed the benefit condition). My article might be viewed as an argument against the relevance of artificial baselines to determine whether an individual has been "penalized" by government funding conditions. Instead, my article argues that the focus should shift from whether an individual has suffered a legally cognizable penalty to whether the individual has in fact been harmed by a denial of funding. When viewed this way it should be clear that any government denial of funding constitutes *harm in fact*, in that the individual does not have the funding. It is irrelevant whether the individual is "entitled" to the funding. The fact that the individual is denied the funding is harm in fact. The question then becomes, has the government harmed the individual by denying her funding *because of* the exercise of a constitutional right, or was the denial for some other rights-neutral reason, i.e., the individual did not otherwise fit the eligibility requirements for the program? If the former, then the government action should be subject to heightened scrutiny. *See generally* discussion *infra* part IV.C.

108. *See* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990). Baker, who focuses on public assistance benefits, argues that Supreme Court welfare benefit cases can be explained as holding that a welfare benefit is an unconstitutional penalty if it requires the welfare recipient to pay a higher price to exercise her constitutional rights than other similarly situated persons earning a subsistence income. *Id.* at 1220. Professor Baker identifies this higher price as the loss of an entitlement for the exercise of the right. *Id.* at 1230. Professor Baker discusses the Medicaid abortion funding cases and argues that Medicaid recipients denied abortion coverage were no worse off than non-Medicaid recipients, each of whom is required to pay the market price for her abortion. That the government refused to subsidize the abortions simply left the women in the position they would have been in had they *not* been Medicaid recipients. This argument, however, disregards the fact that these Medicaid recipients *were* in the Medicaid program and were eligible for Medicaid funding. Accordingly, they were denied funding for medically necessary treatment because that treatment was an abortion. Thus, although they were not "penalized" in the sense that they were deprived of a legal entitlement and thus forced to pay a higher price to exercise the right than a non-recipient, they were harmed in fact in the sense that they were denied government funding that otherwise would have been available to them but for their exercise of a constitutional right. *See also* Gary Feinerman, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369, 1406-07 (1991) (arguing for an "equality" based analysis of unconstitutional conditions in which the court applies "intermediate scrutiny" to benefit conditions that affect the "comparative ability of individuals to exercise their constitutional rights by granting the conditions of liberty to some but not others"). Feinerman argues that the intermediate scrutiny analysis should consider four factors: (1) equality among individuals, (2) equality among groups, (3) the relative importance to individuals of the benefit at issue, and (4) whether the state is the predominant supplier of the benefit. *Id.* at 1404-10. See also Kreimer, *supra* note 106 (partially advocating an equality approach).

109. *See generally* Sullivan, *supra* note 22; RICHARD A. EPSTEIN, BARGAINING WITH THE STATE (1993); SUNSTEIN, *supra* note 18.

expand the scope of the unconstitutional conditions doctrine; both shift focus away from the individual rightsholders and instead ground the analysis of unconstitutional conditions in the systemic problems they claim such conditions cause.[110] In contrast, Cass Sunstein supports abandoning the doctrine altogether and substituting a more straightforward rights analysis that would ask merely whether the challenged condition's intrusion on the particular right is justified by a legitimate governmental interest.

Sullivan argues that theories of coercion, including those in the Supreme Court's analysis, are flawed by their lack of any principled basis to distinguish coercive conditions from ones that are simply voluntary bargains by the benefit recipient.[111] Instead, Sullivan argues, unconstitutional conditions analysis should look beyond the relationship between the individual and government to consider the adverse effect of such conditions on the distribution of rights among rightsholders and on the distinction between the public and private realms of society. Under her view, government benefits allocations would be unconstitutional if their purpose or primary effect is to *pressure* the exercise of a constitutional right. Such conditions, she urges, ought to be subject to the same strict level of constitutional scrutiny as government decisions that directly regulate the constitutional right.[112] One difficulty with Sullivan's view is identifying when a constitutional right is pressured. Indeed, any government condition can be seen as pressuring a constitutional right if the government fails to fund one right but funds an alternative activity. Accordingly, once one goes beyond intentional government attempts to influence the exercise of the constitutional right it is unclear how to distinguish between rights-pressuring and non-rights-pressuring government conditions.

Cass Sunstein argues that the Supreme Court's formulation of the unconstitutional conditions doctrine, in its insistence upon protecting only common law property rights, reflects an arbitrary privileging of the status quo distribution of entitlement. Such privileging, he argues, mistakenly assumes that government action that affects constitutional rights is not rights-violative if it does not disturb existing entitlements. Instead, he concludes, such govern-

110. *See also* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675 (1992) (arguing that constitutional restrictions on government funded speech should be analyzed as establishing institutional "spheres of neutrality" in which social values of fostering public deliberation require government neutrality with respect to funding conditions).

111. *See* Sullivan, *supra* note 22, at 1428-56.

112. *Id.* at 1499-1505.

ment benefit conditions are rights-pressuring and should be invalid unless the pressure on the individual right has a "legitimate legislative justification."[113] Sunstein also argues that the unconstitutional conditions doctrine impossibly attempts a general solution to the problem of rights-pressuring benefit conditions, whereas different constitutional rights warrant different analysis. Thus, some rights may be rights to government neutrality that prevent the government from discriminating among particular exercises of the right. In contrast, other rights may not be rights to government neutrality, in which case the government would have more freedom to affect the rights through benefit conditions.[114]

Accordingly, Sunstein argues, the unconstitutional conditions doctrine should be abandoned. Instead, each benefit condition should be analyzed separately to determine whether the legislative justification for the benefit condition justifies the intrusion upon the particular right.[115] By permitting a legislative justification that is merely *legitimate* rather than compelling, Sunstein advocates a lower level of scrutiny for benefit conditions than for burdens or penalties on fundamental rights. Sunstein's approach is problematic because the harm to an individual caused by loss of government benefits can be at least as devastating as small penalties or fines. Therefore, the same level of legislative justification should be required in both cases to sustain the government action.

In contrast, Richard Epstein argues that the unconstitutional conditions doctrine is not about protecting constitutional rights at all, but rather is about protecting individuals from unfair *takings* of property. Under his view, the unconstitutional conditions doctrine should invalidate government conditions on benefits that worsen the redistributive effect of government takings by taxation.[116] He cares little whether the benefit condition pressures or affects an independent constitutional right, such as freedom of speech or the right to procreate. Instead, he cares only whether the government funding condition affects property rights by increasing the redistributive burden that comes from taxation. He thus argues that a condition on government grants should be unconstitutional if it is inefficient because it does not increase the social surplus, which

113. *See generally* SUNSTEIN, *supra* note 18. Sunstein's position is not limited to unconstitutional conditions doctrine. He argues that this "status quo neutrality" concept spans much of the Supreme Court's analysis in a variety of doctrinal areas, including due process, standing, race and sex discrimination, and takings law. *Id.* at 68-92.

114. *Id.* at 315-18. *See also* Sunstein, *supra* note 22.

115. Sunstein, *supra* note 22. *Cf.* Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

116. *See generally* EPSTEIN, *supra* note 109.

seems to mean the aggregate value of property of individual members of the society, or it is inequitable because it does increase the social surplus but distributes the surplus unequally among members of the society.[117] Epstein's view would invalidate even a small need-based redistribution of property from the top one percent of the society to the bottom one percent, since such a distribution would simply redistribute wealth without increasing total wealth. Moreover, even if such a redistribution of wealth did increase total property values, perhaps by reducing urban ills, such a social surplus from beneficial government action would also be unconstitutional unless it was equally distributed to all members of society, rich and poor. If, for example, the poor benefitted more than the rich, then the government would have to pay compensation to the rich to remedy the unfair government taking.[118]

Epstein's view would not have to be tied to constitutional rights at all, since it implies that any inefficient redistribution of public resources should be unconstitutional, regardless of whether the redistribution otherwise impacts constitutional rights. Accordingly, Professor Epstein has some difficulty using this analysis to determine which government benefit conditions violate individual rights. As he recognizes, such benefit programs begin with the proposition that redistribution of societal benefits is permissible.[119] Ultimately, he adopts a balancing test for determining the constitutionality of benefit conditions and asks whether there is a minimal government justification for the rights-affecting conditions.[120] Since this minimal rationality test constitutes considerably lower scrutiny than that Epstein would apply to government takings of wealth by redistributive social policies,[121] his view seemingly reverses current constitutional doctrine by applying strict scrutiny to deprivations of economic rights and rational relations scrutiny to deprivations of non-economic constitutional rights.

Epstein thus ignores government funding conditions that affect the constitutional rights of non-property holders, such as poor people dependent upon the government for subsistence support. Because poor people have no property to take, they have no cognizable interests in Professor Epstein's view, and thus they have no right to complain about any adverse action the government takes against them. As the poor are likely to be less politically powerful

117. *Id.* at 95-98.
118. *Id.* at 90-103.
119. *See, e.g., id.* at 278-79.
120. *See, e.g., id.* at 278-94.
121. *Id.* at 90-97.

than more propertied interests,[122] Epstein's argument construes the Constitution to protect the most fortunate members of the society from government actions while turning the poor into a perpetual class of victims of whatever oppression the vagaries of the legislative process heap upon them.

Epstein apparently favors an *anti-takings* analysis because of an almost blind faith in market forces as the sole just or correct method of social organization. Any government action that upsets the result of the private market is constitutionally suspect.[123] Such a view, whatever its general merits, patently ignores historical race, sex, and class biases that have substantially contributed to the current distribution of assets within the society.[124]

Of the three analyses, Sunstein's approach appears to be the most successful at actually formulating a workable alternative approach to the Supreme Court's much-maligned burden/subsidy distinction because it transfers general constitutional rights analysis to the benefit conditions problem. His basic analysis asks: does the government action affect the right, and if so, is it nevertheless justified by a countervailing governmental interest? However, by focusing only on the impact of funding conditions on rights, none of the analysts adequately consider that government funding conditions affect not merely rights but also individuals who wish to exercise those rights. Instead, almost all of these analyses treat the harm caused by the loss of a government benefit as an abstract concept such as pressure upon a constitutional right, rather than as an actual loss or suffering imposed upon real people. Kathleen Sullivan coined the term *pressure* in her analysis; Sunstein also speaks frequently and abstractly of funding conditions as "rights-pressuring." This abstraction misses the point of protecting the constitutional rights of individuals. Constitutional rights protect not only an abstract concept of rights from infringement, they also protect people from being harmed by government for wanting to engage in constitutionally-protected activities that government, for whatever rea-

122. *See* discussion *supra* notes 97-99 and accompanying text.

123. Sunstein disputes the idea that government may disclaim responsibility for economic consequences of the market. *See generally* Sunstein, *supra* note 22. He argues that, given the current state of government regulation of private economic activity, government cannot claim merely to be a spectator on what is otherwise the invisible hand of the market. However, even if government were not responsible for a person's poverty, this still should not necessarily mean that government may constitutionally use a person's poverty as leverage to affect her exercise of constitutional rights.

124. *See, e.g.*, WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY 112-13 (1987) (noting that the cumulative effects of centuries or even decades of race and class discrimination can hinder disadvantaged citizens from full participation in free and open markets).

son, disfavors. It is this harm to an individual linked to the exercise of the right, and not merely an abstract harm to the right, that should be of constitutional significance.

IV. A Harm-Based Approach to Welfare Benefit Conditions

Government denials of funding linked to the exercise of constitutional rights can harm people as much as, if not more than, imprisonment, fines, or penalties for the exercise of the right. Rights-based government funding conditions make people suffer as the price for exercising their constitutional rights. Current theory errs by failing to focus on this harm.

A. Shortcomings of Current Theory

Typical unconstitutional conditions analysis fails to focus on harm to the individual, but obscures the harm by using abstractions such as "rights-pressuring" or "refusals to subsidize" rights. This analysis misleadingly suggests that the only problem with linking government funding to the exercise of constitutional rights is the effect on the individual's ability to exercise the constitutional right. The traditional analysis asks whether the funding condition coerces the individual into giving up the right[125] or places an obstacle between the individual and the exercise of the right.[126]

Instead, rights-based denials of funding harm the individual because of her exercise of the right. This harm is itself constitutionally problematic. Constitutional rights do not merely ensure that people *can* engage in protected activity. Constitutional rights also ensure that government does not harm people because they engage in protected activity, even if the government harm fails to prevent the exercise of the right.[127] The power to impose suffering is government's principal weapon for attacking rights. Rarely can government directly compel people to act in a particular way because government can rarely physically control individuals.[128] Rather, the government ordinarily must act indirectly by attaching harm such as jail terms, fines, or loss of funding to government-disfavored activity and by attaching benefits such as government funding to government-favored activity. Thus, to effectively restrain

125. *See, e.g.*, Rosenthal, *supra* note 22.

126. *See supra* notes 60, 70-73 and accompanying text.

127. *See* Richard J. Fallon, *Individual Rights and the Power of Government*, 27 GA. L. REV. 343 (1993) (arguing that theories about the limit of government power are an independent source for constitutional rights).

128. *See* discussion *infra* note 138.

government from attacking constitutionally protected rights, it is necessary to restrain the government's power to harm an individual because of her exercise of the right.

Accordingly, if instead of focusing solely on the effects of funding conditions on the ability to exercise the right one focuses on governmental tools for imposing harm or suffering—these instruments of oppression, if broadly stated—one can discern significant problems with the Supreme Court's analysis of rights-based government funding conditions. To illustrate, the Supreme Court obviously recognizes the need to protect against government-imposed harm in the direct regulatory context since it invalidates burdens on constitutional rights short of direct prohibition.[129] However, when addressing government funding conditions, the Court refuses

129. *Cf.* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). In a joint opinion, Justices O'Connor, Kennedy and Souter suggested that the burden that was problematic for the exercise of a constitutional right was government action that made it more difficult, as a factual matter, for the individual to exercise her constitutional right. *Id.* at 2821. Such a view would shift focus away from harm to the individual to whether this harm actually prevented or obstructed the individual's exercise of the right. However, this position would be inconsistent with traditional, fundamental-rights burdens cases, such as Carey v. Population Services, 431 U.S. 678 (1977), which protect individuals against government harm inflicted upon them because of their exercise of a constitutional right. Not surprisingly, instead of citing these traditional fundamental rights cases to support their definition of a fundamental right, the three Justices cited the unconstitutional conditions opinions such as Harris v. McRae, 448 U.S. 297 (1980), and Maher v. Roe, 432 U.S. 464 (1976). Planned Parenthood v. Casey, 112 S.Ct. at 2819. However, these cases did not involve direct government regulation of constitutional rights, whereas *Casey* did. Indeed, the Court in the unconstitutional conditions cases denied that constitutional rights were even implicated, on the ground that to do so would improperly create a positive constitutional right to government benefits. Nevertheless, this part of the *Casey* opinion bootstrapped these inapplicable unconstitutional conditions cases to support the position that narrowly redefined the original fundamental right. Under this redefinition, a fundamental right is violated only if government action places a substantial obstacle between the citizen and the exercise of the right. This view distorts the basic conception of protection of rights. It would also permit government to impose considerable harm on a person for exercising the right, provided that the person cares enough about the right to exercise it anyway. In any event, the result in *Casey* is probably more consistent with a harm-based analysis than with the three Justices' substantial obstacle approach. Thus, the *Casey* opinion upheld a 24-hour waiting period for abortion, 112 S.Ct. at 2826, while striking down a spousal notification provision. *Id.* at 2831. However, the three Justices' substantial obstacle or "deterrence" approach, if upholding the 24-hour waiting period, would seem to also support the constitutionality of the spousal notification provision. If the focus is to be whether the woman is actually, in fact, deterred from having an abortion, the spousal notification provision does not seem any more likely to block the actual abortion than the 24-hour waiting period would. In either case, the woman is free, afterwards, to come back and have an abortion, with or without the husband's consent. In contrast, the spousal notification provision seems more likely than the 24-hour waiting period to emotionally, or sometimes physically (in the case of abusive husbands), harm the woman who seeks to have the abortion. This harm-based analysis would seem more consistent with, and provide a sounder basis for, the *Casey* result.

to recognize that government funding decisions can similarly harm individuals. Instead, the Court interprets the Constitution to permit government to use funding conditions that encourage, influence, or persuade citizens to sacrifice rights, given no more than a rational government interest, provided that the means the government chooses are mere refusals to subsidize the protected activity.[130]

Three types of doctrinal arguments are generally advanced to justify blindness to government harm from refusals to subsidize rights. These arguments proffer that the government's refusal to subsidize the constitutional right neither violates the right nor unfairly deprives the individual of the government benefit.

The first argument is that rights-based refusals to subsidize constitutional rights do not infringe upon the constitutional right as a direct fine or penalty does[131] because a refusal to subsidize or pay for the right merely leaves the individual free, as before, to exercise the right at her own expense.[132] Since the government's refusal to subsidize the right does not prevent or hinder the individual from exercising the right, there is no constitutional violation.[133] Under this view, a constitutional right merely protects an individual's ability or freedom to exercise the right. However, the Constitution also protects an individual even if she is perfectly free to exercise the constitutional right but is harmed by the government because of her choice. That is, for government action to be constitutional, the

130. *See* discussion *supra* parts II.B.1, 2.

131. *See* discussion *supra* notes 87-88 and accompanying text.

132. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 315 (1980). *See also* Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare Rights Thesis*, 81 COLUM. L. REV. 721 (1981) (arguing that Supreme Court abortion funding cases can be explained as holding that the Medicaid funding restrictions do not impinge the constitutional rights at stake). This argument obviously has less weight in the context of government subsistence welfare programs where, by definition, the individual has no independent resources, other than government aid, to use to pay for the right. Here, the argument that the individual is free to exercise the right rings hollow when the individual lacks resources to pay for the right. However, this concern applies whenever the government refuses to pay for poor people to exercise their constitutional rights and implies that government is obligated to pay for poor people's constitutional rights. As stated earlier, *see* discussion *supra* note 23, this article does not address whether the government is constitutionally obligated either to provide basic levels of subsistence or to pay generally for poor people's constitutional rights. Rather, this article argues that once the government makes the decision to award funding, it should generally not be able to selectively deny such funding on the basis of the individual's exercise of a constitutional right, because such a government decision improperly harms the individual because of the exercise of the right.

133. Justice O'Connor's undue burden standard announced in *Casey* is of this ilk. 112 S. Ct. at 2820-21. *See* discussion *supra* note 129.

individual must not merely be able to exercise the right, she must be able to exercise the right free of government-imposed harm for having done so.[134] For example, in the case of the obviously unconstitutional fine or penalty for the exercise of the right, the individual nevertheless generally remains free to exercise the right in the technical sense that she remains physically able to do so. Thus, if the government fines someone for having an abortion, she is still free to have an abortion, that is, physically able to abort the child. The fine does not prohibit her from aborting the child, it simply penalizes or harms her for doing so. Thus, the constitutional violation is not the loss of her freedom to exercise the right, it is the imposition of government harm, i.e., a penalty, for the exercise of the right.

When viewed in this light, it should be clear that government decisions to selectively refuse to subsidize rights can be just as rights-violative as a government fine, penalty, or other burden on the right. In both cases the government harms or injures an individual for the exercise of the right. In the case of a fine or penalty, the harm is obviously the fine or the penalty.[135] In the case of a government's selective refusal to subsidize the exercise of a constitutional right, the harm is the denial of government benefits that would have been provided if the individual had exercised the right in a government-favored manner. In both cases, the individual remains free to exercise the right but may do so only by suffering a harm or loss imposed by government.[136] Either both types of government action should raise constitutional problems or neither should.

The second argument advanced to justify doctrinal blindness to harm caused by refusals to subsidize is that any harm imposed by government's selective refusals to subsidize constitutional rights is permissible because it is simply the result of a *voluntary* choice by the individual.[137] The government merely conditions funding upon the relinquishment of a constitutional right; the government

134. *See* discussion *infra* part V.A.

135. If there is no penalty for violation, the government's prohibition has no real teeth and is merely a precatory statement of government policy.

136. *See, e.g.*, SUNSTEIN, *supra* note 18, at 293 (noting that "there is no fundamental or metaphysical difference between the unconstitutional conditions case depriving individuals of benefits and the ordinary constitutional case requiring payment of a fine"). Professor Sunstein argues that the resiliency of this distinction in the doctrine is rooted in the Court's inclination to arbitrarily protect status quo entitlements, e.g., the current distribution of property rights. *Accord* EPSTEIN, *supra* note 109, at 11 (challenging the distinction between involuntary and voluntary bargains with the government).

137. *See, e.g.*, Maher v. Roe, 432 U.S. at 474-75.

does not deprive the individual of either the right or the benefit. The individual makes a voluntary choice between the right and the benefit. With selective government funding, the government merely offers assistance on condition that the recipient makes the favored choice. The government might offer the welfare recipient subsistence support for her children, provided that those children are not born while she is receiving welfare. The recipient simply chooses between her procreative rights and her future child's eligibility for welfare assistance. Thus, the argument goes, the individual has lost neither her constitutional right nor the government benefit; she has merely freely decided to waive one to get the other.[138]

However, a freedom of choice argument would apply equally to government imposition of jail terms or fines for exercising a constitutional right. For example, suppose the government imposed a jail term or ten dollar fine for each child born while a family received welfare. Under Supreme Court doctrine such a levy on procreative choices would presumptively violate the welfare recipient's constitutional right to procreate,[139] while the refusal to award benefits

138. The classical response to this view is to argue that the government's threat to remove the benefit coerces the welfare recipient into relinquishing her right, or into exercising it in a manner favored by government. *See generally* Sullivan, *supra* note 22, at 1428-56. Sullivan argues that coercion arguments are flawed because they depend upon, but fail to articulate, an underlying normative theory to explain why some voluntary transactions are freely entered into while others are coercive. Coercion arguments are also unsound because they look to the individual's ability to exercise the constitutional right to justify overriding the individual's voluntary choice between the right and the benefit. In fact, except in unusual cases, individuals are always physically free or able to exercise their constitutional rights, even with direct government regulation of the right. The government rarely has the power to directly compel someone to act or not to act in a particular way, unless the individual is in a straitjacket or under mind control. Ordinarily, even the government's use of physical force to compel action operates upon the individual only indirectly by threatening the individual with negative consequences (death or physical injury) if he does not comply with the request. The individual is thus almost always free to make a decision contrary to the decision the government wishes him or her to make. The government's sole power, except in rare circumstances, is to attach negative consequences to the disfavored choice to discourage the choice. Thus, whether the negative consequence is a fine or penalty or other burden, such as the loss of otherwise available benefits, the governmental technique is the same and thus should be treated the same for constitutional purposes.

139. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 617 (1965) (invalidating state criminal law imposing fines or jail terms for contraceptive use); Carey v. Population Services, 431 U.S. 678 (1977) (holding that a state law that required contraceptives to be sold only by licensed pharmacists violated right to privacy of contraceptive users by making it more difficult and expensive to obtain contraceptives); *cf. Casey*, 112 S. Ct. at 2818-21 (arguing that statutes that made it more difficult to obtain an abortion were constitutional provided that they did not impose an "undue burden" on the constitutional right of pregnant women to receive an abortion).

would be a permissible refusal to subsidize procreative rights.[140] However, whether faced with a fine or the loss of welfare eligibility, in both cases the mother voluntarily chooses between her procreative rights and the negative government consequence. The voluntariness of the individual's response to the two types of government action cannot distinguish their constitutionality. Either both are permissible voluntary waivers of rights, or neither is.

A third argument against acknowledging government-imposed harm because of a refusal to subsidize suggests that an individual's loss of funding is of no constitutional significance because the individual had no right or entitlement to the funding. This analysis mirrors the argument that the recipient voluntarily waives the constitutional right to receive the funding. Although the government cannot require a welfare recipient to give up a legally-protected entitlement to keep her constitutional right, welfare is not such an entitlement until legally defined by government.[141] Accordingly, the government can choose to grant benefits on any terms whatsoever, including terms requiring the waiver of constitutional rights.[142] Since the welfare recipient never owned a right to the funding, she has lost nothing when it is taken away.

Sunstein strongly criticizes the entitlement argument and argues that by protecting only preexisting rights or entitlements from government attack, the Supreme Court improperly privileges the status quo distribution of property without reasoned explanation or justification.[143] What is also troubling about the law only recognizing losses of things that individuals are entitled to is that the law thus ignores the suffering that can result from denials of funding, particularly denials of subsistence welfare assistance. Whether or not an individual is legally entitled to government benefits, the loss of such benefits is a significant harm or injury to that individual which can be greater than the harm from a small penalty or fine.

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140. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 315 (1980) (holding that government exclusion of Medicaid payments for medically necessary abortions was a mere refusal to subsidize the patient's right to an abortion and did not violate the constitutional rights of Medicaid recipients); Rust v. Sullivan, 500 U.S. 173 (1991) (holding that government could constitutionally prohibit doctors at publicly-funded family planning clinics from counseling poor women about abortion since such a condition was a mere government refusal to pay for the exercise of constitutional rights of physicians and their patients).

141. This is true at least as against legislative redefinition.

142. For examples of this argument, see generally *Harris*, 448 U.S. at 316-317; *Maher*, 432 U.S. at 474.

143. *See generally* SUNSTEIN, *supra* note 18. Professor Sunstein argues that this knee-jerk privileging of status quo entitlement is endemic to much of the Supreme Court's constitutional analysis. *See generally* discussion *supra* notes 113-14 and accompanying text.

With subsistence welfare benefits, a destitute family's basic survival may depend upon the level of welfare benefits provided.[144] When the rent bill comes due and the children born while the family was receiving welfare need shoes to attend school and winter coats to fend off the cold, the loss of government funding is no less harmful because the welfare recipient had no antecedent "right" to the funding. Her suffering and her family's suffering are starkly real. This suffering results directly from the government decision not to award her benefits.[145]

When the government imposes suffering on an individual solely because she chooses to exercise her constitutionally-protected rights, such government action should equally violate the constitutional right, whether the cause of the suffering is a government denial of funding or the imposition of a fine, burden, or penalty.[146]

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144. This point, of course, is one of the key insights of the *Goldberg v. Kelly* decision, 397 U.S. 254 (1970), and also of the classic Charles Reich article, *The New Property*, 73 YALE L.J. 733 (1964), namely, that an individual can be as injured by the loss of a benefit to which she has no antecedent right as by the loss of a common law property interest.

145. The Supreme Court's classic response here is to argue that the recipient's suffering in this case is the result of her poverty, not of government action. Cass Sunstein makes the point that the recipient's poverty should also be viewed as the result of government action, that is, as the product of government regulatory decisions to protect the property of others and thus exclude her from access to the shoes, clothing, and other necessities of life for her children. SUNSTEIN, *supra* note 18, at 69-71. However, even if her poverty were, inaccurately, to be viewed as simply the result of the normal private ordering of market forces, the government's decision to exclude her child from subsistence welfare benefits because the child was born while the family was receiving welfare is most decidedly government action, even if her poverty is not. The consequence of the government decision to exclude her from benefits is that she is left to suffer from the destitution that the welfare program was designed to redress. However, this does not mean that the government can lift up its hands and disclaim responsibility for her state, especially when, as with these family cap plans, the government intentionally exploits her poverty as leverage to influence her exercise of constitutional rights. *See* discussion *infra* part IV.B.

146. Much recent scholarship seeks to invalidate conditions on government benefits not because of the impact of such conditions on the individual benefit recipient or rightsholder, but because of the harmful social consequences of the deprivation of rights. Thus, these scholars argue, certain benefit conditions should be unconstitutional because they cause systemic societal harms, which justifies preventing the government and the individual rightsholder from bargaining away these constitutional rights to the detriment of the society at large. *See, e.g.*, Sullivan, *supra* note 22; EPSTEIN, *supra* note 109. Both of these writers ground their unconstitutional conditions analysis at least in part upon societal harm rather than individual harm. This article argues that, regardless of the societal impact of government decisions to harm an individual because of the exercise of a constitutional right, rights-based harm to the individual itself should be sufficient to violate the right.

B. *The Special Problem of Government-Imposed, Rights-Hostile Allocative Harm to the Poor*

The essence of constitutional fundamental rights protection should be protection against government using the threat of harm as leverage over individuals' constitutional rights. This power to harm is government's primary mechanism to adversely affect constitutional rights, particularly rights to voluntary choice. If the constitutional right does not protect against such government harm, it does not protect the constitutional right at all. This should be the real lesson of the cases protecting procreative rights. That is, the only way to protect the right is to denude the government of weapons that it can use to successfully attack the right, namely, the power to impose suffering or harm. Restrictions on government power should apply regardless of whether the harm is a loss of government funding, a fine, penalty, or imprisonment.

The need to restrict the misuse of government allocative power is particularly troublesome where government uses subsistence welfare benefits as a carrot to influence poor individuals' behavior. Welfare benefits provide children's basic survival needs such as food, shelter, and clothing.[147] Limitations on benefits attack parents' constitutionally protected right to make certain private, procreative, moral and value choices free from government interference. The government exploits a family's poverty and distress as leverage to persuade the mother to sacrifice her procreative rights and to improperly substitute government preferred procreative choices. The government thus declares to welfare families that, because they depend on state funding for their children's needs, the government's procreative choices must prevail over their own. Underlying this action is apparently a societal view that poverty is caused by, at best, inferior decision making and, at worst, immorality and sloth,[148] rather than by unfortunate circumstances such as being born poor in a society where child poverty means the deprivation of virtually everything required to participate meaningfully within the economic system.[149] The poor are deprived of equal edu-

147. These family cap plans generally apply only to cash assistance and usually exempt in-kind welfare assistance, such as food stamps and housing subsidies. However, except for medical benefits, in-kind aid often covers only a portion of the actual market cost; the recipient must pay the rest from cash assistance.

148. If this were true, the idle rich would be destitute.

149. *See generally* White, *supra* note 12 (arguing that much of the recent anti-welfare groundswell misinterprets the lives of the poor and is rooted in myths about the character of the poor and the causes of poverty rather than upon a true understanding of the systemic hurdles that trap poor women in poverty and psychically or physically penalize them when they try to escape).

cation,[150] residence in an environment safe enough for economic activity to flourish, and access to persons of power, influence, and knowledge who might mentor them through the shoals of a complex, technocratic society.[151] Nevertheless, the wealthy and the middle-class assume that their good fortune is the result of innate mental and moral superiority, rather than fortunate circumstances which better position them to flourish within the society.[152]

In any event, a rights-based government exclusion from welfare benefits, and the consequent harm the individual suffers, should certainly implicate the individual's constitutional right to procreative choice as much as a ten dollar fine would. This is true regardless of whether the government, the taxpaying citizens, or the community are acting upon a good faith belief that such procreative value choices are immoral, unjust, or simply unadvisable. Once one decides that the Constitution commits value choices to the individual to privately wrestle with in her soul, conscience, and judgment, rather than to the public choice of the political majority, the wisdom or appropriateness of the individual's value choice is irrelevant.[153] If a fine or a burden on the right would violate the

150. *See generally* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

151. Of course, one argument is that the societal response is to forbid poor people from having children, thus decreasing the number of children born into poverty. This argument, of course, ignores the constitutional rights of the poor and could be used to sanction anything from forced sterilization of poor women to genocide of poor children. What might be more appropriate is to actually remove some of the barriers between poor people and real economic opportunity.

152. Indeed, much of what passes for the poverty of values among the poor is really a rational, although ultimately cancerous and socially destructive, response to the fact of poverty. *See, e.g.*, White, *supra* note 12. Thus, for example, criminal activity, as it is for wealthy white collar criminals such as Michael Milken, is a quick and dirty path to relative wealth in a society that highly values economic wealth. Similarly, gang membership supplies goods to poor youths, including a sense of community in a society in which they are despised, security in the war zone of most poor neighborhoods, and status often not otherwise available to the poor. On top of it all is superimposed the vision of middle class moralists who are convinced that they know better, even though they have never lived in the environment in which the poor live, and who seek to impose their will upon the poor with the tools of power which, in the family cap context, is political control over AFDC benefit decisions.

153. Indeed, what fundamental rights protect is the individual's right to make certain private value choices which may be inconsistent with those of the community. In a prior article, I argued that government value choices should be made by consensual, participatory processes. *See* Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273 (1993). However, while I believe that this is true for value choices that are legitimately to be decided by the public, the society, or the community, such a conclusion would not apply to value choices which constitutionally are, and should be, committed to the discretion of the individual. Fundamental rights doctrine can be seen as demarcating those areas of private choice, and the decision to bear or beget children is and should be one of those rights.

right because of its adverse effect on the rights-holder, a rights-based government decision to deny subsistence welfare benefits should be acknowledged as at least as harmful as a fine, and at least as constitutionally suspect.[154]

The Court's traditional response to those who invoke the suffering of the poor to challenge rights-based government denial of aid is to assert that such suffering, while perhaps sad, is not the government's fault but is instead the irremediable consequence of

154. Of course, one implication of this argument might be that the government has a constitutional obligation to redress at least some sufficiently high level of human suffering. That is, if a government refusal to redress suffering is the imposition of harm, when the government refusal is tied to the exercise of a constitutional right, perhaps a government refusal to redress abject suffering *is* a harm of constitutional significance regardless of whether the government refusal is linked to a preexisting constitutional right. One way to think of this is as a fundamental constitutional right to be free from devastating suffering. This could include, for example, abject poverty, racism, sexism, or other types of collective social malaise, or the combination thereof, which operate to deprive individuals of the opportunity to effectively function as full members of the society and thus deprive them of the opportunity to pursue a meaningful social existence. See, e.g., Roberts, *supra* note 74 (arguing that the *Rust v. Sullivan* decision, by upholding the abortion gag rule that deprived poor women clients of Title X family planning clinics of complete and accurate information about methods of family planning by denying them information about abortion, deprived them of what perhaps should be a constitutional right to the knowledge necessary to achieve their own liberation from oppression); Tribe, *supra* note 23 (arguing generally that the Constitution should be interpreted to provide positive constitutional rights to funding for some essential subsistence needs).

However, the definition of such a constitutional right obviously raises particularly thorny questions concerning the legitimacy of constitutional interpretation, and the legitimate role of the state. Moreover, apart from legitimacy questions, one could also ask appropriateness questions. First, if one were to define such a right, who would pay for it? (Of course, some portions of this right would be essentially free. For example, Dorothy Roberts' positive right to information necessary to remedy oppression would cost nothing within the context of an already established government-supported family planning program). Second, would the resulting tax system, with the accompanying massive redistribution of societal resources, itself be oppressive? *See generally* EPSTEIN, *supra* note 109 (arguing that inequitable and inefficient redistribution of societal resources should itself be a constitutional violation and advocating the unconstitutional conditions doctrine as a second-best patchwork substitute for the definition of such a constitutional right). *See* discussion *supra* text accompanying notes 109-18.

In any event, as stated earlier, this article is not intended to construct such a theory of positive constitutional rights. Rather, this article argues that when the government specifically bases a denial of government funding on the exercise of a previously defined fundamental constitutional right, which results in harm to the would-be recipient, such government imposed suffering should be held to violate that constitutional right if, in the same circumstances, a government fine, penalty, or burden would. One does *not*, contrary to the Supreme Court's view, *see, e.g., Harris*, 448 U.S. at 317-18, have to construct such a positive right to government deliverance from abject suffering or, even more narrowly, a positive right from government-imposed abject suffering, to reach this conclusion. Rather, government should not be able to, by denial of government aid, impose suffering, much less abject suffering, as a way of attacking a previously defined fundamental constitutional right which already protects citizens from government imposed harm.

the recipient's poverty. The poor suffer, the Supreme Court argues, not because the government denies them funding but because they are poor.[155] With astounding ease, the Supreme Court thus dismisses the government's intentional imposition of suffering as the kind of victimless crime in which there is not only no victim, but no criminal. The would-be victim, who is denied funding, "voluntarily agreed" to her suffering in order to retain her constitutional right.[156] The government, which denied her hungry children otherwise available government aid solely because it disfavored the mother's procreative choices, somehow bears no responsibility, even though the government acted with full knowledge of, indeed even exploited, the misery that denial of relief would effectuate.[157]

The argument is an extraordinary *trompe l'oeil*. Welfare beneficiaries who are denied benefits because of a disfavored exercise of a constitutional right suffer not just because they are poor, but because the government expressly denied them relief from their poverty that would have been available had they marched in step to the government's conception of morality. To argue that somehow the government's refusal of subsistence aid does not contribute to their suffering requires a certain kind of emotional blindness that only lawyers seem able to achieve. If the law is to be even minimally consistent, such intentional imposition of suffering on the least fortunate members of society designed to affect their exercise of a constitutional right must surely invoke some constitutional protection of the right. Whether the government's club is a fine or a denial of funding, both decisions should be constitutionally suspect.[158]

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155. *See, e.g., Maher*, 432 U.S. at 479 (stating that "we certainly are not unsympathetic to the plight of an indigent woman who desires an abortion but 'the Constitution does not provide judicial remedies for every social and economic ill' " (citation omitted)). *See also Harris*, 448 U.S. at 316 (arguing that the harm suffered by a woman who has been unable to have a medically necessary abortion was the result of her poverty and not the government's exclusion of funding for abortion from otherwise available Medicaid funding for medically necessary procedures).

156. This appears to perhaps be the same way in which the Reagan Administration argued that the homeless volunteered to be homeless because they did not wish to move into crime-, vermin-, and filth-infested homeless shelters. *See Reagan Cites "Choice" by Homeless: Shelter Available, President Says*, WASH. POST, Dec. 23, 1988, at A8.

157. Additionally, Cass Sunstein argues that the government's past practices are significantly responsible for poverty itself, which he argues is largely the result of government decisions to protect certain types of entitlement, such as property, and not others, such as the right of a homeless person to use available shelter. Accordingly, he argues, the government should be recognized as having a broader responsibility to ameliorate poverty that its actions have largely caused. *See generally* SUNSTEIN, *supra* note 18.

158. There is an argument that the unconstitutional conditions doctrine simply demarcates appropriate lines of public and private authority. That is, the individual

C. A Proposal: Harm-Based Analysis

Part of the reason for the failure of doctrine and scholarship to focus on harm to the individual as the basis for analyzing the constitutionality of government conditions on benefits is that both doctrine and scholarship are trapped by the classical conception of the unconstitutional conditions problem as a bargaining problem; the government, in placing conditions on government benefits, offers to give benefits if the individual will relinquish his or her constitutional right. Under this view, the constitutional question is to determine whether this bargain between the individual and the state is enforceable.[159] Using this false contracts conceptualization leads the analyst to focus on misleading issues, such as whether the individual's consent to the government contract was voluntary or coerced. If the individual's assent was coerced, such as by undue dependence upon the government benefit, then, the argument goes, the condition may be unconstitutional.[160] If not, then the individual has voluntarily waived the constitutional right. Other resulting questions are whether the bargain between the government and the individual is unenforceable because it is contrary to public policy, or whether the bargain is unconscionable.[161]

However, instead of this bargaining analysis, one might conceptualize the rights-affecting benefit conditions as an oppression problem. The core difficulty would then be neither defects in a hypothetical bargaining process between the individual and the state nor the negative social externalities that flow from bargains that ignore harms to third parties. Rather, the core issue would be

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may have a right to make a private value choice for abortion, but that right stops when the individual asks the government to pay for the exercise of the right. Similarly, the individual has no claim on the government to pay the expenses of rearing children, even though she has the right to decide to bear a child. This is essentially the argument that the Supreme Court made in Harris v. McRae, 448 U.S. 297 (1980), Maher v. Roe, 432 U.S. 464 (1976), and Rust v. Sullivan, 500 U.S. 173 (1991). However, what this analysis fails to recognize is that the individual's claim to the government's purse comes not from a right to funding per se, but a right to require the government not to allocate funding on the basis of her exercise of a constitutional right.

159. *See generally* EPSTEIN, *supra* note 109; Sullivan, *supra* note 22. Cass Sunstein is one exception, however, in that he examines the unconstitutional conditions question primarily as a question of the allocation of government power. *See* discussion *supra* text accompanying notes 113-15.

160. *See, e.g.*, Sullivan, *supra* note 22 (discussing the problems with using coercion as a theory of unconstitutional conditions). *See also* discussion *supra* note 138.

161. *See, e.g.*, Sullivan, *supra* note 22 (arguing that unconstitutional conditions are those that, despite the agreement of the rightsholder and the state, should be invalidated because of systemic consequences that arise from the exercise of these rights); Bogle, *supra* note 106.

whether government harms individuals for exercising constitutional rights.

The reason why harm-focused analysis is more helpful than a bargaining analysis for understanding rights-affecting benefits conditions is that harm focus is indeed the analysis originally underlying the constitutional right. In analyzing whether the government violated an individual's constitutional right, one ordinarily does not ask whether the government breached a bargain with the individual not to violate her constitutional right. One asks whether the government deprived the individual of her constitutional right or otherwise harmed the individual because of the exercise of her constitutional right. If so, the government's action violates the right regardless of any agreement by the individual.[162] Of course, one could conceptualize government placement of disincentives on constitutional rights as a draconian contract, in which the government agrees, for instance, not to imprison a person if she agrees not to exercise her constitutional right to free speech or to procreate. Instead, the usual argument is that the government harms her or, in Supreme Court parlance, burdens or penalizes her, for the exercise of the constitutional right.[163] The harm, in this example, the imprisonment, is seen as the problem. The government harms individuals to attack their state-disfavored exercise of a constitutional right, and thus improperly interferes with those individuals' freedom to exercise their rights without government interference. It is irrelevant whether the injured individuals accepted the government's terms or not, that is, whether they spoke or procreated freely or relinquished the right to speak or to procreate in order to

162. Thus, a fine for exercising a fundamental right is still unconstitutional even if the individual agrees to forego the right to avoid the fine, unless the government justifies its action by a compelling interest. There are reasons for this. As stated earlier, ordinarily government cannot physically prevent an individual from exercising the right. Thus, the government cannot physically prevent an individual from speaking or procreating, except perhaps by such drastic measures as cutting out tongues or sterilization. Instead, the government can affect constitutional rights only indirectly by harming individuals, after the fact, for exercising the right. Thus, the government may imprison a person who utters disfavored speech or makes state-disfavored childbearing choices. However, none of these tactics will prevent the person from speaking or procreating if she is determined to do so. Nonetheless, by placing a disincentive on the speech or procreation the government can hope to dissuade the person from exercising the right.

163. Epstein argues that this is an illegitimate bargain because the government is bargaining with what it does not have, that is, the right to imprison an individual. *See* EPSTEIN, *supra* note 109, at 40-41. However, whether the government has the "right" to imprison a person, it certainly has the *power* to imprison a person, and it is this power with which it is bargaining. Here, the constitutional right provides that the government cannot use that power or otherwise harm, penalize, or burden a person for the decision to exercise a constitutional right.

stay out of jail. The government harm for exercising the constitutionally-protected right violated the right.

Strangely, when the analysis shifts from traditional burdens or penalties, such as fines or imprisonment, to conditions on government benefits, suddenly the analytical structure shifts from torts to contracts. The question becomes whether or not the individual has or has not made a valid bargain with the state to freely relinquish her constitutional right in exchange for the government benefit, to which some scholars answer yes, others no. But the question should be, why, all of a sudden, has the discussion become about contracts at all? If it is improper to harm an individual by imprisoning her or fining her for the exercise of her constitutional right, and if consent to the imprisonment or fine will not cure a constitutional problem,[164] why is it considered to be a simple contractual matter when the state harms an individual by depriving her of a government benefit because of her exercise of a constitutional right?

A cynic might suggest that the conventional analysis shifts to contracts when the problem shifts to funding restrictions because contracts analysis posits an arms-length, bargained-for exchange between parties of equivalent status (although not necessarily equal bargaining power). This facilitates approval of the naked oppression that results when those who have, such as the state, give to those who need, such as welfare recipients, only on terms favorable to the giver. Where a harm-based analysis would see the terms as a problematic abuse of power, a contract-based analysis assumes a valid bargained-for exchange between someone who has (the state) and someone who needs (the welfare recipient). The welfare recipient has no right to what the state has. Therefore, the welfare recipient must take what she can get, upon whatever terms it is offered, and be grateful for it. Such a shift in the analytical structure permits the rich to keep both their wealth and their constitutional rights, while requiring the poor to surrender constitutional rights to obtain relief from destitution.[165]

Even without cynicism one can question why government violations of constitutional rights through "takings" should be so sharply different from government violations of constitutional rights through "refusals to give." Both government "takings" and "refusals to give," if linked to the exercise of a constitutional right, harm an individual because of her exercise of her constitutional

164. Thus, a government decision to affirmatively pay for people not to have children would probably be considered to be a violation of the right to procreate.

165. Indeed, the poor may have nothing to bargain with except their constitutional rights.

right. An individual who does not receive a government benefit solely because she has exercised her constitutional right in a state-disfavored way is harmed by the government. She is no less harmed because she had no antecedent right to the government benefit. Indeed, *because* she is bereft of other resources and depends upon government alms, she may be harmed more than a wealthy person would be disadvantaged by a small fine, or, qua Epstein, by a disproportionate redistribution of property through tax and spend policies. She is harmed because she has in fact lost something, that is, a government benefit. Moreover, her constitutional right is implicated because her loss is the result of her choice to exercise her constitutional right.[166] Once one focuses on the harm to the individual for exercising her constitutional right, one should clearly recognize that such harm is as constitutionally problematic as the loss of property or of liberty.

Of course, one might argue that government-imposed harm by refusal to subsidize a right should be treated differently than government harm imposed by a fine or a penalty on the right because subsidies of rights require government to supply funds, whereas fines or penalties do not.[167] When the government is asked to commit resources it is important to protect the public purse and to assure that resource-allocative decisions are made in a democratically responsible manner. Accordingly, the government, and particularly the legislature, must be free to allocate resources on any basis that it sees fit, even if such allocations adversely affect rights.

At some level, the argument about the government's need to democratically allocate resources makes sense. Obviously, resource allocation decisions require fundamental social judgments that seem quintessentially for legislative or executive rather than judicial determination. However, there must be limits on government discretion to make resource-allocative decisions. For example, if tomorrow, through some bizarre convergence of public hysteria and myopia, the legislature voted to give all government resources to one person, say Ross Perot, to distribute as he saw fit, there certainly would be constitutional problems. Accordingly, government allocation of benefits is not completely immune from judicial consti-

166. An analogy might be made to sexual harassment. Here, the employee has a cause of action for sexual harassment even if she consents to the sexual pressure to keep her job. *See, e.g.*, Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986) (permitting Title VII action for workplace sexual harassment if employer's sexual advances were unwelcome, even if plaintiff voluntarily "consented" to the advances). The bargain does not excuse the harm, i.e., the employer's misuse of power by requiring sexual favors as a condition of employment.

167. Fines and penalties do not require the government to supply funds, except to fund the bureaucracy needed to enforce the penalties.

tutional scrutiny.[168] Rather, the question is, to what extent does the Constitution limit the government's power to allocate the public purse? More particularly, why should government funding decisions that expressly disfavor the exercise of a constitutional right be permissible when the government cannot otherwise act to adversely affect the constitutional right?[169] In other words, although the government generally should have broad authority to allocate resources, there is no governmental authority that should override the otherwise constitutionally protected value choices of individuals.

Another counter to the harm by government denial of funding argument is practical. A focus on harm from government funding decisions would prevent government from making any funding decisions that adversely affect constitutional rights, since such decisions technically harm the individual by denying her government benefits. For example, any governmental funding decision that simply fails to include funding of a constitutional right can be construed to harm an individual because of her exercise of that right. Thus, a government decision to fund whale research, which by negative implication does not fund snail research, may be viewed as harmful to snail-researchers because of their First Amendment freedom of speech decision to research snails, not whales. The government obviously must make simple allocative decisions, such as to fund whale research but not snail research. Thus, government arguably must have discretion to allocate funds in a manner that adversely affects a constitutional right. Otherwise, the government, in order to make any funding decision that impacts a constitutional right, would be constitutionally obligated to fund all constitutional rights.[170]

This argument is incorrect, however. Prohibiting government harm to an individual because of her exercise of a constitutional right would not mean that the government must therefore fund the exercise of all constitutional rights. A government refusal to fund the constitutional right would only be constitutionally problematic if the government refusal to fund the constitutional right is specifically linked to the exercise of the constitutional right.

A few examples might clarify the distinction. Sometimes the government simply excludes a broad category of activity that hap-

168. *See, e.g.*, SUNSTEIN, *supra* note 18, at 294-96.

169. Of course, this is to be distinguished from neutral criteria that may incidentally affect the exercise of the constitutional right.

170. *See* Sullivan, *supra* note 22, at 1501 (arguing that "incidental" government rights-affecting conditions should be permitted because otherwise government would be able to make only unrestricted grants). *See also* Kreimer, *supra* note 106.

pens to include some constitutionally protected conduct. Thus, the government might decide to fund medical procedures but exclude discretionary medical procedures such as cosmetic surgery. The fact that the discretionary category includes non-medically necessary abortions does not mean that the government's failure to fund abortions infringes upon the woman's constitutional right to an abortion.[171] Although the decision harms the woman by denying her funding for abortion, the harm does not result *because* she decided to have an abortion. Rather, she was denied funding because she chose a discretionary medical procedure, which happened to be an abortion. Accordingly, such a refusal to fund is not really linked to, and thus should not be held to implicate, the constitutional right.[172]

In other cases, the government does not affirmatively exclude any activity from funding, it simply decides to include funding of other activities. Thus, the government might decide to fund rain

171. This would be true even if the general medical-assistance government funding program included pregnancy and childbirth, but not abortion—the funding distinction that is usually assumed to cause the primary constitutional problems in the Medicaid abortion funding cases. To understand this better, imagine a program in which the government decides to fund *solely* prenatal care for poor women. Here, the government simply establishes a priority to fund prenatal care and exclude all other activities, not just abortion. Thus, the government refuses to fund abortion because it is not prenatal care, not because it is abortion. This should be considered simply a rights-neutral allocation of government resources, even though the effect is to privilege one exercise of a constitutional right, childbearing, over another, "not childbearing," including abortion. The fact that childbirth assistance is a small part of a larger medical assistance program does not weaken this argument, indeed it may strengthen it. *See* Maher v. Roe, 432 U.S. 464 (1977) (holding that the government's decision to fund non-medically necessary abortions did not violate the recipient's constitutional right to an abortion); Hope v. Perales, 83 N.Y.2d 563 (1994) (holding that a state law that provided prenatal and post partum care to poor women, but did not fund abortion, did not violate the New York State Constitution). *But see* SUNSTEIN, *supra* note 18, at 315-18 (arguing that the U.S. Constitution as a matter of substantive due process should be interpreted to require government to fund abortions for poor women in the case of rape or incest).

172. An exception here might be where the government intentionally used this more general category as a way of targeting abortion. In such a case, the government's hostility to the woman's right to an abortion links the funding decision to the right and thus would implicate the right. *See* Minneapolis Star Tribune & Company v. Minnesota Comm'r of Revenue, 460 U.S. 575, 579-580 (1983) (discussing Grosjean v. American Press, 297 U.S. 233, 250 (1936), which invalidated a general Louisiana tax on large newspapers where all but one of the newspapers had "ganged up" on Huey Long and in which the Governor had advocated a general tax as a tax on "lying" newspapers; the Court in *Grosjean* further stated that the tax was a "deliberate" and "calculated" device in the form of a tax to limit the circulation of information to which the public was constitutionally entitled). An alternative argument is that there is an implicit constitutional right of poor people to government funding for the exercise of some constitutional rights; however, one does not have to make this argument to conclude that some selective government funding should be unconstitutional. *See* discussion *supra* note 23 and text accompanying notes 168-69.

forest protection. This decision should not implicate, say, the right to abortion, merely because the government funds rain forests and not abortions. Obviously, the government must be able to decide how to best use scarce governmental resources. The fact that the government decides to include funding of one category of activity does not imply that it is constitutionally obligated to fund others simply because the other activity is constitutionally protected.[173] What is constitutionally problematic, however, is when the government specifically *excludes* the exercise of a constitutional right from funding. Thus, the government may decide to fund medically necessary procedures, but exclude medically necessary abortion.[174] Such government decisions target the constitutional right. These decisions are not justified by the government's need to allocate resources. The need to allocate does not imply that one must allocate on the basis of a constitutional right. If the government is setting funding priorities, one might ask, Why not use a rights-neutral al-

173. Supplemental income programs, such as unemployment compensation and government disability payments may be in this category. Supplemental income programs generally apply only to persons who are unable to work, either because they cannot find work (unemployment compensation programs) or are physically unable to work (government disability programs). Persons who voluntarily choose not to work are not eligible. Because the Thirteenth Amendment provides a constitutional right not to work, these programs might arguably be a "refusal to fund" a constitutional right on the basis of the exercise of the right. However, here as well, the government simply makes a priority decision to fund persons who are unable to work. All people who are able to work, including those who are working and those who voluntarily are not, are excluded from funding. Thus, whether an individual chooses to work or not, that individual is still ineligible for aid. This distinction may seem like hairsplitting, but it is the legislative line. Here, Congress has denied funding on the basis of an individual's ability to work, and not on the basis of whether the able individual exercises her constitutional right not to work.

The workfare program and learnfare programs are more problematic because with these programs the government clearly denies need-based aid because of a constitutional right (assuming a constitutional right to refuse work or to choose not to be educated). Thus, with workfare and learnfare, if one works or goes to school, one gets aid; if one refuses to work or go to school, one is denied aid. However, the workfare program might be construed as simply implementing the same rights-neutral "ability to work" requirement as unemployment compensation programs. That is, because welfare is need-based aid, refusal to work, as opposed to inability to work, might be conceptualized as lack of need.

The problem with workfare programs, however, is that the work requirements often go beyond eligibility requirements and actually seek to require welfare recipients to work. Thus, the programs may impose punitive sanctions such as reducing aid for failure to work rather than simply defining welfare eligibility to exclude those who have available work. The former would seem to be government harm imposed because of the exercise of a constitutional right. Learnfare similarly denies a benefit on the basis of the exercise of a constitutional right (assuming, again, a constitutional right to choose not to be educated), and thus may be rights-violative. Instead, the government perhaps should provide better funding for education rather than punitive sanctions.

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

locative basis?[175] In such cases, the government harms people not by simply refusing to fund their constitutional right; instead, the government harms people by refusing to fund their constitutional right *because* of their exercise of the right. Such decisions to allocate government funds on the basis of the exercise of a constitutional right should be presumptively unconstitutional as a direct prohibition, fine, or penalty on the right would be. That is, it should be unconstitutional for government to deny funding *expressly* on the basis of the exercise of a constitutional right unless the government has a compelling reason for doing so.

One limited exception might be when the government must make rights-based funding decisions. An example is a government program that exclusively funds constitutionally protected activity. The government might decide to fund research, or university education, or the arts. Here, all funded activity in the program is constitutionally protected. Accordingly, any further narrowing line that the government draws must necessarily allocate upon the basis of a constitutional right. Thus, unless the government funds all research or all university education or all artistic activity or none at all, it cannot avoid drawing narrowing, rights-based lines.

The whale/snail research problem also falls within this category.[176] Once the government sets out to fund research of any sort, unless the government funds all research, no matter where the government draws the allocative line, at whales, snails, marine biology, or whatever, it necessarily allocates on the basis of a constitutional right—the right to select one's own research topic.[177]

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175. The Court's recent decision in *Rosenberger* supports this view. *See* Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995) (holding that the University of Virginia could not constitutionally exclude a student organization's Christian newspaper from funding that the university extended to other student organization publications).

176. *See* discussion *supra* text accompanying notes 171-72.

177. This analysis also takes care of the Supreme Court's oft quoted problem of funding for programs of democracy. The Supreme Court takes the position that overturning government refusals to subsidize would mean that the government would be required to fund research into communism if it sought to fund research into democracy. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173 (1991). However, this is an example of the situation in which the government seeks exclusively to fund constitutionally protected activity. This program exclusively funds a constitutionally protected activity—political science research. Here, once the government decides to fund any research program, any narrowing line that the government draws will allocate on the basis of First Amendment rights. Thus, government generally should be permitted to draw the line at research that it believes is appropriate for it to promote. However, this does not mean that any rights-affecting line that government draws is necessarily permissible. Thus, the government might draft a proposal to fund university programs in animal behavior, but only on the condition that such programs do not engage in research in snail behavior. The fact that prioritizing between animal behavior and other research may be a legitimate reason to adversely

Another example is a government decision to fund prenatal care for pregnant women. Here, the government chooses to exclusively fund constitutionally protected activity: the decision to have children. Yet a decision to fund prenatal care, by negative implication, denies funding to people who choose to adopt children or have abortions. The very decision to fund prenatal care draws an allocative line on the basis of the exercise of a constitutional right. However, unless the government decides to fund all childbearing decisions, it must make some allocative choice, and any allocative choice it makes, short of universal funding for all childbearing decisions, is going to negatively impact the exercise of a constitutional right. In this limited category of cases, then, the government's decision must be rights-based or government may not fund at all. To best protect the constitutional rights of individuals, the government should perhaps draw lines in a manner that least impairs the values protected by the constitutional right. Since any allocative decision violates the constitutional right here, any government decision that has some legitimate basis is probably sound.[178]

When the subject matter of the government funding includes both protected and non-protected activity, however, the government has a choice to draw allocative lines on some basis other than the exercise of a constitutional right. In this context, it should be reasonable to require the government, given a choice, to do so; if, instead, the government insists on drawing rights-based allocative

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affect the exercise of a constitutional right does not mean that specifically excluding a limited research topic must necessarily be. These types of government funding decisions are particularly difficult to analyze because the government is in effect treading in a mine field, that is, any decision it reaches will adversely affect rights. The Court's recent decision in *Rosenberger* involved a funding criterion of this type. *See* Rosenberger v. Rector and Visitors of the University of Virginia, 115 S. Ct. 2510 (1995) (striking down a state university's decision to exclude a Christian student newspaper from general university funding for student organization publications). *See also* Cole, *supra* note 110 (arguing that constitutional restrictions on government funded speech should be analyzed as establishing institutional "spheres of neutrality" in which social values of fostering public deliberation require government neutrality with respect to funding conditions).

178. Professor Sunstein argues that any impact on rights by denial of a benefit should be permissible, unless the right requires government neutrality, if supported by a legitimate government interest. SUNSTEIN, *supra* note 18, at 304-05. His standard may suffice when the government has no choice but to violate the right or abandon the aid program altogether, but in other cases where the government has a choice between impairing rights and not impairing rights, his legitimate interest standard does not adequately protect rights. A government decision to impair rights should be treated the same as direct regulation of the right. In many ways this argument is for consistency, that is, once the Court establishes a fundamental right against direct regulatory activity, all government funding decisions that harm persons because of the exercise of that right should be equally suspect because they contain the *same* government wrong—harming individuals because of the exercise of their constitutional rights.

lines, it should expect those lines to be subject to the same level of scrutiny as any other rights-based government action.

Even more problematic are rights-hostile government denials of funding on the basis of the exercise of a constitutional right. Such denials are not really allocative decisions at all. The government uses denials of funding as a regulatory tool to disadvantage the exercise of a constitutional right. That is, many government refusals to fund are not positive decisions to allocate scarce resources to higher-priority projects, but rather are negative decisions to *exclude* from funding the exercise of a constitutional right because of government hostility to the exercise of that right. These types of government funding decisions clearly raise the same kind of constitutional issue concerning government intrusions into constitutionally protected activity as do direct fines or penalties on the activity.

An example is found in the Medicaid funding for abortions case, *Harris v. McRae*,[179] in which the government generally funded medically necessary procedures but refused to fund medically necessary abortions. There was no necessity for the government decision to draw the allocative line at the doorstep of a constitutional right. Indeed, there was really *no* allocative basis for this government decision. Funding medically necessary abortions would have saved the government the Medicaid expenses of a full-term, medically-risky pregnancy.[180] The government excluded

179. 448 U.S. 297 (1980).

180. One frequently made argument is that refusing to fund abortions is justified by a "conscientious objector" rationale that permits the government to constitutionally refuse to fund activities that a portion of the taxpaying public object to on moral or religious grounds, even if the denial of funding would otherwise violate the constitutional right. Under this view, such "conscientious objections" constitute a sufficiently strong governmental interest to negate whatever constitutional problem flows from the rights-based denial of funding. *See, e.g.*, McConnell, *supra* note 115; SUNSTEIN, *supra* note 18, at 305-16; EPSTEIN, *supra* note 109, at 291-94.

The conscientious objector argument should not justify violations of constitutional rights. First, the forum for accommodating individual preferences concerning appropriate funding is the legislative process and, accordingly, should be subject to the same constitutional constraints that otherwise bind the legislative process. Since constitutional abortion rights are a check on the power of the legislature as a whole to impose individual moral preferences on others, these individual preferences should not override otherwise applicable constitutional limits on legislation.

Even if taxpayer moral preferences were relevant on free exercise or other grounds, it is misleading to suggest that an individual taxpayer's tax will "pass through" to a particular program, say abortion funding, rather than defense spending; taxes are pooled and then distributed to government programs. Accordingly, an individual taxpayer's claim that she or he is directly funding any particular government program seems strained at best.

Moreover, even if preferences were significant, they should not be strong enough to authorize an imposition of harm upon rightsholders simply to accommodate the moral objections of those who essentially disagree with the protection afforded under

abortions from funding because it sought to discourage poor women from having abortions, even if their health was at risk.[181] Such a rights-hostile government decision to harm a person by denying her funding solely because she plans to use the funding to subsidize a government-disfavored constitutional right should be treated exactly as would direct regulation of the constitutional right.[182]

However, even if the government's goal is not naked hostility to the exercise of a constitutional right, a government decision to expressly exclude a constitutional right from funding should be presumptively unconstitutional, unless the government has no choice but to affect the right. Such a government decision harms individuals because of their decisions to exercise constitutional rights and should be treated like all other government actions that harm individuals because of the exercise of constitutional rights. Only a com-

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the right. An analogue would be refusing interracial couples marital deductions or Social Security spousal benefits because some taxpayers claim to have moral or religious objections to interracial marriage.

181. *See Harris*, 448 U.S. at 315 (upholding Hyde Amendment denying federal funding for medically necessary abortions except to save the life of the mother).

182. The government programs in Lyng v. International Union, 485 U.S. 360 (1988), and Rust v. Sullivan, 500 U.S. 173 (1991), would appear problematic under this analysis. The Supreme Court in *Lyng* upheld a statutory provision that denied food stamps to striking workers even though workers who had voluntarily quit work for other reasons were eligible for benefits. 485 U.S. at 372. However, such a program clearly harmed workers by denying them eligibility for food stamps solely on the basis of their exercise of their apparent constitutional right to strike and thus should be subject to the same level of scrutiny as other statutes burdening or penalizing the right to strike. This analysis assumes, of course, that there is a constitutional right to strike and that striking workers otherwise would have been eligible for food stamps. Obviously, if there is no constitutional right to strike, then the *Lyng* restrictions would not pose constitutional problems. *Lyng* petitioners raised First Amendment associational rights to unionize and free speech rights to express themselves about union matters. However, these interests do not necessarily support a constitutional right to express these interests through strikes. *See* Baker, *supra* note 108, at 1221-22 (arguing that there was no constitutional right to strike at stake in *Lyng*).

Rust v. Sullivan is also problematic. There, the Supreme Court upheld a government regulation which clearly harmed Title X recipients by preventing the clinics and doctors from giving clinic clients information about abortion. As in *Lyng*, the government excluded program recipients from otherwise available funding solely on the basis of their exercise of a constitutional right—namely, a First Amendment right to give medical information to patients. Again, this assumes the constitutional right is protected here. Thus, the *Rust* restrictions might be analyzed as a time, place, and manner restriction on free expression since the doctors could offer counseling about abortion outside of the Title X programs. However, time, place, and manner restrictions are, as a rule, content-neutral and based upon government administrative concerns, which the abortion counseling restriction was not. *See* Roberts, *supra* note 74 (arguing in favor of a substantive government obligation to provide poor women information for their own liberation).

pelling legislative justification for the imposition of such harm should suffice.[183]

One might argue that invalidating government refusals to subsidize that harm individuals *because* of their exercise of a constitutional right requires government to spend additional funds. However, overturning harmful government funding decisions does not necessarily require government to expend additional funds, it merely requires government to draw different allocational lines. Thus, the government could remedy the problem by eliminating the benefit altogether or by drawing non-rights-based lines. Of course in some cases, legislative majorities may not approve funding programs without the rights-offensive criteria.[184] However, such legislative difficulty may support invalidation because it may indicate a legislative bias against the constitutional rights of program beneficiaries rather than a genuine legislative purpose to enact socially desirable policies.

Additionally, one might argue that forbidding government to adopt benefit allocations that harm individuals because of the exercise of constitutional rights would improperly mandate government neutrality regarding constitutionally-protected value choices, which would impermissibly handicap the government from effectively legislating in the social interest.[185] That is, the government must have some permissible tools to encourage individuals to exercise their rights in a socially-productive rather than socially-destructive manner. Indeed, the government regularly legislates incentives for individuals to make government-favored choices instead of government-disfavored choices. Tax policy is an obvious example of the government structuring laws to favor or disfavor certain types of activity.[186] No one would reasonably argue that the Constitution completely precludes the government from using its tax or benefit allocation authority to encourage socially productive behavior.[187]

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183. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (concluding that the federal government's refusal to subsidize racially discriminatory religious schools by granting them a charitable tax exemption implicated the school's right to religious freedom and thus triggered strict scrutiny, but holding that the restriction was justified by the state's compelling governmental interest in combatting racism).

184. Recent difficulties in passing health care legislation that also covers abortions is an example of this problem. *See, e.g., The Health Care Debate: The Abortion Issue*, N.Y. TIMES, July 14, 1994, at A1.

185. *See generally* Sunstein, *supra* note 22. Of course, if the government's social interest is compelling, the government could constitutionally make such benefit allocations anyway. *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

186. The use of charitable tax deductions to encourage charitable donations is an example of such a legislative tax incentive.

187. *See, e.g.*, Sunstein, *supra* note 22.

This argument has some persuasive force. Of course, often government incentive programs do not disfavor the exercise of a constitutional right. However, even when government allocations do disfavor constitutionally protected rights, some community interests, short of compelling interests, may justify permitting the government to encourage citizens to exercise rights in socially productive ways. For example, teenage pregnancy is obviously a significant social problem. Teenagers, children themselves, have difficulty providing satisfactory emotional and financial support to their children.[188] Teenage parents' frequent inability to properly rear their children strains the fabric of the society considerably, which often must support those children through the welfare and social services system. Such procreative decisions also may cause increased crime and other antisocial behavior if immature teenage parents fail to give their offspring adequate social survival skills. Accordingly, the government should arguably have some means to influence teenagers to postpone childbearing.[189] To argue otherwise would improperly require absolute neutrality from the government with respect to constitutionally protected rights, even when such constitutional rights do not demand government neutrality.[190]

However, the fact that the legislature may disfavor teenage pregnancy as social policy and thus seek to discourage it does not mean that *any* government means to effectuate its policy choice are necessarily valid. Rather, as rights doctrine recognizes, governmental means that harm or injure an individual to promote or influence "responsible" or socially-desirable exercises of constitutional rights are presumptively invalid and may be justified only if the government's social interest is compelling.[191] Although the Constitution does not require absolute neutrality with respect to constitutionally-protected value choices, the Constitution prohibits government from using harmful or oppressive means to implement its social policies.

Certainly, some governmental means to discourage socially troublesome behavior should be permissible. A public education

188. *See* discussion *supra* note 13. *See also* Katherine M. Waters, *Judicial Consent to Abort: Assessing a Minor's Maturity*, 54 GEO. WASH. L. REV. 90 (1985) (discussing research concerning emotional and parenting problems of teenage parents).

189. These arguments are undercut somewhat in the benefit allocation context because the government limits its policies to program beneficiaries and does not apply them to the population at large. Thus, the government may challenge a decision by an impoverished teenage welfare recipient to have a fourth child out of wedlock while permitting an upper middle class teenager to subsidize her child through family tax exemptions.

190. *See* discussion *supra* notes 171-78 and accompanying text.

191. *See* discussion *supra* part II.B.

campaign, for example, to encourage children not to have children would certainly seem permissible. Imprisonment of teenage parents is clearly impermissible. Conditioning access to government benefits on an individual's decision to forego constitutionally-protected procreative value choices should not fall within the category of appropriate governmental means. This type of intrusive government benefits allocation, as opposed to other non-harmful government action such as public information campaigns, harms or injures the individual for her exercise of the right to procreate just as direct government regulation would and therefore should be an invalid use of government power.

In sum, a constitutionally problematic funding condition is one in which the government harms an individual by denying her government funding because of her exercise of a constitutional right. Such a condition should be problematic regardless of hostile legislative intent to affect the exercise of the right, although such hostile intent should certainly suffice. Rather, the key inquiry should be whether the government has in fact harmed an individual expressly on the basis of the individual's exercise of the right.

V. The Harm-Based Analysis and Family Cap Plans

Using a harm-focused analysis, one can see more clearly why family cap plans should be unconstitutional. They are government's imposition of harm to influence the childbearing choices of welfare recipients. The very definition of a fundamental constitutional right to procreative choice imposes limits on the government's ability to affect these rights by direct prohibition or by harm to individuals for their exercise of the right. The right to make childbearing decisions demarcates areas of private choices where basic personal value choices and lifestyle decisions are protected from government harm.

Underlying the protection of fundamental procreative rights is a normative choice that these decisions are ones that should be committed to the private sphere rather than to the public one. That is, a necessary attribute of citizenship is that one carries the right to make, without government interference, certain fundamental choices about matters that are important to one's life. Thus, the Supreme Court has described the decision to bear or beget a child as the essence of the right to privacy.[192]

192. *See, e.g.*, Carey v. Population Services, 431 U.S. 678, 685 (1977) ("if the right to privacy means anything, it means the right to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision

A. *Harm Analysis and Traditional Procreative Rights*

In the abortion and contraceptive decisions, the Supreme Court interpreted the Constitution to delegate moral procreative choices to the individual rather than to the state. The Constitution, as thus interpreted, creates laissez-faire zones where individuals' private moral choices prevail over those of the state (or, perhaps put another way, of legislative majorities).[193]

Even the Court's roundly criticized decision in *Bowers v. Hardwick*[194] recognizes that some procreative decisions are private moral choices protected from government intrusion. The *Bowers* Court refused to protect private sexual conduct, traditionally culturally and legally proscribed,[195] and concluded that moral regulation of such conduct was within the permissible legislative sphere.[196] However, the *Bowers* Court also recognized that the Constitution protects private procreative choices including the decision whether to bear or beget children.[197] Indeed, the Court characterized previously defined fundamental rights, and thus by implication the right to decide whether to bear or beget a child, as "deeply rooted in the nation's tradition"[198] and "so essential to the concept of ordered liberty that 'neither liberty nor justice' would exist if they were sacrificed."[199] Whether the Court correctly concluded that such traditional "essential rights" are the only fundamental rights protected under the Constitution, the Supreme

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whether to bear or beget a child" (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

193. An alternative theme in abortion cases grounds rights on bodily integrity rather than moral choices. Problems arise, of course, where moral choices affect other persons, which gives rise to a government interest in regulating the choice. However, the strict scrutiny standard determines whether governmental interests are sufficient to override the individual's fundamental rights.

194. 478 U.S. 186 (1986) (upholding state law criminalizing sodomy). *See also* Earl Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629, n.95 (1990) (providing extensive list of articles criticizing *Bowers v. Hardwick*).

195. Many objections can be made to the Court's view, not the least of which is to question protecting private sexual choices less than private procreative choices, particularly given *Griswold*'s emphasis on protecting private, consensual sexual activity from state interference. Griswold v. Connecticut, 381 U.S. 617 (1965) (invalidating state law outlawing contraception).

196. An additional issue raised by *Bowers* is that it fails to distinguish the question of whether the community may develop community norms for private consensual sexual conduct and enforce them by community sanctions, such as ostracism, from the question of whether the community may use state power to force dissenters to comply with those norms.

197. *Bowers*, 478 U.S. at 190 (approving decisions conferring a fundamental individual right to decide whether to bear or beget a child).

198. *Id.* at 192 (citing Moore v. East Cleveland, 431 U.S. 494 (1977)).

199. *Id.* at 191-92 (citing Palko v. Connecticut, 302 U.S. 319 (1937)).

Court's strong support for the right to decide whether to bear and beget children confirms that such procreative decisions are constitutionally committed to private choice and insulated from government control.

The protection of private lifestyle and value choices with respect to the right to bear children distinguishes procreative rights from other economic constitutional rights that have often been the subject of the unconstitutional conditions doctrine. Privacy rights protect the individual's ability to make personal value choices.[200]

The definition of the right to procreate protects individuals not just against direct government prohibition of the right, but also against the government harming an individual because of the exercise of the constitutional right. Thus, the doctrine protects against burdens on the right to procreate as well as upon direct prohibitions. Except for *Skinner v. Oklahoma*,[201] which involved forced sterilization, the subsequent cases that protect the right to bear and beget children all involved indirect government attacks on the right through government policies that harmed individuals for making procreative choices disfavored by government. In *Griswold v. Connecticut*[202] and *Eisenstadt v. Baird*,[203] the Supreme Court invalidated state statutes that criminalized the use and distribution of contraceptives and imposed a fine and/or jail term. The statutes did not, indeed could not, prevent individuals from using contraception if they could obtain it. Rather, the statutes imposed subsequent harm, that is, fines and/or jail terms, for contraceptive use.

Similarly, in the subsequent case *Carey v. Population Services*,[204] the Supreme Court invalidated statutes that did not criminalize contraceptives but instead imposed regulatory restrictions on their use, such as requiring distribution by licensed pharmacists. In *Carey*, the Court recognized that the statutes indirectly harmed those who sought to use contraceptives not by criminalizing their use, but by making the acquisition of contraceptives more expensive or inconvenient. The statutes, even less so than the criminal ones at issue in *Griswold* and *Eisenstadt*, did not prevent people from exercising their constitutional right to decide to bear or

200. In contrast, rights that protect only economic interests are generally not subject to strict scrutiny. *But see* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (using a germaneness/reasonableness standard to invalidate the government's conditioning of a permit on a partial taking of the applicant's property rights).

201. 316 U.S. 535 (1942).

202. 381 U.S. 479 (1965).

203. 405 U.S. 438 (1972).

204. 431 U.S. 678 (1977).

beget children. For example, people could easily obtain contraceptives by going to their local pharmacists. However, the Court held even the relatively minor imposition of harm on individuals who sought to obtain contraceptives to be sufficient to invalidate the statute.

The procreation cases, in effect, illustrate the Supreme Court's traditional burden or penalty concept. They exemplify the notion that government violates a constitutional right if it imposes a burden or a penalty on the exercise of the right, even if the individual retains the ability to exercise the right.[205]

B. Analysis of Family Cap Proposals

In the context of statutes that refuse to support children born while the mother is on welfare and supporting children born before the mother joined the welfare rolls, the Supreme Court should recognize that once the obscuring language of burdens and subsidies is stripped aside, the statutes are in effect the same as statutes that would seek to impose fines or penalties on welfare mothers who choose to bear children.[206] In both cases, the government harms the welfare mother by imposing a cost upon the family expressly because of her decision to bear children while on welfare. Under family cap proposals, the family that makes the disfavored choice is expressly disadvantaged in relation to other similarly situated families that receive higher welfare payments because they chose to bear their children born before they were welfare recipients. Welfare families are thus harmed for their decisions to exercise their procreative choices to decide when and whether to have children.

Moreover, the harm to welfare families, in real-life terms, is frightening given the fact that, by definition, they are already destitute. The denial of welfare benefits for additional children solely because they are born while the family receives welfare can devastate the family unit. Welfare payments to poor families already

205. *See supra* notes 60-69, 129 and accompanying text.

206. Family cap plans might arguably be analyzed as penalties under Supreme Court doctrine, since the mother who has a child while receiving welfare will, after the birth of the child, receive less aid per child then she did before the child was born. However, under the analysis in *Dandridge*, 397 U.S. 471 (1970) (treating the welfare family as a unit for equal protection purposes rather than treating each child as a separate recipient), *Harris*, 448 U.S. 297 (1980), and *Maher*, 432 U.S. 464 (1976), the Court would likely analyze these welfare statutes not as "penalties" but as *refusals to subsidize*, since the government does not reduce the family's welfare grant on the birth of the additional child but rather simply refuses to increase it. To the extent that this means the family's economic condition is worsened, the response under *Harris* and *Maher* would be that this worsened economic condition is not the result of any government action, but rather is the "result of their poverty," a situation for which the government, the Court argues, is not responsible.

provide only a portion of what children need.[207] Moreover, welfare payments over the last several years have significantly decreased when adjusted for inflation.[208] To take a family that is already deprived and to deprive them further can only exacerbate the negative problems associated with childhood poverty, including lowered behavior and cognitive skills, augmented health problems, and reduced access to medical care.[209] The United States already has the highest child poverty rate of the industrialized nations.[210] Family cap plans serve only to reduce the weak safety net provided to poor children.[211] The sole basis for the benefit denial is the procreative choice of the mother.

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207. States need not fully cover standard of need, and they generally do not. *See* 45 C.F.R. § 233.20(a)(2)(ii) (1993).

208. *See Welfare Debate Driven by Half Truths*, L.A. TIMES, Oct. 28, 1992, at A1 [hereinafter *Half Truths*] (stating figures showing that welfare rates decreased significantly in the 1980's after adjusting for inflation).

209. *See* Sandra E. Danziger & Sheldon Danziger, *Child Poverty and Public Policy: Toward a Comprehensive Anti-Poverty Strategy*, 122 DAEDULUS 57, 71-72 (1993).

210. *Id.* at 57 n.1. The Danzigers state that 20% of American children live in poverty, compared with 9% in Canada and Australia and less than 2% in Sweden. Moreover, 54.2% of American children in single parent families live in poverty, compared with 37% in Canada and less than 2% in Sweden. *Id.* at Table 5. In addition, the Danzigers urge that high American child poverty rates may be caused by a combination of low wages and relatively high unemployment in the United States, and the failure of the American "social safety net" to provide adequate relief from this poverty. *Id.* at nn.1-20. Also, American policy in the 1980's shifted to divert safety net resources away from the young and towards the elderly. *See generally* WILSON, *supra* note 124 (arguing that large-scale structural changes in the economy have created a socially isolated urban underclass with little opportunity for employment and larger participation within the society, and advocating systemic economic changes to promote economic growth and low unemployment).

211. Some argue that total welfare benefits, including food stamps, federal tax earned income credit, Medicare, Medicaid, and child care are too high, in part because they may exceed the amount which one can earn from a minimum or low wage job, thus providing a disincentive for welfare heads of household to seek low wage employment. *See, e.g.*, *Welfare Trap or Net? Reformers, Recipients Fear Help That Hurts*, WASH. TIMES, Mar. 22, 1994, at C4. However, as stated earlier, these benefits are generally well below the standard of need for welfare families. *See supra* note 207. Instead, some argue that the converse is probably true—that the minimum wage is too low, miring low wage workers in poverty and thus depressing wage rates for the population at large as well as increasing the burden on the welfare system. For example, the current minimum wage of $4.25 per hour makes it impossible for single parent families with only one wage earner, which happens to be the largest proportion of welfare beneficiaries, to lift their families out of poverty by returning to work. *See, e.g.*, Roberts, *supra* note 12, at 1305. Roberts advocates raising the minimum wage as part of a welfare reform program that attacks poverty, rather than welfare recipients. *Id.* at 1306. Her program would also include increased child care, child support collection, education, and training for poor women. *See also Half Truths*, *supra* note 208, at A1 (noting that more than one-third of poor children under age six live with single or married parents who work at least one full time job, and profiling a welfare mother who quit a good job that paid nine dollars per hour because child care costs, and lack of medical insurance, consumed so much of her income that she could not afford to continue working).

Such a benefit denial presumptively violates a welfare mother's right to procreate and should be held unconstitutional unless it is either a necessary consequence of the government's decision to fund, or is otherwise justified by a compelling governmental interest. Government obviously does not need to allocate AFDC payments on the basis of the procreative choice of the welfare mother. Government can easily allocate welfare on some other basis. For example, the government could place flat dollar caps on benefits, which would apply regardless of the welfare recipient's procreative choices. Alternatively, the government could, as it generally does, allocate welfare on the basis of need. Such allocative lines would be rights-neutral and would not implicate the welfare mother's procreative rights.[212]

In addition, government does not have a strong enough interest to justify family cap plans. The question should be: would the government's asserted interests warrant direct restrictions on procreative rights? If not, then these interests also should not justify a rights-based denial of funding. Family caps should fail under this analysis. The reasons advanced for basing welfare benefit levels on the recipients' procreative decisions are often avowed hostility to the mother's procreative choices.[213] That is, the rationale typically advanced in support of these family cap proposals is explicitly to discourage welfare mothers from having additional children.[214] Such a rights-hostile governmental interest clearly does not suffice as a compelling interest since the government cannot argue that its compelling interest for violating the constitutional right is that it objects to the right.[215]

Other government arguments advanced to justify family cap plans are also not compelling. For example, the plans are sometimes justified as cost-saving devices, or as ways of ensuring equity between the welfare recipient and the working poor who, it is claimed, "don't get a raise if they have an additional child, even if they need more money." Yet a mere government interest in saving money is generally not considered sufficient to override a constitutionally protected right, and in any event, flat dollar caps would advance this interest in a rights-neutral manner.[216] Moreover, the

212. *See, e.g.*, Dandridge v. United States, 397 U.S. 471 (1970). *See also* discussion *supra* notes 81-85 and accompanying text.

213. *See* discussion *supra* notes 51-54 and accompanying text.

214. *See generally* discussion of family cap policies *supra* part I.

215. Of course, if the government did have a sufficiently compelling reason to directly prohibit the exercise of the right, it could also refuse to fund it. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

216. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974).

argument that increasing welfare benefits on the birth of an additional child advantages welfare recipients over the working poor is simply incorrect. Unlike wages, welfare payments are limited to need.[217] Welfare recipients are given aid only because they need government assistance to avoid starvation and homelessness, and may generally receive benefits only until they are able to find employment.[218] The level of government assistance is thus tied to, and is often below, the level of need.[219] Accordingly, the welfare recipient's benefit level increases on the birth of an additional child not as a reward or payment for the birth, but as a reflection of the family's additional need, which is the sole basis for welfare.

Welfare recipients are still worse off than the working poor whose salary levels are not determined by and thus not limited to need. Although the birth of an additional child increases a working family's need, the increased need should not affect the individual's salary, because that salary is not determined by, or limited to, need. Consequently, unlike welfare recipients, wage earners can earn considerably more than they need.[220] To argue that increasing need-based aid, when levels of need increase, fosters "inequity" between welfare recipients and the working poor misprises the nature and function of the welfare program. To compare the two payment schemes is an apples and oranges debate. Moreover, even if reducing inequity between income classes is a legitimate governmental concern, and even if this concern is impaired by welfare recipients' childbearing decisions, reducing the inequity does not justify directly regulating recipients' procreative rights and should accordingly not suffice to uphold rights-based benefit allocations.

Another argument is that removing the increment for the birth of an additional child would discourage a welfare mother from having additional children and thus make it easier for her to get off

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217. *See* 42 U.S.C. § 602(a)(7).

218. Often welfare policy analyses such as that reflected in family cap proposals seem to assume that welfare is collected instead of work, rather than because the welfare recipients are unable to find work. To some extent, this view might be an outgrowth of historical AFDC policy which often advocated keeping women out of the workforce and at home with children. *See generally* Handler, *supra* note 97. However, as women's family roles, marital status, and the racial composition of AFDC recipients changed, so did societal expectations about whether young AFDC mothers should be expected to work. Of course, some argue that the structure of the welfare system provides a disincentive to work and thus "fosters dependency." However, if this argument were true, it should be viewed as a deficiency in the welfare system rather than its purpose.

219. *See supra* note 207.

220. Of course, wage-earners can also earn less than their need. However, if a wage-earner earns less than her standard of need, she is eligible for welfare.

welfare. This may or may not be the case.[221] However, unless this argument would be strong enough to justify a direct prohibition on procreative choices of non-welfare recipients, it should not be strong enough to justify harming a welfare recipient because of her exercise of procreative rights.

Moreover, these plans are rights-hostile. With family cap proposals the government exploits the recipient's poverty itself as leverage to influence her private moral, behavioral, and value choices. Because of their poverty, welfare recipients have little choice but to submit to the government's terms in order to survive. By definition, a welfare recipient has nowhere to go for subsistence but to the government. If the welfare recipient had other resources, she would be ineligible for welfare which, by statutory design, is the safety net of last resort. Knowing this, the government uses welfare recipients' desperation to curtail the recipients' ability to freely make constitutionally-protected value choices, and harms them in a direct and immediate way for the exercise of the constitutional right to procreative choice. Linking welfare benefits to procreative choices substitutes the government's value choice for that of the welfare recipient and constitutes excessive government intrusion into the private moral, social, and value decisions of welfare beneficiaries. These proposals unconstitutionally subject welfare beneficiaries to the oppressive control of those fortunate enough to not be dependent upon state largesse for survival and consequently deprived of their constitutionally-protected procreative rights.

Conclusion

Family cap plans raise the issue of whether government may constitutionally use rights-based benefit conditions as a tool to influence value choices otherwise constitutionally protected from government intrusion.

Traditional Supreme Court doctrine answers this question by asking whether the government benefit condition is a burden or penalty (in other words, a government decision that takes away something to which the individual has a right), or a mere government refusal to subsidize (that is, a government decision to not pay for constitutionally protected activity). If the latter, the denial of funding is constitutional regardless of its link to constitutionally protected activity or its harmful impact on the recipient of the funding.

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221. *See, e.g.*, Williams, *supra* note 11, at 737-41.

This bifurcated approach protects the "haves" while unleashing the power of the government to attack the constitutional rights of those who are recipients of government aid. This is particularly true with subsistence welfare benefits where, by definition, the recipients are poor and dependent upon government funding for basic necessities such as food, clothing, and shelter. This view thus gives government significant power to use poverty itself as leverage to affect otherwise constitutionally-protected value choices.

Scholars have consistently criticized the Court's approach. However, they have focused on whether the government action has prevented, affected, coerced, or pressured the exercise of the constitutional right. In truth, the effect of the condition on the exercise of the constitutional right is only a smoke screen. The underlying problem with both government fines or penalties and government funding conditions is the harm or suffering that government imposes because of the exercise of a constitutional right. In the former case, the harm is the fine or penalty on the exercise of the right; in the latter case, the harm is the loss of funding because of the exercise of the right. It is this rights-based harm that is the basis for invalidating government fines or penalties. Thus, fines or penalties are unconstitutional even if there is no effect on the individual's choice—that is, if the individual nevertheless elects to exercise the rights and incur the penalty. This rights-based harm should also be the basis for invalidating rights-based government funding conditions.

Accordingly, this article argues, the better analysis should assess the constitutionality of funding conditions on the basis of whether they impose rights-based government harm. Under this view, government harm that is expressly or intentionally linked to the exercise of a constitutional right would be constitutionally problematic whether the harm is the deprivation of a right or the denial of a benefit. Thus, a government decision to specifically exclude rights-protected activity from funding should be impermissible if a direct fine or penalty on the exercise of the right would be.

An exception might be where some rights-based line drawing is necessary. However, child limitation plans do not fit within the limited exception. The plans involve AFDC payments that generally provide for the subsistence needs of poor families. There is no need for the government to draw a distinction in payment levels on the basis of the welfare mother's exercise of a constitutional right to procreate. The government can base payment levels on a myriad of other factors. Accordingly, such benefit plans should be recognized for what they are: rights-based, government-imposed harm and

suffering. Accordingly, they should be subject to the same strict scrutiny as any other attack on the right would be.

This view does not mean that the government is stripped of power to attempt to encourage citizens to make wise procreative choices. However, the government, in its reformist zeal, should not be able to use unconstitutional means to achieve legitimate goals in disregard of the constitutional protection of the fundamental right to procreate. Instead, the government should seek constitutional, non-oppressive means to achieve legitimate ends—means that respectfully seek to persuade citizens to make wise choices rather than bludgeon them into compliance.

As applied to child limitation plans, the government should be held to violate the procreative rights of welfare recipients if it uses harm and suffering, the weapons of oppression, to substitute the government's own procreative value choice for that of the recipient. Otherwise, what price rescue?