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In Committee to Defend Reproductive Rights v. Myers, the California Supreme Court held that the California legislature could not constitutionally refuse to pay for abortions for indigent women if it was willing to pay for other procreation-related medical expenses. The court rejected the conclusion of the United States Supreme Court that a public welfare program could constitutionally fund childbirth but not abortion and invalidated the abortion funding restrictions under the California Constitution.

In contrast to the United States Supreme Court's use of an equal protection analysis, the California court in Myers applied the little known doctrine of unconstitutional conditions to the problem. Using this doctrine to invalidate abortion funding limitations had been suggested by several commentators, among them Justice Brennan. The Myers court followed their lead, concluding that the doctrine of unconstitutional conditions was a more appropriate method to use in deciding abortion funding cases than the more traditional approach based on the equal protection clause. This Note traces the development of the doctrine of unconstitutional conditions.
both in California and in the federal courts and compares the doctrine with equal protection analysis in the context of the abortion funding cases. The Note concludes that the Myers court should not have applied the doctrine of unconstitutional conditions because the doctrine was not applicable to the facts of the case and because equal protection analysis provides a better analytical tool for deciding such cases.

I. BACKGROUND OF THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The doctrine of unconstitutional conditions prevents the government from conditioning the grant of a benefit upon the waiver of a constitutional right.\(^9\) The history of the doctrine’s development and decline, both in the federal courts and in California, helps explain its meaning and significance.

A. Development of the Doctrine in Federal Courts

1. State Restrictions on Out-of-State Corporations

Federal courts first applied the doctrine of unconstitutional conditions in a series of cases involving state attempts to deny certain benefits to out-of-state corporations.\(^10\) The states contended that because they had the constitutional right to ban out-of-state corporations from doing business in the state,\(^11\) they also had the right to place conditions upon the “privilege” of doing business there.\(^12\) After vacillating in several cases,\(^13\) the

\(^11\) See infra note 15.
\(^12\) See Davis v. Massachusetts, 167 U.S. 43, 48 (1897); Doyle v. Continental Ins. Co. 94 U.S. 535, 541 (1877). The states’ most persuasive argument for allowing them to do this was that the “greater” right, which they admittedly possessed, to exclude corporations necessarily encompassed the “lesser” right to admit the corporations only upon certain terms. The Court apparently accepted this argument in some cases. See Packard v. Banton, 264 U.S. 140, 145 (1924); Davis v. Massachusetts, 167 U.S. 43, 48 (1897). For a defense of the logic of the argument, see Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321, 321–22 (1935); Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879, 889–92 (1929).
\(^13\) The Supreme Court indicated as early as 1856 that a state could not impose conditions that are “repugnant to the Constitution or laws of the United States” on foreign corporations wishing to do business in the state. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856). The Court held in Doyle v. Continental Ins. Co., 94 U.S. 535 (1877), however, that a state government could condition a license to do business in the state on a waiver of the constitutional right to remove lawsuits to federal court. Id. at 541. The Doyle decision was gradually given a narrower and narrower interpretation, and was finally overruled by Chief Justice Taft in Terral v. Burke Constr. Co., 257
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United States Supreme Court concluded that such restrictions were unconstitutional.  

Although the Court recognized the absolute right of each state to exclude out-of-state corporations, it did not allow the states to force foreign corporations to choose between doing business and exercising constitutionally guaranteed rights. The Court concluded that a state’s threat to exclude out-of-state corporations could be so coercive that the corporations would have little real choice but to “waive” their rights. This fictitious “choice,” if legitimized by the Court, would have enabled states to accomplish indirectly, through conditions placed on the benefits they dispensed or controlled, what the Constitution prohibited them from doing directly.

As the Supreme Court expanded the scope of the equal protection clause and the commerce clause, and limited the states’ absolute right
to exclude out-of-state corporations, the doctrine lost its usefulness in this context. In recent years, the Court has not applied the doctrine to cases involving out-of-state corporations, even where the prior unconstitutional conditions decisions are directly on point.

2. Civil Rights Cases

Following World War II, the doctrine of unconstitutional conditions found new life with expanded judicial scrutiny of restrictions on free speech and other civil rights. Many of the early civil rights cases decided by the Court involved governmental denials of economic or political benefits to those who exercised various unpopular rights. These cases dealt with conditions such as loyalty oath requirements, restrictions on the use of the mails by “subversive” organizations, and restrictions on

22. A good example of a case decided under the commerce clause that previously would have been decided under the doctrine of unconstitutional conditions is H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949) (holding that state could not restrict milk producer’s expansion into interstate commerce).
23. In Western & S. Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981), for example, the Court upheld a retaliatory tax imposed only on out-of-state corporations against equal protection attacks. In its analysis, the Court cited a number of the unconstitutional conditions cases, including Frost v. Railroad Comm’n. After analyzing these cases, Justice Brennan, writing for the majority, determined that:

[W]hatever the extent of a State’s authority to exclude foreign corporations from doing business within its boundaries, that authority does not justify imposition of more onerous taxes or other burdens on foreign corporations than those imposed on domestic corporations, unless the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose. Id. at 667–68.
24. The genesis of this development was in a 1950 case, American Communication Ass’n v. Douds, 339 U.S. 382 (1950). There, the Court examined a 1947 amendment to the National Labor Relations Act allowing access to the investigatory and enforcement arms of the National Labor Relations Board only to those union leaders who signed loyalty oaths. Although the Court upheld the provision, Justice Frankfurter dissented in part, arguing that the oath requirement was an unconstitutional condition. Id. at 419–20 (Frankfurter, J., concurring and dissenting). For a general discussion of the doctrine’s applicability to civil rights cases, see O’Neil, Unconstitutional Conditions: Welfare Benefits with Strings Attached, 54 CALIF. L. REV. 443 (1966); Van Alstyne, The Demise of the Rights-Privileges Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968); Willcox, Invasions of the First Amendment through Conditioned Public Spending, 41 CORNELL L.Q. 12 (1955); Comment, supra note 16; Comment, Another Look at Unconstitutional Conditions, 117 U. PA. L. REV. 144 (1968); Note, Judicial Acquiescence in the Forfeiture of Constitutional Rights Through the Expansion of Conditioned Privilege Doctrine, 28 IND. L.J. 520 (1953).
25. Speiser v. Randall, 357 U.S. 513 (1958). The Court there struck down a California statute granting property tax exemptions only to those veterans who signed loyalty oaths.
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religious expression. The government’s position in these cases was an extension of the argument that the greater right to refuse to provide a certain benefit at all encompassed the “lesser” right to provide it selectively, subject to any condition the government wished to impose.

Deeply embedded in constitutional law during this period was the sharp distinction between “rights,” which were protected by the Constitution, and “privileges,” which were exclusively controlled by legislatures. The legislatures or administrative agencies that sought to impose conditions on constitutional rights relied on the right-privilege distinction to argue that they were merely discouraging the exercise of rights by restricting the privileges they granted. Because the benefits that legislatures manipulated in these cases were clearly privileges, the distinction seemed to require that courts defer to the legislature even if constitutional rights were indirectly abridged.

With the public’s increasing reliance on public welfare benefits after World War II, the Court became increasingly interested in limiting the ability of legislatures and administrative agencies to manipulate the benefits they controlled so as to shape the recipients’ behavior. One way to

27. Sherbert v. Verner, 374 U.S. 398 (1963). The Court in Sherbert invalidated restrictions on unemployment compensation denying benefits to applicants who refused, for religious reasons, to work on days other than Sunday, but allowing benefits to applicants who refused Sunday work.

28. For a discussion of this argument, see supra note 12 and accompanying text.

29. The right-privilege distinction provided that while constitutional rights such as first or fourth amendment rights could never be granted or denied conditionally, privileges provided by the government could be conditioned or limited as the government wished. Packard v. Banton, 264 U.S. 140, 145 (1924); see generally, E. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 105-51 (1956). The most famous early exposition of this principle is Justice Holmes’ statement: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E.2d 517 (1892). The reasoning of McAuliffe was rejected in Garrity v. New Jersey, 385 U.S. 493, 500 (1967), where the Court, in striking down rule requiring police officers to waive right against self-incrimination, stated “policemen . . . are not relegated to a watered-down version of constitutional rights”. The concept that public welfare benefits are “privileges” that can be restricted or eliminated as the government sees fit has been severely eroded. See Reich, The New Property, 73 YALE L.J. 733 (1964); Van Alstyne, supra note 24, at 1464-66.

30. In Davis, for example, the Court upheld an ordinance prohibiting public speaking in a municipal park on the theory that since the local government could deny access to the park completely, it could grant access subject to any conditions it wished to apply, even if those conditions included denying first amendment rights. Although Davis was never explicitly overruled, the Court has since refused to accept its reasoning, see Hague v. CIO, 307 U.S. 496, 514-16 (1939); Jamison v. Texas, 318 U.S. 413, 415-16 (1943), and has indicated that the Davis rule is no longer good law, see Saia v. New York, 334 U.S. 558, 561 n.2 (1948); but see Barsky v. Board of Regents, 347 U.S. 442, 451 (1954) (Court refused to review state standards for admission to medical practice because such admission is a “privilege granted by the state”).

31. Note, supra note 16, at 985; Note, Unconstitutional Conditions, 73 HARV. L. REV. 1595, 1596 (1960). The Court still enforced the right-privilege distinction in some cases. See, e.g., Cohen

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limit this abuse was to insist that the government not restrict the exercise of constitutional rights in return for distributing benefits. Because it prohibited this type of activity, the unconstitutional conditions doctrine became a well-recognized and frequently used exception to the right-privilege distinction. By applying the exception broadly, courts could retain the right-privilege distinction while at the same time invalidating conditions put on "privileges" when those conditions seriously impaired the recipients' abilities to exercise fundamental constitutional rights. In most cases, the doctrine successfully prevented the harsh results caused by treating a benefit as a fully revocable "privilege." 

3. The Rise of Equal Protection Analysis

By the early 1960's, equal protection analysis had generally replaced


33. For a forceful argument favoring use of the doctrine of unconstitutional conditions to check abuse of legislative and administrative power, see Willcox, supra note 24, at 45-48.

34. Van Alstyne, supra note 24, at 1445-48; see also cases cited supra notes 25-27. The Court also occasionally used equal protection analysis without so identifying it. See, e.g., Keyishan v. Board of Regents, 385 U.S. 589. 605-06 (1967) (Court held rule prohibiting communist party members from working as teachers "overbroad," but indicated that benefit of public employment could not be conditioned on waiver of constitutional rights).

35. Van Alstyne, supra note 24, at 1447. The doctrine has some limitations as an exception to the right-privilege distinction. First, it applies only to conditions that involve recognized, and apparently fundamental, constitutional rights. Second, it is usually not applied to conditions that have only an indirect effect on a constitutional right. See Van Alstyne, supra note 24, at 1449. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981), is an exception to this second limitation. In Myers, the doctrine was applied even though the effect of the abortion funding law was indirect.

36. The doctrine did not always prevail over the right-privilege distinction, however. For an example of an onerous condition on a public benefit to which the doctrine did not apply because there were no constitutional rights involved, see Hamilton v. Board of Regents, 293 U.S. 245 (1934) (refusing to apply doctrine to conditions on college admission because higher education was not a fundamental constitutional right). But see Smythe v. Lubbers, 398 F. Supp. 777 (W.D. Mich 1973) (holding that state college cannot condition attendance on waiver of right not to have dormitory room searched).

the doctrine of unconstitutional conditions in the federal courts as a means
to ensure that the exercise of constitutional rights was not compromised in
exchange for governmental benefits.\textsuperscript{38} Under equal protection analysis, a
court applies strict scrutiny to legislation that discriminates against a
"suspect class"\textsuperscript{39} or burdens a "fundamental right."\textsuperscript{40} Legislation subject
to strict scrutiny is upheld only if it is justified by some "compelling
state interest."\textsuperscript{41} Legislation that does not implicate a suspect class or a
fundamental right, on the other hand, is constitutional so long as it bears a
"rational relationship to a legitimate state interest."\textsuperscript{42}

The reasons for the Court's shift from the doctrine of unconstitutional
conditions to equal protection analysis in cases involving restrictions on
public welfare benefits was never elucidated by the Court, nor can they be
gleaned solely from the cases. The two doctrines function completely
separately as independent methods of constitutional analysis, and the
decision to apply one rather than the other seems to depend less on the facts
of any particular case than on the predilections of the author of the opinion.\textsuperscript{43} While the reasons for a shift away from the unconstitutional conditions doctrine may be unclear, the fact of the shift is undeniable.

\textsuperscript{211–13} (1976) (Stevens, J., concurring) (arguing that two-tiered analysis is inappropriate because "[t]here is only one Equal Protection Clause").

\textsuperscript{38} The equal protection clause was first used in civil rights cases as a tool to fight racial discrim-
ination. \textit{See}, e.g., Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Buchanan v. Warley, 245
U.S. 60 (1917); Strauder v. West Virginia, 100 U.S. 303 (1880).

But the Court soon began to apply equal protection analysis to a wide variety of cases. By the
1960's, it had largely replaced the doctrine of unconstitutional conditions as a means to protect recipients of public welfare benefits from limitations on those benefits designed to deny or limit recipients' ability to exercise constitutional rights. Sherbert v. Verner, 374 U.S. 398 (1963), represents the last
time the Court purported to apply the unconstitutional conditions doctrine to a public welfare pro-
gram. Although \textit{Sherbert} invalidated limitations on unemployment benefits because they were "un-
constitutional conditions," the Court's opinion was couched in equal protection language. \textit{See id.} at 404–06. Some lower federal courts continue to apply the doctrine of unconstitutional conditions. \textit{See}, e.g., Roberts v. Cameron-Brown Co., 410 F. Supp. 988, 998 (1975) (court held Federal National
Mortgage Association clause requiring waiver of right to hearing before foreclosure an unconsti-
tutional condition).

\textsuperscript{39} The first explicit application of the so-called "strict scrutiny" test to a "suspect classification"
came in \textit{Korematsu} v. United States, 323 U.S. 214, 216 (1944). Strict scrutiny has since been
applied by the Court to invalidate virtually all explicit racial classifications. \textit{See}, e.g., \textit{Loving v. Virginia}, 388 U.S. 1, 11 (1967) (invalidating statute prohibiting interracial marriages under strict scrutiny analysis).

\textsuperscript{40} \textit{E.g.}, \textit{Roe v. Wade}, 410 U.S. 113, 155 (1973); \textit{Kramer v. Union Free School Dist.}, 395


\textsuperscript{42} \textit{San Antonio Indep. School Dist. v. Rodriguez}, 411 U.S. 1, 17 (1973); \textit{see J. NOWAK, R.

\textsuperscript{43} This is illustrated by the numerous cases both before and after \textit{Sherbert v. Verner} in which
the Court could have applied the doctrine of unconstitutional conditions but did not. In \textit{Wiemann v. Updegraff}, 344 U.S. 183 (1952), for example, the Court rejected the State of Oklahoma's argument
Commentators have suggested two possible reasons for this unexplained but discernable movement away from unconstitutional conditions analysis. The first was the decline of the distinction between rights and privileges. As that distinction gradually became less important in constitutional jurisprudence, the need for a means to avoid its strictures naturally lessened. Thus, one of the primary advantages of the doctrine was eliminated. The second was the growing realization that equal protection analysis was more universally applicable and more flexible than that it could impose conditions such as loyalty oath requirements on the "benefit" of public employment. The Court did not even mention the doctrine of unconstitutional conditions. Id. at 191–92. Rather, the Court flatly stated that "constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Id. at 192. See also Flemming v. Nestor, 363 U.S. 603, 611 (1960) (Court upheld restrictions on social security benefits denying them to deported aliens); Tinker v. Des Moines School Dist., 393 U.S. 503 (1959) (Court invalidated suspension of high school students for wearing black armbands to protest Vietnam War).

In a recent case, Western & S. Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981), the Court was faced with a situation factually similar to the older unconstitutional conditions cases involving out-of-state corporations. After analyzing these older cases extensively, the Court concluded that in essence they established a rationality requirement: the State could not "discriminate" between domestic and foreign corporations unless that discrimination bore a "rational relation to a legitimate state purpose." Id. at 667–68. See supra note 23.

In one line of cases involving conditions on public employment requiring a waiver of constitutional rights, the Court has continued to use the doctrine of unconstitutional conditions, perhaps in an effort to avoid the conclusion that public employment is anything more than a mere privilege. Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981); Branti v. Finkel, 445 U.S. 507, 514 (1980); Elrod v. Burns, 427 U.S. 347, 355–57 (1976); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967). Even in these public employment cases, however, the Court’s reliance on the doctrine seems to be waning. In the most recent of these cases, Thomas, Justice Brennan characterized the unconstitutional condition involved there as only one type of possible infringement on a fundamental right, indicating that the doctrine is a variant of the more common equal protection analysis. Id. at 717–18.


In two cases since Sherbert, the Court has explicitly refused to extend the doctrine. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226–27 (1977) (doctrine inapplicable when no constitutional rights are involved); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9–10 n.10 (1972) (doctrine inapplicable to private contractual clauses denying right of removal to federal court).

44. See Van Alstyne, supra note 24, at 1454–57. Professor Van Alstyne states that "use of the equal protection clause, although it does not qualify the right-privilege distinction, does succeed in rendering it inconsequential." Id. at 1457.

45. Van Alstyne, supra note 24, at 1444–46. One recent commentator has taken issue with Professor Van Alstyne about his claim that the right-privilege distinction is dead. See Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan L. Rev. 69 (1982).

46. Cummings v. Godin, 119 R.I. 916, 377 A.2d 1071, 1075 (1977) ("[T]he distinction between privileges and rights has been eliminated, and unconstitutional conditions cannot be placed on public employment.").
the doctrine of unconstitutional conditions. Unlike the system of multi-tiered scrutiny courts created to make equal protection analysis useful in many different types of situations, no consistent scheme for evaluating the validity of conditions which require the waiver of constitutional rights has ever emerged. Certainly not all conditions requiring a waiver of constitutional rights are invalid. Yet the doctrine never incorporated an identifiable method for distinguishing those conditions that were permissible from those that were not.

**B. Unconstitutional Conditions in California**

In contrast to the federal courts, some state courts have applied the doctrine of unconstitutional conditions vigorously in the last forty years. The majority of the cases have involved the first amendment conditions relating to party affiliation on public employment; People v. Huntley, 43 N.Y.2d 175, 371 N.E.2d 698 (1970) (state statute requiring all insurance companies to lower rates by 15% or give up privilege of doing business in Massachusetts declared a condition on a constitutional right and therefore automatically invalid). No court has suggested a means for determining which test should be applied to a particular condition. The closest that any court has come to a uniform test is the test developed in California. See infra note 80. But even in California, this test has not been applied to all conditions burdening fundamental rights. See, e.g., Carmel-By-The-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (invalidating condition on public employment for "overbreadth"); Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964) (applying overbreadth analysis).

51. California is the best example. See infra notes 54–62 and accompanying text. Justice Brennan implicitly recognized in his majority opinion in *Sherbert v. Verner* that state courts have applied the doctrine to civil rights cases more often than have federal courts. See *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Buckley v. Coyle Pub. School Sys.*, 476 F.2d 92 (10th Cir. 1973) (court applied strict scrutiny to overturn rule that conditioned employment on waiver of right to become pregnant); *Jarmel v. Putnam*, 179 Colo. 215, 499 P.2d 603 (1972) (court applied strict scrutiny to residency requirement that was characterized as an unconstitutional condition). Other courts have applied the more lenient "rational relationship" test. See *Brunton v. United States*, 518 F. Supp. 223 (S.D. Ohio 1981) (applying rational relationship test to uphold rule conditioning public employment on party affiliation); *United States v. Thorn*, 317 F. Supp. 389 (E.D. La. 1970) (court rejected argument that requiring service with Goodwill in lieu of draft was unconstitutional condition because alternate service requirement met rational relationship test); *Campbell v. District Court*, 195 Colo. 304, 577 P.2d 1096 (1978) (state can impose conditions on benefits given to mental incompetents if the conditions meet rational relationship test); *People v. Huntley*, 43 N.Y.2d 175, 371 N.E.2d 794, 401 N.Y.S.2d 31 (1977) (conditions requiring waiver of constitutional rights can be put on "privilege" of parole if they meet rational relationship test). At least one court has indicated that no conditions burdening constitutional rights are valid. *Aetna Casualty & Sur. Co. v. Commissioner of Ins.*, 358 Mass. 272, 263 N.E.2d 698 (1970) (state statute requiring all insurance companies to lower rates by 15% or give up privilege of doing business in Massachusetts declared a condition on a constitutional right and therefore automatically invalid). No court has suggested a means for determining which test should be applied to a particular condition. The closest that any court has come to a uniform test is the test developed in California. See infra note 80. But even in California, this test has not been applied to all conditions burdening fundamental rights. See, e.g., *Carmel-By-The-Sea v. Young*, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (invalidating condition on public employment for "overbreadth"); *Fort v. Civil Serv. Comm'n*, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964) (applying overbreadth analysis).
rights of either government workers or welfare recipients, but the doctrine has also been applied in other situations.

The doctrine has found especially strong support in California. The California Supreme Court first held that a condition on a public benefit was unconstitutional in Danskin v. San Diego Unified School District. In Danskin, the court invalidated a regulation requiring organizations wishing to use school buildings for public meetings to sign statements that they did not advocate the forceful overthrow of the United States government. Because the school district could not constitutionally demand that the plaintiffs promise not to advocate overthrow of the government, the court concluded that it also could not condition the benefit of using school buildings on the giving of such a promise.

The doctrine of unconstitutional conditions has often served as a substitute for equal protection analysis in California. California courts have

U.S. 398, 404-05 n.6 (1963) (citing eight state court cases and only one federal case that had held that liberties of religion could not be curtailed by placing conditions on a privilege).


See, e.g., Parrish v. Civil Serv. Comm’n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (county cannot condition receipt of housing benefits on waiver of right against unreasonable searches); People v. Connell, 2 Ill. 2d 332, 118 N.E.2d 262 (1954) (state cannot condition right to seek divorce upon waiver of constitutional rights); Harryman v. Hayles, 257 N.W.2d 631 (Iowa 1977) (nonclaim statute requiring notice to state within sixty days or suit against state would be disallowed held an unconstitutional condition); Aetna Casualty & Sur. Co. v. Commissioner of Ins., 358 Mass. 272, 263 N.E.2d 698 (1970) (state cannot condition grant of license to issue insurance policies upon waiver of right to be free from confiscatory rates); People v. Huntley, 43 N.Y.2d 175, 371 N.E.2d 794, 401 N.Y.S.2d (1977) (state cannot condition granting of parole upon waiver of constitutional rights in certain circumstances); Hartford Accident & Indem. Ins. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976) (requiring all general liability insurers also to write health care insurance held an unconstitutional condition); Commonwealth v. Quarles, 229 Pa. Super. 363, 324 A.2d 452 (1974) (requiring waiver of right to refuse breathalyzer test in order to obtain driver’s license held an unconstitutional condition).

28 Cal. 2d 536, 171 P.2d 885 (1946).

171 P.2d at 888.

Justice Traynor, writing for the majority, assumed that such statements could not directly be prohibited absent a "clear and present danger." Id. at 889 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).


California also has a line of cases developing its equal protection clause in a way that is substantially identical to that found in federal cases. The California Constitution has an equal protection clause which is identical to the equal protection clause of the fourteenth amendment. CAL. CONST. art. 1, § 7. See Sail’er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 15–20, 485 P.2d 529, 538–41, 95 Cal. 688.
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used the doctrine to invalidate conditions requiring the waiver of free speech, political association, and other constitutional rights placed on the "privilege" of being employed by the government or of receiving welfare benefits. In doing so, the California court has developed a two-step analysis. The first step is to determine whether there is a condition burdening a fundamental constitutional right. The second step is to determine whether that condition is a valid one. Since reaching the second step means in effect automatic invalidation of the statute, the first step in this

Rptr. 329, 338-41 (1971) (interpreting privileges and immunities/equal protection clause that was predecessor to current California constitutional provision as equivalent to federal equal protection clause); Los Angeles County v. Southern Cal. Tel. Co., 32 Cal. 2d 378, 196 P.2d 773, 781 (1948) (stating test under state constitution is substantially the same as under federal equal protection clause). But see Gay Law Students Ass’n v. Pacific Tel. & Tel., 24 Cal. 2d 458, 469, 595 P.2d 592, 598, 156 Cal. Rptr. 14, 20-21 (1979) (refusing to follow decisions of federal courts in interpreting state action requirement of state equal protection clause, stating that "we do not consider ourselves bound by. . . decisions interpreting the federal Constitution in interpreting the reach of the safeguards of our state equal protection clause").

The California court has used equal protection analysis in lieu of the doctrine of unconstitutional conditions on several occasions. In Gay Law Students Ass’n, for example, a public utility allegedly refused to hire gay persons. Id. at 463, 595 P.2d at 595, 156 Cal. Rptr. at 17. The court could have characterized the utility’s action as conditioning the privilege of public employment upon a waiver of the constitutional right to privacy including protection of sexual autonomy. See Morrison v. Board of Educ., 1 Cal. 3d 214, 233 n.38, 461 P.2d 375, 390 n.38, 82 Cal. Rptr. 175, 190 n.38 (1969); Griswold v. Connecticut, 381 U.S. 479, 485 (1965). Instead, without even mentioning the doctrine of unconstitutional conditions, the court concluded that the utility could not arbitrarily discriminate against homosexuals or any other class. Gay Law Students Ass’n., 24 Cal. 3d at 470, 595 P.2d at 597, 156 Cal. Rptr. at 21.

Another case in which the California court could have applied the doctrine is Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972). In that case, the court decided that requiring United States citizenship as a prerequisite to entrance to the California Bar was an unconstitutional classification because it had an insufficient rational connection with a legitimate state purpose. Id. at 301, 496 P.2d at 1273, 101 Cal. Rptr. at 905. The court could also have concluded that the requirement unconstitutionally conditioned the "privilege" of practicing law on the requirement that all applicants be or become citizens. See also Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572 (1976) (applying strict scrutiny to rule that aliens could not be certified as engineers).


61. This is accomplished by the so-called "Bagley" test. See infra note 80.

62. California appellate courts have rarely, if ever, held that a statute could pass the strictures of the test employed in the second step of this analysis. For a full discussion of this test, see infra note 80. As Justice Tobriner has conceded, this test, in its harshness, resembles the strict scrutiny test employed by the federal courts. See infra note 81. One commentator has argued that the test has the potential for being more flexible than strict scrutiny, but did not mention any cases in which the test had been applied to validate a statute. See Note, Committee to Defend Reproductive Rights v. Myers:
process is the crucial one. Accordingly, this Note analyzes only the first step: whether or not a condition burdening a constitutional right exists.

II. THE MYERS COURT’S REASONING

California’s 1978, 1979, and 1980 Budget Acts had provisions that refused to extend the state’s “Medi-Cal” coverage to abortions except under limited circumstances. Before these provisions took effect, a


65. The 1979 and 1980 Budget Acts contained the following restrictions:

[N]one of the funds appropriated . . . [for Medi-Cal] shall be used to pay for abortions, except under any of the following circumstances:

(a) Where the life of the mother would be endangered if the fetus were carried to full term.

(b) Where the pregnancy is ectopic.

(c) Where the pregnancy results from an act punishable under Section 261 of the Penal Code and such act has been reported, within 60 days, to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency, and the abortion occurs during the first trimester.

(d) Where the pregnancy results from an act punishable under Section 261.5 of the Penal Code, and the female is under 18 years of age, and the abortion is performed no later than the first trimester, provided the female’s parent or guardian or, if none, an adult of the female’s choice is notified at least five days prior to the abortion by the physician who performs the abortion. Regulations governing the notice requirement shall be promulgated by the State Director of Health Services.

(e) Where the pregnancy results from an act punishable under Section 285 of the Penal Code, and such act has been reported to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency and the abortion occurs no later than during the second trimester.

(f) Where it is determined by prenatal studies limited to amniocentesis, fetal blood sampling, fetal angiography, ultrasound, X-ray, or maternal blood examination that the mother is likely to give birth to a child with a major or severe genetic or congenital abnormality due to the presence of chromosomal abnormalities, neural tube defects, biochemical diseases, hemoglobinopathies, sex-linked diseases, and infectious processes.

(g) Where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, when so certified under penalty of perjury by two physicians, one of whom, where practicable, is a specialist in the affected medical discipline, and documentation thereof is provided with the claim for payment.

1980 Cal. Stat. 1146–47; 1979 Cal. Stat. 644–45. The exceptions contained in the 1978 Act were substantially the same, except that (f) was limited to amniocentesis and (g) was applicable only if the “severe and long-lasting physical health damage” was caused by one or more of ten specifically
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group of welfare, health care, and women’s rights organizations and other interested parties filed suit against several state officials alleging that the provisions were unconstitutional.

In Committee to Defend Reproductive Rights v. Myers, the California Supreme Court held that the provisions violated the California Constitution. The Myers plurality opinion, written by the late Justice Tobriner, applied the unconstitutional conditions analysis as set out in Danskin and its progeny. Justice Tobriner first noted that the court was not bound by federal constitutional law and could, under the California Constitution, reach a result different from that reached by the United States Supreme Court. He stated that the basic premise of his analysis was that "all

66. In the legal challenge to these abortion funding restrictions in the Myers case, see infra notes 67-69 and accompanying text, the trial court granted a temporary restraining order extending through pendency of appeal, but later held both the 1978 and 1979 Budget Act provisions constitutional. For a full procedural history of the case before the California high court’s decision, see Myers, 29 Cal. 3d at 258-60, 625 P.2d at 782-83, 172 Cal. Rptr. at 869-70; Note, Committee to Defend Reproductive Rights v. Cory, 132 Cal. App. 2d 852, 183 Cal. Rptr. 475 (1982).

67. Three physicians, one patient, and one taxpayer were also named as plaintiffs. Note, supra note 16, at 979 n.8.

68. These included Beverlee A. Myers, Director of the State Department of Health Services; Kenneth Cory, State Comptroller; and Jesse M. Unruh, State Treasurer. Note, supra note 16, at 979 n.7.

69. Myers, 29 Cal. 3d at 256, 625 P.2d at 780, 172 Cal. Rptr. at 867.

70. 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981).

71. Id. at 283, 625 P.2d at 799, 172 Cal. Rptr. at 886. Justices Mosk and Newman concurred in the plurality opinion. Chief Justice Bird wrote a concurring opinion. Justice Richardson filed a dissent in which Justice Clark concurred. There were only six justices on the court at the time the decision was published, as Justice Wiley Manuel had recently died.

72. Justice Mathew O. Tobriner died on April 7, 1982. See Bird, Justice Mathew O. Tobriner—the heart of a lion, the soul of a dove, 70 CALIF. L. REV. 870 (1982); Balabanian, Justice was more than his title (Mathew Tobriner, Cal. Supreme Ct.), 70 CALIF. L. REV. 878 (1982); Tribe, Remembering Mathew Tobriner, 70 CALIF. L. REV. 876 (1982).

73. 29 Cal. 3d at 262-70, 625 P.2d at 784-89, 172 Cal. Rptr. at 871-76. See supra notes 54-62 and accompanying text.

74. 29 Cal. 3d at 260-62, 625 P.2d at 783, 172 Cal. Rptr. at 870-71. The court cited People v. Brisendine, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315 (1975) ("[t]he California Constitution is, and always has been, a document of independent force . . . "). Although the court did determine that the words of the California Constitution supported a broader reading of the right to an abortion than the United States Supreme Court gave the United States Constitution in Maher v. Roe, 432 U.S. 464 (1977), and Harris v. McRae, 448 U.S. 297 (1980), see infra note 75,
women in this state—rich and poor alike—possess a fundamental constitutional right to choose whether or not to bear a child.”

Justice Tobriner then addressed the state’s major contention: that the legislature is free to decline to fund the exercise of a constitutional right without violating the constitution. He found that this was essentially the same argument the court had rejected in Danskin, and determined that the abortion restrictions were an unconstitutional condition on a public benefit just as were the restrictions on the use of public buildings in Danskin. The abortion funding limitations, he concluded, excluded “potential recipients solely on the basis of their exercise of constitutional rights” and thus fell squarely under the reasoning of Danskin and the other California unconstitutional conditions cases.

The court applied a three-part test developed in earlier California decisions to determine the validity of these conditions contained in the funding restrictions. In its application to the facts of Myers, Justice Tobriner

the best evaluation of Myers is that the California court simply disagreed with the results of the federal cases.

75. 29 Cal. 3d at 262, 625 P.2d at 784, 172 Cal. Rptr. at 871. The California court first declared that abortion was a fundamental constitutional right in People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969), cert. denied, 397 U.S. 915 (1970). Justice Tobriner did not discuss the United States Supreme Court's statement in Roe v. Wade that states do have at least a minimal interest in preventing abortions even in the first trimester of pregnancy. See Roe v. Wade, 410 U.S. 113, 162-63 (1973) (state has some interest in protecting both the health of the mother and the "potentiality of human life" existing in the fetus throughout pregnancy). This language lends support to the argument that although the state’s interest is not strong enough to support criminal statutes outlawing nontherapeutic abortions, it may be strong enough to support a refusal to subsidize such abortions. The argument is especially strong if the refusal is characterized as mere deference on the part of the legislature to economic forces it does not control.

Justice Tobriner also argued that the right to choose abortion was especially strong in California because the California Constitution explicitly guarantees the right to privacy. Myers, 29 Cal. 3d at 262-63, 625 P.2d at 784, 172 Cal. Rptr. at 871. Art. 1, § 1, added in 1974, provides that: "All people are by nature free and independent and have certain rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Justice Tobriner argued that the right to abortion under the federal Constitution was weaker because the right to privacy is not explicitly mentioned in that document. Myers, 29 Cal. 3d at 263, 625 P.2d at 784, 172 Cal. Rptr. at 871. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (Court first found an implicit right to privacy in reproductive rights context). However, Justice Richardson, in his dissent in Myers, argued that "[t]here is nothing whatever in the history of the initiative [adding the right of privacy to the list of constitutional rights in California] to suggest such a bizarre result." 29 Cal. 3d at 304, 625 P.2d at 811, 172 Cal. Rptr. at 898 (Richardson, J., dissenting). He went on to state that the privacy right was ostensibly designed only to prevent government and business from massing personal information about citizens. Id.

76. 29 Cal. 3d at 263, 625 P.2d at 784-85, 172 Cal. Rptr. at 871-72.


78. 29 Cal. 3d at 264, 625 P.2d at 785-86, 172 Cal. Rptr. at 872-73.

79. Id. at 265, 625 P.2d at 786, 172 Cal. Rptr. at 873.

80. This test was first formulated in Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d
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stated, the three-part test "closely parallel[ed]" strict scrutiny. Because the state's interest was on all counts insufficient to meet the standards set out by the test, Justice Tobriner concluded that the restrictions were invalid.

Concurring, Chief Justice Bird declined to follow the unconstitutional conditions analysis. She utilized instead the traditional equal protection approach: that governmental infringement of a fundamental constitutional right triggers strict scrutiny. In using equal protection analysis to determine the validity of these provisions, she followed the method the United States Supreme Court had used in *Maher v. Roe* and *Harris v. McRae*, although her conclusion was different. She rejected the United States

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499, 421 P.2d 409, 55 Cal. Rptr. 401 (1967). That case held that an unconstitutional condition is valid only when the following three issues are decided in favor of the state:

1. the conditions which are imposed relate to the purposes of the legislation which provide the benefit, 421 P.2d at 414, 55 Cal. Rptr. at 406;
2. the utility of the conditions imposed clearly outweighs the resulting impairment of constitutional rights, 421 P.2d at 415, 55 Cal. Rptr. at 415; and
3. there are no less offensive alternatives available to achieve the state's objective, id.

Justice Tobriner called this approach "special scrutiny." *Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868. The relative merits of this test as opposed to the more traditional "two-tiered" test associated with equal protection analysis are beyond the scope of this Note. For a complete analysis of this topic, see Note, supra note 62.

Justice Tobriner's view of the doctrine of unconstitutional conditions was not shared by all members of the California Supreme Court. Chief Justice Bird argued in a long footnote in her concurring opinion in *Myers* that the so-called "Bagley" test was an early formulation of the strict scrutiny standard and as such had been superseded by more recent California cases. She also disagreed with the suggestion in *Bagley* and in Justice Tobriner's plurality opinion in *Myers* that restrictions on a fundamental right can be justified by anything less than a compelling state interest. *Myers*, 29 Cal. 3d at 289 n.2, 625 P.2d at 801 n.2, 172 Cal. Rptr. at 888 n.2 (Bird, C.J., concurring).

81. 29 Cal. 3d at 276 n.22, 625 P.2d at 793 n.22, 172 Cal. Rptr. at 880 n.22. The California court seems to be alone in developing a separate test for determining the validity of unconstitutional conditions. Other courts have applied either the "strict scrutiny" test or the "rational relationship" test but have not enumerated any identifiable method for determining which is applicable to various cases. See supra note 49. Subsequent California cases have referred to *Myers* as a case applying a strict scrutiny test. See, e.g., *Hernandez v. Department of Motor Vehicles*, 30 Cal. 3d 70, 79 n.9, 634 P.2d 917, 571 n.9 (1981).

82. 29 Cal. 3d at 270–85, 625 P.2d at 789–98, 172 Cal. Rptr. at 876–85.
83. *Id.* at 286, 625 P.2d at 799, 172 Cal. Rptr. at 886 (Bird, C.J., concurring).
84. *Id.* at 287, 625 P.2d at 800, 172 Cal. Rptr. at 887 (Bird, C.J., concurring). She assumed, based on *Roe v. Wade*, that the right to abortion was fundamental. This is a fairly well-accepted assumption. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 38 (1978) ("If therefore, the *Roe* decision is to be even coherently defended, it has to be along the general line the Court itself pursued, that a woman's right to choose abortion is simply so important, so fundamental, that we cannot permit it to be legislatively inhibited."). Ely pointed out, however, that the Court has never really enumerated the reasons why procreative choice is a fundamental right. *Id.* at 80.

86. 448 U.S. 297 (1980).
87. *Myers*, 29 Cal. 3d at 294–95, 625 P.2d at 805, 172 Cal. Rptr. at 892 (Bird, C.J., concurring). One other court has followed roughly the same analysis. See *Right to Choose v. Byrne*, 91 N.J.
Supreme Court’s holding that refusing to fund abortions did not infringe upon a woman’s right to have one. Chief Justice Bird instead maintained that the legislature cannot ever directly or indirectly burden the exercise of a fundamental right without a compelling reason for doing so. Two justices joining in the dissent emphasized the distinction between infringing upon a right and refusing to subsidize the exercise of a right. This distinction, they argued, allows the government to choose not to subsidize activities it cannot outlaw altogether without violating either the equal protection clause or the doctrine of unconstitutional conditions.

III. ANALYSIS OF THE COURT’S REASONING

The most common modern analytical approach to the abortion funding problem, equal protection analysis, is unsatisfactory in many respects. The Myers opinion implicitly suggests that unconstitutional conditions analysis can be used to reach a more just result while avoiding many of the doctrinal problems that influenced the United States Supreme Court when it denied poor women a constitutional right to publicly funded abortions. The result reached by the plurality opinion in Myers did avoid many of these problems. It implicitly recognized the need to limit the government’s disproportionate power to influence the behavior of poor


88. For a discussion of this argument, see infra notes 132–38 and accompanying text.

89. Chief Justice Bird stated that: “In California, there is no precedent for permitting government to burden the exercise of vital constitutional rights without establishing a compelling need. The fact that the state has not banned the exercise of the right entirely is irrelevant to the basic issue.” Myers, 29 Cal. 3d at 288, 625 P.2d at 800, 172 Cal. Rptr. at 887 (Bird, C.J., concurring). In support of the proposition that indirect restrictions of constitutional rights are invalid, she cited only one other California case involving the equal protection clause. Id. at 288, 625 P.2d at 801, 172 Cal. Rptr. at 888. That case, Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979), involved the right to counsel and may for that reason be distinguishable because of the government’s monopoly of the courts.

90. 29 Cal. 3d at 297–98, 625 P.2d at 807, 172 Cal. Rptr. at 894 (Richardson, J., dissenting).

91. Id. Justice Richardson stated that: “The Legislature’s decision to pay for the expenses of childbirth . . . no more ‘forces’ a woman to give up abortion than funding the purchase of false teeth forces one to give up toothbrushes.” Id.

92. For a general discussion of the equal protection approach and its weaknesses when applied to the abortion funding problem, see infra notes 132–43.

93. The result in Myers required funding for abortions, but avoided a general requirement that all exercises of constitutional rights by poor people be subsidized. See infra notes 94–95 and accompanying text.
persons, while stopping short of requiring government subsidies for the exercise of constitutional rights by the poor.

Analyzing the doctrine of unconstitutional conditions as it was used in Myers, however, indicates that applying it to the abortion funding problem is not satisfactory despite the surface appeal the doctrine may have in this context. The remainder of this Note shows why the doctrine of unconstitutional conditions did not work well in Myers. It concludes that equal protection analysis, although also flawed in its application to abortion funding cases, is nonetheless a superior alternative to that chosen by the plurality in Myers.

A. The Doctrine of Unconstitutional Conditions and the Abortion Funding Problem

The doctrine of unconstitutional conditions does not function effectively in abortion funding cases for two reasons. First, it leads courts to sidestep the main issue of these cases. Second, it cannot logically be applied to a situation in which the benefit is related to the condition that restricts it.

1. The Doctrine Allows Courts to Bypass the Main Issue of the Abortion Funding Problem

The most important issue presented by cases dealing with abortion funding restrictions is how far the government may go to discourage a woman's constitutionally protected right to have an abortion. There is no simple answer to this question. Clearly the government may not take affirmative steps, through its police power, to proscribe constitutionally protected activities absent some compelling state interest. Such steps are no more valid when they entail conditioning a benefit than when they

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94. Myers, 29 Cal. 3d at 268, 625 P.2d at 788, 172 Cal. Rptr. at 875: "The California courts . . . have acknowledged both the practical importance of many governmental benefits to individual recipients and the corresponding likelihood that a discriminatory benefit program will effectively nullify constitutional rights."

95. The court stated that "plaintiffs do not contend that 'the state would be required to fund abortions for poor women if the state had not chosen to fund medical services for poor women who choose to bear a child.'" Id. at 256–57, 625 P.2d at 780–81, 172 Cal. Rptr. at 867–68. It concluded that, as a general proposition, "the state need not fund abortions, childbirth, appendectomies, or any other medical procedure." Id. at 285 n.31, 625 P.2d at 799 n.31, 172 Cal. Rptr. at 886 n.31.

96. The sheer volume of criticism this aspect of Harris v. McRae has received shows the importance of this point. See, e.g., Goldstein, A Critique of the Abortion Funding Decisions: On Private Rights in the Public Sector, 8 HAST. CONST. L.Q. 313, 316–17 (1981); see also infra note 136.

involve a direct criminal sanction. But it is equally clear that the government can refuse altogether to subsidize the exercise of a constitutionally protected activity if it wishes.

The California legislature’s activity in Myers lay somewhere in between these two extremes. It can be characterized as a neutral decision to stop spending public funds to subsidize a practice that is politically unpopular, although protected by the Constitution. But though the restrictions do not on their face limit the ability of California women to obtain abortions, the legislature must have been aware that the restrictions would have a significant effect on poor women’s access to that procedure. When combined with the fact that the legislature was willing to defray childbirth and birth control expenses for poor women, its refusal to pay for abortions calls into question whether the legislature exercised its admittedly broad discretionary power over public welfare funds in a way that impermissibly interfered with the right to abortion.

If the right involved were a first amendment right, the restrictions would clearly create a “chilling effect” on the exercise of the right and would therefore be invalid. But courts have heretofore been unwilling to extend first-amendment-type protection to abortion or to any other right outside the free speech and religion area. The question whether governments should be allowed to structure public welfare benefit programs so as to influence constitutionally protected choices such as abortion is a close one with competing considerations on both sides.

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98. See supra note 18 and accompanying text. Although the methods used in the old unconstitutional conditions cases may be discounted in federal courts today, the constitutional principles enunciated in those cases are for the most part still good law. See Western & S. Life Ins. Co. v. Board of Equalization, 451 U.S. 648 (1981) (citing with approval many old out-of-state corporations cases).


100. For a discussion of the effect abortion funding restrictions have on the ability of poor women to get abortions, see infra note 134. This argument is analogous to evaluating the “chilling effect” of a statute that indirectly impairs free speech rights. See infra note 103.

101. See supra note 99.


103. The United States Supreme Court has not decided whether an economic or welfare provision can be invalid because of its “chilling effect” on the exercise of a right. However, the Court has, in other contexts, made plain that the type of exacting scrutiny given the effects of provisions impinging on free speech rights cannot be similarly used to evaluate public welfare legislation. See Dandridge v. Williams, 397 U.S. 471, 485 (1970) (refusing to invalidate public welfare measure for “overreaching”). One state court has declared that abortion funding restrictions are invalid under this reasoning. See Moe v. Secretary of Admin. & Fin., 387 Mass. 795, 417 N.E.2d 387, 400–02 (1981) (state funding of procreation-related expenses must be neutral).
The *Myers* court did not, however, address this central question. Instead, once the court found that the abortion restrictions “‘conditioned’” public health care benefits, the doctrine, as the court applied it, invalidated the restrictions almost as if they were any other clearly discriminatory exercise of the state’s police power. Although the court did discuss some of the competing interests, it indicated that only a compelling state interest, or something resembling one, would be sufficient to justify the restrictions. Since there is clearly no compelling state interest to support abortion funding restrictions, most of this discussion is surplusage.

The real determination of the case was made in the preliminary step of deciding whether or not to apply the unconstitutional conditions doctrine. Once it was deemed applicable, the government faced an almost impossible standard of proof to justify its action. Instead of forcing the *Myers* court to face the complex and difficult issue the case presented, the doctrine allowed the court to avoid it. If the *Myers* court had applied equal protection analysis as did the United States Supreme Court in *Maher v. Roe* and *Harris v. McRae*, it would have been forced to deal with this central question. For then the court would have had to define what

104. Justice Tobriner alluded to this question when he applied the three-part “*Bagley*” test to determine the validity of the condition he found. *See supra* note 80. But if his statement that applying the “*Bagley*” test “closely parallels” strict scrutiny analysis, 29 Cal. 3d at 276 n.22, 625 P.2d at 793 n.22, 172 Cal. Rptr. at 880 n.22, is correct, then that application will virtually always result in invalidation. Dunn v. Blumstein, 405 U.S. 330, 363–64 (1972) (Burger, C.J., dissenting) (“To challenge [statutes] . . . by the ‘compelling state interest’ standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.”); Gunther, *supra* note 37, at 8 (strict scrutiny is “‘strict’ in theory and fatal in fact”). *But see Korematsu v. United States*, 323 U.S. 214 (1944) (only Supreme Court case upholding governmental action against strict scrutiny attack).

105. *See supra* note 104.

106. *See supra* note 104. The “*Bagley*” test can be somewhat less protective of individual rights than strict scrutiny, in that it allows more balancing of the competing interests. Note, Committee to Defend Reproductive Rights v. *Myers: The Constitutionality of Conditions on Public Benefits in California*, 33 Hastings L. Rev. 1475, 1500 (1982). But see *Myers*, 29 Cal. 3d at 289 n.2, 625 P.2d at 802 n.2, 172 Cal. Rptr. at 889 n.2 (Bird, C.J., concurring) (rejecting argument that “*Bagley*” test is less restrictive than strict scrutiny and allows balancing); Hernandez v. Department of Motor Vehicles, 30 Cal. 2d. 70, 634 P.2d 917, 922 n.9, 177 Cal. Rptr. 566, 571 n.9 (1981) (in later opinion, Justice Tobriner refers to *Myers* as a case applying strict scrutiny). But even assuming that the “*Bagley*” test does allow the government’s interest to be balanced against the individual’s interest, applying it bypasses the real question, which is whether poor women have any legitimate interest at all in having the government pay for abortions. *See supra* notes 96–99 and accompanying text.

107. *Myers*, 29 Cal. 3d at 297 & n.11, 625 P.2d at 806 & n.11, 172 Cal. Rptr. at 893 & n.11 (Bird, C.J., concurring).

108. *See supra* note 106.


110. 448 U.S. 297 (1980).
constitutes a "burden" on a "fundamental right," issues the Myers court did not really confront.

In contrast, the Supreme Court did confront these issues and concluded that restricting Medicaid funding for abortions did not create a government-imposed "obstacle" to a woman seeking to exercise her constitutional right to have an abortion. Because the Court applied equal protection analysis, its first step was to analyze the strength of the competing rights and interests involved in order to determine how strong the state's interest needed to be in order to uphold the restrictions. This forced the Court to determine the extent of a state's power to selectively fund public welfare programs in ways that reduce funding for constitutionally protected activities. Although many have criticized the Court for its conclusion, it at least took a discernible position on the extent to which the government can shape its public welfare programs in this way. The California court's use of the doctrine of unconstitutional conditions did not produce such a position in Myers. This silence reduces the usefulness and persuasive value of the case.

2. The Doctrine Is Workable Only When Applied to a Condition Unrelated to the Benefit Upon Which It Is Imposed

The second reason the doctrine of unconstitutional conditions should not be applied to abortion funding cases is that the doctrine only works when the condition is unrelated to the benefit on which it is imposed. Traditionally, the unconstitutional conditions doctrine has been used to prohibit the government from creating a coercive "choice" between receiving some important government benefit and exercising a constitutional right. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. See also Charles v. Carey, 627 F.2d 772, 776 (7th Cir. 1980) (abortion funding restriction "merely implemented a State's preference for childbirth over abortion without adding any 'restriction on abortion that was not already there' ").

111. Id. at 315 ("The Hyde Amendment . . . places no government obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activities deemed in the public interest."); Maher v. Roe, 432 U.S. at 474:

112. See infra note 136.

113. See infra notes 132-35 and accompanying text.

114. See supra note 57 and cases cited therein.
used the doctrine to invalidate attempts by the government to punish those who exercised constitutional rights by denying them access to unrelated benefits. The government chose the benefits to be conditioned more for their ease of manipulation than for their connection to the rights forfeited. In these cases, the doctrine insured that the government could not discriminate against those who wished to exercise certain constitutional rights any more than it could against racial minorities, aliens, or other “suspect classifications.”

The logic behind the doctrine of unconstitutional conditions breaks down when the benefit conditioned is simply government subsidization of the constitutional right the condition seeks to restrict. In this type of case, the legislature does not pick out some benefit that is easy to manipulate but otherwise unexceptional and deny it to a group the legislature wishes to coerce into waiving constitutional rights. Rather, the lawmakers determine, based on substantive reasons independent of their ability to manipulate a benefit, that they do not wish to subsidize the activity at which the benefit is aimed even though it happens to be constitutionally protected. This distinction is subtle, but important. In the latter case, the legitimate desire to restrict a public welfare benefit is at least arguably the motivating force. In the cases where the benefit is unrelated to the condition, however, the benefit is not cut back out of any concern related to the scope of that particular benefit, but solely out of a desire to use the legislature’s power over it to restrict the exercise of an unrelated constitutional right. Although the result may be the same, one is arguably a much less objectionable legislative motive.

The difficulties that are encountered when the doctrine of unconstitutional conditions is applied to situations in which the benefit and the condition relate to the same act are illustrated by Myers. In Myers, the plaintiffs were not asking to receive some benefit unrelated to the right they wished to assert. Rather, they were asking that the government pay

115. See supra note 57 and cases cited therein.
116. This can be seen by the very fact that the benefits have no particular relationship to the rights they are used to restrict. See, e.g., Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946) (benefit was free use of school buildings, right was right to advocate communism); Parrish v. Civil Serv. Comm’n, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (benefit was subsidized housing, right was freedom against unreasonable searches and seizures).
117. In fact, the doctrine can be characterized as creating another suspect classification: those who wish to exercise a constitutional right.
118. For a general discussion of the constitutionality of legislative motives, see Ely, Legislative and Administrative Motive in Constitutional Law, 79 Yale L.J. 1205 (1970).
119. The Myers court purported to deal with the argument that there is “a distinction between a measure which denies other governmental benefits to women who choose to have an abortion and one which simply denies funding for the abortion itself.” 29 Cal. 3d at 268, 625 P.2d at 788, 172 Cal. Rptr. at 875. But the court dealt with the wrong distinction. It failed to recognize the problem with having the condition and the benefit relate to the same activity.
for the assertion of the right itself. The Myers court realized that it could not properly find an unconstitutional condition if the "benefit" to be conditioned was defined as subsidized abortions. For there would then be no benefit. All women were denied Medi-Cal-funded nontherapeutic abortions: rich women, poor women, women who desired abortions, and those who did not.\textsuperscript{120} Indigent California women were not forced to make a choice between receiving benefits and exercising constitutional rights as were the plaintiffs in the earlier unconstitutional conditions cases.\textsuperscript{121} The legislature made that choice for them as it did for all California women. The only identifiable "condition" or "limitation" the legislature placed on the benefit of free nontherapeutic Medi-Cal abortions was to repeal the benefit altogether.

Since a benefit that does not exist cannot be "conditioned," the Myers decision could not be defended if the benefit were defined as subsidized abortions. Although the indigent women who chose to bear their children actually received more benefits than those who chose abortion, identical benefits were freely available to all poor California women. The difference between the two groups is not that the government discriminated against one in favor of the other, but that one group chose to avail itself of the limited benefits the government did provide while the other group did not.\textsuperscript{122} If subsidized abortions were defined as the "benefit," it was a benefit denied to all and not just to some.

The Myers plurality opinion took a more sophisticated approach. Justice Tobriner described the conditioned benefit as procreation-related health care benefits in general rather than merely subsidized abortions.\textsuperscript{123} The main objection to the restrictions was that when the California legislature eliminated abortion funding, it did not eliminate subsidies for other procreation-related health care expenses such as childbirth and birth control.\textsuperscript{124} The benefit, if defined in this way, was limited but not eliminated by the abortion funding restrictions.

\textsuperscript{120} See supra note 65.
\textsuperscript{121} See supra note 114 and accompanying text.
\textsuperscript{122} This is not to say that the abortion restrictions in the Budget Act would not put a special burden on women wishing to exercise their right to an abortion. Nevertheless, the burden is not caused by direct governmental action, but by the economic system. See Gary-Northwest Ind. Women's Servs. v. Bowen, 496 F. Supp. 894, 901 (N.D. Ind. 1980) ("The obstacle which the indigent women faced [in attempting to obtain an abortion] was not the Hyde Amendment, but the women's indigency."). aff'd mem., 451 U.S. 934 (1981).
\textsuperscript{123} See Myers. 29 Cal. 3d at 270 n.19, 625 P.2d at 789 n.19, 172 Cal. Rptr. at 876 n.19. His argument was that the Budget Act created a condition by not allowing indigent women who desired abortions to receive the procreation-related health care of their choice as it did other indigent women. See id. at 268–69, 625 P.2d at 788, 172 Cal. Rptr. at 875–76.
\textsuperscript{124} See generally CAL. WELF. & INST. CODE §§ 14053, 14132, 14191 (West 1980 & Supp. 1983); Note, supra note 66, at 393.
Characterizing the benefit in this way leads to two problems. First, the budget restrictions still place no "condition" on procreation-related benefits in general. Benefits are "conditioned" when they are denied to some while the very same benefits are granted to others. In this case, the range of available procreation-related health care benefits did not change depending on whether a woman wanted to exercise her right to an abortion. The same benefits were available to all poor California women at any time. Therefore, they were not "conditioned." From an objective point of view, the health care benefits Medi-Cal provided to women who desired abortions were no less adequate than those it provided to indigent women who wished to bear children. Although some women received fewer benefits than others, the ones who received less were at all times eligible for exactly the same benefits as the ones who received more.

The second problem with defining the "benefit" as procreation-related health care subsidies in general is that applying the doctrine of unconditional conditions in this way unduly restricts the legislature's ability to control the benefits it dispenses through public welfare programs. If the doctrine were consistently applied as it was defined in Myers, it would deny the legislature the right to narrow the scope of its public welfare programs in ways that are likely to prevent some from exercising constitutional rights. The Myers court held in effect that the legislature could not, consistent with the California Constitution, cut off funds that would otherwise be spent for subsidizing the exercise of a constitutional right if it chose to continue funding other "related" activities. If this means

125. For example, in Danskin, those refusing to sign a loyalty oath were refused access to the exact same benefits granted to those who did sign. 28 Cal. 2d 536, 545-56, 171 P.2d 885, 893 (1946). In Myers, however, this is not true. Thus, Justice Tobriner's statement that the plaintiffs were denied abortion benefits "solely because such persons [sought] to exercise their constitutional right of procreative choice in a manner which the state does not favor" is simply wrong. 29 Cal. 3d at 256-57, 625 P.2d at 781, 172 Cal. Rptr. at 868.

126. The Budget Act provisions were on their face completely equal in application. See supra note 65.

127. See supra note 122 and accompanying text.

128. This is not to say that the legislature's decision was desirable or even permissible or that it had no effect on the number of women who obtained abortions. See infra note 138. But whatever it did do, it did not create a "condition" burdening the exercise of a constitutional right.

129. The Myers court held that if the government did not fund other related activities, it would have no constitutional obligation to pay for abortions. See supra note 95. Making this the touchstone of a determination that an unconstitutional condition exists creates other problems. For example, how is it possible to know when funds "would otherwise be spent" for abortions? The Myers court determined this by looking at the general purpose provision of the Medi-Cal statute. 29 Cal. 3d at 271-72, 625 P.2d at 790, 172 Cal. Rptr. at 877. The California legislature could amend section 14000 (the purpose provision of Medi-Cal) to state that the purpose of the legislative scheme is to provide strictly limited health care benefits to selected persons and only to the extent that the legislature determined that public policy favored those specific benefits. Then abortion funding restrictions identical to the Budget Act provisions invalidated in Myers would arguably be valid under the court's analysis.
that the California legislature has lost the ability ever to spend less on public welfare benefits when such cutbacks might restrict poor people's exercise of constitutional rights, then its impact on public welfare schemes would be much more severe than the Myers court intended.\textsuperscript{130} Not only would this rule seriously restrict the legislature's right to spend its public welfare dollars as it wishes, but it would create the irrational result that the legislature could cut off funds for constitutionally protected activities as long as it also cut off funds for all other "related" pursuits. Besides creating uncertainty about what were "related" activities, this result would allow the legislature to bypass the requirements of the doctrine simply by eliminating subsidies for all "related" activities as well. This would serve only to harm an even larger number of poor people.\textsuperscript{131}

B. Equal Protection Analysis in Abortion Funding Cases

The clarity of the Supreme Court's analysis in Maher v. Roe and Harris v. McRae provides a sharp contrast to that of the California court in Myers. The Court's position was based on the theory that under the federal Constitution, economic restrictions on the exercise of fundamental rights do not create government-imposed impairments of those rights.\textsuperscript{132} If the Constitution protects only against active governmental encroachments of fundamental rights,\textsuperscript{133} it follows that the government may refuse simple legislative legerdemain would be sufficient. Justice Tobriner stated that such a characterization would not save the abortion restrictions, however, because characterizing them in this way would be constitutionally impermissible. 29 Cal. 3d at 276 n.19, 625 P.2d at 789 n.19, 172 Cal. Rptr. at 876 n.19. But his statement that it is impossible to provide a particular benefit (here free medical care during childbirth) while not providing an alternative (abortion) which many might prefer and which is a constitutionally protected right is conclusory and begs the question.

\textsuperscript{130} This result contradicts the well-known doctrine that states may attack a social problem by "select[ing] one phase of one field and apply[ing] a remedy there, neglecting the others." Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Geduldig v. Aiello, 417 U.S. 484, 495 (1974). \textit{See also} Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) ("the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all"). This doctrine has been accepted by the California court. Hale v. Morgan, 22 Cal. 3d 388, 395, 584 P.2d 512, 516-17, 149 Cal. Rptr. 375, 379-80 (1978).

\textsuperscript{131} Justice Tobriner apparently was willing to concede that a state permissibly could decline to pay for any procreation-related health care expenses. \textit{See supra} note 95.


\textsuperscript{133} The proposition that the Constitution protects only against direct governmental encroachments hinges on the premise that constitutional guarantees are not subjective; i.e., they protect individuals from government activity limiting certain specified rights but do not guarantee to individuals the unfettered opportunity to exercise those rights. Such an assumption was made by Justice White in his concurring opinion in \textit{Harris v. McRae}: "The constitutional right recognized in \textit{Roe v. Wade} was the right to choose to undergo an abortion without coercive interference by the government." Harris v. McRae, 448 U.S. 297, 327 (1980) (White, J., concurring). One commentator has stated that \textit{Harris v. McRae} creates a distinction between "positive" rights and "negative" rights. Appleton, \textit{supra} note 5, at 734. Positive rights, such as voting, are subjective because they are shown to be violated by
to subsidize activities that it cannot prohibit. This is true even if the structure of our economic system will, as a result of the government’s inaction, preclude the poor from exercising their rights.134 It remains true even when the government was motivated in part by the desire to discourage constitutionally protected activities.135

This conclusion has been disquieting to critics of the Court’s conclusions in *Maher* and *Harris*. Many courts and commentators have criticized the Supreme Court for finding, based on equal protection analysis, that governments can constitutionally pay for childbirth but not abortion.136 The determination that abortion funding restrictions create no showing only that a person has not received them and not that the government has taken steps to affirmatively deny them. These positive rights require government subsidy, whereas negative rights protect only against objective government infringements. *Id.* at 731–37.

134. There are many constitutionally protected activities that the government would never wish to subsidize or encourage. For example, the Supreme Court has repeatedly reaffirmed the right of an individual to advocate and, in certain cases, to practice racial discrimination. *See* Runyon v. McCrary, 427 U.S. 160, 176 (1976) (“[P]arents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and . . . children have an equal right to attend such institutions.”); Moose Lodge v. Irvis, 407 U.S. 163, 171–72 (1972) (private clubs have a constitutional right to exclude members on the basis of race); *see also id.* at 179–80 (Douglas, J., dissenting) (Bill of Rights permits racially segregated clubs). Yet it is established that governments may, and often must, take an activist stand toward discouraging racial discrimination. *See, e.g.,* Terry v. Adams, 345 U.S. 461 (1953) (state is not allowed passively to "permit" duplication of its primary election by a private segregated organization); Shelley v. Kraemer, 334 U.S. 1 (1948) (state must refuse to enforce private racially restrictive covenants); 42 U.S.C. § 1981 (1976) (prohibiting racial discrimination in the enforcement of private contracts).

135. The United States Supreme Court has upheld at least one decision to withhold benefits even though it was clearly motivated by constitutionally impermissible purposes. Palmer v. Thompson, 403 U.S. 217 (1971) (upholding closure of public swimming pools to avoid racial desegregation); *see generally* Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. REv. 95 (1971) (analyzing whether an improper legislative motive should in itself be grounds for constitutional infirmity); Ely, *supra* note 118 (general discussion of the role of legislative motive in constitutional jurisprudence). Clearly, the government need not guarantee that all will have the opportunity to fully exercise all of their constitutional rights. *Harris* v. *McRae*, 448 U.S. 297, 318 (1980). But the line between "active" discouragement and "failure to subsidize" or "indirect action" becomes less clear when selective funding for indigents, whose activities may largely depend on government subsidy, is involved. Chief Justice Bird, concurring in *Myers*, stated with some justification that "it is a distinction without a difference to assert that because the governmental action is indirect rather than direct, the infringements which result are of less significance constitutionally." 29 Cal. 3d at 290 n.3, 625 P.2d at 802 n.3, 172 Cal. Rptr. at 889 n.3 (Bird, C.J., concurring).


*Maher* and *Harris* have been almost universally criticized in the scholarly literature as well. *See, e.g.,* L. Tribe, *American Constitutional Law* 933 n.77 (1978); Bennett, *Abortion and Judicial Review: Of Burden and Benefits, Hard Cases and Some Bad Law*, 75 *U. L. Rev.* 978, 1009–17
"government-imposed obstacle" to poor women seeking abortions\textsuperscript{137} has been characterized as both inaccurate and unfair. These critics point to the well-documented fact that restrictions on abortion funding make it impossible for many women to procure abortions.\textsuperscript{138} The Court has recognized in other contexts that for many people who depend upon government benefits, a refusal to subsidize certain constitutionally protected activities is little different from outlawing their exercise.\textsuperscript{139} The critics have argued with some force that \textit{Maher} and \textit{Harris} open the door for increased legislative control over the exercise of constitutional rights by the poor and

\textsuperscript{137} See supra note 132.

\textsuperscript{138} The number of publicly funded abortions dropped from 295,000 in fiscal year 1977 to 194,000 in fiscal year 1978 as a result of abortion funding restrictions permitted by the Supreme Court's holding in \textit{Maher} allowing states to implement Medicaid funding restrictions. Henshaw, Forrest, Sullivan & Tietze, \textit{Abortion Services in the United States, 1979 and 1980}, 14 \textit{Fam. Plan. Persp.} 5, 13 (1982). One study, based on statistics from two states, estimated that the funding restrictions caused between 18\% and 23\% of those women who would have obtained a Medicaid abortion before passage of the budget restrictions to forego one. Trussel, Menken, Lindheim & Vaughn, \textit{The Impact of Restricting Medicaid Financing for Abortion}, 12 \textit{Fam. Plan. Persp.} 120, 127-28 (1980).

\textsuperscript{139} In \textit{Boddie v. Connecticut}, 401 U.S. 371 (1971), the Court required states to dispense with court fees for indigents seeking divorces, thereby indicating that the right of access to the courts includes a requirement that the government subsidize the exercise of that right for indigents. \textit{Id.} at 383. \textit{See also} Bounds v. Smith, 430 U.S. 817 (1977) (prisoners have constitutional right of access to adequate law libraries); Douglas v. California, 372 U.S. 353 (1963) (finding that a right to appointed counsel for indigent criminal defendants seeking to appeal convictions is mandated by the equal protection clause); Griffin v. Illinois, 351 U.S. 12 (1956) (constitutional right of indigent criminal defendants to state prepared trial court transcripts for appeal purposes). \textit{But see} Ortwein v. Schwab, 410 U.S. 656 (1973) (refusing to apply \textit{Boddie} result to judicial review of administrative denial of welfare benefits); United States v. Kras, 409 U.S. 434 (1973) (refusing to apply \textit{Boddie} to voluntary bankruptcy proceeding); Rowell v. Oesterle, 626 F.2d 437 (5th Cir. 1980) (court equates freedom to bring child custody proceeding with freedom to have an abortion and holds that government is not required to subsidize either). Voting is another area in which the Court has recognized that refusing to subsidize an activity is equivalent for indigents to outlawing it. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidating poll taxes). The \textit{Maher} Court distinguished these cases on the ground that the involved activities not only were protected by the Constitution, but also were controlled and monopolized by the government. Maher v. Roe, 432 U.S. 464, 469-70 n.5, 471 n.6 (1977).

An interesting consequence of this is that women in prisons may still have a right to subsidized abortions despite \textit{Maher}. This is because of the monopoly position the government occupies as the only provider of medical care to prisoners. Note, \textit{Inmate Abortions—The Right to Government Funding Behind the Prison Gates}, 48 \textit{Fordham L. Rev.} 550, 558 (1980).
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indicate a growing unwillingness on the part of the Court to protect the rights guaranteed by Roe v. Wade. 140

Critics of the Court’s use of equal protection analysis in Maher and Harris can also point to the difficulties inherent in using the equal protection clause to invalidate abortion funding limitations. While several jurists have argued that the equal protection clause compels the protection of abortion funding, 141 this position seems difficult to support. It comes close to establishing a constitutional right to have the government pay for exercising all constitutional rights. 142 If the government’s refusal to subsidize the exercise of a fundamental right is equivalent to unconstitutionally burdening that right, the conclusion that the government must always pay for the exercise of such rights by indigents seems inescapable. 143 This problem becomes especially acute when applied to rights such as the right to interstate travel. 144


142. Although this proposition may not seem so unworkable in the context of abortion, it becomes clearly unworkable when such rights as the right to travel and free speech and press rights are considered. An example of the latter is Presbyterian Hosp. v. Harris, 638 F.2d 1381 (5th Cir. 1981). In that case, a hospital claimed that Medicare was required to fund television and telephone privileges for covered patients because the patients had a first amendment right to use these instruments. The court held that even if the patients did have a constitutional right to watch television and use the telephone, “the government is not required to finance the exercise of First Amendment rights.” Id. at 1385. Of course, the fact that the government might not only refuse to fund constitutionally protected activity, but might agree to fund alternative activities makes the issue more difficult. But this factor should not be constitutionally relevant since the government normally has the right to subsidize or not subsidize any activity it wants in the context of a social welfare program. See supra note 130.

143. Harris v. McRae, 448 U.S. at 318 (“To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services.”).

The Supreme Court, for good reason, has expressly refused to reach this conclusion: “[A] refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.” Id. at 317 n.19.

It is doubtful, as the Court has indicated, that it would be practical or desirable for a court to require governments to fund the exercise of constitutional rights by indigents. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), Justice Powell, writing for the majority, ended his opinion with a long postscript in which he admitted that the problems there facing the Court (inequitable funding between rich and poor school districts) were desperately in need of solution. Id. at 56–58. However, he determined that “the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.” Id. at 59. See also Dandridge v. Williams, 397 U.S. 471, 484–85 (1970) (applying same analysis to state administration of public welfare program).

The plurality opinion in Myers indicates that Justice Tobriner was also attempting to avoid creating
Even considering the weaknesses equal protection analysis creates when applied to the abortion funding problem, it remains a better approach than the doctrine of unconstitutional conditions. The difficulties with equal protection analysis in this context are caused not so much by any logical inconsistencies in its approach, but by the difficult policy choices that must be made to solve the problem in a fair and consistent manner. Even though the Court in *Maher v. Roe* and *Harris v. McRae* reached an unpopular result, it at least faced the problem of the extent to which the government can discourage the exercise of constitutional rights by selective subsidies and took a discernible and defensible position.

The doctrine of unconstitutional conditions allowed the *Myers* court to avoid some of the problems the Supreme Court faced in *Maher* and *Harris*. But in doing so, it substituted for the clear policy choice reached in the federal cases a logically unsupportable method that allowed the California court to bypass the real issue posed by this controversy. Neither legal scholarship nor sound policy is served when a court uses the wrong method to reach what many say is the right result.

IV. CONCLUSION

The doctrine of unconstitutional conditions does not hold the promise some believed it did after *Maher* and *Harris*. Close examination reveals that it is not a sound principle of constitutional analysis, at least in its application to the abortion funding problem. The weaknesses inherent in the plurality opinion in *Committee to Defend Reproductive Rights v. Myers* demonstrate the weaknesses of the doctrine itself. The doctrine is no longer needed to serve its historical role as a means for bypassing the right-privilege distinction. Moreover, the danger exists that it will be misapplied to cases like *Myers* where it is not logically supportable. Therefore, it is not a viable alternative to equal protection analysis in abortion funding cases.

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144. *See supra* note 142.
145. *See supra* note 136.
146. *See supra* part IIIA1.
147. *See supra* part IIIA1.
149. *See supra* part IIIA2.
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Because the problems associated with applying equal protection analysis to abortion funding cases are on balance less severe than those caused by applying the doctrine of unconstitutional conditions, the former is the proper analytical tool and should have been applied by the *Myers* court. The doctrine of unconstitutional conditions should be returned to its place as one of the many historically interesting but now useless doctrines in constitutional adjudication.

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