THE UNCONSTITUTIONAL CONDITIONS DOCTRINE AND MANDATING NORPLANT FOR WOMEN ON WELFARE DISCOURSE

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> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . .
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> Perry v. Sinderman, 408 U.S. 593, 597 (1972).

The current movement for welfare reform[1] has caused both federal[2] and state legislatures[3] to seek quick solutions to revive a failed welfare system. The system is perceived to have failed mothers who receive welfare benefits for their dependent children. Three themes underlie many of the recommended solutions: 1) mothers receiving Aid to Families with Dependent Children (hereinafter AFDC) benefits for a long period of time become increasingly

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1. *See* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992) (discussing the recent attempts to "reform" welfare by modifying the behavior of recipients).

2. *E.g.*, Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified in scattered sections of 42 U.S.C.) (requiring some welfare mothers to enroll in training programs as a condition for welfare). One such training program is: The Job Opportunities and Basic Skills Training Program, Title II, 42 U.S.C. § 602 (1988). *See also* Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 277 (1991) (discussing the Family Support Act of 1988).

3. *See, e.g.*, Act of Jan. 21, 1992, ch. 526, 1991 N.J. Sess. Law Serv. 2782 (West) (denying any additional benefits for recipients who parent new children while on welfare); 1987 Wis. Laws 27 (conditioning the retention of welfare benefits on a child's school attendance, popularly known as "learnfare").

dependent on aid and have their sense of a work ethic undermined;[4] 2) mothers, especially minority, unwed, teenage mothers, receiving AFDC benefits continue having children in order to receive more benefits;[5] and 3) these mothers and their children are costly to taxpayers.[6] Given its potential for controlling women's reproduction, it is little wonder, then, that the Norplant contraceptive device[7] has been heralded as an important factor in welfare reform.

Since the 1960s, very few new birth control methods for females have been developed; however, this trend changed in 1990, when the Food and Drug Administration (hereinafter FDA) approved the use of Norplant in the United States.[8] The introduction of Norplant, a contraceptive designed to provide up to five years of continuous, but reversible, birth control,[9] immediately attracted the attention of trial courts and state legislatures. Courts sought to use it as a condition for probation in the criminal justice system,[10] and state legislatures

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4. *See, e.g.*, Fineman, *supra* note 2, at 277 (noting that the Family Support Act of 1988 "focus[es] on reinforcing the work ethic and dominant individualistic norms of self-sufficiency through the imposition of 'workfare' provisions for mothers of young children"); Williams, *supra* note 1, at 719-20 (outlining the "rhetoric of the current 'welfare reform' debate [which includes] . . . dysfunctional mothers incapable of fitting into mainstream society . . . [who] are economically and emotionally atrophied because of their 'dependence' on welfare") (*comparing* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964) *with* LAWRENCE N. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP 41 (1986)). *See also* GEORGE GILDER, WEALTH AND POVERTY 111-13 (1981) (noting that in 1979, the average income for a welfare family of four was greater than the average American family median income which encouraged those who could be self-supporting to remain on welfare); CHARLES MURRAY, LOSING GROUND 148-53 (1984) (describing the Negative Income Tax (NIT) experiment that conservative economists advocated instead of a welfare system since they felt that all welfare subsidies discouraged the poor from working).

5. *See* Fineman, *supra* note 2, at 280 n.11 (citing several statements made by a Congressional Representative in opposition to the Family Support Act, which hypothesized a welfare mother staying on welfare indefinitely by having a child every two years).

6. *Primetime Live* (ABC television broadcast, Sept. 9, 1993).

7. *See infra* part II (discussing the development, history, and use of Norplant as a tool to control contraception).

8. *Long-Term Contraceptive Approved*, [1990-91 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) ¶ 43,066 (Dec. 26, 1990); Melissa Burke, Note, *The Constitutionality of the Use of the Norplant Contraceptive Device as a Condition of Probation*, 20 HASTINGS CONST. L.Q. 207, 207 (1992).

9. Burke, *supra* note 8, at 207 (describing how the implant can be easily removed).

10. The most notorious case was People v. Johnson, No. 29390 (Cal. Super. Ct., Tulare County 1991) (ordering a convicted child abuser to use Norplant for three years as a condition for probation). *See* Stacey L. Arthur, *The Norplant Prescription: Birth Control, Woman Control, or Crime Control?*, 40 UCLA L. REV. 1 (1992) (providing a comprehensive discussion of the *Johnson* case and the constitutionality of mandating Norplant as a condition for probation). *See also* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, 16 HARV. WOMEN'S L.J. 139 (1993) (describing the statutory problems with imposing Norplant on welfare recipients); Burke, *supra* note 8 (exploring the constitutional problems with conditioning probation on the use of Norplant); Janet F. Ginzberg, Note, *Compulsory Contraception as a Condition of Probation: The Use and Abuse of Norplant*, 58 BROOK. L. REV. 979 (1992) (arguing that the imposition of Norplant is unconstitutional and poor public policy); Madeline Henley, Comment, *The Creation and Perpetuation of the Mother/Body Myth: Judicial and Legislative Enlistment of Norplant*, 41 BUFF. L. REV. 703 (1993) (discussing the myth that women's conduct can be explained by and controlled

began to see it as part of welfare reform.[11] States have even made Norplant available for welfare recipients through Medicaid.[12] Some states proposed legislation to provide financial incentives to welfare recipients who use Norplant.[13] Two states proposed legislation to mandate its use for some welfare recipients.[14]

This article contends that the unconstitutional conditions doctrine must be part of the discourse regarding welfare reform and contraceptives, especially if the government begins to mandate the use of contraceptives such as Norplant. The simplest statement of the doctrine is that in conditioning the receipt of a government benefit, the government must not be allowed to do indirectly what it cannot do directly.[15] This article consists of four parts. Part I provides a historical background on welfare reform. Part II describes the Norplant contraceptive system. Part III discusses how linking the use of the Norplant system to welfare reform affects various individual rights. Part IV addresses the role of the unconstitutional conditions

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through their reproductive capacity); Kristyn M. Walker, Note, *Judicial Control of Reproductive Freedom: The Use of Norplant as a Condition of Probation*, 78 IOWA L. REV. 779 (1993) (discussing the imposition of Norplant as the latest of several attempts by the government to control reproductive freedom).

11. Legislatively encouraging the use of Norplant typifies the dramatic turnaround in state contraceptive policy. Before Griswold v. Connecticut, 381 U.S. 479 (1965), and its progeny, the states' policies towards contraceptives were to restrict their availability. *See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (discussing CONN. GEN. STAT. §§ 53-32, 54-196 (1958), which, although later repealed, criminalized both using and providing medical advice on contraceptives).

12. *See, e.g.*, TENN. CODE ANN. § 71-5-133 (Supp. 1993) (requiring the Tennessee Department of Human Services to provide information on the availability of Norplant through the Medicaid program); WASH. REV. CODE § 74.09.800 (Supp. 1994) (requiring the Washington Department of Health and Social Services to provide information about Norplant as part of its family planning services).

13. *See, e.g.*, H.B. 2089, Kan. 74th Leg., 2d Sess. (1991) (offering women receiving AFDC benefits a free Norplant implant and a $500 cash grant); David S. Coale, Note, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189, 195-96 (1992) (discussing proposed bills in Kansas and Louisiana to give cash grants to female welfare recipients who agree to use Norplant).

14. H.B. 3207, S.C. (1993); S.B. 2895, Miss. (1992). *See* John Robert Hand, Note, *Buying Fertility: The Constitutionality of Welfare Bonuses for Welfare Mothers Who Submit to Norplant Insertion*, 46 VAND. L. REV. 715, 718 (1993) (describing proposed legislation in Mississippi which would mandate Norplant use in some cases); Henley, *supra* note 10, at 749-51 (discussing a bill considered by the Mississippi Senate which would have "required women with four or more children to be implanted with Norplant in order to qualify for or continue to be eligible for public assistance[,]" as well as several other states' proposed programs offering incentives to encourage women to be voluntarily implanted); ALAN GUTTMACHER INSTITUTE, NORPLANT: OPPORTUNITIES AND PERILS FOR LOW-INCOME WOMEN (Dec. 1992) (Special Report #1).

15. *See infra* part IV.A (describing in greater detail the "unconstitutional conditions doctrine"). The conditions that this article considers are ones that influence conduct. The government provides a benefit on the condition that the recipient alters some type of conduct which is constitutionally protected from government interference. For a further discussion of this doctrine, *see generally* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1189 (1990); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1114 (1987); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421-22 (1989).

doctrine in the discourse and is divided into three sections. Section A describes the doctrine itself. Section B explores the reasons why the doctrine must be part of the discourse. Section C discusses how the courts have applied the doctrine and concludes that the fairest way to apply it in welfare benefits cases is to treat the condition as though it were direct.

PART I. WELFARE REFORM BACKGROUND

Historically, the policy underlying assistance to the poor contained the idea that only the "deserving poor," such as the blind, deaf, insane, and orphaned, should receive assistance.[16] Strands of this type of reasoning continue to appear today in discussions concerning public assistance policy.[17] Prior to 1935, there was essentially no national policy for public assistance to the poor;[18] instead, private groups or local cities and counties provided welfare relief.[19]

Because of the depression in the 1930s, the number of persons in need of public assistance dramatically increased.[20] States were overwhelmed by the costs of such assistance.[21] In an effort to provide some relief to the states, Congress enacted the Federal Emergency Relief Act of 1933,[22] thus beginning a national policy for public assistance.[23] Two years later, Congress enacted the Social Security Act of 1935.[24] This Act created three programs: the unemployment insurance program, the old-age insurance program, and a federal aid program to those states providing cash relief to "unemployables," such as the old, the blind, and the orphaned.[25]

The AFDC program[26] provided assistance for needy children

16. J.M. Wedemeyer & Percy Moore, *The American Welfare System*, 54 CAL. L. REV. 326, 327-28 (1966); Williams, *supra* note 1, at 721; Fineman, *supra* note 2, at 279-80. *See also* King v. Smith, 392 U.S. 309, 320 (1968).

17. Fineman, *supra* note 2, at 279-80 (indicating that the purpose of the Family Support Act of 1988 was to promote a new work ethic, thereby implying that the poor lacked such an ethic).

18. *See generally* Wedemeyer & Moore, *supra* note 16 (discussing the patchwork of public assistance programs that existed prior to the passage of the Social Security Act of 1935).

19. Wedemeyer & Moore, *supra* note 16, at 326.

20. Williams, *supra* note 1, at 722.

21. Williams, *supra* note 1, at 722.

22. Pub. L. No. 73-15, ch. 30, § 4(a), 48 Stat. 57 (1933) (codified at 15 U.S.C. § 724 (1988)).

23. Williams, *supra* note 1, at 722.

24. Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (1935) (codified at 42 U.S.C. §§ 301-1397f (1988)).

25. Williams, *supra* note 1, at 722 (discussing the target populations of the Social Security Act of 1935); *see* Wedemeyer & Moore, *supra* note 16, at 329-34 (providing a comprehensive discussion of groups targeted for federal assistance).

26. *See* Social Security Act of 1935, ch. 531, 49 Stat. 620, 627 (codified as amended at 42 U.S.C. §§ 301-1304 (1988)) (stating that this program was initially named Grants to States for Aid to Dependent Children (ADC)). *See also* Public Welfare Amendments of 1962, Pub. L. No.

whose parent was deceased, absent, or incapacitated.[27] The program was targeted to provide relief for children living with their widowed mothers; however, the states were allowed to impose eligibility requirements, such as conditioning benefits upon the sexual behavior of women, which often made children ineligible for aid.[28] Through subsequent legislation in 1950, the program was extended to cover the caretakers of dependent children[29] and in 1962, to cover families with an unemployed parent and dependent children.[30] During the 1960s and 1970s, the program continued to expand[31] as part of the "War on Poverty" initiatives[32] and because of court decisions that overruled state regulations which prevented eligibility.[33] During that period, the government focused on the eradication of poverty and did not blame the poor for their economic plight.[34] Overall, the concept of welfare as an entitlement emerged.[35]

By the 1980s, many people concluded that the AFDC program had to be reformed.[36] Books by scholars George Gilder[37] and Charles

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87-543, § 104(a)(3), 76 Stat. 172, 185 (codified as amended at 42 U.S.C. §§ 301-1394 (1988)) (noting that the name was changed to Aid and Services to Families with Dependent Children (AFDC) in 1962).

27. Social Security Act of 1935, ch. 531, 49 Stat. 620, 629 (codified as amended at 42 U.S.C. §§ 301-1304 (1988)).

28. *See* Williams, *supra* note 1, at 723 (contending that the program targeted white, widowed mothers and their needy children, but intentionally excluded single black women); King v. Smith, 392 U.S. 309, 311-22 (1968) (citing a judicial summary of welfare for the "worthy poor").

29. Social Security Act Amendments of 1950, Pub. L. No. 81-734, § 323, 64 Stat. 477, 551 (codified at 42 U.S.C. § 606(b) (1988)).

30. Social Security Act Amendments of 1962, Pub. L. No. 87-543, §§ 108(a), 109, 152, 76 Stat. 185, 189-90, 206-07 (codified at 42 U.S.C. § 606(b) (1988)); *see* Wedemeyer & Moore, *supra* note 16, at 333 (noting the extension of benefits to groups other than children).

31. *See* Williams, *supra* note 1, at 724-25 (citing that the welfare movement began to include groups previously excluded).

32. *See generally* Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1506 (1991) (describing the initiatives, which were developed during a time of economic growth, to help the poor without stigmatizing them as immoral).

33. *See, e.g.*, New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (overturning a regulation that denied AFDC benefits to families with children born out of wedlock); Lewis v. Martin, 397 U.S. 552 (1970) (striking down a regulation which included for AFDC qualification the income of the man who shared the mother's home and had no obligation to support the child); King v. Smith, 392 U.S. 309 (1968) (invalidating a regulation which disqualified from AFDC any mother cohabiting with a man who was not obligated to support the child).

34. *See* Ross, *supra* note 32, at 1507 (referring to notions that welfare recipients are undeserving and not truly needy based on their supposed immorality); Williams, *supra* note 1, at 724-25 (describing welfare recipients as moral deviants who manipulate public assistance funds for personal economic gains).

35. Williams, *supra* note 1, at 724 nn.34, 37 & 39. *See generally* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964) (introducing the term 'New Property' and extending the idea of property rights in government largess in the form of public assistance).

36. *See* GILDER, *supra* note 4, at 111 (emphasizing that AFDC presents a moral dilemma because AFDC increases fatherless, dependent families); MURRAY, *supra* note 4, at 159-66 (noting that the receipt of AFDC funds creates a disincentive to marry and acquire employment).

37. *See generally* GILDER, *supra* note 4 (using the tools of sociology to describe the limitations of contemporary economics in analyzing the disparities between the rich and the poor).

Murray[38] greatly influenced the welfare reform debate. They concluded that public assistance increased poverty, created dependence and immorality, and undermined traditional values.[39] Murray also concluded that poor people were motivated by economic incentives.[40] Many current welfare reform initiatives are based on these conclusions.[41] One of the numerous ways legislatures have proposed to remedy welfare's ills has included predicating a welfare mother's receipt of benefits on her use of Norplant.[42] Before discussing the constitutionality of such a requirement, it is helpful to gain first a better understanding of Norplant itself. With this goal in mind, the following section describes the Norplant contraceptive system in greater detail.

PART II. THE NORPLANT CONTRACEPTIVE SYSTEM.

The FDA approved the Norplant contraceptive system in December 1990 for general use by women.[43] The system consists of six small silastic rods, each containing the synthetic hormone levonorgestrel.[44] This device is implanted surgically under the skin of the woman's arm near the elbow joint.[45] The surgical removal of the system is a longer, more difficult procedure than the implantation.[46] The hormone slowly filters through the rods into the woman's blood-

38. *See generally* MURRAY, *supra* note 4 (discussing the change in character of the poor and the growth of welfare expenditure in the United States from 1950 to 1980).

39. *See* GILDER, *supra* note 4, at 111-12, 114-27 (stating how the prospect of receiving welfare benefits eliminates the breadwinner role of the father, dissolves the traditional two parent family, encourages public assistance fraud, increases government spending for income programs well over GNP earnings, and overall makes welfare funds more attractive than a minimum wage job); *see also* MURRAY, *supra* note 4, at 147-66, 178-91 (discussing the disincentives to work, marry, and maintain a certain socio-economic status due to the increase of welfare expenditures by the United States Government); Williams, *supra* note 1, at 725 (referring to works by authors who identified the differences between the truly needy and unworthy poor).

40. MURRAY, *supra* note 4, at 156-62.

41. *See* Williams, *supra* note 1, at 725 (contending that current welfare reform stems from the idea that there are unworthy recipients); *see also id.* at 726-46 (discussing the Learnfare and Family Cap welfare reform programs in Wisconsin which stemmed from the belief that some welfare recipients are unworthy).

42. *See supra* notes 13-14 (referring to states that have proposed conditioning the receipt of welfare benefits on a woman's use of Norplant).

43. *Long-Term Contraceptive Approved*, *supra* note 8; *see* Coale, *supra* note 13, at 189 n.3 (noting that Wyeth-Ayerst Laboratories is the United States' distributor of Norplant).

44. *See* WYETH-AYERST LABORATORIES, WOULD YOU LIKE UP TO 5 YEARS OF CONTINUOUS BIRTH CONTROL THAT IS REVERSIBLE? (1992) (describing levonorgestrel as a progestin that has been used in the pill since the 1960s).

45. *See Long Term Contraceptive Approved*, *supra* note 8, at 43,066 (describing the 10-15 minute procedure performed under a local anesthetic and in a doctor's office).

46. *See* WYETH-AYERST LABORATORIES, *supra* note 44 (estimating that removal of Norplant is a 15-20 minute procedure).

stream.[47] The rods contain enough levonorgestrel to prevent pregnancy for five years.[48]

Norplant is considered ninety-nine percent effective as a method of birth control.[49] Once removed, the subsequent conception rate for women formerly implanted with Norplant is the same as that of comparable women who were not implanted.[50] Common side effects may include menstrual cycle irregularity, headache, nausea, nervousness, and dizziness.[51] Norplant, however, does not protect against the transmission of Human Immunodeficiency Virus (HIV) and other sexually transmitted diseases (STD).[52]

The effectiveness of the contraceptive device, once implanted, does not depend upon the user or the user's sexual partner.[53] Furthermore, the user cannot remove it without medical assistance.[54] Thus, the woman is powerless to decide that she wants to try to conceive and then act on that decision. For these reasons, some proponents of welfare reform find Norplant an attractive contraceptive for women receiving AFDC benefits, even though individual rights may be affected.

PART III. LINKING NORPLANT TO WELFARE REFORM AFFECTS VARIOUS INDIVIDUAL RIGHTS[55]

After the FDA's approval of Norplant, the federal and state governments rapidly added it to their welfare programs by making it available to welfare recipients.[56] For instance, some state legislatures proposed "bonus" programs awarding cash bonuses to women

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47. Irving Sivin, *Norplant Clinical Trials, in* DIMENSIONS OF NEW CONTRACEPTIVES: NORPLANT AND POOR WOMEN 1 (Sarah E. Samuels & Mark Smith eds., 1992) [hereinafter NORPLANT AND POOR WOMEN].

48. *Id.*

49. Coale, *supra* note 13, at 189.

50. WYETH-AYERST LABORATORIES, *supra* note 44.

51. WYETH-AYERST LABORATORIES, *supra* note 44.

52. NORPLANT AND POOR WOMEN, *supra* note 47, at xiv-xv.

53. NORPLANT AND POOR WOMEN, *supra* note 47, at xii-xiii, 1.

54. NORPLANT AND POOR WOMEN, *supra* note 47, at xi.

55. Norplant legislation also raises equality issues. For instance, Norplant legislation uniquely affects females. Although contraceptives are *not* uniquely female, the history of contraceptive technology focused upon the female. Further, this legislation overtly discriminates against lower socio-economic classes. The legislation, facially neutral as to race, also disproportionately affects minorities. For example, in the 1991 fiscal year, 40.1% of the children receiving AFDC funds were black and 18.5% were Hispanic. U.S. Department of Health and Human Services, 1991 Aid to Families with Dependent Children Recipient Characteristics Study 6.

56. *See* Coale, *supra* note 13, at 189 (identifying the various governments that include Norplant as an option in their welfare programs).

receiving AFDC benefits as long as they agreed to use Norplant.[57] Others, going further, proposed legislation mandating that some women use Norplant as a condition of receiving AFDC benefits.[58]

The focus of the debate for the proponents of these bills centers upon the following: the scarcity of the state's resources; the allegation that the welfare system creates intergenerational dependency; the opinion that welfare undermines the work ethic; and, the opinion that only mothers who can afford to care for their children, independent of public resources, should have children.[59] The debate's focus, however, fails to discuss the serious constitutional issues raised by these bills.

Legislation that links Norplant to welfare benefits infringes upon the protected fundamental rights of mothers.[60] The Constitution protects such rights from government interference unless the state can show a compelling need.[61] Since 1965, the right of privacy umbrella has protected the fundamental rights affected by Norplant legislation.[62]

Two branches of the right to privacy exist, and Norplant legislation would affect both. One branch involves the broad right to privacy in sexual matters,[63] including the fundamental rights to procreate,[64] to use contraceptives,[65] to parent,[66] and to define the family.[67]

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57. H.B. 2089, Kan. 74th Leg., 2d Sess. (1991); H.B. 1584, La. 17th R.S. (1991). *See generally* Coale, *supra* note 13, at 189-94 (stating that Kansas and Louisiana introduced bills which established bonus programs).

58. S.B. 2895, Miss. (1992); H.B. 3207, S.C. (1993). In contrast, a proposed California bill provided that no person would be required to use contraceptives as a condition for eligibility for public assistance. Cal. Assembly 3593, Reg. Sess. (1993) .

59. *See Primetime Live*, *supra* note 6 (citing statements made by Roland Corning, a South Carolina state legislator, that mandating Norplant for women who want welfare would benefit states financially).

60. *See* Arthur, *supra* note 10, at 61-63 (noting that court-ordered Norplant for criminal cases in connection with probation also impinges on fundamental rights).

61. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

62. *Id.* at 485-86 (addressing, more generally, the interrelation of a contraceptive mandate and constitutional rights such as personal security and liberty).

63. *See Griswold*, 381 U.S. at 485 (identifying the right of privacy as a constitutionally protected right even though this right is not explicitly found in the Constitution). The majority and concurring opinions in *Griswold* relied on the First, Third, Fifth, Ninth, and Fourteenth Amendments to infer a general right of privacy applicable to the federal government and to the states. *Id.* Since that time, such fundamental rights as procreation, contraceptive use, and parenting have been described as being under the privacy umbrella. *Id.* at 485-86; *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (extending the concept of fundamental rights to procreation); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (extending fundamental rights to parenting).

64. *See Skinner*, 316 U.S. at 541 (recognizing the right to procreate as a fundamental right). The Court identified the right to marry and procreate as basic civil rights "fundamental to the very survival of the race." *Id.*

65. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing the right of unmarried people to use contraceptives); *Griswold*, 381 U.S. at 485-86 (1965) (recognizing the right of

The other affected branch involves the privacy right in personal or individual autonomy.[68] For example, one has a constitutionally protected right to bodily integrity regarding nonconsensual medical treatment, known as the principle of informed consent.[69] The principle of informed consent involves two elements: being informed about the treatment and giving one's consent.[70] Mandating the use of Norplant violates this principle because consent must be given freely, without any form of coercion. The principle of informed consent is central to medical ethics and legal doctrine.[71] It cannot be ignored with impunity. Further, the First Amendment Free Exercise Clause regarding religious objections to medical treatment may also protect an individual's right to bodily integrity.[72] Mandating the use of Norplant violates the Free Exercise Clause of the First Amendment when such contraceptive practices oppose religious

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married couples to use contraceptives). *Accord* Carey v. Population Servs. Int'l, 431 U.S. 678, 685-88 (1977) (stating that access to contraceptives is essential to exercising the protected right of deciding whether to conceive a child).

66. Mandatory contraception laws preventing mothers on welfare from conceiving would interfere with their fundamental right to parent. The Constitution protects this right under the principle of family or parental autonomy. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (stating that the natural parents' fundamental liberty interest in the care, custody, and management of their child is protected by the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (recognizing the fundamental right of parents to determine a child's education); Laurence C. Nolan, *Honor Thy Father and Mother: But Grandparent Visitation in the Intact Family?*, 8 B.Y.U. J. PUB. L. 51, 53-54 (1993) (discussing the principle of parental autonomy as part of the right to privacy interest).

Norplant legislation suggests that mothers on welfare are unfit to become parents. The Supreme Court held that a conclusive presumption that all unwed fathers were unfit parents violated the due process clause of the Fourteenth Amendment. Stanley v. Illinois, 405 U.S. 645, 649 (1972). Via a similar analysis, it would appear that such a presumption about mothers on welfare would violate due process as well. *Accord* Charles W. Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CAL. L. REV. 917, 928-32 (1974) (discussing issues surrounding mentally retarded persons' fitness for parenthood as a basis for sterilization).

67. The Supreme Court has held, in cases of blood and marital relationships, that the Constitution protects the right of family definition. *See* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (allowing a grandparent to define her family to include her children and grandchildren). Norplant legislation would interfere with the welfare mother's right to define her family to include additional children.

68. The branch of the right of privacy—expressed in terms of the autonomy of the individual as a liberty interest—is protected by the Due Process Clause of the Fifth and Fourteenth Amendments. U.S. CONST. amend. V (stating that no person shall be "deprived of life, liberty, or property without due process of law"); U.S. CONST. amend. XIV (restating the Due Process Clause of the Fifth Amendment as applicable to the states).

69. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221-22 (1990) (recognizing a liberty interest in avoiding unwanted administration of antipsychotic drugs); Parham v. J.R., 442 U.S. 584, 597 (1979) (recognizing a child's liberty interests when involuntarily committed to a mental hospital).

70. *See* Arthur, *supra* note 10, at 93-94 (providing a general discourse on informed consent).

71. Arthur, *supra* note 10, at 93-96.

72. *See* Coale, *supra* note 13, at 206-08 (explaining the Free Exercise Clause and various religious objections to contraceptives).

beliefs.[73] Clearly, Norplant legislation significantly affects individual rights.

PART IV. THE ROLE OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE IN THE DISCOURSE

Unless considered in the light of the unconstitutional conditions doctrine,[74] it is likely that Norplant legislation will be judged merely as social and economic legislation, rather than legislation adversely impacting on the aforementioned constitutionally protected rights. Courts use a rational standard to determine the constitutionality of social and economic legislation, which requires the court to give deference to the legislation.[75] However, if Norplant legislation directly affects constitutionally protected rights, the Court would determine its constitutionality under a higher standard of review.[76] Thus, bringing the unconstitutional conditions doctrine into the discourse may result in such legislation being reviewed under a higher standard.[77]

SECTION A. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Legal scholars recognize the classical theory that the government does not interfere in areas of personal decision-making.[78] With the growth of the modern regulatory state, however, the government disburses benefits in all areas of American life.[79] Consequently,

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73. *See generally* JOHN T. NOONAN, JR., CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS (enlarged ed. 1986) (identifying the religious debates behind contraceptive use).

74. The doctrine states that although the government may choose not to provide a benefit, if it does so, then the government may not place a condition on the granting of that benefit. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 681 (2d ed. 1988). *See also* sources cited, *supra* note 15.

75. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (stating that in the area of economic and social welfare, a state needs only a reasonable basis to satisfy the Equal Protection Clause).

76. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing that a violation of fundamental rights receives strict scrutiny by courts rather than rational review). *See also infra* notes 146-49 and accompanying text (defining the two standards).

77. *Carey v. Population Servs. Int'l* indicated that the Supreme Court would not only apply strict scrutiny to those statutes entirely prohibiting abortion, but would also apply this standard to those statutes limiting a woman's access to an abortion. Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977).

78. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1324-26 (1984); Gary A. Winters, Note, *Unconstitutional Conditions as "Nonsubsidies": When Is Deference Inappropriate?*, 80 GEO. L.J. 131, 135 (1991).

79. *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 593 (1990) (identifying

government regulations increasingly affect constitutionally protected rights indirectly.[80] Such governmental activity as it relates to constitutional issues is problematic. For instance, citizens cannot claim an affirmative right to government aid.[81] Since the government is under no obligation to provide benefits, should the government be able to attach conditions to achieve indirectly that which it cannot do directly? The unconstitutional conditions doctrine answers this inquiry.

The essence of the doctrine is that a government may not grant a benefit with the condition that the recipient forego a constitutionally protected right, even if the government has no duty, in the first place, to provide the benefit.[82] The doctrine, then, protects individuals from a government's indirect actions which compromise constitutionally protected rights.

Having its genesis in the nineteenth century,[83] the doctrine was molded during the "Lochner era" to protect economic liberties which, at that time, were protected under substantive due process.[84] This judicially created doctrine is still applied post-"Lochner."[85] Opponents, such as Justice Holmes, argue that this doctrine does not exist since the greater power of the state not to create a benefit includes the lesser power to impose the condition.[86] The next section

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spending, licensing, and employment as areas of increased government regulation).

80. Sunstein, *supra* note 79, at 598-99; Kreimer, *supra* note 78, at 1296-97.

81. The government generally has no affirmative duties, only negative ones. *See* DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even when such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

82. Sullivan, *supra* note 15, at 1415. *Accord* Perry v. Sinderman, 408 U.S. 593, 597 (1972) (explaining the doctrine in terms of the protected interest in freedom of speech).

83. Richard A. Epstein, *The Supreme Court 1987 Term-Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5, 10 (1988).

84. Sullivan, *supra* note 15, at 1416 (commenting that traces of the statement of the doctrine appeared in earlier cases where courts have held that states cannot condition privileges on the surrender of constitutional rights). *See, e.g.*, Doyle v. Continental Insurance Co., 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."); Lafayette Insurance Co. v. French, 59 U.S. (18 How.) 404, 407 (1856) (maintaining that Ohio could condition a foreign corporation's consent to do business in the state "provided they are not repugnant to the [C]onstitution or laws of the United States").

85. Epstein, *supra* note 83, at 5-7; *see also* Sullivan, *supra* note 15, at 1428-42 (describing how the doctrine developed in three areas of the law: state regulations against corporate rights, federal encroachment on state autonomy, and federal and state regulations against individual rights).

86. *See, e.g.*, Western Union Telegraph Co. v. Kansas, 216 U.S. 1, 53 (1909) (Holmes, J., dissenting) ("Even 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.").

contends that the doctrine is still necessary because of the effect the growing regulatory state has on welfare benefits.

SECTION B. THE ROLE OF THE DOCTRINE IN THE WELFARE REFORM DISCOURSE

Today, the government has very broad powers to dispense welfare benefits with conditions that affect constitutionally protected rights, though indirectly.[87] Such conditions make it easier for the government to be less cognizant of these protected rights. The doctrine fulfills the need "to mediate the boundary between constitutional rights and government prerogatives in the area of spending."[88] Making the doctrine part of this discourse on Norplant and welfare reform, therefore, provides legislatures and courts with the proper framework against which to view the constitutionality of such conditions.

Foremost, the doctrine serves to safeguard the individual's protected rights from government manipulation.[89] Since the New Deal, the doctrine's protector role has gained significance in light of the government's expanded regulatory powers over social and economic programs.[90] Before the 1930s, poor people relied primarily upon private sources for welfare benefits.[91] The government has now assumed the central role in providing these benefits.[92] As a result, private funding sources have become scarce or have disappeared altogether, and the government's role today is basically

87. *See* Hand, *supra* note 14, at 743, 753 (commenting that the Supreme Court can examine the right involved, determine that the right is not unduly burdened by the condition, and uphold the condition). The Court typically does not overturn conditional laws when the benefit involved is welfare. *Id.*

88. Sunstein, *supra* note 79, at 593.

89. *See* Epstein, *supra* note 83, at 28 (commenting that the doctrine is a "second best approach" to controlling government discretion which is used to "take back" some of the power which was originally conferred upon government).

90. *See* Joel F. Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479, 492-500 (1966) (discussing the governmental interference and manipulation that occurs in welfare administration and the limited judicial procedures established to protect welfare recipients' rights against such intrusion).

91. *See* Kreimer, *supra* note 78, at 1296 (stating that poor individuals previously relied on the church and family for support); *see also* Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CAL. L. REV. 293, 329 (1993) (commenting that after the New Deal, the government created numerous welfare programs which were traditionally functions exercised by the private sector).

92. Kreimer, *supra* note 78, at 1296 (observing that since the government has inherited the educational and welfare functions from the church and family, there are opportunities for government intrusion through the allocation of benefits).

monopolistic.[93] The doctrine is useful in this discourse to provide a check "against the political perils of monopoly."[94]

With the government in this "monopolistic" role as welfare provider, it can easily abuse its power. Norplant legislation may be an illustration of such abuse. A law making Norplant mandatory for a woman on welfare leaves two unsatisfactory choices for the woman: either accept welfare benefits conditionally or not at all. Such choices allow a government to foster its goals[95] at the expense of the mother's protected reproductive rights. Similarly, if bonuses are provided for women on welfare who agree to use Norplant, the government gains increased leverage over a welfare mother's constitutionally protected reproductive rights.[96] In this light, the government's offer of a bonus is not benign legislation. It is a cunning incentive to poor mothers to forego their constitutionally protected rights in exchange for their most immediate need: money.[97] It encourages poor women to forego their reproductive rights in choosing whether to use a contraceptive as well as what type of contraceptive to use.

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93. *See* Maddigan, *supra* note 91, at 329-30 (stating that the government's acquisition of welfare functions, which had traditionally been the responsibility of the private sector, limited the private sector's ability to provide opportunities for its citizens). *But cf.* WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 257-61 (3d ed. 1984) (stating that the inability of the private sector to provide the financial resources necessary was a factor in the growth of federal welfare).

94. Epstein, *supra* note 83, at 15. *See also* Kathleen M. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327, 330 (1989) (describing this function as "state checking" since the power of the state is checked by maintaining the boundary between public and private spheres).

95. For example, Roland Corning, the author of a South Carolina bill, said on ABC Primetime that taxpayers are tired of making welfare payments to women who continue to have children: "They can have all the children they want. They just have to pay for them." *Primetime Live*, *supra* note 6.

96. *See* Sullivan, *supra* note 15, at 1492-93 (stating that the government overreaches when it forbids actions protected by individual rights of reproductive privacy); *see also* Charles A. Reich, *Beyond the New Property: An Ecological View of the Due Process*, 56 BROOK. L. REV. 731, 738 (1990) ("If benefits necessary to the survival of the individual are the property of the government, then these benefits become an instrument of social control. The government can impose conditions, supervise the behavior of the recipients, or deny them the control over their lives that most other citizens take for granted.").

97. Commenting on the proposed Kansas bill to give a bonus to welfare mothers who choose to use Norplant, Kansas Representative Kathleen Sibelius stated, "The idea of choice, I think, is removed, if you have a starving person and you offer them food if they will do something. I don't think that's a very realistic choice." *60 Minutes: Norplant* (CBS television broadcast, Nov. 10, 1991, cited in Henley, *supra* note 10, at 769). *See also* Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 YALE J.L. & FEMINISM 255, 262 (1992) (commenting that some argue that offering cash bonuses should not be allowed because it emphasizes the wrong issue for the cause of poverty). By limiting poor women's procreational rights, issues of racism, sexism, and classism will not be eliminated. These issues are the root cause of poverty. *Id.*

The government may argue that since welfare benefits are gratuities, it may attach conditions. These conditions become of great concern when the state is acting as a "monopoly." Citizens, who do not have real options,[98] are placed in the unfair position of having to give up constitutionally protected rights in order to accept the government's gratuities. On the other hand, the government may argue that when it provides welfare benefits, the government and its citizens are acting more along "contract principles." Citizens are free either to accept or to refuse the government's offer. However, the government may become coercive in its demands when welfare mothers look to it as their only source of income.

Even if the government is not acting monopolistically, the doctrine preserves "private ordering"[99] in decision-making in which the government should have no power to control. Decisions regarding reproductive rights are in the private realm.[100] Norplant legislation allows the government to be in a position to take advantage of a welfare mother's plight and to influence her constitutionally protected reproductive decisions. The fact that Norplant does not require the woman's cooperation to be effective, once implanted, allows the government to assert control over her fertility with relative ease.[101] There is but one male contraceptive—the condom—and it is not comparable to Norplant.[102] Whenever the government can assert such control over a woman's decisions about her reproductive rights, these decisions are removed from the private realm. If the government could not enact legislation which directly asserted this control without showing a compelling state interest, neither should it be able to do so indirectly.

As a direct consequence of legislation allowing the government to influence a woman's reproductive decisions, the government is able to engage in the social engineering of family structures by gender, class, and race.[103] Norplant legislation affects only poor women

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98. There is always the argument that there is an alternative: "Get a job."

99. *See* Sullivan, *supra* note 15, at 1492-96 (discussing the occurrence of "private ordering" when the government shifts the boundary between private and public ordering through its allocation of benefits). The unconstitutional conditions doctrine preserves this boundary.

100. Sullivan, *supra* note 15, at 1492.

101. *See supra* part II (discussing the fact that Norplant does not depend upon the cooperation of the user to be effective since it cannot be removed without medical assistance).

102. *See* Ballard, *supra* note 10, at 161 (commenting that establishing Norplant as a condition for probation violates equal protection because there is no approved long-term male contraceptive). Indeed, other than sterilization or the use of condoms, there are no controls over male fertility.

103. *See generally* Rutherford, *supra* note 97 (conveying that Norplant, like cash bonuses, is linked to issues of race, gender, and class).

receiving aid for dependent children.[104] Many proponents advocate Norplant legislation to reduce this particular class of welfare recipients.[105] These proponents believe this class should be reduced because it continues intergenerational dependency on welfare.[106] They say that only mothers who can afford additional children without welfare benefits should procreate: no more children should be born to a family that depends on welfare benefits.[107] By manipulating reproductive decisions, the government would be directly engineering the family structure of these welfare recipients. Such decisions on family structure are, however, in the private realm of decision-making, not in the government's realm.[108]

The unconstitutional conditions doctrine would encourage "government evenhandedness" or neutrality among its citizens in their constitutionally protected decision-making.[109] The Supreme Court has held that courts should defer to democratic decision-making in ordinary distributive matters.[110] Professor Stephen Loffredo notes that the Supreme Court bases its deference to social and economic legislation upon both the theory that decision-making in the legislature is democratic, and the assumption that poor people have fair access to this process.[111] He argues, however, that poor people do not have fair access.[112]

If poor people do not have fair access to the democratic process, the unconstitutional conditions doctrine provides a greater likelihood of the government's evenhandedness in its enactment of Norplant

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104. *See supra* note 55 (illustrating how Norplant legislation affects a large number of minority women).

105. *E.g.*, Donald Kimelman, *Poverty and Norplant: Can Contraception Reduce the Underclass?*, PHILADELPHIA INQUIRER, Dec. 12, 1990, at A18 [hereinafter PHILADELPHIA INQUIRER] (recommending that Norplant be made available to African-American women who are members of the underclass).

106. *See supra* note 4 and accompanying text (explaining the proponents' fear of the lack of work ethic instilled in recipients of AFDC benefits).

107. *See Primetime Live*, *supra* note 6 (explaining the argument that taxpayers do not want to support women who continue to have more children).

108. Carl R. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1833-42 (1985).

109. See Sullivan, *supra* note 15, at 1496-97 and Sullivan, *supra* note 94, at 331 which state that this doctrine imposes on the government an obligation of neutrality, such as that found in speech or religion, to not use benefits to shift viewpoints.

110. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 596-97 (1987) (holding that "unless the Legislative Branch's decisions run afoul of some constitutional edict, any inequities created by such decisions must be remedied by the democratic process").

111. Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1277-85 (1993).

112. *See generally id.* (offering the argument that because poor persons do not have access to the democratic process, their constitutional rights are not adequately protected).

legislation.[113] Norplant legislation allows the government to favor the reproductive rights of non-welfare mothers, as they are free to exercise their reproductive rights while welfare mothers must pay a higher price to do so.[114] The unconstitutional conditions doctrine affords a method to ensure that the government is evenhanded in its dealings between these two classes of women.[115] If the doctrine is not part of the discourse, Norplant legislation may be judged merely as social and economic legislation under the ruse that it does not directly affect reproductive rights.

The unconstitutional conditions doctrine also deters the government from making hasty decisions in times of crises regarding Norplant.[116] Norplant legislation first arose during a climate of severe budgetary constraints.[117] Its proponents argued that it would save money and reduce the budget,[118] ignoring that other consequences would also follow. This legislation will shape the childbearing rights of poor women and will allow the government to regulate an intimate aspect of the lives of one group of its citizens.[119] It will allow the government to engage in social engineering of family structures based on gender, race, and class. Ironically, it may encourage promiscuous sexual behavior because of the spontaneity that Norplant allows, increasing the risks of AIDS and other sexually transmitted diseases.[120] Moreover, legislation mandating Norplant for welfare recipients will deny the state's most vulnerable citizens, dependent children, a subsistence income if their mothers refuse to give up their constitutional rights. Legislatures must confront these consequences of Norplant legislation. Without including the unconstitutional conditions doctrine in this discourse,

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113. *See* Skinner v. Oklahoma, 316 U.S. 536, 546 (1942) (Jackson, J., concurring) (stating that "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority").

114. *See generally* Coale, *supra* note 13, at 208-10 (stating that Norplant legislation places surcharges on poor women).

115. Sullivan, *supra* note 15, at 1496-97.

116. *See, e.g., supra* notes 2-3 (describing Congress and states' quick solutions to the welfare problem).

117. *See Primetime Live, supra* note 6 (describing the pro-Norplant argument that AFDC recipients are costly to taxpayers).

118. *Primetime Live, supra* note 6; *see also* Kerry Patrick, *Poor Women and Society Benefit by Linking Norplant, Welfare Aid*, WICHITA EAGLE, Mar. 4, 1991, at A11 (advocating the passage of his Norplant bonus bill because it would eventually save thousands of dollars in welfare payments).

119. *See supra* note 66 and accompanying text (indicating that Norplant legislation would interfere with the fundamental right to parent).

120. *See* NORPLANT AND POOR WOMEN, *supra* note 47, at xiv-xv (explaining that Norplant prevents pregnancy but does not protect against transmission of AIDS or other sexually transmitted diseases).

the government may not stop and re-evaluate the conditions attached to the welfare benefits.[121]

In times of budgetary crisis, legislatures may be more likely to follow popular opinions and prejudices in their haste to meet the crisis and silence critics. Norplant legislation promotes the theme that the government should only help the deserving poor.[122] Norplant legislation proponents argue that the undeserving poor, now termed the underclass, should be reduced.[123] The stereotype of this class includes welfare mothers who stay on welfare in order to avoid working and welfare mothers who continue to have children in order to continue receiving welfare.[124] This stereotype is unsupported in fact and contrary to recent studies.[125] As part of the discourse, the unconstitutional conditions doctrine would moderate legislative vulnerability to biased, popular beliefs and would encourage more careful analysis of the constitutional issues involved.[126]

The unconstitutional conditions doctrine serves to prevent the government from creating what Professor Kathleen Sullivan terms "a caste system among right-holders."[127] Some constitutional rights are too fundamental to be distributed in creating a hierarchy among

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121. Coale, *supra* note 13, at 203 n.105.

122. *See supra* notes 16-17 and accompanying text (noting that the proponents of this legislation assert that AFDC creates a class of undeserving poor: those who do not work, those who continue to be dependent upon government largess, and those who continue to have children out of wedlock).

123. Ross, *supra* note 32, at 1507-08; *see* PHILADELPHIA INQUIRER, *supra* note 105 (describing how society would be better off if Norplant were used to reduce the number of children born into poverty).

124. Henley, *supra* note 10, at 753 n.315.

125. Henley, *supra* note 10, at 753 nn.316-17; *see also* Barbara Vobejda, *Gauging Welfare's Role in Motherhood: Sociologists Question Whether 'Family Caps' Are a Legitimate Solution*, WASH. POST, June 2, 1994, at A1 (reporting that social scientists doubt the existence of a causal link between welfare benefits and birth rates).

126. Popular opinions and prejudices are similar to myths: partly true and partly false. *See* Greg J. Duncan & Saul D. Hoffman, *Teenage Welfare Receipt and Subsequent Dependence Among Black Adolescent Mothers*, 22 FAM. PLAN. PERSP. 16, 16 (1990) (showing how the argument that welfare creates dependency and is systemic to future generations can be supported by studies that show black teenage mothers receiving AFDC are more likely to continue to be dependent on AFDC at age 26 than those who do not have children); Table prepared by the U.S. Department of Health and Human Services, Administration for Children and Families, on file with DHS (providing statistics showing that welfare recipients have additional children). *But see Unplanned Pregnancy is Main Cause of Welfare Reliance, Survey Finds*, 13 FAM. PLAN. PERSP. 186 (1981) (noting that studies show an unplanned pregnancy is the main cause of welfare dependency); Henley, *supra* note 10, at 753 nn.316-17 (noting that numerous studies do not support the argument that welfare mothers have additional children to increase their payments and arguing that Norplant legislation was inspired by the myth that women's conduct can be explained by and controlled through their reproductive capacity). *See also* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1438, 1444 (1991) (discussing the myth of the promiscuous black woman which was prevalent from the time of slavery).

127. Sullivan, *supra* note 15, at 1497-99.

classes who would make the same choice except for the government's intervention.[128] Dependency on welfare benefits defines the class. Conditioning the exercise of procreational rights on the receipt of welfare benefits creates a caste constitutionally inferior to those not receiving welfare benefits.[129] This class is deemed unfit to procreate.[130] Additionally, such legislation punishes poor women and their children who do not choose to accept the condition. The unconstitutional conditions doctrine would, however, require the same standard for judging the constitutionality of laws affecting procreational rights, regardless of whether such laws are direct or indirect.[131]

Norplant legislation resembles legislation from the eugenics movement in the first quarter of this century, the premise being that only the biologically fit should procreate.[132] Mandatory Norplant legislation would also deny procreation rights to certain people, i.e., mothers who are AFDC recipients. The development of surgical techniques for sterilization, such as vasectomy and tubal ligation, increased the call for the passage of eugenic sterilization laws in some states[133] because castration could be supplanted by these more aesthetic and humane procedures.[134] Similarly, the attractiveness of Norplant as a contraceptive increased the call for Norplant legislation.[135] Once Norplant is implanted, the state does not depend on the user to control her fertility: the contraceptive stays implanted until surgically removed; it is easy to monitor; it is nearly ninety-nine percent effective; and its effectiveness can last up to five years.[136]

Finally, the doctrine serves as a warning that the government may be unconstitutionally affecting a protected right.[137] As previously discussed, Norplant legislation would affect the fundamental right to procreate.[138] The Supreme Court stated in *Meyer v. Nebraska*[139]

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128. Sullivan, *supra* note 15, at 1498.

129. Sullivan, *supra* note 15, at 1498.

130. *See* Murdock, *supra* note 66, at 928-32 (discussing how one might perceive the foundation of sterilization laws to be unfitness for parenthood).

131. Sullivan, *supra* note 15, at 1498.

132. Walker, *supra* note 10, at 780 (explaining that the biological "fit" is defined according to the definer). *See* Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1431-32 (1981) (stating that sterilization laws were also premised on punishment and therapeutic motives).

133. Cynkar, *supra* note 132, at 1433.

134. Cynkar, *supra* note 132, at 1433.

135. *See supra* notes 45-54 and accompanying text (describing the Norplant contraceptive and its appeal to legislators).

136. NORPLANT AND POOR WOMEN, *supra* note 47, at xi.

137. *See generally* Sunstein, *supra* note 79 (noting the government's ability to affect lives through means other than criminal sanctions).

138. *See supra* part III (providing a description of other rights which are affected).

139. 262 U.S. 390 (1923).

that the right to start a family and raise children is constitutionally protected.[140] In *Skinner v. Oklahoma*,[141] the Court stated that marriage and procreation are fundamental to the very existence and survival of the human race.[142] More recently, the Court, in *Carey v. Population Services International*,[143] stated that the choice of whether to beget or bear a child is protected.[144] The right to procreate and its component parts are thus basic personal rights. The doctrine, therefore, allows for an analysis of the type of right involved and the consequences of attaching the condition.[145]

The unconstitutional conditions doctrine has an important role in this discourse. It provides the proper backdrop against which to view Norplant legislation when weighing the extent to which the condition will affect a welfare mother's constitutional rights.

SECTION C. THE APPLICATION OF THE DOCTRINE

Including the doctrine in this discourse helps one see why the standard for determining the constitutionality of Norplant legislation should be the same as if the legislation directly affected a constitutionally protected right. Since the 1930s, the Supreme Court has, as previously discussed, reviewed social and economic legislation under a rational basis standard.[146] This standard provides that the government must show that legislation has a rational relationship to a permissible state interest.[147] Legislation directly affecting constitutionally protected rights is reviewed under a strict scrutiny standard.[148] This standard provides that the state must show a compelling interest for the legislation which must also be narrowly drawn to achieve only that legitimate interest.[149]

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140. *Id.*
141. 316 U.S. 535 (1942).
142. *Id.* at 541.
143. 431 U.S. 678 (1977).
144. *Id.* at 685.
145. *See infra* note 161 (suggesting that the standard of review under the doctrine should take an equal protection approach). Although equality issues almost always arise with unconstitutional conditions, the doctrine centers on the right that is affected. *Id.*
146. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (upholding a rational basis standard for evaluating welfare classifications); Lyng v. Castillo, 477 U.S. 635 (1986) (upholding a provision of the Federal Food Stamp Act under rational review and rejecting the argument that this classification is subject to heightened scrutiny).
147. *Dandridge*, 397 U.S. at 485-86.
148. *See* Santosky II v. Kramer, 455 U.S. 745 (1982) (affirming the need for a compelling state interest when deciding whether to terminate parental rights).
149. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (holding that a regulation suppressing controversial inserts in utility bills is not justified by a compelling state interest).

The Supreme Court has never held that there is a constitutionally protected right to welfare benefits.[150] Since the government has no obligation to provide welfare benefits, welfare legislation is usually reviewed under a rational basis standard.[151] As previously discussed, among the fundamental rights that Norplant legislation affects is the right to procreate.[152] Norplant legislation, therefore, may be reviewed under this minimum level of scrutiny since it does not directly affect a constitutionally protected right.

The unconstitutional conditions doctrine provides that the government should not be able to do indirectly what it cannot do directly.[153] The Supreme Court has not, however, applied the doctrine as it is literally stated.[154] That is, any condition indirectly affecting a protected right will be reviewed as if its impact were direct.[155] Legislation directly affecting a protected right, such as the right to procreate, would be reviewed under a strict scrutiny standard. Instead, the Court has sought to determine which conditions affecting constitutional rights should come under the doctrine.

Furthermore, the Court's approach in determining which conditions trigger the doctrine has been inconsistent. The Court uses

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150. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (upholding a Maryland AFDC program provision imposing a maximum monthly grant per family as constitutionally valid).

151. The Court has applied different standards of scrutiny based on the legislation involved. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (explaining that although the legislation discriminates on the basis of gender, current law provides for review under a standard lower than strict scrutiny); *see also* Yick Wo v. Hopkins, 118 U.S. 351, 373-74 (1886) (holding that discrimination which is based on race is subject to a strict scrutiny standard of review); *but see* Washington v. Davis, 426 U.S. 229 (1976) (holding that legislation which has a disparate impact on race does not violate the Equal Protection Clause unless objective evidence shows that the law was purposefully designed to discriminate invidiously on the basis of race). The Supreme Court has been reluctant to find a violation of the Equal Protection Clause unless the legislation facially discriminates on the basis of race. *Id. See also* Henley, *supra* note 10, at 148 n.271 (explaining that Norplant legislation is facially neutral as to race, but disproportionately affects minorities since there is a high percentage of minority women who have families below the poverty line); David Robert Baron, *The Racially Disparate Impact of Restrictions on the Public Funding of Abortion: An Analysis of Current Equal Protection Doctrine*, 13 B.C. THIRD WORLD L.J. 1 (1993) (describing statutory restrictions on abortion as a form of government discrimination against minorities and a violation of equal protection laws).

152. *See supra* notes 64-66 and accompanying text (discussing Norplant's relationship to fundamental rights, such as procreation, parenting, contraceptive use, and other personal decisions which should remain free from governmental interference).

153. *See* Charles R. Bogle, *"Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193 (1994) (discussing government methods for dealing with undesirable behavior in society).

154. *See supra* text accompanying note 111 (noting the Supreme Court's historical position on applying the doctrine to social and economic legislation).

155. *See* Sullivan, *supra* note 15 and accompanying text (explaining that the doctrine must be interpreted in a way that prevents government from indirectly impinging on protected rights).

theories of germaneness,[156] inalienability,[157] and coercion[158] to determine whether a particular condition triggers the doctrine. The Court has most frequently used various reformulated versions of the coercion theory.[159] Presently, the Court appears to be approaching the doctrine from the standpoint of government's presumptive power to allocate resources according to its selections. There is no coercion if the allocation results as a nonsubsidy instead of a penalty.[160]

Commentators have tried to reconcile the various approaches of the Supreme Court and have concluded that there is no reconciliation.[161] One is not able, therefore, to predict with any certainty whether the Supreme Court would determine that the unconstitutional conditions doctrine applies to the Norplant legislation.[162]

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156. Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935) (noting that the less germane the purpose of the condition is to the underlying benefit, the more it looks like an unconstitutional condition). *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that the Commission cannot condition the issuance of a building permit on reasons which are not germane, even to an outright denial of the permit).

157. Sullivan, *supra* note 15, at 1477-89 (noting that some rights, such as procreational ones which are inherent and biological, should not be traded because they are central attributes of personal identity).

158. Sullivan, *supra* note 15, at 1428-56 (noting that the coercion theory identifies unconstitutional conditions as those that have a coercive effect on the individual's exercise of his/her right).

159. *See* Sullivan, *supra* note 15, at 1428-56 (describing the Court's inconsistencies in determining what constitutes coercion). The Supreme Court has not, however, developed a paradigm for determining coercion. It has focused at times on whether the condition acts as a penalty, at other times on whether the condition acts as a deterrent, and at other times on the coercive effect of making the choice. *Id.*

160. Winters, *supra* note 78, at 132-33 (emphasizing the Court's change from a penalty focus to one of encouraging or discouraging alternative choices). The government can choose to subsidize or not to subsidize. *Id.* *See also* Rust v. Sullivan, 500 U.S. 173 (1991) (noting that funding to subsidize non-abortion family planning instead of abortion-related family planning is a legitimate choice); Harris v. McRae, 448 U.S. 297 (1980) (stating that funding to subsidize childbirth expenses instead of abortion expenses is a legitimate choice).

161. *See, e.g.*, Baker, *supra* note 15, at 1196-97 (proposing some theories on when to apply the doctrine); Epstein, *supra* note 83, at 6-14 (referring to the unconstitutional conditions doctrine as "mysterious" since it has different meanings in different contexts); Sullivan, *supra* note 15, at 1415-16 ("[R]ecent Supreme Court decisions on challenges to unconstitutional conditions seem a minefield to be traversed gingerly. Just when the doctrine appears secure, new decisions arise to explode it."). *See also* Sullivan, *supra* note 15, at 1491-99 (focusing on the effect of the doctrine being raised when a condition affects any of the following: private ordering, government evenhandedness, and constitutional caste). Professor Sullivan has rejected the theories of coercion, germaneness, and inalienability as unhelpful. *Id.* *See* Kreimer, *supra* note 78, at 1359-74 (suggesting that an unconstitutional condition arises if predictive, historical, and equality baselines show the condition penalizes the exercise of a constitutional right); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthorse*, 65 N.Y.U. L. REV. 247, 256 (1990) (suggesting an equal protection type of analysis, applying a heightened standard of review, where the state would have to show that the condition was substantially related to important purposes since a condition that limits a constitutional right creates a suspect classification); Gary Feinerman, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369 (1991) (expanding on Judge Wald's approach).

162. *See* Baker, *supra* note 15, at 1187 (writing that the Supreme Court articulates a positive rule for unconstitutional conditions cases that involve public assistance programs). According

This article posits that the unconstitutional conditions doctrine should be applied to Norplant welfare legislation as if the legislation were directly affecting a woman's procreational rights.[163] The purpose of the doctrine is to prevent the government from doing indirectly what it cannot do directly regarding constitutional rights.[164] An analysis of whether the doctrine applies ends by determining if a condition is affecting a constitutionally protected right. Further analysis beyond this determination defeats the purpose of the doctrine and creates the possibility that identical affected rights will be judged by different standards.[165]

There is risk to individual freedom, as this article argues, in allowing the government to use conditions to do indirectly what it cannot do directly. To minimize this risk, it is crucial that one standard be applied to legislation affecting identical constitutionally protected rights. This approach is the fair way to determine the constitutionality of Norplant legislation. It protects the rights of the individual from government's indirect regulations.

It is only when the appropriate standard has been identified, and is applied, that the constitutionality of the condition should be judged. A welfare reform statute should stand or fall under the same standard as if its effect were direct. This approach, however, does not mean that the application of the same standard to direct and indirect legislation would yield the same result.[166] It only means that

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to Baker's theory, if the Court determines that a constitutional right is involved, it then determines whether the condition requires those unable to earn a subsistence income — who are otherwise eligible for AFDC benefits — to pay a higher price to exercise the right than those earning an income. *Id.* *See also* Coale, *supra* note 13, at 193, 208 (concluding that Norplant incentive bonuses do require poor women to pay a higher price to exercise their constitutional rights).

163. Sunstein, *supra* note 79, at 595 (writing that the doctrine is an anachronism and should be abolished). Instead, the constitutionality of conditions should be "an approach that asks whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting constitutionally protected interests." *Id.* It is not clear, however, whether "constitutionally sufficient justifications" are the equivalent to this article's approach: namely, that the standard for evaluating the constitutionality of the condition should be the same standard that would be used if the legislation directly affected the protected interest.

164. *See* Sullivan, *supra* note 15 and accompanying text (asserting that an individual should not change his/her constitutionally protected behavior or choices because of governmental interference or conditions).

165. For example, if the legislation required women to use Norplant as a condition to receiving AFDC, and if the legislation were determined to be merely social and economic legislation, the constitutionality of the condition would be judged under the rational basis standard. *See* Dandridge v. Williams, 397 U.S. 471 (1970). If the legislation required all women to use Norplant, it would be judged under the strict scrutiny standard. Both laws would affect procreational rights. *See supra* note 77 and accompanying text (discussing the application of strict scrutiny to the parallel issue of abortion rights).

166. It is during the application of the standard that the court weighs such interests of the state in Norplant legislation against the curtailment of the individual's right. For example, the state's interests in Norplant legislation may vary from increasing the health of poor women, to

legislation affecting the same right would be reviewed under a common standard. In this way, protected rights would be judged and treated alike. The constitutionality of Norplant legislation should, therefore, be judged by the same standard as if the legislation directly affected constitutionally protected rights.

CONCLUSION

As the government has become more powerful in its regulation of benefits in American life, the conditions it imposes in exchange for benefits become extremely significant. This is especially true regarding AFDC benefits. These benefits provide subsistence income for poor mothers and their children. The options for such families to obtain subsistence income elsewhere are negligible. Under such circumstances, the power of the government to impose conditions on AFDC benefits increases while the recipients' other options, if they choose to forego the benefit, are reduced. Moreover, the pervasive potential of the government's use of Norplant to influence reproductive rights critically increases the significance of conditioning AFDC benefits. The unconstitutional conditions doctrine serves to prevent possible overreaching when constitutional rights are affected. The doctrine should be part of the discourse regarding welfare benefits and Norplant legislation, for it will serve as a constant reminder that the government should not be able to do indirectly that which it cannot do directly.

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ecological concerns of population control, to the welfare of unborn children, to the judicial recognition that "states have considerable latitude in allocating their AFDC resources." Dandridge v. Williams, 397 U.S. 471, 478 (1970). These interests may or may not be compelling when the standard is applied to the legislation, whether direct or indirect. And, applying the standard to Norplant bonus legislation may give a different result than when applying the standard to Norplant legislation mandating its use to all recipients. What is crucial, however, is that the same standard is being applied to legislation affecting identical constitutionally protected rights.