A FAVOR AT WHAT COST?
INTERFERENCE WITH EDUCATION
IS THE NEW MIDNIGHT RAID

DAN ROSIN

INTRODUCTION

The growth of the modern welfare State demands new approaches from constitutional theorists struggling to protect the Bill of Rights.1 Before the New Deal State actively regulated economic benefits, constitutional protections focused upon limiting coercive force or criminal sanctions.2 Accordingly, constitutional theory emphasized the protection of negative rights against unilateral government action.3

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1. Professor Charles A. Reich, in his influential article, The New Property, warns that "[w]hen government - national, state, or local - hands out something of value, government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess. It obtains new rights to investigate, to regulate, and to punish." Charles A. Reich, The New Property, 73 YALF L.J. 733, 746 (1964). One year earlier, Reich documented the coercive midnight raid policies of many state welfare agencies. See Charles A. Reich, Midnight Welfare Searches and the Social Security Act, 72 YALE L.J. 1347 (1963). History regards such policies as an affront to human dignity and to constitutional values. The wisdom of state programs under the current welfare revolution has yet to be determined.


3. Generally, "negative rights" refers to the individual's right to stop a state or private actor from acting against her. The Fourth Amendment's right to be free
In the modern State, such a theory has limited effect when the government can encourage, or discipline, an individual towards a preferred behavior as a bilateral condition for receipt of benefits. This Comment analyzes the social harm that may result when the government, through its allocation of resources, forces the recipient to abdicate certain constitutional rights. It presents the argument that the Constitution does not solely provide negative rights, owned by the individual; but instead, mandates particular relational rights, benefiting the polity, that cannot be contracted away. The major groundwork for this analysis has been laid out in the rule against unconstitutional conditions. Generally stated, the doctrine prohibits the State from compelling an individual to surrender "one constitutional right as a condition of its favor." Although the rule is over sixty years old, it

of unlawful search and seizure is a paradigmatic example.

Professor Charles Fried defines a negative right as "the right not to be wronged intentionally in some specified way; while a positive right is a claim to some specified share of goods." CHARLES FRIED, RIGHT AND WRONG 110-112 (1978). For further discussion of negative versus positive rights, see infra Part II.C.

4. Examples of such conditions influence behavior across a wide spectrum. Connick v. Myers, 461 U.S. 138 (1983) (upholding a requirement that interferes with speech as a condition of government employment); Bob Jones Univ. v. United States, 103 U.S. 3017 (1983) (upholding a condition requiring a college to abdicate a particular admissions policy as a prerequisite to tax-exempt status and access to student loans); United States v. Lee, 455 U.S. 252 (1982) (upholding the requirement of an Amish employer to pay Social Security taxes despite religious protests); Harris v. McRae, 448 U.S. 297 (1980) (upholding interference with a woman's right to choose an abortion while receiving restricted Medicaid funding) (Brennan, J., dissenting, called Congress' allocation of funds "a deliberate effort to discourage the exercise of a constitutionally protected right.").

5. MAX WEBER, ECONOMY AND SOCIETY 668-71 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Bedminster Press 1968). Max Weber has noted that "in no legal order is freedom of contract unlimited in the sense that the law would place its guaranty of coercion at the disposal of all and every agreement regardless of its terms." Id. at 668.

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has too often been neglected. This Comment considers the arguments awarding judicial deference and finds them wanting. The object is to expand the scope of the unconstitutional conditions doctrine.

Part I discusses the constitutional impact resulting from one detail of Pennsylvania's current welfare program: the "Up-Front" job search requirement. The "Up-Front" requirement demands that all Pennsylvania recipients of the Aid to Families with Dependent Children ("AFDC") program participate in a rigid state created job-search which interferes with the individual’s choice to pursue an education. Part II discusses and criticizes three doctrines of judicial deference, inimical to the rule against unconstitutional conditions, which approve the government’s use of largess to interfere with constitutional rights. Part III argues that some constitutional rights are non-waivable, and therefore, the individual cannot freely enter into a contract with the government and accept the allocation upon the condition of a particular waiver. Part IV examines education as a constitutional relational right and revisits Pennsylvania's "Up-Front" program. Finally, this Comment concludes that education receives some constitutional protection which the state cannot demand to be waived.

I. PENNSYLVANIA'S WELFARE ALLOCATION - STEERING RECIPIENTS AWAY FROM EDUCATION

On August 1, 1996, Congress called President Bill Clinton’s bluff and sent him a welfare reform bill that omitted the harsh Medicaid cuts the President had previously opposed. Without the cover of these

7. See discussion infra Part II.
9. A "contract" is defined as "[a]n agreement between two or more persons which creates an obligation to do or not to do a particular thing... Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." BLACK'S LAW DICTIONARY 322 (6th ed. 1990). The phrase "contract with the government" is not meant to imply that all of these requirements are formally met. Rather, the phrase is used figuratively to describe the individual and government’s mutual obligation according to the terms of the relevant statute.
cuts, Clinton was forced to follow through with his 1992 election promise to "end welfare as we know it." On August 22, 1996, he signed Congress's Personal Responsibility and Work Opportunity Reconciliation Act.10

Section 401(b) of the Personal Responsibility Act provides: "This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." This provision clearly repudiates the sixty-one year old social policy of guaranteeing welfare benefits as an entitlement to anyone who meets the requisite eligibility criteria.11 With the end of federal entitlement status, the cooperative state-federal welfare system12 has been transmogrified. Replacing a system of federal requirements, block grants are now allotted to each state, free of any specifications.

The current law in Pennsylvania, utilizing the federal block grant, among other provisions, demands that each non-exempt AFDC recipient participate in the Road to Economic Self-Sufficiency through Employment and Training (RESET) program.13 RESET demands that all participants seek, accept, and perform "work-related" activity for at least twenty hours a week.14 The initial phase of RESET consists of the Up-Front job search program which must occur within the first eight weeks of receiving benefits.15 If an applicant desires, she may fulfill the work-related requirement, following the initial eight-week Up-Front program, by participating in vocational education, general education, English-as-a-second-language, or jobs

11. The word "entitlement" may refer to either (1) the "entitlement doctrine" - a judicial doctrine guiding the courts' interpretation of the amount of due process protection awarded to public largess; or (2) an individual entitlement - if an individual meets a given program's eligibility criteria, the state must provide the relevant benefit independent of budgetary allocations.
12. See King v. Smith, 392 U.S. 309, 316 (1968) ("The AFDC program is based on a scheme of cooperative federalism.").
14. Id. § 405.1(a.2)(2).
15. Id. § 405.1(a.2)(3).
skills training. Applying personal education to the work-related requirement may be done for a maximum of twelve months. If the applicant has not received a high school diploma, and is between the age of eighteen and twenty-two, he or she may fulfill the work-related requirement by pursuing a Graduate Equivalence Degree ("GED") for a maximum of twenty-four months.

Pennsylvania's Up-Front program forces the recipient of the government allocation to abandon her pursuit of an education. Before the new block grant system was signed into law, a state was precluded by federal requirement from attaching any conditions to a welfare benefit that interfered with the individual recipient's choice of a basic education.

Under the present block-grant system, a state is free to demand the waiver of a right whose waivability is highly questionable. Currently, AFDC recipients are engaged in GED programs in an effort to attain meaningful, long-lasting employment. The Up-Front program, however, has forced women to drop out of their GED programs in order to participate in the job search program. When the

16. Id. § 405.1(a.2)(5)
17. Id.
18. Id.
19. The relevant statute reads in part:
   If the State requires an individual who has attained the age of 20 years and has not earned a high school diploma (or equivalent) to participate in the program, the State agency shall include educational activities consistent with his or her employment goals. . . . Any other services or activities to which such a participant is assigned may not be permitted to interfere with his or her participation in an appropriate educational activity.


The interpreting regulations put forth by the Department of Health and Human Services clearly state that "[a] State's JOBS [Job Opportunity and Basic Skills] program [the predecessor to RESET] must include . . . (1) High school education or education designed to prepare a person to qualify for a high school equivalency certificate . . . ." 45 C.F.R. § 250.44(a)(1) (1995) (emphasis added).

20. One individual interviewed, indicative of the class, was enrolled in a GED program in order to satisfy a prerequisite for entry to the Berean Institute, a Philadelphia secretarial school. The Up-Front program forced her to drop out of her GED class. Interview with Jane Doe in Philadelphia, Pa. (July, 1996).
search yields a job at Burger King, the state forces the individual to accept the employment or pursue the GED for a maximum of one year. This one year cut-off comes too quickly for most women who left school before the tenth grade. For them, it is, therefore, a choice between flipping cheeseburgers or losing their benefits. The choice to pursue a minimal education and apply it towards the work requirement has effectively been removed.

II. DOCTRINES AWARDED JUDICIAL DEFERENCE

A. The Greater Does Not Include the Lesser

The most dominant rationale justifying judicial deference to allocational sanctions is "the greater includes the lesser." In 1876, the Supreme Court held that a state could revoke a foreign corporation's business license in retaliation for the corporation's invocation of federal diversity jurisdiction. The dissent warned that such retaliation would amount to an "unconstitutional condition" on the right to do business. The majority responded that "[i]f the State has the power to cancel the license . . . [i]t has the power to determine for what causes and in what manner the revocation shall be made." The greater, therefore, includes the lesser.

This logic was most famously articulated in a number of dissents by Justice Holmes. In 1910, Holmes forcefully argued that "[e]ven in the law, the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." If the government may deny the applicant outright, the applicant suffers no more when the denial is due to a failure to comply with the entitlement's specific condition. Holmes

21. Many of the claims in this section, discussing doctrines of judicial deference, benefit from the forceful arguments and examples provided by Professor Seth Kreimer. See Kreimer, supra note 2, at 1304-26.
23. Id. at 543 (Bradley, J., dissenting).
24. Id. at 542.
26. See Kreimer, supra note 2, at 1306.
stressed that "[t]he consequence is the measure of the condition. When the only consequence of a breach is a result that the State may bring about directly in the first place, the condition cannot be unconstitutional."

Such reasoning sustained government actions in various constitutional areas until the final years of the Warren Court. While the intuitive appeal of greater includes lesser analysis still guides constitutional criminal doctrine, in most civil arenas it has been abandoned. Justice Rehnquist, however, has been reluctant to fully turn his back. In regard to due process protection, he stubbornly insists that a plaintiff "must take the bitter with the sweet," and thus accept whatever due process protections originally accompanied a benefit. Concerning First Amendment protection, he has firmly

27. Western Union Tel. Co., 216 U.S. at 54 (Holmes, J., dissenting).
30. See Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (plurality opinion). This approach appeared to command the weight of a majority in Bishop v. Wood, 426 U.S. 341 (1976) (refusing a claim for due process protection by a dismissed government employee). This bitter and sweet reasoning was, however, quickly repudiated in Vitek v. Jones, 445 U.S. 480, 491 (1980) (stating minimal requirements of procedural due process are "a matter of federal law [and] are not diminished by the fact that the state may have specified its own procedures that it may deem adequate . . . . "). This line of reasoning was solidified in Logan v. Zimmerman Brush Co., 455 U.S. 422, 431-32 (1982) (applying due process requirements to government fair employment practices review).

For a detailed discussion and critique of the government's ability to define property rights and thus subsequently define the limits of due process protection, see Rodney A. Smolla, The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much, 35 Stan. L. Rev. 69 (1982);
held that government as "proprietor" is distinct from government as "sovereign," and the greater power to dispose of property includes the lesser power to restrict its First Amendment uses. In regard to the general distribution of public largess, he has held that "[w]hen the government appropriates public funds to establish a program, it is entitled to define the limits on that program." Similarly, in regard to corporate speech, Justice Rehnquist insists that because a corporation exists at the grace of the state, the greater power granting incorporation includes the lesser of prohibiting its speech.

In deference to Justice Rehnquist, even critics of "greater includes lesser" logic have qualified their reproach. Professor Robert Hale, in an article questioning the government's power to induce an individual to contract away certain liberties, states that "this doctrine of unconstitutional conditions . . . is difficult to support logically. If I have no ground for complaint at being denied a privilege absolutely, it is difficult to see how I acquire such a ground merely because the state . . . offers me an alternative . . . ." Such self-conscious hesitancy, however, is misplaced for two reasons. First, constitutional analysis does not exclusively focus


34. Hale, supra note 6, at 321-22. See also Kreimer, supra note 2, at 1310.

35. At the outset, it should be noted that the greater includes the lesser rationale is not a perfect syllogism. Professor Powell criticizes Justice Holmes' claim that the power of total exclusion is a "whole," of which the power to impose
upon consequences. When Justice Holmes explains judicial restraint as "the consequence is the measure of the condition," he ignores that constitutional protection is often awarded against the manner or process in which the government attempts to achieve certain consequences. The process must be restrained independent of the consequences. For example, it is clear that the State may incarcerate certain unlawful individuals. Such imprisonment is the consequence the state desires. It is also a "greater" power than searching an individual's home. However, such a search, without a warrant, has been found to clearly violate the Fourth Amendment prohibition against unreasonable searches and seizures. Indeed, most Fourth Amendment jurisprudence restricts the process, or means, by which the state may achieve the consequence of incarceration.

A second criticism of the "greater power includes the lesser" attacks the assumption that the two powers can be qualitatively compared. Professor Seth Kreimer insightfully points out that the consequence of excluding African-Americans from a swimming pool is entirely different from closing the pool to everyone. Applying any burdens whatsoever, on those admitted, is a "part":

Major Premise: There is a class of corporations "A" . . . over which the state has the power of absolute exclusion.
Minor Premise: The X corporation is an "A" corporation.
[false] Conclusion: Therefore, the X corporation is one upon which the state has power to impose any burden whatsoever.

Plainly the only legitimate conclusion is that the X corporation is one over which the state has the power of absolute exclusion . . . . [Justice Holmes] has a different predicate in his conclusion from that in his major premise. . . . The "power of absolute exclusion" is a term not identical with "the power of relative exclusion" or [with] the "power to impose any burden whatsoever."

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Agreeing with Professor Powell, Professor Kreimer writes that "[a]ll that can be deduced logically from the power to deny a benefit absolutely is the power to deny it absolutely. . . . If one does not accept the premise that the power of conditional denial is an element of the power of absolute denial, then the former can not be deduced from the latter." Kreimer, *supra* note 2, at 1310-11.


Holmes' argument that "the consequence is the measure of the condition," in both cases African-Americans cannot swim. In the former case, however, they suffer comparative injustice. Kreimer states that "it seems clear that being denied an advantage granted to others differs from being harmed in isolation." Indeed, much of equal protection analysis turns on such a distinction between the power to comparatively deny and the power to categorically deny. If a state, for example, conducts a school board election, it cannot give the vote to only those with a distinct interest in the schools. Equal protection analysis is not avoided because the state could have categorically denied the right to vote.

The preceding criticisms of Holmes' argument give reason to apply constitutional analysis to any government allocation. Realization that (1) the Constitution demands scrutiny of a state's process to achieve a consequence, and (2) respect for the reality that comparative denial is significantly different from categorical denial, demand renunciation of any legacy that the greater includes the lesser.

B. State As Proprietor Is Still The State

Another doctrine advocating judicial deference towards government allocations is the fictitious distinction between the government's proprietary and sovereign functions. If constitutional protection seeks to protect certain discreet liberties from majoritarian interference, the sovereign-proprietor distinction urges lax judicial review when such interference results from the government's use of its property.

Justice Rehnquist has declared that "the role of government as sovereign is subject to more stringent limitations than in its role of

38. Id.
40. See supra notes 30-33 and accompanying text, discussing Justice Rehnquist's firm belief in the distinction between government as proprietor and government as sovereign as justification for the adherence to greater includes the lesser logic - a proprietary interest inherently allows the proprietor the greater power to shut-down, or deny all access to the property.
government as employer, property owner or educator." 41 Similarly, Justice Powell has written:

There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader. 42

The relevance of the distinction made by Justices Rehnquist and Powell has been urgently called into question. As Professor Kreimer aptly points out, "[i]f one of the most effective means of social control at the disposal of modern government is the allocation of benefits, then [the] proprietary/sovereign distinction portends the disintegration of constitutional review." 43 Surely, the government acting as proprietor has equal power to limit individual liberty. One does not have to be a vulgar legal economist 44 to recognize that fines and taxes will deter behavior as readily as threats of incarceration. 45 Likewise,

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41. Board of Educ. v. Pico, 457 U.S. 853, 908-10 (1982) (Rehnquist, J., dissenting). See also Buckley v. Valeo, 424 U.S. 1, 290-91 (1976) (Rehnquist, J., concurring in part, dissenting in part) (the limits imposed by the First and Fourteenth Amendments on government action may vary in their stringency depending on the capacity in which the government is acting); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 571 (1975) (Rehnquist, J., dissenting) (defending lax First Amendment scrutiny of the refusal of a municipal theater to carry the play "Hair" because "[h]ere we deal with municipal action[,] . . . not prohibiting or penalizing the expression of views in dramatic form by citizens at large, but rather managing its municipal auditorium").


43. See Kreimer, supra note 2, at 1315.

44. There exists no quick summary of the contribution to legal theory made by law and economics scholars. Here, reference is only made to analyses that measure the effect of legal rules based upon the assumption that individuals will react in a manner that rationally maximizes that individual's wealth.

45. The Supreme Court has affirmed this assessment. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) (threat of selective tax is an effective way to burden and censor the press); Grosjean v. American Press Co., 297 U.S. 233, 245-48 (1936) (newspaper revenue tax amounts
Revocation of an economic benefit can also act as an effective interference.\textsuperscript{46}

Some defenders of the sovereign-proprietor distinction argue that the private market will limit the harm of proprietary functions by providing less damaging alternatives. If an individual, for example, wants to talk politics, he is not forced to remain a policeman; he might choose to become a private security guard.\textsuperscript{47} It is reasoned, on the other hand, that when the government as sovereign "attempts to impose its will by force of law,"\textsuperscript{48} there is no alternative for the individual - all must obey the criminal law.

This justification can be attacked on a number of grounds. First, within the modern State, there might not be an adequate alternative private-sector source of employment.\textsuperscript{49} In many proprietary services furnished by the State, the government is a monopoly. As such, the individual lacks a viable choice.\textsuperscript{50}

to censorship of the press).

\textsuperscript{46} See United States \textit{ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson}, 255 U.S. 407, 434-35 (1921) (Brandeis, J., dissenting) (revocation of an organization's second-class mail privilege is "in effect a very heavy fine").

\textsuperscript{47} See \textit{McAuliffe v. Mayor of New Bedford}, 155 Mass. 216 (1892).

\textsuperscript{48} \textit{Maher}, 432 U.S. at 476.

\textsuperscript{49} For further elaboration of this claim, see William W. Van Alstyne, \textit{The Demise of the Right-Privilege Distinction}, 81 \textit{Harv. L. Rev.} 1439 (1968):

[The] tough-minded distinction between constitutionally protected rights [and] unprotected government privileges [may] have been influenced by the comparatively small economic role played by governmental units in 1892. Excluding [a plaintiff] from public employment still left open . . . a very large percentage of the available employment in the country. But today the federal and state governments directly or indirectly control a great proportion of the nation's employment; if one is unable to hold public employment, his chances of personal economic success are significantly limited.

\textit{Id.} at 1461-62.

A second criticism attacks the sovereign-proprietor distinction for assuming that when the government allocates resources, it is a like-kind contributor to a normally competitive market. Such an assumption is most likely false. Professor Kreimer argues that "even in a perfect market, a government willing to expend sufficient tax-generated resources could effectively purchase most constitutional rights."51 Furthermore, Kreimer notes, in competitive markets, if only a minority of recipients need a constitutional right, the private market will probably not find it worthwhile to provide the less offensive alternative.52 In regard to Pennsylvania's new welfare condition, there is clearly no effective private market remedy. No private producer will come along and offer employment that frees the individual to pursue a necessary, constitutionally protected remedial education.

A third criticism recognizes that the effect and reach of proprietary sanctions are often greater than sovereign sanctions. The force of sovereign sanctions depend on the government finding the violators, and then succeeding in prosecution. Proprietary sanctions, on the other hand, automatically reach the recipient as he or she comes to the government.53 They need not be applied with the specificity of a criminal statute, and because their denial only triggers due process protection once an initial interest has vested,54 the use of proprietary sanctions is often more forceful than sovereign sanctions. With this in mind, any exercise of economic power which interferes with constitutional interests should be subjected to the strictest review.55

51. See Kreimer, supra note 2, at 1319 n.81.
52. Id.
53. Professor Kreimer makes this point and cautions that "the government can tailor its inducements to forego constitutional rights so they affect only the least popular or politically efficacious groups." Kreimer, supra note 2, at 1323.
54. See Smolla, supra note 30, at 115-16.
55. See Kreimer, supra note 2, at 1323-24 (noting the obvious equal protection difficulties if a statute taxed only low income women who undergo abortions; while a statute, achieving the same result through the imposition of a condition would escape strict review).
C. Positive and Negative Rights - Is Non-Action Actionable?

A third doctrine advocating deference towards allocational sanctions rests upon the false distinction between state non-action and action. Classic liberal political philosophy, at its minimal, interprets the Constitution to provide negative checks against various government actions. The State is a necessary institution to protect Locke’s principle of property, defined as "life, liberty, and estate," yet, maximum freedom depends upon the State’s circumscription. Hobbesian liberty is an "absence of . . . external impediment." Such a reading of freedom imagines membership in a constitutional democracy where each individual is free, to the maximum extent, from government force. Negative rights, accordingly, ensure that the government will not interfere with individual volition.

This characterization of constitutional protection implies judicial deference when the government simply refuses to confer a benefit which it had no obligation to originally provide. The right holder is still free to exercise the right, only now within a different setting, and without government assistance.

Such a facile description of the interaction and dependence within any political body collapses upon examination. In a Lochner world of atomized individuals with natural rights, such a description may be accurate. Clear boundaries are violated when a state interferes with pre-existent rights. If the right to contract, however, does not exist

56. Although wary of anarchistic extremes, Thomas Hobbes, a great seventeenth-century English political philosopher, proclaimed that "[t]he liberties of subjects depend on the silence of the law." THOMAS HOBBES, LEVIATHAN 271 (Penguin Books 1968). Robert Nozick adds that "[i]ndividuals have rights, and there are things no person or group may do to them. So strong and far reaching are these rights that they raise the question of what, if anything, the state . . . may do." ROBERT NOZICK, ANARCHY, STATE AND UTOPIA ix (1974).


59. Lochner v. New York, 198 U.S. 45 (1905) (the Supreme Court struck down as an abridgement of the individual’s liberty to contract, and therefore a violation of due process, a New York law which limited the hours a bakery employee could work).
before the state grants its exercise, then the state is forever facilitating, and interfering, with individual choice. This makes the line between state action and inaction difficult to draw.\(^6\)

For example, when a state removes a book from a school library, is it withdrawing the optional provision of that book and thus, performing a permissible non-action, or is it actively censoring?\(^5\)

Similarly, when the government threatens to close down a Title X health clinic if certain anti-abortion speech is not advocated, is the state performing a valid non-action, or an offensive constitutional interference?\(^6\)

If we recognize the difficulty in establishing a clear distinction between non-action and action, negative rights and positive,\(^6\) it becomes clear that judicial deference predicated upon such dichotomies is false. This is especially true, when, as Professor Hale recognizes,

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\(^6\) See Rust v. Sullivan, 500 U.S. 173 (1991) ("Section 1008 of the Public Health Service Act specifies that none of the federal funds appropriated under the Act's Title X for family planning services shall be used in programs where abortion is a method of family planning.")

\(^6\) Justice Frankfurter remarked upon the ambiguity of the distinction: "Negative" has really been an obfuscating adjective in that it implied a search for a distinction - non-action as against action - which does not involve the real considerations on which rest [the ultimate issue]. 'Negative' and 'affirmative,' in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "misfeasance."

"threats of not acting . . . are among the most effective weapons of coercion."

It is not within the scope of this Comment to elaborate a set determination of when an allocation permissibly or impermissibly interferes with constitutional rights. Such an analysis turns on the slippery question of when the allocation offers an expansion of liberty above a baseline and when it threatens to take the individual below the baseline. Defining the baseline, before the allocation, becomes the rub.

It is important, however, to realize that the three aforementioned rationales for judicial deference are unpersuasive. Even if the baseline is such that the allocation cannot make the individual worse off, in some cases, there are still reasons why a court must disallow the government's condition. Such a case exists if the condition compels the individual to waive a non-waivable constitutional right, notwithstanding that she might freely choose to accept the condition.

III. WAIVABLE VERSUS NON-WAIVABLE RIGHTS - MORE THAN INDIVIDUAL LOSSES

If a constitutional right is intended to secure the autonomy and range of choice available to the individual, then intuitively there appears nothing offensive about the individual choosing to waive a protection. Such a surrender would be a further manifestation of choice. Indeed, it seems repugnant to the constitutional value of autonomy to paternalistically tell an individual that she cannot voluntarily surrender her right should she decide that she would be better off without it.

An initial reproach of this "choice" theory is based upon a


65. For example, it seems implausible to argue that the National Aeronautics and Space Administration unconstitutionally makes a scientist worse off than she would otherwise be in her exercise of free speech when it denies her grant application to research a glue on's weak force. Such an allocation may influence individual choice, but it is realistically very different from denying a welfare recipient her benefit for being a Democrat. For a detailed effort to establish such a principled baseline, see Kreimer, supra note 2, at 1351-74.
skepticism that true voluntary action exists. Professor C. Edwin Baker describes the nature of voluntariness:

A person's voluntary participation means only that, given that this type of exchange is permitted, given that resources are distributed the way they are, given that people's preferences have been conditioned as they have, and given any number of other presuppositions, she views her participation as preferable to nonparticipation. Given the circumstances, people also generally "voluntarily" hand over their money to a person holding a gun. According to this view, one must be deeply suspicious of an AFDC recipient's voluntary waiver of an education as a condition of accepting a benefit. Given such distribution of resources, what is the choice? Similarly, and building upon the criticism of the distinction between government action and inaction, Professor Hale argues that the State's maintenance of inheritance and property rights is a positive state action which perpetuates unequal bargaining power. This initial inequity undermines individual choice and creates an underlying assumption of duress. Professor Timothy Terrell builds upon this suspicion, and argues that it is such a lack of individual choice, most notably occurring when the individual deals with the government as a monopoly provider, that makes constitutional protections most necessary.

Even if the individual freely chooses to waive her educational right, there exists other arguments proscribing such a condition. Constitutional rights may provide more than an individual's veto against particular government action. The Thirteenth Amendment is more than the individual's check against any system of slavery, and the First Amendment does not end at the definition of

67. See supra Part II.C.
68. See generally Hale, supra note 64.
69. See Hale, supra note 64, at 627-28.
70. See Terrell, Causes of Action as Property, supra note 50, at 499-500.
71. U.S. CONST. amend. XIII.
72. U.S. CONST. amend. I.
censorship. Constitutional protections, applied through individual cases, may function as relational rights for the benefit of the polity.

Professor Laurence Tribe writes that the non-waivable nature of certain "relational" rights "appear to correspond to systemic norms." Such systemic norms are concerned with "structuring power relationships to avoid the creation or perpetuation of hierarchy in which some perennially dominate others." Tribe recognizes that "much of the structure of the entire Constitution, with its separation and division of powers, can be viewed as resting on relational norms and on the need for deliberate diffusion of power to combat the hegemony of any single group or faction."

The Establishment Clause is a clear example of such relational norms. Its central object is to maintain a division between secular and religious spheres of power; neither may dominate the other. It is obvious that these rights protecting against a commingling cannot be waived. A church group cannot forfeit its right of separation in order to receive an allocation from the Treasury. One cannot speak of the rights granted by the Establishment Clause as the exclusive rights of an individual or of a group. The right to have a division between a secular state and religious groups is a right owned by all of society. A conception of constitutional rights as only individual vetoes against government action incompetently vindicates such relation-focused norms.

Similarly, a constitutional right may be intended to structure a decent society. The Thirteenth Amendment's prohibition against slavery protects more than the individual's interest in being free from

73. See e.g., Branzburg v. Hayes, 408 U.S. 665 (1972) (Justice Powell's concurrence has been interpreted to award the press a right to gather news.).
75. Id. at 333.
76. Id. at 333 n.14.
77. U.S. CONST. amend. I.
78. Tribe, supra note 74, at 333 n.14.
79. Id. at 333
80. U.S. CONST. amend. XIII.
bondage. It also represents the ideal that a decent American society cannot tolerate slavery. Therefore, in order to protect a free society, an individual is precluded from waiving her Thirteenth Amendment right. Likewise, the Eighth Amendment recognizes that a decent society cannot tolerate cruel and unusual punishment. If a state offered an inmate the choice between serving a twenty year sentence under existent prison conditions versus serving a ten year sentence accompanied by weekly whippings, a court would presumably bar the prisoner’s choice of the latter.

Economic theory also accounts for the non-waivability of certain rights. In their seminal article, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, then-Professor Guido Calabresi and Mr. A. Douglas Malamed recognized that when a right is waived, certain externalities, or costs to third parties, inevitably result. The following hypothetical illustrates the point.

When Zack produces politically progressive movies consumed by Ed, he creates positive externalities affecting a scattered group of Saras. These Saras benefit from the positive externalities because Ed, who did see the movies, is more altruistic towards them. If the sum of the value of Ed’s consumption and Saras’ positive externalities are greater than the sum of Zack’s cost and the negative externalities, then society is richer with an entitlement scheme that grants Ed an entitlement to always see Zack’s movies. Assuming wealth maximization is the goal behind choosing a particular entitlement scheme, Ed should have this entitlement, and the Saras should benefit from the positive externalities. This entitlement should remain Ed’s until Zack’s costs and the negative externalities are greater than the collective value of the benefit to Ed and the Saras.

If the Saras’ positive externalities cannot be fully recognized or measured, some Saras do not even know that Ed is acting kindly towards them as a result of Zack’s movies, thus, the value compiled

81. U.S. CONST. amend. VIII.
82. See Kreimer, supra note 2, at 1387.
to keep Ed's entitlement will not properly reflect the actual benefit to society of Ed's consumption of the movies. Furthermore, the final benefit to society may be undervalued because there are many Saras, and freeloader problems will result. When the benefit is undervalued, and Zack's costs and the negative externalities become mistakenly greater, Zack will gain the entitlement not to produce his movies, and wealth will not be maximized. Assuming a society that desires a scheme of entitlements that maximizes wealth, the wrong result is reached.

In such a situation, the State must grant Ed the entitlement to consume Zack's movies and then create an inalienability rule prohibiting Ed from transferring this entitlement. Some might argue that the State could institute a liability rule which would attempt to compute the positive externalities, and use this as a price Zack must meet in order to forego the production of his movies. If, however, there are so many Saras that the price would always be prohibitive, it would be more efficient to not waste the resources required to compute Saras' benefits, but simply construct an inalienability rule.84 Barring Ed's transfer of the entitlement to consume the movie will best maximize wealth if the immeasurable benefits to Ed and the Saras outweigh the sum of the costs to Zack plus the negative externalities.85

Similarly, the externalities resulting from the interference with one individual's education are immeasurable and not easily internalized. When an AFDC recipient is pulled out of her GED class and forced to accept minimum wage employment, the dimming of her future defies quantification. The effect upon children, health, community and crime are all within the calculus. Furthermore, the norm that we, as a society, value an educated, self-improving citizenry

84. id. at 1111.
85. This discussion assumes an empirical situation where the positive externalities are difficult to measure because of free-loader and information problems. Of course, another set of facts may cause these same problems in regard to negative externalities. In such a case, if the immeasurable negative externalities would be greater than the positive externalities, the state will still need to construct a non-waivability rule. Under this situation, however, Zack would be prohibited from waiving his entitlement to not produce his movie.
is seriously compromised.

Calabresi and Malamed offer a second persuasive argument against free waivability: "self-paternalism." They analogize that, just as Ulysses tied himself to the mast in order to avoid temptation, our constitutional democracy created the Bill of Rights so that we will be "prevented from yielding to momentary temptations which [in the end are] harmful." Self-paternalism assumes that over a long series of cases, the individual knows what is best for him, and the immediate non-waivability of constitutional rights are a manifestation of that determination. Calabresi and Malamed, therefore, note that in some situations, "the most efficient pie is no longer that which costless bargains would achieve, because a person may be better off if he is prohibited from bargaining."

IV. EDUCATION AS A CONSTITUTIONAL RELATIONAL RIGHT

It has been argued in this Comment that a constitutional right is non-waivable when (i) it is relational - necessary to protects other rights, (ii) it establishes a norm which, according to constitutional values, constitutes a decent society, or (iii) its waiver causes immeasurable externalities. This section discusses the valence of these qualities in regard to an individual’s right to an education. It concludes with the assertion that Pennsylvania’s Up-Front work program impermissibly interferes with a constitutional right to a minimum education.

The constitutional status of education is unsettled. In San Antonio Independent School District v. Rodriguez, Justice Powell reiterated the sensitive stance adopted by the Supreme Court nineteen years earlier, that "education is perhaps the most important function of state and local governments." Despite this recognition, Justice Powell dismissed the claimant’s equal protection challenge to Texas’ system
of financing public school education.  

Under the Texas system, the state guaranteed a minimum level of education to each of the state's children by allocating to each school district approximately $220 per student. Each district was then free to augment its dollar per pupil allotment through the application of a local property tax. The Rodriguez claimants lived in a school district imposing the highest property tax in the San Antonio area, yet the district was only able to designate an additional $26 per student above the state sustenance grant. The total amount, with federal funds included, was $356 per student. This amount was contrasted with that of Alamo Heights, a wealthy district, which raised an additional $333 per student with a lower percentage property tax rate. Alamo Heights was able to spend a total of $594 per student.

Justice Powell refused to apply strict scrutiny to the plaintiff's equal protection claim because (1) the class is "large, diverse, and amorphous" and (2) the state financing system does not result in an "absolute deprivation of education." For these two reasons, deference was awarded, and the financing scheme stood valid.

90. Id. at 55.
91. Id. at 12.
92. Id.
93. Id.
94. Id.
95. Id. at 12-13.
96. Id. at 13.
97. Id. at 28. The Court, in criticizing the plaintiffs' claim, states that "in support of their charge that the system discriminates against the 'poor,' appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose income are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts." Id. at 22-23.
98. Id. at 25 n.60. The Court took comfort in the fact that "[b]y providing 12 years of free public-school education, and by assuring teachers, books, transportation, and operating funds, the Texas Legislature has endeavored to guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education." Id. at 24.
The scope of such deference, however, was carefully bound. After reasoning its application of rationality review, the Court, in footnote 60, hypothesized a case that "would present a far more compelling set of circumstances for judicial assistance than the case before [it] today." If the state conditioned elementary or secondary education upon the payment of tuition by each student, "a clearly defined class of 'poor' people would be absolutely precluded from receiving an education." Such a scheme, the Court implied, would necessitate judicial intervention.

In further dicta, Justice Powell considered the claim that because education is preservative and instrumental to other fundamental rights, such as speech and voting, education demands special protection. Again, he distinguished between a "relative deprivation" and an "absolute deprivation," stating that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short." The Court implied that if an absolute deprivation resulted, the nexus test would be appropriate, and heightened scrutiny would be required.

99. Id. at 25 n.60.
100. Id.
101. Id. at 36. This approach emphasizing a nexus between the interest in question and other constitutionally protected rights was most forcefully advocated by Justice Marshall in his dissent in *Rodriguez*:

> Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas. . . . [O]f particular importance is the relationship between education and the political process . . . . [I]t is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual interests such as procreation and the exercise of the state franchise.

Nine years later, in *Plyler v. Doe*, the Court considered an absolute denial of public education, and invalidated a Texas law which required the children of illegal aliens to pay a public school tuition. Although the majority opinion, authored by Justice Brennan, found that education is not a fundamental right, it was also not deemed "merely some governmental benefit indistinguishable for other forms of social welfare legislation." Recognizing the relational values addressed by Professor Tribe, the Court noted that "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." The opinion further protected against the immeasurable externalities feared by Calabresi and Malamed, stating that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." While education may not be recognized as a fundamental right, recognition of its interrelated values demand active judicial intervention. Justice Blackmun's concurrence may have best voiced the Court's true concern:

[C]lassifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. In a sense, then, denial of education is the analogue of denial of the right to vote: the former relegates the individual to second-class status; the latter places him at a permanent political disadvantage.

The analyses of *Rodriguez* and *Plyler* substantiate the arguments for non-waivability of certain rights and stress that education must not be subject to allocational sanctions. If a court were to review

104. *Id.* at 230.
105. *Id.* at 221.
106. *See supra* notes 74-76 and accompanying text.
108. *See supra* notes 83-85 and accompanying text.
110. *Id.* at 234.
Pennsylvania’s Up-Front job program, it should recognize the importance of education, and the interference caused by a welfare sanction. When Pennsylvania conditions a welfare benefit upon the waiver of one’s right to a basic education, it effectively exacts a tuition payment equal in amount to the welfare benefit. This is precisely the situation that is cautioned against in footnote 60 of the Rodriguez opinion.\textsuperscript{111}

V. CONCLUSION

The Court has too often neglected the rule against unconstitutional conditions. Broadly stated, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee’s submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution."\textsuperscript{112} In \textit{Sherbert v. Verner},\textsuperscript{113} the Court was forced to consider whether South Carolina could require recipients of unemployment compensation to accept available employment regardless of any constitutional effect.\textsuperscript{114} Therein, plaintiff, an unemployed Seventh Day Adventist for whom Saturday is the Sabbath, was discharged by her employer because she would not work on that day.\textsuperscript{115} She was unable to obtain other employment because in abiding the dictates of her religion, she did not take Saturday work.\textsuperscript{116} South Carolina refused her unemployment benefits.\textsuperscript{117} The Supreme Court stated:

\begin{quote}
The [South Carolina Supreme Court’s] ruling forces [the recipient] to choose between following the precepts of her religion and forfeiting benefits . . . . Nor may . . . the
\end{quote}

\textsuperscript{111} See supra notes 99-100 and accompanying text.

\textsuperscript{112} United States v. Chicago, 282 U.S. 311, 328-29 (1931). See also Frost & Frost Co. v. Railroad Comm’n, 271 U.S. 583, 594 (1926) ("If a state may compel the surrender of one constitutional right as a condition of its favor, it may in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

\textsuperscript{113} 374 U.S. 398 (1963).

\textsuperscript{114} \textit{Id}. at 400-01.

\textsuperscript{115} \textit{Id}. at 399.

\textsuperscript{116} \textit{Id}.

\textsuperscript{117} \textit{Id}. at 401.
statute be saved from constitutional infirmity on the
ground that unemployment compensation benefits are not
appellant's 'right' but merely a 'privilege.' It is too late
in the day to doubt that the liberties of religion and
expression may be infringed by the denial of or placing of
conditions upon a benefit or privilege . . . .\textsuperscript{118}

Following Sherbert, when a court reviews such an allocational
sanction, no weight should be placed on the fact that the greater
includes the lesser, or the government acts as proprietor, or the
allocation is a mere gratuity. It must be realized that the pressure
against constitutional rights from such allocational sanctions can be as
severe as pressure from unilateral action. In regard to the
Pennsylvania's Up-Front program, compelling an individual to waive
the right to an education will (i) compromise the relational rights
which ensure effective speech and voting, and (ii) create immeasurable
externalities. Such losses should proscribe the government from
conditioning an allocation upon the waiver of a basic remedial
education.

\textsuperscript{118} Id. at 404.