Committee to Defend Reproductive Rights v. Myers: The Constitutionality of Conditions on Public Benefits in California

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Federal, state, and local governments provide many public benefits, including employment opportunities, welfare, unemployment compensation, university education, and the use of public facilities. While a government necessarily must restrict access to the benefits it bestows, the manner in which it does so is constitutionally limited. Thus, restrictions that require potential recipients to waive constitutional rights to qualify for benefits raise serious constitutional questions. These types of restrictions, which countermand constitutional safeguards, have been called "unconstitutional conditions."

In *Harris v. McRae*, the United States Supreme Court demonstrated that not all conditions affecting the constitutional rights of public benefit recipients are invalid. Finding that restrictions on federal abortion funding did not directly impinge on a woman's constitution-

3. See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) (plaintiff alleged that denial of welfare benefits upon recipient's refusal to allow home visit threatened fourth amendment rights; Court upheld denial of benefits because such a visit not a "search"); *Sherbert v. Verner*, 374 U.S. 398 (1963) (plaintiff's refusal to work on Saturdays because of religious beliefs prompted state's denial of unemployment benefits; Court held that such indirect coercion violated first amendment); see also Note, *The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes*, 7 HASTINGS CONST. L.Q. 165, 167-68 & n.7 (1979).
5. 448 U.S. 297 (1980).
ally protected freedom to terminate her pregnancy, the Court upheld the restrictions because they bore a rational relationship to the government's legitimate interest in protecting the potential life of the fetus.

In Committee to Defend Reproductive Rights v. Myers, the California Supreme Court, however, struck down provisions of the 1978, 1979, and 1980 California Budget Acts that similarly restricted abortion funding obtainable through the state Medi-Cal program. The provisions in the Budget Acts at issue in Myers required Medi-Cal candidates to forego their constitutional right to have an abortion in order to qualify for pregnancy-related medical benefits. Rejecting the reasoning of Harris v. McRae, the California Supreme Court decided Myers on independent state grounds.

The Myers court asserted that "a discriminatory or restricted government benefit program demands special scrutiny," and evaluated the Budget Acts under the test it had articulated in Bagley v. Washington.

8. 448 U.S. at 315. Constitutional protection for the woman's right to choose abortion in the first trimester of pregnancy was recognized in Roe v. Wade, 410 U.S. 113 (1973).
12. The provisions of the 1978, 1979, and 1980 Budget Acts limited Medi-Cal funding for abortions to the following situations: (1) when pregnancy would endanger the mother's life; (2) when pregnancy would cause severe and long-lasting physical health damage to the mother, as determined by two physicians, one of whom is a specialist; (3) when pregnancy results from rape or incest, provided such rape or incest is reported to a law-enforcement agency; or (4) when prenatal studies (amniocentesis, fetal blood sampling, fetal antigraphy, ultrasound, x-ray or maternal blood examination) show that the mother is likely to give birth to a severely defective child. See 1978 Budget Act, ch. 359, § 2, item 248, 1978 Cal. Stat. 755, 823-25; 1979 Budget Act, ch. 259, § 2, item 261.5, 1979 Cal. Stat. 576, 644-45; 1980 Budget Act, ch. 510, § 2, item 287.5, 1980 Cal. Stat. 1069, 1146-47.
13. The California Medi-Cal program was designed to provide health care for the aged and other recipients of public assistance "in the same manner employed by the public generally, and without discrimination or segregation based purely on economic disability." CAL. WELF. & INST. CODE § 14000 (West 1950). The program funds a wide spectrum of health care services, including inpatient hospital expenses, outpatient physician, hospital or clinic services, and family planning services. Id. § 14132(a), (b), (o) (West Supp. 1981); see also id. § 14503 (West Supp. 1981) (outlining eligibility requirements for, and scope of, family planning services).
15. Id. at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868. The court analyzed the validity of the Budget Acts under the California Constitution, reaffirming its ultimate responsibility to interpret provisions of the state constitution. "[W]e cannot properly relegate our task to the judicial guardians of the federal Constitution, but instead must recognize our personal obligation to exercise independent legal judgment in ascertaining the meaning and application of state constitutional provisions." Id. at 262, 625 P.2d at 784, 172 Cal. Rptr. at 871 (quoting People v. Chavez, 26 Cal. 3d 334, 352, 605 P.2d 401, 412, 161 Cal. Rptr. 762, 773 (1980)) (footnote omitted).
16. Id. at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.
This test requires the government to justify statutory schemes that condition the receipt of benefits upon a recipient's waiver of a constitutional right. The government must establish that the imposed condition is reasonable, that it is more beneficial to the public than it is harmful to individual rights, and that the statute is narrowly drawn, restricting the exercise of constitutional rights only to the extent necessary to achieve the government's purpose.

Conditions on public benefit programs arise in a variety of contexts and impinge to varying degrees upon the constitutional rights of large segments of society. These restrictions affect not only public employees and welfare recipients, who depend on the government for their livelihood, but also those who occasionally use public services such as universities or permit programs. In federal courts, the judicial treatment of such conditions has been inconsistent, resulting in confusing precedent.

This Comment discusses the problem of determining the constitutionality of conditions placed on public benefit programs. It first examines the analysis of these conditions under the United States Constitution and then reviews the development of the Bagley test in California law, discussing its application in Committee to Defend Repro-

17. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1967).
18. Id. at 505-07, 421 P.2d at 414-15, 55 Cal. Rptr. at 406-07.
19. See, e.g., Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966) (statute restricting political activities of public employees found unconstitutional). In Bagley, the court noted that "the expansion of government enterprise with its ever-increasing number of employees marks this area of the law a crucial one. As the number of persons employed by government and governmentally assisted institutions continues to grow, the necessity of preserving for them the maximum practicable right to participate in the political life of the republic grows with it." Id. at 510, 421 P.2d at 417, 55 Cal. Rptr. at 409; see also Van Alstyne, supra note 4, at 1482 (contending that because of the government's expansion into, and attendant influence over, employment, housing, education, and welfare, its potential control over an individual's personal life is practically absolute).
24. Compare Zablocki v. Redhail, 434 U.S. 374 (1978) (requirement that individual report child support status before being issued license for second marriage ruled unconstitutional) with Califano v. Jobst, 434 U.S. 47 (1977) (termination of Social Security benefits upon marriage to nonrecipient upheld). See also Abrams, Systematic Coercion: Unconstitutional Conditions in Criminal Law, 72 J. CRIM. L. & CRIMINOLOGY 128, 132 (1981) ("To date, the Court has not formulated or consistently applied a coherent theory of unconstitutional condition analysis. This inability to articulate the boundaries of a reasonable condition . . . has left the lower courts to reconcile inconsistent holdings and produced myriad rationales and resolutions.")
ductive Rights v. Myers. Finally, the Comment compares the Bagley test to the compelling interest and rational relation standards used by federal courts analyzing conditioned benefit programs. This Comment concludes that the Bagley test, which includes a balancing process, is a more flexible and therefore more adequate test for determining the validity of restrictions that condition receipt of benefits on the waiver of constitutional rights.

The Federal Approach to Conditions on Public Benefits

The Right-Privilege Distinction

Prior to 1950, courts presumed that conditions on public benefits were valid because the state’s ultimate power to withhold benefits included the lesser power to place conditions on them. In 1892, Justice Holmes, writing for the Massachusetts Supreme Judicial Court, set forth this position in McAuliffe v. Mayor of New Bedford. Dismissing the petition of an ex-policeman who had been fired for disobeying a department prohibition of employee participation in political activities, Justice Holmes stated: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

This statement reveals the fundamental distinction between constitutionally protected rights, such as free speech, and governmentally bestowed privileges, such as employment. The latter, Justice Holmes reasoned, were subject to complete government control; the government could freely grant, withdraw, or restrict benefits. If the individual accepted the benefits, he or she also accepted the loss of constitutional rights.

Justice Holmes's right-privilege distinction guided judicial analysis of conditions placed on public benefits until the mid-1950's; federal courts upheld these conditions almost automatically. In Adler v. Board of Education, for example, the Court upheld a New York law.
that made membership in subversive organizations grounds for per-
emptory dismissal from public school employment. Embracing Justice
Holmes's argument, the Court stressed that, although school employees
had the right to assemble, speak, and think freely, the local school sys-
tem's control of the terms of employment permitted local governments
to force a choice between membership in subversive organizations and
public school employment.\(^{31}\)

Erosion of the Right-Privilege Distinction

Soon after Adler, the Supreme Court began to strike down benefit
restrictions that impinged on a recipient’s free exercise of constitutional
rights.\(^{32}\) In Sherbert v. Verner,\(^ {33}\) the Court evaluated the validity of a
restriction on South Carolina’s unemployment compensation scheme
that disqualified recipients who were available for work but who, with-
out “good cause,” refused to accept suitable work.\(^{34}\)

In Sherbert, the plaintiff refused suitable employment because her
religious practices forbade her to work Saturdays, as would have been
required by the employment offered. The Employment Security Com-
mission found that the plaintiff’s refusal of work was without good
cause and that she was ineligible for benefits.\(^ {35}\)

The plaintiff in Sherbert raised two constitutional objections to the
Commissioner’s decision. First, she argued that the decision impermis-
sibly burdened her first amendment right to the free exercise of her
religion because it forced a choice between receipt of benefits and ad-
herence to her religious practices.\(^ {36}\) Second, she argued that the deci-
sion made an impermissible distinction between recipients who were
available to work Saturdays and those who were not, because it im-
pinged on the fundamental right to practice a religion that observed the
Sabbath on Saturday.\(^ {37}\)

Under the reasoning of Adler, South Carolina could have required
unemployment recipients to choose between receiving benefits and fol-
lowing religious practices.\(^ {38}\) As no criminal sanctions compelled plain-
tiff to work a six-day week, she was free to refuse unemployment
compensation and retain her religious beliefs. The Sherbert Court,
however, recognized that a forced choice of receiving benefits or of ob-

\(^{31}\) Id. at 492-93.
\(^{32}\) See, e.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sherbert v. Verner,
374 U.S. 398 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Speiser v. Randall,
\(^{34}\) Id. at 400-01 & n.3.
\(^{35}\) Id. at 401.
\(^{36}\) Id. at 404.
\(^{37}\) Id. at 410.
\(^{38}\) See Adler v. Board of Educ., 342 U.S. at 492-93.
serving religious precepts put the same kind of burden on the free exercise of religion as would a criminal penalty imposed on Saturday worship. The Court eschewed the right-privilege distinction, finding that it was "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." Thus, in Sherbert the Court created an exception to Justice Holmes’s principle that governmentally bestowed benefits may be conditioned on the waiver of constitutional rights. The Court concluded that, absent a compelling state interest, the state could not impose conditions on benefits that indirectly deterred express constitutional rights and thereby obtain a result the state could not achieve directly.

Equal Protection

Because the Sherbert Court invalidated the South Carolina regulations as a direct infringement on first amendment rights, it did not consider the equal protection arguments raised by the plaintiff. Nonetheless, the equal protection clause, which also limits the types of conditions the government may place on public benefits, could have provided another basis for the Court’s decision in Sherbert.

Generally, a statutory classification will be upheld under the equal protection clause if the classification bears a rational relation to a legitimate legislative purpose. If the statutory classification either impinges on the exercise of a fundamental right or involves a suspect

39. 374 U.S. at 404. Criminal penalties imposed on the exercise of religion as such and discriminatory regulations directed at groups whose religious views are abhorrent to the authorities contravene the free exercise clause of the first amendment. Fowler v. Rhode Island, 345 U.S. 67 (1952); Cantwell v. Connecticut, 310 U.S. 305 (1940).
40. 374 U.S. at 404.
41. Id. at 405. Professor Van Alstyne calls this principle the doctrine of unconstitutional conditions and explains its scope. "As an 'exception' to the right-privilege distinction, the doctrine seems to be a very broad one which is subject only to one major limitation: the petitioner must demonstrate that the condition of which he complains is unreasonable in the special sense that it prohibits or abridges the exercise of a right protected by an explicit provision in the Constitution. It provides no protection against a regulation which is simply unreasonable or even outrageous in that it has no reasonable connection with any legitimate public purpose, for in that case only the petitioner’s public status is menaced—something to which he presumably has no 'right' to begin with." Van Alstyne, supra note 4, at 1447.
42. 374 U.S. at 410.
43. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
44. See Van Alstyne, supra note 4, at 1454-57.
46. A fundamental right has been defined both as one which is "of the very essence of a scheme of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), and as one explicitly or implicitly protected by the Constitution, San Antonio School Dist. v. Rodriguez, 411 U.S. at 17. Examples of fundamental rights include the right to vote, the right to procre-
class, however, the court evaluates the classification under a standard of strict scrutiny. Only classifications that promote a compelling state interest and that provide the least restrictive means of furthering that interest are deemed constitutional under strict scrutiny.

In the unconstitutional conditions context, courts have used the equal protection analysis most often to evaluate conditions that require benefit recipients to forego implied constitutional rights, such as the right to travel. In *Shapiro v. Thompson*, the Court reviewed Connecticut regulations requiring welfare applicants to reside in the state one year before receiving benefits. Under this scheme, Connecticut denied welfare benefits to a nineteen-year-old unwed mother because she did not meet the residency requirement. Although the Court could have followed the *Sherbert* analysis and invalidated the statute as an impermissible interference with a constitutional liberty protected by the due process clause, it instead based its holding on the equal protection clause.

The Court found that the waiting period created two classes of

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47. The central purpose of the fourteenth amendment was to eliminate all official state sources of invidious racial discrimination. Loving v. Virginia, 388 U.S. 1, 10 (1967). Under the amendment, the Court has held that statutory distinctions based solely on race, ancestry, and lineage are suspect. *Id.* at 11; *Korematsu v. United States*, 323 U.S. 214 (1944); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088 (1969).


53. *Id.* at 623.

54. See *id.* at 659 (Harlan, J., dissenting). Justice Harlan would have used the due process clause to invalidate any undue burden on fundamental rights, such as the right to travel. Instead of requiring that a compelling state interest justify any infringement of this right, however, he would have balanced the extent of the interference with the right to travel against the governmental interests supporting the restriction. After taking all competing considerations into account, Justice Harlan would have upheld the waiting period requirement. *Id.* at 671-76.

55. *Id.* at 641. The Court also ruled on the waiting period requirement adopted by
needy resident families, one composed of residents who had lived in
the state for more than one year, the other of residents who had re-
cently moved to the state. The first group received benefits, the second
did not. Finding that the distinction burdened the fundamental right
of interstate travel, and finding no compelling state interest that justi-
fi ed the distinction, the Court invalidated the waiting period require-
ment for welfare recipients. Thus, although the courts in Shapiro and
Sherbert used different approaches to analyze conditions, each reached
the same conclusion: conditions must be justified by a compelling state
interest to be upheld.

Recent Developments

By requiring that public benefit restrictions impairing the constitu-
tional rights of recipients be justified by a compelling state interest,
Sherbert, Shapiro and other decisions in the 1960's and early 1970's
eroded the view that a state could condition the receipt of public ben-
fits on any basis it chose. In several recent cases, however, the Court
has evaluated conditions on public benefits under the less demanding
rational relation test, indicating that the Court may be returning to a
modified form of the right-privilege distinction.

In Califano v. Jobst, the Court reviewed Social Security Act pro-
visions that mandate termination of secondary benefits when the recipi-
ent marries an individual who is not entitled to receive benefits under
the Act. The plaintiff was the disabled child of a qualified wage
earner. After his father's death, he received Social Security benefits
until he married another cerebral palsy victim who was not receiving
Social Security benefits. The district court held that the marriage
provisions of the Act violated the equal protection clause.

Congress for the District of Columbia and invalidated it under the due process clause of the
fifth amendment. Id. at 641-42.

56. Id. at 627.
57. Id. at 638.
59. See note 32 & accompanying text supra. See also Van Alstyne, supra note 4, at
1445-64 (describing several means of circumventing the right-privilege distinction and not-
ing a judicial trend confirming that substantive due process directly protects interests such as
government employment, public education and public-financed housing).
60. See, e.g., Harris v. McRae, 448 U.S. 297 (1980); Califano v. Jobst, 434 U.S. 47
64. 434 U.S. at 48. Mrs. Jobst was receiving welfare assistance from Missouri, but no
Social Security benefits. Id. at 48 n.1.
65. Id. at 49.
A unanimous Supreme Court disagreed, finding that the marriage rule bore a rational relationship to the congressional purpose of determining dependency. Noting that the Social Security program was designed to provide protection to dependent members of the wage earner’s family, the Court observed that Congress, instead of examining each case separately, had elected to use simple criteria, such as age and marital status, to determine probable dependency. The Court concluded that marital status was a reliable yardstick for determining dependency and that the limited exception allowing two beneficiaries who marry to retain benefits was a reasonable means of eliminating some of the hardship imposed by the marriage rule. Congress was not obligated to take a larger step and provide protection for people such as the Jobsts.

Although the Court in Jobst made few references to any infringement on the right to marry, it squarely addressed this issue in Zablocki v. Redhail. Zablocki involved a Wisconsin statute that required a parent who did not have custody of his or her child, but who was under court orders to provide support for the child, to obtain a court’s permission to marry. Justice Marshall, writing for the majority, concluded that the statute violated equal protection because it interfered with the exercise of the fundamental right to marry and was

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66. Id. at 42-53. Jobst came to the Court on direct appeal from the district court. Id. at 49-50.
67. Id. at 52.
68. Id. at 53-58.
69. The court acknowledged that Social Security Act provisions “may have an impact on a secondary beneficiary’s desire to marry, and may make some suitors less welcome than others,” but noted that neither party had suggested that Congress harbored any antagonism toward a class of marriages. Id. at 58. The Court made no attempt to reconcile the Social Security Act provisions with the fundamental right to marry.
70. 434 U.S. 374 (1978).
71. Wis. STAT. § 245.10(1), (4), (5) (1973); see 434 U.S. at 375.
72. The plaintiff in Zablocki was ordered, as a result of a paternity suit, to pay for the support of his child born out of wedlock and in the mother’s custody. As the plaintiff was unemployed and indigent, he was unable to make the support payments. In 1974, the plaintiff’s application for a marriage license was denied because he did not obtain court permission to marry. Under Wis. STAT. § 245.10, such permission would have been denied because of the plaintiff’s outstanding support obligations. The plaintiff challenged the statute as violative of the equal protection and due process clauses of the fourteenth amendment.
73. 434 U.S. at 388-89. Marriage was first declared a fundamental right in Loving v. Virginia, 388 U.S. 1 (1967), although previous cases had emphasized the importance of marriage and family matters to the individual and had suggested that this interest deserved constitutional protection. See Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942). For discussion of marriage as a fundamental right, see LeFrancois, The Constitution and the “Right” to Marry: A Jurisprudential Analysis, 5 Okla. CITY U.L. REV. 507 (1980); Developments in the Law—The Constitution and the Family, 93
not justified by a sufficiently important state interest.\textsuperscript{74} Affirming that the right to marry is fundamental, the Court qualified the character of the right:

\begin{quote}
[W]e do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not \emph{significantly interfere} with decisions to enter into the marital relationship may legitimately be imposed. . . . The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.\textsuperscript{75}
\end{quote}

The majority distinguished the Wisconsin statute in \textit{Zablocki} from the Social Security Act provisions in \textit{Jobst} on the basis of the directness and substantiality of the interference with the freedom to marry inherent in the Wisconsin statute.\textsuperscript{76} The \textit{Zablocki} Court emphasized the more indirect interference in \textit{Jobst}: “The Social Security provisions placed \emph{no direct legal obstacle} in the path of persons desiring to get married, and . . . there was no evidence that the laws significantly discouraged, let alone made ‘practically impossible,’ any marriages.”\textsuperscript{77} Nonetheless, in dissent, Justice Rehnquist argued that the extent of the burden placed on the right to marry by the Social Security Act provisions challenged in \textit{Jobst} did not differ substantially from the extent of the burden imposed by the Wisconsin statute challenged in \textit{Zablocki}.\textsuperscript{78}

The \textit{Jobst} and \textit{Zablocki} opinions have altered the fundamental rights branch of equal protection analysis by requiring that statutory classifications directly and substantially burden the exercise of fundamental rights before they need to be subjected to strict scrutiny.\textsuperscript{79} The

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\textsuperscript{74} 434 U.S. at 388-91. The Court did not evaluate the Wisconsin statute under the strict scrutiny standard. Instead, the Court conducted a “critical examination” of the state interests advanced in support of the classification. \textit{Id.} at 383. Such interests, Justice Marshall wrote, must be “sufficiently important” and the statute must be “closely tailored to effectuate only those interests.” \textit{Id.}

\textsuperscript{75} \textit{Id.} at 386-87 (emphasis added) (citations omitted).

\textsuperscript{76} \textit{Id.} at 387 n.12.

\textsuperscript{77} \textit{Id.} (emphasis added).

\textsuperscript{78} \textit{Id.} at 408. (Rehnquist, J., dissenting): “In the case of some applicants, this [Wisconsin] statute makes the proposed marriage legally impossible for financial reasons; in a similar number of extreme cases, the Social Security Act makes the proposed marriage practically impossible for the same reasons.” Justice Rehnquist would have applied the rational relation test in both cases. \textit{Id.} at 407. At least one commentator agreed with Justice Rehnquist, arguing that the inconsistent holdings of the factually similar \textit{Jobst} and \textit{Zablocki} cases were not adequately explained by the Court. See LeFrancois, \textit{The Constitution and the "Right" to Marry: A Jurisprudential Analysis}, 5 OKLA. CITY U.L. REV. 507 (1980). Professor LeFrancois suggested that the different results in the two cases show confused reasoning, \textit{id.} at 527-37, and called for judicial reevaluation of equal protection and fundamental rights and development of a more coherent judicial analysis. \textit{Id.} at 559.

\textsuperscript{79} \textit{Zablocki} v. Redhail, 434 U.S. at 386-87 & n.12; Califano v. Jobst, 434 U.S. at 54-58.
\end{footnotesize}
effect of this added "direct and substantial" requirement is to allow conditions on public benefit programs if the conditions only indirectly discourage the exercise of constitutional rights and if they meet the rational relation test.

*Harris v. McRae* demonstrates the use of the *Zablocki* "direct and substantial" test in evaluating conditions placed on public benefit programs. In *McRae*, a majority of the United States Supreme Court upheld the Hyde Amendment against due process and equal protection challenges. Under the Hyde Amendment, Medicaid funds would be available only for certain medically necessary abortions; all expenses related to childbirth, however, would be provided. Although in the earlier case of *Roe v. Wade* the Court had found that the constitutionally protected right to privacy included the freedom to

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83. 448 U.S. at 326-27. The decision was reached by a closely divided court: Justices Stewart, White, Powell, Rehnquist, and Chief Justice Burger formed the majority; Justices Brennan, Marshall, Blackmun, and Stevens dissented.
84. Under the Medicaid program, see 42 U.S.C. § 1396 et seq. (1976), states with medical assistance plans meeting federal requirements receive federal funds to enable them to furnish health care services to recipients of public assistance. *Id.* § 1396.
85. The initial version of the Hyde Amendment withheld federal funds for Medicaid abortions "except where the life of the mother would be endangered if the fetus were carried to term." Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976). Under the version in force for fiscal years 1978 and 1979, funds were available for abortions when "severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians." Pub. L. No. 95-205, § 101, 91 Stat. 1460, 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586 (1978). Victims of rape or incest could also obtain Medicaid abortion funding provided the rape or incest was reported to the police or a public health service. *Id.* The third version of the Amendment, passed for fiscal year 1980, abandoned the exception for severe and long-lasting physical health damage to the mother, but retained the rape or incest exception. Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979).
86. In order to be eligible for Medicaid funds, participating states must provide inpatient hospital services, outpatient hospital services, laboratory and x-ray services, skilled nursing and physician services, and family planning services. 42 U.S.C. §§ 1386a(a)(13)(B), 1396d(a)(1)-5 (1976). The Hyde Amendment withdrew federal funding for certain medically necessary abortions, thereby relieving the states of any obligation to provide such abortions. *Harris v. McRae*, 448 U.S. at 310-11 & n.16.
terminate a pregnancy, the McRae Court held that the Hyde Amendment did not impinge on a "liberty" protected by the due process clause. Applying a "direct and substantial" requirement like that used in Zablocki, the McRae Court held that the Hyde Amendment did not directly interfere with a woman's freedom to choose to have an abortion. "The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."

Having concluded that the Hyde Amendment did not directly impinge on the due process liberty interest recognized in Roe v. Wade, the Court next turned to the equal protection arguments. As the Court had concluded that no fundamental rights were threatened, it applied the rational relation test. Measuring by this standard, the majority found that the Hyde Amendment bore a rational relationship to the government's legitimate interest in protecting the potential life of the fetus and that therefore the Hyde Amendment was constitutionally sound.

The decisions in Harris v. McRae, Califano v. Jobst, and Zablocki v. Redhail seriously limit the applicability of Shapiro v. Thompson and Sherbert v. Verner in unconstitutional condition cases. The Shapiro and Sherbert decisions required a compelling state interest to justify conditions placed on public benefit programs that affected fundamental rights, whether the impact was direct or indirect. The Jobst, Zablocki, and McRae decisions limited this principle by holding that only conditions that directly and substantially restrict the exercise of a right trigger strict scrutiny analysis. As the McRae
Court explained, unless a condition constitutes a "penalty" on the exercise of a fundamental right, it will be upheld if it meets the rational relation test.100

Conditioned Public Benefits: The California Analysis

Danskin v. San Diego Unified School District

For the last 35 years the California courts have viewed restrictions on public benefits with suspicion. In Danskin v. San Diego Unified School District,101 the California Supreme Court rejected the right-privilege distinction as a per se justification for government programs conditioned on the loss of constitutional rights.102 In Danskin, members of the San Diego American Civil Liberties Union (ACLU) requested permission from the school board to use a school auditorium for a series of lectures on the Bill of Rights. Under the Civic Center Act,103 the San Diego School Board was required to grant the free use of school auditoriums to associations formed for educational purposes.104 Another section of the Act, however, directed school districts to deny auditorium use to "subversive elements."105

The San Diego School Board insisted that the ACLU submit an affidavit stating that it was not a subversive element. When the ACLU refused, the Board withheld permission to use the auditorium. ACLU representatives then sought a writ of mandamus to compel the Board to grant it the use of the school facilities.106

Under the Holmes right-privilege theory, the Board validly could

100. 448 U.S. at 317 n.19.
101. 28 Cal. 2d 536, 171 P.2d 885 (1946).
102. Id. at 545-46, 171 P.2d at 891.
103. 1943 Cal. Stat. 690-91 (current version codified at CAL. EDUC. CODE §§ 40048-40050 (West 1978)).
104. 28 Cal. 2d at 540, 171 P.2d at 888. "There is a civic center at each and every public school building and grounds within the state where the citizens, parent-teachers association, Camp Fire Girls, Boy Scout troops, farmers' organizations, school-community advisory councils, senior citizens' organizations, clubs and associations formed for recreational, educational, political, economic, artistic, or moral activities of the public school districts may engage in supervised recreational activities, and where they may meet and discuss, from time to time, as they may desire, any subjects and questions which in their judgment appertain to the educational, political, economic, artistic, and moral interests of the citizens of the communities in which they reside." CAL. EDUC. CODE § 40048 (West 1978) (formerly CAL. EDUC. CODE § 19431).
105. 1945 Cal. Stat. 2301-02 (formerly codified at CAL. EDUC. CODE § 19432). A subversive element was defined by the statute as "any person who is affiliated with any organization which advocates or has for its object . . . the overthrow of the present government of the United States . . . by force or violence or other unlawful means, or any organization . . . which advocates or has for its object . . . the overthrow of the present government of the United States . . . ." Id. at 2302.
106. 28 Cal. 2d at 538-39, 171 P.2d at 887-88.
have conditioned the use of its facilities on the submission of the required affidavits. Although the ACLU may have had a protected right to espouse subversive convictions, it did not have a right to use the school auditorium to do so.\textsuperscript{107} Justice Traynor, writing for the California Supreme Court, disagreed with the right-privilege distinction. He reasoned that, although the state is not obligated to make school buildings available for public meetings, once it elects to do so it cannot make the privilege of holding a meeting dependent on conditions that would deprive any members of the public of their constitutional rights.\textsuperscript{108}

By requiring groups to submit affidavits proving their nonsubversive convictions and affiliations as a condition of using a school auditorium, the Civic Center Act provisions compelled groups that were unwilling to submit such proof to forfeit their rights of free speech and assembly in a public forum.\textsuperscript{109} Finding no "grave and immediate danger" to state interests that would justify a restriction on first amendment freedoms, the court struck down the provisions of the Civic Center Act restricting use of the buildings under the first and fourteenth amendments.\textsuperscript{110}

Bagley v. Washington Township Hospital District

\textit{Danskin} guided subsequent California courts in deciding the validity of conditioned public benefit programs.\textsuperscript{111} However, the \textit{Danskin} holding, that the government cannot condition privileges on the forfeiture of constitutional rights, lacked the flexibility to resolve problems when governmental interests necessitated restriction of rights.\textsuperscript{112} Twenty years after \textit{Danskin}, the California Supreme Court addressed the issue of governmental interests in \textit{Bagley v. Washington Township Hospital District}.

\begin{itemize}
\item \textsuperscript{107} See notes 25-28 & accompanying text supra.
\item \textsuperscript{108} 28 Cal. 2d at 545, 171 P.2d at 891.
\item \textsuperscript{109} Id. at 548, 171 P.2d at 892-93.
\item \textsuperscript{110} Id. at 550-52, 554-55, 171 P.2d at 894, 896-97.
\item \textsuperscript{112} Professor Van Alstyne noted that the doctrine of unconstitutional conditions preserves the appearance of judicial objectivity and expedites decisionmaking. It asks one question: "[D]id the regulation in question condition the petitioner's privilege upon the waiver of a named constitutional right?" Van Alstyne, supra note 13, at 1447-48. He also noted a problem with the doctrine: "Mr. Justice Holmes . . . was probably correct in believing that [the doctrine] . . . evaded the more difficult question raised by justifiable state regulations." Id. at 1448.
\end{itemize}

The \textit{Danskin} court did consider governmental interests, but held that the state may only protect against "'grave and immediate danger to interests that the state may lawfully protect.'" 28 Cal. 2d at 550, 171 P.2d at 894 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).
Hospital District. A nurse's aide was dismissed from her job at a public hospital for participating in a campaign to recall from office certain of the District's directors. The plaintiff's participation in the campaign consisted of attending meetings, circulating a recall petition, and distributing literature during off-duty hours. The District defended the discharge first on the basis of former California Government Code section 3205, which prohibited local agency employees from actively participating in agency election campaigns or in campaigns to recall local agency officials. The District's second argument was that the plaintiff held her hospital position "at the pleasure" of the District and that therefore the District could terminate her employment for any reason.

The Bagley court disposed of the District's second argument by noting that, although an individual can claim no constitutional right to public employment, the government cannot condition such employment upon any terms it may choose. Quoting Danskin with approval, the court emphasized that the government cannot grant public benefits conditioned upon an arbitrary deprivation of constitutional rights. The court, however, also rejected any suggestion that the government may never condition the receipt of benefits upon the waiver of constitutional rights. It recognized that circumstances may "inexorably... require" that the government impose such conditions. To distinguish those cases in which conditions on public benefit programs are warranted from those in which the conditions are improper, the court constructed a three-pronged test:

[A] governmental agency which would require a waiver of constitutional rights as a condition of public employment must demonstrate: (1) that the political restraints rationally relate to the enhancement of the public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are

114. Id. at 502, 421 P.2d at 412, 55 Cal. Rptr. at 404.
115. Act of July 19, 1963, ch. 9.5, § 1, 1963 Cal. Stat. 4078, 4079 (repealed 1976). Section 3203, added to the California Government Code in 1976, provides: "Except as otherwise provided in this chapter, or as necessary to meet requirements of federal law as it pertains to a particular employee or employees, no restriction shall be placed on the political activities of any officer or employee of a state or local agency." CAL. GOV'T CODE § 3203 (West 1980).
116. 65 Cal. 2d at 503, 421 P.2d at 412-13, 55 Cal. Rptr. at 404-05.
117. Id. at 503-04, 421 P.2d at 413, 55 Cal. Rptr. at 405.
118. Id. at 505, 421 P.2d at 414, 55 Cal. Rptr. at 406. The court explained: "Just as we have rejected the fallacious argument that the power of government to impose such conditions knows no limits, so must we acknowledge that government may, when circumstances inexorably so require, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitutional rights." Id.
Applying this test to the restrictions imposed by Government Code section 3205, the court concluded that they were unjustified. The District had contended that section 3205 reasonably related to hospital employment and administration by preventing the disruption that would occur if employees could campaign actively against their supervisors. As section 3205 prohibited an employee from participation in the campaign of any local agency officer, including an officer who was not the employee's supervisor, the court held the statute to be too broadly drawn.

Thus, the District failed to meet the first part of the test because it could not show that the broad sweep of the imposed conditions related to the purposes of hospital employment and services. It also failed to satisfy the second part of the test because the blanket prohibition on political activities did not produce any benefits to the employers or to the general public commensurate with the waiver of constitutional rights. Finally, the District failed to satisfy the third part of the test; although the court did not review alternatives available to the legislature, it did imply that a less restrictive statute could have been available.

The court noted that the state might also meet the first step of the test by showing that enjoyment of the benefit by the class excluded by the conditions "would affirmatively harm compelling public interests." In formulating the three-pronged test, the court relied heavily on Professor O'Neil's assertion that several factors are relevant in determining the validity of conditions placed on benefit programs. O'Neil, supra note 1, at 463-78. Professor O'Neil suggested that courts take the following factors into account: (1) Could the object of the condition be achieved directly? (2) How relevant is the condition to the benefit? (3) Are there alternative means of effecting the governmental interest? (4) How important is the benefit to the individual recipient? (5) Are equivalent benefits available in the private sector? (6) How does the condition influence the beneficiary's judgment? (7) What is the form of condition? (8) What procedures are provided to determine a breach of the condition? He stressed that no one factor should determine the result; courts should attempt to balance all of the elements. A case-by-case approach is better than a rigid test.

Although the Bagley court did not consider all of Professor O'Neil's factors, it accepted the argument that the problem of conditioned benefits is too complex to be decided by an unvarying rule. The District cited Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964), in which the court had acknowledged that some restrictions on employee political activities were justified.

See CAL. GOV'T CODE § 3201 (West 1980), defining "local agency" as a "county, city, city and county, political subdivision, district or municipal corporation." Because the court ruled that § 3205 was too broad, it did not decide whether, in the particular application, the District could be considered the plaintiff's supervisor and therefore could proscribe her participation in a recall campaign.
Developments in the Bagley Test

The three-pronged Bagley test has provided a versatile analytical tool for later courts reviewing conditions placed on public benefit programs. Although the test most often has served to evaluate conditions that infringe on the first amendment rights of public employees, its application has not been limited to this situation. Citing Bagley, California courts have protected the recipients of governmental benefits, such as welfare, public education, and the use of public forums, from conditions that threatened constitutional rights, including the right to privacy, the right to be secure in the home, and the right to operate a private school. Bagley has also been extended to situations outside the public benefit context.

The year after Bagley was decided, the California Supreme Court decided Parrish v. Civil Service Commission, in which it extended the Bagley principles to protect the fourth amendment rights of welfare recipients. In Parrish, the court reviewed the plaintiff's claim for reinstatement as a social worker in Alameda County. He had been fired for "insubordination" when he refused to participate in a series of morning raids on the private homes of county welfare recipients.

The searches, called "Operation Bedcheck," were conducted at the order of the Alameda County Board of Supervisors, purportedly for the purpose of discovering unreported....
The court found that these warrantless searches violated both the recipients' fourth amendment rights and their implied right to privacy.\textsuperscript{131}

Justice Tobriner, writing for the majority, analyzed the case as an "unconstitutional conditions" problem and applied the \textit{Bagley} test to determine whether the county justifiably could require welfare recipients to consent to illegal searches.\textsuperscript{132} In applying the first prong of \textit{Bagley}—whether requiring such consent related to the purposes of welfare legislation—the court recognized that a requirement to consent to searches might facilitate the detection of welfare fraud. The court could not determine, however, whether the first prong of the test had been met because the evidence failed to "establish the incidence of welfare fraud or the efficacy of mass morning raids in reducing such fraud."\textsuperscript{133} For the same reason, the court did not balance the benefits derived from imposing the condition against the corresponding loss of rights, as required by the second prong of the \textit{Bagley} test.\textsuperscript{134}

The lack of evidence was inconsequential, however, because the county failed to establish, under the third prong, that no less offensive alternatives existed to achieve the ends sought by the statute.\textsuperscript{135} The morning raids were not limited to the homes of recipients who were suspected of fraud. Instead, evidence showed that, to prove the low cohabitation among recipients, \textsc{Cal. Welf. \\& Inst. Code} \textsection 11351 (repealed 1971): "[T]he amount of the grant [to a needy child] shall be computed after consideration is given to the income of . . . such adult male person [who lives with and assumes the role of spouse to the mother]."

\textsuperscript{131} 66 Cal. 2d at 270-72, 425 P.2d at 230-31, 57 Cal. Rptr. at 630-31.
\textsuperscript{132} \textit{Id.} at 271, 425 P.2d at 230, 57 Cal. Rptr. at 630. The court noted that "Operation Bedcheck" rested on the assumption that "a welfare agency may withhold aid from recipients who do not willingly submit to random, exploratory searches of their homes; from its inception, the operation contemplated the use of such searches to threaten the withdrawal of welfare benefits from anyone who insisted upon his rights of privacy and repose. . . . [T]he power of government to decline to extend to its citizens the enjoyment of a particular set of benefits does not embrace the supposedly 'lesser' power to condition the receipt of those benefits upon any and all terms." \textit{Id.} at 270-71, 425 P.2d at 230, 57 Cal. Rptr. at 630.

Before the court reached the question of unconstitutional conditions, it considered two other issues: whether the county's searches had to meet the standards ordinarily applied to searches for evidence of a crime, and whether the beneficiaries' consent to be searched made the searches legal. \textit{Id.} at 265-70, 425 P.2d at 226-30, 57 Cal. Rptr. at 626-30. As to the first issue, the Commission claimed that the purpose of "Operation Bedcheck" was merely to secure proof of welfare eligibility. The court noted that welfare fraud constituted a crime and held that the searches were unconstitutional unless the county could "show compliance with the standards which govern searches for evidence of crime." As the county had no probable cause and no warrants, the searches were invalid. \textit{Id.} at 267-68, 425 P.2d at 228, 57 Cal. Rptr. at 628. As to the second issue, the court held that the consents were ineffective because of the coercive circumstances under which they were obtained. \textit{Id.} at 268-70, 425 P.2d 228-30, 57 Cal. Rptr. 628-30.

\textsuperscript{133} \textit{Id.} at 272, 425 P.2d at 231, 57 Cal. Rptr. at 631.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
incidence of fraud in the welfare system, the county director sought to search the homes of nonsuspect recipients. Such an objective, Justice Tobriner emphasized, did not justify indiscriminate raids upon the homes of persons selected solely because their honesty could be exploited. As the court found the searches, and the regulation requiring welfare recipients to consent to such searches, unconstitutional under the fourth and fourteenth amendments, it concluded that the plaintiff's failure to participate in the illegal searches was justified; thus, his termination was without good cause.

After Parrish, California courts only occasionally used the Bagley test to evaluate conditions on public benefit programs. While some courts conscientiously applied each step of the three-part test, others noted the Bagley requirements but failed to perform the balancing process mandated by step two; still other courts confused Bagley with the strict scrutiny standard, applying this rigid standard to invalidate conditions that impinged on public benefit recipients' constitutional rights.

Bagley in the 1980's

Committee to Defend Reproductive Rights v. Myers

In Committee to Defend Reproductive Rights v. Myers, the California Supreme Court revived the Bagley test to strike down abortion funding restrictions. Except in a few limited cases, the 1978, 1979, and 1980 Budget Acts denied Medi-Cal funding for abortions to those women who wanted to terminate their pregnancies, but provided for the

136. Id. at 273, 425 P.2d at 232, 57 Cal. Rptr. at 632.
137. Justice Tobriner described the overreaching of the county’s operation: “[S]o striking is the disparity between the operation's declared purpose and the means employed, so broad its gratuitous reach, and so convincing the evidence that improper considerations dictated its ultimate scope that no valid link remains between that operation and its proffered justification.” Id.
140. E.g., City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970); Vogel v. County of Los Angeles, 68 Cal. 2d 18, 434 P.2d 961, 64 Cal. Rptr. 409 (1967).
funding of childbirth expenses of women who chose to bear children.143
The plaintiffs contended that the Budget Acts violated women's rights
to privacy, due process, and equal protection as guaranteed by the Cali-
ifornia Constitution.144

The court noted that the Budget Act provisions were similar to the
Hyde Amendment restrictions that had withstood federal constitutional
challenge in Harris v. McRae,145 but pointed out that Myers required
application of California law.146 Thus, the California Supreme Court
conducted an independent analysis to determine whether the restric-
tions on Medi-Cal funding for abortions violated the California Constitu-
tion.147 In the context of the independent grounds analysis, the
California court framed the issue as

whether the state, having enacted a general program to provide med-
ical services to the poor, may selectively withhold such benefits from
otherwise qualified persons solely because such persons seek to exer-
cise their constitutional right to procreative choice in a manner which
the state does not favor and does not wish to support.148

Applying the Bagley test,149 the court found that the Budget Acts
failed all three prongs. First, the court maintained, restrictions on
Medi-Cal funding bore no relationship to the program's purposes of
affording health care and remedial services to recipients of public
assistance;150 in some cases, the Budget Act provisions would impede
Medi-Cal objectives by denying abortion funding to women for whom
pregnancy would pose a significant health hazard.151

Second, the court held that the utility of imposing these restrictions
on abortion funding did not manifestly outweigh the resulting impair-
ment of constitutional rights.152 The court examined the importance of
the constitutional rights at stake—the woman's right to life and the
right to choose whether to bear children—and determined that these
rights were among the most intimate and fundamental of all Califor-
nia's constitutional rights.153 Finding that the Budget Act provisions
severely impaired these important rights, the court concluded that only
the most compelling of state interests could justify such significant im-
pairment. The court then examined three state interests—curtailing

143. See note 13 supra.
144. 29 Cal. 3d at 256, 625 P.2d at 780, 172 Cal. Rptr. at 867; see CAL. CONST. art. I, § 1
(privacy); art. I, § 7 (due process, equal protection).
146. 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.
147. Id. at 262, 625 P.2d at 784, 172 Cal. Rptr. at 871.
148. Id. at 256-57, 625 P.2d at 781, 172 Cal. Rptr. at 868.
149. Id. at 257-58, 625 P.2d at 781, 172 Cal. Rptr. at 868.
150. CAL. WELF. & INST. CODE § 14000 (West 1980).
151. 29 Cal. 3d at 271-72 & n.20, 625 P.2d at 790 & n.20, 172 Cal. Rptr. at 878 & n.20.
152. Id. at 282, 625 P.2d at 797, 172 Cal. Rptr. at 884.
153. Id. at 275, 625 P.2d at 793, 172 Cal. Rptr. at 880.
Medi-Cal expenses, encouraging childbirth, and protecting the life of the fetus—and concluded that these interests did not manifestly outweigh the loss of constitutional rights.154

Finally, the court concluded that the provisions were drawn too broadly. The state could use less offensive alternatives to promote its interests in encouraging childbirth and aiding women who choose to bear children.155

As the Budget Act provisions failed to meet the Bagley requirements, the court invalidated them under article I, section 1 of the California Constitution, which explicitly protects an individual's inalienable right to privacy.156 Justice Tobriner, writing for the majority, emphasized that California, through discriminatory financing, may not indirectly nullify a woman's right to obtain an abortion.157

The majority opinion both explained and expanded the Bagley test. The court explained that the test applies to a discriminatory or restricted government benefit program whether or not it erects a "new or additional obstacle that impedes the exercise of constitutional rights."158 Thus, the court distinguished the Bagley test from the federal analysis of unconstitutional conditions. Under the federal approach, the strict scrutiny standard is applied only to conditions that directly and substantially impair constitutional rights.159 The court also emphasized the importance of the second prong of the Bagley analysis and explained how future courts might better perform the

154. Id. at 273-82, 625 P.2d at 791-97, 172 Cal. Rptr. at 878-84.
155. If the Budget Act restrictions were intended to prevent indigent women from obtaining abortions, the court noted, the Act failed the second part of the Bagley test by subordinating the woman's right to procreative choice and did not have to be evaluated under the "least offensive alternatives" doctrine. Id. at 282-83, 625 P.2d at 797, 172 Cal. Rptr. at 884. However, as the Attorney General suggested an alternative purpose of the restrictions—to aid poor women who want to have children but cannot afford the expense of childbirth—the court applied the third component of the Bagley test and concluded that California could achieve this purpose without burdening the right of procreative choice simply by funding impartially the expenses of childbirth and abortion. Id. at 283, 625 P.2d at 797, 172 Cal. Rptr. at 884. A decision to fund both childbirth and abortions would not jeopardize Medi-Cal funds for women who preferred childbirth, because those who ordinarily would choose to have abortions, in the absence of the Budget Act restrictions, would be forced to draw upon Medi-Cal funds for their childbirth expenses. In fact, a decision to provide funds only for childbirth would lead to greater depletion of Medi-Cal resources. See id. at 277, 625 P.2d at 794, 172 Cal. Rptr. at 881 ("[W]hatsoever money is saved by refusing to fund abortions will be spent many times over in paying maternity care and childbirth expenses and supporting the children of indigent mothers.").
156. Id. at 284-85, 625 P.2d at 798-99, 172 Cal. Rptr. at 885-86.
157. Id. at 284, 625 P.2d at 798, 172 Cal. Rptr. at 885: "There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper."
158. Id. at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.
159. Id. See notes 79-80, 99-100 & accompanying text supra.
weighing and balancing process. Principally, the *Myers* court stressed the need to examine the nature and importance of the right at issue and then consider the degree to which this right actually is threatened by the proposed condition. Finally, the court expanded the balancing test, recognizing that a condition on public benefits that curtails the constitutional rights of the poor alone should be viewed more suspiciously than a condition that applies to both rich and poor.

Chief Justice Bird, concurring, rejected the majority’s use of the *Bagley* test, but reached the same conclusion as the majority by applying the traditional strict scrutiny standard to the Budget Act provisions. Finding no difference between direct infringements and indirect infringements on fundamental rights, Chief Justice Bird disagreed with any implication in the majority opinion that indirect impairments of constitutional rights may be justified by anything less than a compelling state interest. The balancing required by the *Bagley* analysis, she argued, presents a task the judiciary is not competent to perform. Also rejecting the majority’s use of the *Bagley* test, Justice Richardson, in dissent, would have evaluated the Budget Acts under the rational relation test. For Justice Richardson, the issue was not whether women may exercise their constitutional right to abortion without undue governmental interference, but “whether they have a right to abort free of charge and at taxpayer expense.” Citing *Harris v. McRae*, Justice Richardson noted that the United States Constitution does not require a state to pay for the exercise of fundamental rights. Similarly, he contended, the California constitutional provision protecting the right of privacy does not encompass the right of “constitutional access to the public treasury for all indigents who want free abortions.” As no fundamental rights were directly impaired by the Budget Acts, Justice Richardson would have deferred to the legislature as the ultimate authority for the selection of those benefits and services to be included in the state welfare program.

The *Bagley* Test, Strict Scrutiny, and the Rational Relation Test

The majority in *Myers* chose to apply the *Bagley* test rather than
the strict scrutiny or rational relation standard to the Budget Act restrictions. A comparison of the two standards demonstrates why Bagley is a better method of analysis for determining the validity of conditions placed on public benefit programs. Although Bagley and its progeny are based on the California Constitution, a similar analysis could be used to determine the constitutionality of conditions under the United States Constitution.

The Bagley test borrows elements from both the rational relation standard and the strict scrutiny standard. The first requirement of the test—that the imposed condition relate to the purposes of the program that confers the benefits—is merely a restatement of the federal rational relation standard. The third requirement—that no alternative less offensive to constitutional rights be available to achieve the state's interest—is a component of strict scrutiny.

The unique element of Bagley is the weighing and balancing requirement of the second prong. In performing this process, courts must assess realistically the importance of the state interest served by the restriction and the degree to which the restriction actually promotes the interest. Courts then must evaluate carefully the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is threatened or impaired. Weighing all the factors, a court following Bagley must decide whether the state's interest manifestly outweighs any resulting impairment of constitutional rights.

This balancing process is absent from both the strict scrutiny and the rational relation standards. Strict scrutiny demands that a statute

170. See, e.g., New Orleans v. Dukes, 427 U.S. 297, 302 (1976) ("[O]ur decisions... require only that the... [statutes] challenged be rationally related to a legitimate state interest."); see also Bogacki v. Board of Supervisors, 5 Cal. 3d 771, 796 & n.12, 489 P.2d 537, 555 & n.12, 97 Cal. Rptr. 657, 675 & n.12 (1971) (Tobriner, J., dissenting) ("[T]he 'rational relationship' standard which constitutes the sole 'due process' criterion, is only the first criterion which a dismissal... based on an employee's exercise of a constitutional right must satisfy [under Bagley].").

171. See Sugarman v. Dougall, 413 U.S. 634, 643 (1973) ("The means the state employs [in seeking to define its political community] must be precisely drawn in light of the acknowledged purpose"); see also Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d at 282 n.28, 625 P.2d at 797 n.28, 172 Cal. Rptr. at 884 n.28 (noting that the third component of Bagley parallels the requirement under strict scrutiny that the distinctions drawn by the law in question are necessary to further the state's purpose).

172. The balancing process is not wholly unknown in federal cases analyzing conditions on public benefit programs. See, e.g., United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Wyman v. James, 400 U.S. 309 (1971); Pickering v. Board of Educ., 391 U.S. 563 (1968). In these cases, however, the Court never articulated an analytical framework. It did not indicate the factors to be considered, nor did it assign a particular burden of proof.

promote a *compelling* state interest; few statutes survive that standard.\(^{174}\) In contrast, a statute will not be set aside under the rational relation test if any set of facts reasonably may be conceived to justify it.\(^{175}\) Frequently, when courts decide to use the rational relation test, the statute is upheld.\(^{176}\)

After *Califano v. Jobst* and *Harris v. McRae*, a federal court evaluating conditions imposed on public benefit programs will apply the strict scrutiny standard only if the condition directly and substantially affects constitutional rights by placing a "legal obstacle" in the path of those who choose to exercise their rights.\(^{177}\) All other conditions must be evaluated under the rational relation standard.\(^{178}\)

The *Bagley* test is more flexible than either of the federal standards. Because of the balancing process in the second prong, results under the test are not predetermined solely by the characterization of the right at issue. The importance of individual rights is not determinative under *Bagley* but rather is a factor weighed against the benefits produced by the challenged conditions.\(^{179}\) Although under current federal analysis a court also must characterize the nature of the impact\(^{180}\) the challenged restriction has on individual rights, the *Bagley* test permits courts to avoid making the difficult and often meaningless distinction between a direct and an indirect effect on fundamental rights. As evidenced by the confusion in the *McRae, Jobst,* and *Zablocki* cases, no clear test exists for determining whether or not a governmental regulation directly affects a fundamental right.\(^{181}\) The *Bagley* analysis allows courts to decide the validity of conditions on a case-by-case basis.\(^{182}\)

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\(^{174}\) See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *Loving v. Virginia*, 388 U.S. 1 (1967); see also *Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting) ("To challenge . . . [statutes] by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.").


\(^{177}\) See notes 73-77, 91-92, 99 & accompanying text *supra*.


\(^{179}\) See Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d at 273-74, 625 P.2d at 791-92, 172 Cal. Rptr. at 878-79.

\(^{180}\) See notes 70-80, 93-100 & accompanying text *supra*.

\(^{181}\) See notes 79-100 & accompanying text *supra*.

\(^{182}\) Because of the balancing process in the second prong, the *Bagley* test does not produce a rule that will determine the outcome of a class of cases. Although the state does bear the "heavy burden" of demonstrating "the practical necessity" for the condition at issue, see *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. 2d at 505, 421 P.2d at 414, 55 Cal. Rptr. at 406, a court following *Bagley* can determine that a condition
Although the weighing and balancing process in *Bagley* invites subjective judicial determinations in decisions perhaps better left to the legislature, this criticism is equally applicable to the current federal analysis. Under that analysis, judges are forced to make a variety of subjective determinations regarding whether a right is fundamental and whether that right is directly and substantially burdened by a statutory condition. The *Bagley* test is superior to the federal approach because the second stage structures subjective judicial determinations by directing courts to focus on the specific factors that separate permissible conditions from impermissible conditions.

The strength of the *Bagley* test lies in the flexibility of the balancing process in the second prong. This flexibility, however, is diminished by the absolute nature of the third prong. Even if a statute survives the balancing process, the third prong requires courts to strike down statutes that could be drawn more narrowly. This requirement means that *Bagley*, in its current form, may force courts to invalidate beneficial legislation because another potentially less restrictive means exists for obtaining the same objective. Although narrowly drawn laws should be a legislative goal, perfection should not be required; a court should not be allowed to invalidate a condition that meets the first two requirements under *Bagley* solely because the court can conceive of a more narrowly drawn statute. The third prong should be eliminated. Instead, the possible existence of a less restrictive way to achieve the same legislative end should be another factor balanced in the second prong of the *Bagley* test to determine whether the statute should be affecting the constitutional rights of benefit recipients is constitutional. See, e.g., *Akin v. Board of Educ.*, 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968). As a flexible test that directs courts to consider a number of relevant factors in determining the validity of public benefit conditions, the *Bagley* test corrects many of the shortcomings Justice Marshall recognized in the federal two-tiered equal protection analysis. Criticizing the rigidity of the federal approach, Justice Marshall, dissenting in *Dandridge v. Williams*, 397 U.S. 471 (1970), suggested that cases involving the "literally vital interests of a powerless minority" should not be subjected to the same reasoning used to evaluate the regulation of business interests. *Id.* at 520 (Marshall, J., dissenting). He advocated evaluation of statutory classifications that withhold benefits from public aid recipients by balancing "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive and the asserted state interests in support of the classification." *Id.* at 521. The *Bagley* analysis, by gauging the practical effect of statutory restrictions on recipients' rights and by realistically assessing the importance of the state's interests, balances two of the three factors Justice Marshall considered important in evaluating restrictions in public benefit programs. Committee to Defend Reproductive Rights v. *Myers*, 29 Cal. 3d at 273, 625 P.2d at 791, 172 Cal. Rptr. at 878.

183. *See* 29 Cal. 3d at 305, 625 P.2d at 811-12, 172 Cal. Rptr. at 898-99 (Richardson, J., dissenting).

upheld.\textsuperscript{185}

Conclusion

The \textit{Bagley} test has guided California courts in analyzing unconstitutional condition cases over the last fifteen years. In \textit{Myers}, the Supreme Court reaffirmed the importance of the \textit{Bagley} test in California constitutional law. Because of the balancing process incorporated in the second prong of the test, \textit{Bagley} is a more flexible analytical tool than the strict scrutiny or rational relation standard. \textit{Bagley} directs courts to consider a variety of factors when evaluating restrictions that condition receipt of benefits on the loss of constitutional rights, and provides a workable solution to the unconstitutional conditions dilemma.

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\textsuperscript{185} \textit{See} O'Neil, \textit{supra} note 1, at 478 (the existence of other alternative means should not be the determinative factor, but rather one of many weighed).

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