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The Viability of Strict Scrutiny Review and the Doctrine of Unconstitutional Conditions after Lyng v. International Union

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THE VIABILITY OF STRICT SCRUTINY REVIEW AND THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AFTER *LYNG v. INTERNATIONAL UNION**

In *Lyng v. International Union, UAW*[1] the United States Supreme Court held that striking union workers were not entitled to federal food stamp assistance.[2] Justice White's opinion for the Court in *International Union* ignored *Shapiro v. Thompson*,[3] a landmark equal protection case in which the Court, presented with a remarkably similar factual scenario, held the applicants were entitled to welfare payments.[4] The *Thompson* Court reasoned that welfare benefits could not be denied simply because the applicant had not met the granting state's residency requirements, since denial of benefits would have penalized the welfare applicant for having recently exercised her right of interstate travel.[5] *International Union* is troublesome, therefore, because it signals a possible retreat from the rationale of *Thompson*, a retreat which could limit the use of strict scrutiny review in cases involving individual liberties.

I. INTRODUCTION

The United States Constitution was intended to preserve individual liberties within the framework of a federal system of government.[6] The preservation of individual liberties, however, has not been accomplished by any single constitutional provision, but by an amalgam of doctrines including equal protection and substantive due process.[7] The

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1. 485 U.S. 360 (1988).

2. *Id.* at 374.

3. 394 U.S. 618 (1969).

4. *See id.*

5. *Id.* at 629-30.

6. *See generally id.* at 629 (principles of federalism and constitutionalism require freedom to travel throughout nation without unreasonable burdens or restrictions).

7. "Substantive due process" is the name given to a judicial doctrine which arose in the late nineteenth century and which dominated the Supreme Court's treatment of leg-

fourteenth amendment to the Constitution provides, *inter alia*, that no person shall be denied equal protection of the law by any state.[8] Accordingly, states must treat all similar individuals in a similar manner, at least when no legal justification exists for disparate treatment.[9]

The doctrine of equal protection, like the doctrine of substantive due process, has evolved during the twentieth century. Although the doctrines were initially used primarily to protect economic rights,[10] both have been used in the latter part of this century primarily to protect individual liberties.[11] Equal protection has been used more widely in recent individual rights cases,[12] perhaps because of the disparagement cast upon substantive due process in the early twentieth century.[13] While substantive due process has been revived,[14] it has not

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islative regulations well into the twentieth century. The doctrine is characterized by heightened activism in the review of legislation, for which the Court has traditionally been criticized. Opponents of substantive due process argue that the Court should not usurp the role of the legislature by transforming the due process clause from a guarantee of fair procedures into a method for passing judgment on the substantive policies of legislative regulations. C. PRITCHETT, CONSTITUTIONAL CIVIL LIBERTIES 292 (1984). Several Supreme Court decisions demonstrate that this view also is held by some members of the Court. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting), *limited by* Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

8. U.S. CONST. amend XIV, § 1.

9. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)).

10. Early substantive due process cases involved economic rights, not individual liberties. *See, e.g.*, Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869) (Legal Tender Act set aside because Act's retroactive application deprived creditors of property without due process of law); Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) ("Dred Scott" decision) (fifth amendment due process clause invoked to defend property against substantive legislative power); Wynehamer v. People, 13 N.Y. 378 (1856) (involving statute which made liquor a nuisance and required owners to destroy their liquor or face criminal prosecution).

Economic legislation also was the early focus of equal protection cases. One researcher studied the use of the doctrine and found that of 554 Supreme Court decisions up to 1960 in which the equal protection clause was involved, 426 (76.9%) dealt with economic legislation, while only 78 (14.2%) concerned state laws alleged to impose racial discrimination or Congressional acts designed to end the discrimination. The remaining cases involved miscellaneous statutes dealing with "criminal procedure, laws applicable to cities on the basis of size, and matters equally unexciting." R. HARRIS, THE QUEST FOR EQUALITY 59 (1960).

11. *See, e.g.*, *Wade*, 410 U.S. 113 (1973) (in denying states the right to proscribe abortion before third trimester, Court held right of privacy to be a due process right); Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute which limited use of contraceptives to married couples violated equal protection, since law classified persons according to marital status).

12. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (discussing emergence of the "new" equal protection during the Warren Court era).

13. In Lochner v. New York, 198 U.S. 45 (1905), the Court used substantive due

caught up with equal protection in terms of constitutional importance. Given the Court's increased reliance upon equal protection, the *International Union* decision is especially startling because it seems to narrow the utility of the doctrine. This Note will analyze *International Union* and its impact, but first an understanding of equal protection is necessary.[15]

A. *Applicability of the Equal Protection Doctrine*

The equal protection doctrine is triggered by classifications drawn by states for the distribution of governmental benefits or burdens, under which similarly situated individuals receive dissimilar treatment.[16] Since states must treat similar individuals in a similar manner,[17] classifications of individuals are scrutinized for constitutionality. A particular classification is unconstitutional unless it measures up to the appropriate standard of review, which is determined according to the significance of the personal right allegedly infringed upon by the classification. The more significant the right implicated, the more rigorous is the appropriate standard of review.[18]

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process to strike down a statute that sought to protect the health of bakers by limiting the number of hours they might work in a day or a week. Justice Peckham's opinion for the majority asserts that the Court must look beyond legislative pretenses to the real motives behind challenged laws, thus clearly illustrating the Court's activism at that time. This judicial activism, however, later was criticized as being inappropriate. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 729 (1963) (criticizing *Lochner* and subsequent substantive due process cases as "intrusion by the judiciary into the realm of legislative value judgments"). Criticism of *Lochner* and similar cases caused a sharp decline in the application of substantive due process.

14. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (right to marry, although not expressly enumerated in the Constitution, is "implicit in the Fourteenth Amendment's Due Process Clause"); Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977) ("Substantive due process has at times been a treacherous field for this Court. . . . That history counsels caution and restraint. But it does not counsel abandonment . . . ."); *Wade*, 410 U.S. 113 (right of privacy is a due process right); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (right to privacy, although not expressed in the Constitution, arises from "penumbras" and "emanations" inherent in the guarantees of the Bill of Rights).

15. Even though the law challenged in *International Union* was federal rather than a state statute, the principles of equal protection still apply. In *International Union* the plaintiffs alleged that the 1981 amendments to the Food Stamp Act violated the equal protection component of the fifth amendment due process clause, which restricts the federal government in the same manner the fourteenth amendment restricts the states. *See International Union, UAW*, 485 U.S. at 365.

16. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-7, at 1454 (2d ed. 1988).

17. *See supra* note 9 and accompanying text.

18. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Marshall, dissenting in *Rodriguez*, referred to a "spectrum" of equal protection standards under which the most important rights implicate the most demanding standards. Criti-

The standard of review dictates which party carries the burden of proof, how important the state interest must be to sustain the classification, and how closely tailored the state action must be to the achievement of the governmental objective. Ordinarily, the state will not have the burden of proof in an equal protection case. When the classification involves highly significant personal rights, however, the standard of review is most rigorous (*i.e.*, strict scrutiny), and the state will have the burden of proof and must meet the standard or the law will be declared unconstitutional.[19]

A state law that penalizes the exercise of a fundamental right also triggers strict scrutiny.[20] Such a penalty warrants the most searching equal protection scrutiny, under which the state must provide a compelling interest in order to prevail.[21] Consequently, this aspect of equal protection remains a safeguard to protect an individual's constitutional rights.

The Supreme Court has clearly established that "[i]n determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[22] Courts must consider these factors, however, in the context of an appropriate standard of review.

B. Three Standards of Review for Equal Protection Analysis

Under the equal protection clause, a statute is examined according to one of three standards of review, "depending upon the interest affected or the classification involved."[23] Under strict scrutiny, the most strin-

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cizing the majority, Justice Marshall stated:

> The Court apparently seeks to establish . . . that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.

Id. at 98-99 (Marshall, J., dissenting).

19. Bernal v. Fainter, 467 U.S. 216, 227 (1984).

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

21. *Id.* at 634. When strict scrutiny is invoked, the state has the burden of showing a compelling interest justifying its action. *See infra* notes 24-29 and accompanying text.

22. Williams v. Rhodes, 393 U.S. 23, 30 (1968) (footnote omitted).

23. Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (footnote omitted).

gent standard of review, the challenged governmental action must be necessary to achieve a compelling state interest.[24] The government also must prove that the action is narrowly tailored to the achievement of that interest.[25] Thus, if the government fails to show the action serves a compelling interest, or if the challenging party offers a less burdensome alternative that achieves the governmental objective, the law will be declared unconstitutional.[26]

The Court applies strict scrutiny when a statute creates an inherently suspect class[27] or penalizes the exercise of a fundamental right.[28] Given the significant burden placed on the government under strict scrutiny, it is virtually an outcome determinative test, since the law almost certainly will be declared unconstitutional.[29] If, however, strict scrutiny is not appropriate, the Court will apply one of two less demanding standards of review.[30] In cases creating classifications for general economic or social legislation, the Court generally defers to other branches of government, presuming actions legitimate.[31] Thus, as long as "[t]he state . . . proceed[s] upon a rational basis and [does] not resort to a classification that is palpably arbitrary, the legislation is constitutional."[32] Explaining this "rational basis test," the Supreme Court has said that "it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably

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24. *See* Bernal v. Fainter, 467 U.S. 216, 227 (1984); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); Korematsu v. United States, 323 U.S. 214, 216 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

25. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989); Riley v. National Fed'n of the Blind, 108 S. Ct. 2667, 2679 (1988); United States v. Paradise, 480 U.S. 149, 171 (1987); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980).

26. Attorney General v. Soto-Lopez, 476 U.S. 898, 906 (1986) ("If we find that [the New York law penalizes persons who have exercised their right to migrate], appellees must prevail unless New York can demonstrate that its classification is necessary to accomplish a compelling state interest."); *see also Blumstein*, 405 U.S. at 343 ("If there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960))).

27. The Supreme Court has "long held that if the basis of classification is inherently suspect, such as race, the statute must be subjected to an exacting scrutiny, regardless of the subject matter of the legislation." Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 628 n.9 (1969).

28. *See Thompson*, 394 U.S. at 634.

29. *See* Gunther, *supra* note 13, at 8 (noting the Warren Court's aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact).

30. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

31. *Id.*

32. Allied Stores v. Bowers, 358 U.S. 522, 527 (1959).

can be conceived that would sustain it."[33] This test is weighted as heavily in favor of the government as the strict scrutiny test is weighted in favor of the individual.[34]

Traditionally, the rational basis and strict scrutiny tests were the only standards of review applied to classifications alleged to violate equal protection. Because the two standards are so diametrically opposed, however,[35] the Supreme Court has recognized an intermediate level of review.[36] This intermediate level applies to semi-suspect classifications and significant, though less than fundamental, interests. To date, this level of review has included gender,[37] illegitimacy,[38] and alienage.[39] Intermediate level scrutiny requires that "[c]lassifications . . . must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives."[40]

Although the intermediate standard appears similar to the strict scrutiny test, the marked difference between the two becomes apparent when the significant words of each test are compared. Intermediate scrutiny only requires an *important* governmental interest, whereas strict scrutiny requires a *compelling* governmental interest.[41] Further, the intermediate test only requires the state to show an interest is *sub-*

33. *Id.* at 528.

34. To prevail, the party attacking the statutory classification must establish that it is wholly arbitrary and irrational. *See* Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71, 83-84 (1988).

35. Strict scrutiny review, which requires the state to meet a heavy burden of proof, is virtually outcome determinative in favor of the challenging party. Rational basis review, on the other hand, requires a nearly impossible showing by the challenging party, and thus is virtually outcome determinative in the state's favor.

36. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985).

37. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976).

38. *See* Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972).

39. *See* Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (in upholding California law requiring peace officers to be citizens, Court refused to acknowledge alienage as suspect classification); Ambach v. Norwick, 441 U.S. 68 (1979) (upholding state law limiting public teaching positions to citizens); Foley v. Connelie, 435 U.S. 291 (1978) (New York law limiting service in the state police to citizens upheld, impliedly rejecting alienage as suspect classification). The Supreme Court, however, has not consistently applied an intermediate level of review in alienage cases. *See* Plyler v. Doe, 457 U.S. 202 (1982) (illustrating the Court's vacillation between standards in alienage cases); *see also* Graham v. Richardson, 403 U.S. 365, 372 (1971) (aliens are prime example of a "discrete and insular minority" meriting heightened judicial scrutiny); Korematsu v. United States, 323 U.S. 214, 215 (1944) (despite upholding executive action expelling persons of Japanese ancestry after Pearl Harbor, the Court declared any legal restriction on the civil rights of a single racial group suspect).

40. *Craig*, 429 U.S. at 197 (emphasis added).

41. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

stantially related to the achievement of the governmental objective, while strict scrutiny requires that the state prove the action is *necessary*.[42]

Thus, there are clearly three distinct standards of review in equal protection cases: strict scrutiny, intermediate scrutiny, and the rational relation test. The Supreme Court's decisions in the field of equal protection, however, have applied these standards in myriad ways. Indeed, Justice Marshall has characterized the Court's equal protection analysis as one employing a "spectrum of standards."[43] Despite this characterization, however, strict scrutiny review is the core of equal protection analysis, at least in the context of individual liberties. Accordingly, *Lyng v. International Union, UAW*,[44] a case that may significantly restrict application of both the strict scrutiny standard and the doctrine of unconstitutional conditions, warrants qualitative discussion.

II. *INTERNATIONAL UNION*'S IMPACT ON *THOMPSON* AND THE PENALTY ANALYSIS OF EQUAL PROTECTION

Since *Shapiro v. Thompson*[45] the United States Supreme Court has applied a strict scrutiny analysis to determine the constitutionality of any law that penalizes the exercise of a fundamental right.[46] The penalty analysis was first employed in *Shapiro v. Thompson* in 1969. *Thompson* involved statutory provisions whereby Connecticut, Pennsylvania and the District of Columbia denied welfare assistance to applicants who had not resided in the jurisdictions for at least one year immediately preceding their applications for welfare.[47] Vivian Thompson, an unwed mother of one child who was pregnant with a second, moved from Massachusetts to Connecticut when her mother became unable to support her. Because Ms. Thompson's pregnancy prevented her from working, she applied for assistance under the program for Aid to Families with Dependent Children (AFDC).[48] Thompson was denied AFDC assistance, however, because she had not met Connecticut's one-year residence requirement before her application was filed.[49] Thompson challenged the denial in a Connecticut federal district court, alleging that the one-year requirement was unconstitutional because of its

42. *Id.*
43. *See supra* note 18.
44. 485 U.S. 360 (1988).
45. 394 U.S. 618 (1969).
46. *See infra* text accompanying notes 113-52.
47. *See Thompson*, 394 U.S. at 622, 624, 626.
48. *Id.* at 623.
49. *Id.*

chilling effect on the right to travel.[50] Thompson prevailed in the three-judge district court,[51] and Shapiro, Connecticut's Commissioner of Welfare, appealed to the United States Supreme Court.[52]

The United States Supreme Court affirmed the district court's ruling, holding that the residence requirement was an unwarranted denial of equal protection by the state of Connecticut.[53] Justice Brennan, writing for the majority, based the decision upon the fundamental right of interstate travel.[54] The Court noted that "[i]f a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' "[55] Applying a strict scrutiny analysis, the Court held that the interests advanced by the state of Connecticut[56] were insufficient to justify the burden placed on indigents traveling into the state.[57]

The Court did not have to determine whether the interests of the state of Connecticut were sufficient to justify the denial of welfare under the AFDC program, since welfare is considered a governmental gratuity, not a constitutional entitlement.[58] Although the government

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50. *Id.*

51. Under former sections 2281 and 2282 of title 28 of the United States Code, any suit to enjoin the enforcement of a state statute on constitutional grounds was required to be heard before a three-judge federal district court, with direct review in the United States Supreme Court. 28 U.S.C. §§ 2281, 2282 (repealed 1976).

52. *Thompson*, 394 U.S. at 623.

53. *Id.* at 629.

54. Justice Brennan did not rely upon a specific constitutional provision to establish the right of interstate migration. Rather, he noted:

> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
>
> . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created."

Id. at 630-31 (1969) (quoting United States v. Guest, 383 U.S. 745, 757-58 (1966)) (ellipses original).

55. *Id.* at 631 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)) (ellipsis original).

56. The state of Connecticut asserted several justifications for the one-year residency requirement. Among the interests rejected by the Court were the state's desire to protect the fiscal integrity of its welfare system, *see id.* at 627, the alleged need to discourage indigents who would enter the state solely to obtain larger benefits, *see id.* at 631, and the state's desire to distinguish between old and new residents on the basis of their prior tax contributions. *See id.* at 632.

57. *Id.* at 638.

58. *See* Dandridge v. Williams, 397 U.S. 471, 484 (1970) (Court observed that state regulation in social and economic fields, including programs such as Aid to Families with

may not abridge the fundamental right to travel between states, the government has no obligation to provide AFDC assistance.[59]

A. Entrenchment of the Penalty Analysis

Thompson significantly advanced the protection of individual liberties because it limited the government's ability to discriminate against politically powerless minorities. Along with several other cases in the late 1960s and early 1970s,[60] *Thompson* expanded the applicability of the strict scrutiny analysis by including within its scope state laws that penalize the exercise of a fundamental right.

One case following *Thompson*, *Dunn v. Blumstein*,[61] involved a durational residence requirement similar to the one at issue in *Thompson*. The plaintiff, James Blumstein, moved in June of 1970 to Tennessee to teach law at Vanderbilt University in Nashville. Intending to vote in Tennessee's August and November elections, Blumstein tried to register as a voter in July of 1970.[62] The county registrar refused to register Blumstein because Tennessee law prohibited the registration of any voter who would not have been a resident for one year by the time of the next election.[63] Blumstein challenged the law as a violation of equal protection, and the United States Supreme Court sustained his objection, stating, "Obviously, durational residence laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right [to travel], and penalize such travelers directly."[64] The Court, finding that the right to vote was fundamental, relied on its holding in *Thompson* to strike down the Tennessee law.[65] The Court held that " 'any classification which serves to penalize the exercise of [a constitutionally protected] right, unless shown to be necessary to promote a *compelling* governmental interest,

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Dependent Children, does not affect freedom guaranteed by the Bill of Rights); *see also* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 1010 (1989) (Brennan, J., dissenting) (dissent characterizing *Dandridge* as implicitly rejecting the idea that a fundamental right to welfare exists); Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (discussing practical and theoretical impediments to the judicial creation of a constitutional right to welfare).

59. *See* Harris v. McRae, 448 U.S. 297, 316 (1980).

60. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (travel and voting); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (voting); Loving v. Virginia, 388 U.S. 1 (1967) (marriage).

61. 405 U.S. 330 (1972).

62. *Id.* at 331.

63. *Id.*

64. *Id.* at 338.

65. *Id.* at 338-40.

is unconstitutional.' "[66] Furthermore, the Court established that deterrence was not required by *Thompson*: a penalty alone, applied to a person because of the exercise of a fundamental right, was sufficient.[67] Thus, *Blumstein* firmly established *Thompson*'s penalty analysis as a protection against one form of governmental restriction on the exercise of fundamental rights.[68]

B. Lyng v. International Union, UAW*: No Impermissible Burden*

In *International Union* the Court applied the penalty analysis, but reached a result difficult to reconcile with *Thompson* and *Blumstein*.[69] In *International Union* striking union members challenged the constitutionality of a 1981 amendment to the Food Stamp Act that precludes households from becoming eligible for food stamps or having their allotment increased if a member of the household participates in a strike.[70] The federal statute grants benefits to persons not working for any reason other than striking; thus, any worker could *quit* his job, for example, and still be eligible for food stamps.[71]

Two unions and several individual union members brought suit

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66. *Id.* at 339 (quoting Shapiro v. Thompson, 394 U.S. 618, 634 (1969)) (emphasis added).

67. *Id.* at 339-40. The Court stated:

> It is irrelevant whether disenfranchisement or denial of welfare is a more potent deterrent to travel. [*Thompson*] did not rest upon a finding that denial of welfare actually deterred travel . . . . In [*Thompson*] we explicitly stated that the compelling state interest test would be triggered by "any classification which serves to *penalize* the exercise of that right [to travel] . . . ."

Id. (quoting *Thompson*, 394 U.S. at 634). *But see infra* text accompanying notes 101-11.

68. *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (Court again relied on *Thompson* to strike down durational residence requirement for medicare). *But see* Sosna v. Iowa, 419 U.S. 393 (1975) (Court upheld durational residence requirement for divorce, but avoided use of strict scrutiny language).

69. *See* Lyng v. International Union, UAW, 485 U.S. 360, 363-64 (1988).

70. The challenged amendment provides in part:

> [A] household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements . . . is on strike . . . because of a labor dispute (other than a lockout) . . . : *Provided*, That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as the result of a decrease in the income of the striking member or members of the household . . . .

7 U.S.C. § 2015(d)(3) (1988) (emphasis in original).

71. *See International Union*, 485 U.S. at 372 n.9 ("[O]ne who voluntarily quits a job is disqualified for food stamps for 90 days. Thereafter, he is eligible as long as he registers for work and cannot find a job.").

against the Secretary of Agriculture, asserting that the amendment penalized union members' fundamental right to associate with their families, their unions, and their fellow union members.[72] The plaintiffs also contended that the amendment to the Food Stamp Act interfered with their first amendment right to "express themselves about union matters free of coercion by the Government."[73] Finally, the plaintiffs argued that the new law violated the equal protection component of the due process clause of the fifth amendment.[74]

In a 5-3 decision,[75] the Supreme Court upheld the constitutionality of the amendment.[76] Consequently, if *International Union* is factually analogous to *Thompson*, then the Court has modified *Thompson*—and with it the important penalty analysis requiring strict scrutiny. In order to determine *Thompson*'s future viability, closer comparison of *Thompson* and *International Union* is necessary. When comparing the two cases, one must keep in mind the distinction between policy objectives and constitutional requirements. Although the effect of the statute in *International Union* may be desirable from a policy standpoint, since the workers voluntarily chose to become unemployed, the Court's role is to evaluate the statute's constitutionality, not its political desirability, which is the province of the legislature.[77]

The two cases are easy to compare. In each case a fundamental right was implicated: *Thompson* involved the right to travel; *International Union* involved the right to associate. Further, the plaintiffs in both cases were eligible for a statutory benefit[78] but for their respective decisions to exercise a constitutional right. Here the similarities end, however, for in *Thompson* the Supreme Court protected the exercise of the right,[79] but in *International Union* the Court denied protection.[80]

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72. *See id.* at 363. In *International Union*, as in *Thompson*, the parties were denied benefits as a result of their exercise of a fundamental right. In *Thompson*, Vivian Thompson would have been eligible for benefits if she had been a resident of Connecticut for one year prior to her application, but her recent change of residence kept her from receiving them. *See* Shapiro v. Thompson, 394 U.S. 618, 623 (1969).

73. *International Union*, 485 U.S. at 364.

74. *Id.* (violation of equal protection component of fifth amendment due process clause argued before the district court).

75. Justice Kennedy did not participate in the case.

76. *Id.* at 374.

77. *See* Harris v. McRae, 448 U.S. 297, 326 (1980) ("It is not the mission of this Court or any other to decide whether the balance of competing interests reflected in [duly enacted statutes] is wise social policy.").

78. The statutory benefits in *Thompson* and *International Union* were food stamps (policy-based entitlements distributed under a revocable legislative decree, not by constitutional mandate) and did not involve constitutional rights. *See International Union*, 485 U.S. at 362; *Thompson*, 394 U.S. at 622-23.

79. *See Thompson*, 394 U.S. at 642.

80. *See International Union*, 485 U.S. at 374.

Accordingly, the inconsistent result must be explained by the importance of the fundamental right involved, the construction of the statutes, the importance of the state interest, or the manner in which the right was affected.

The relative importance of the rights involved does not explain the apparently inconsistent result. The *Thompson* Court declared the right of travel to be fundamental to our federal system,[81] and the Court in *International Union* granted the same status to the right of association.[82] It would be illogical to assume that of two fundamental concepts, one is more important than the other. Therefore, *International Union* cannot be justified by reference to the significance of the interest at stake.

Statutory construction and importance of state interests also fail as bases on which to distinguish the cases. In *Thompson* the Court applied the strict scrutiny test and held that the law was not tailored narrowly enough to prevent fraud.[83] The *International Union* Court applied the more lenient rational relation standard and upheld the law.[84] The *Thompson* Court used a strict scrutiny analysis because the state legislation penalized the fundamental right at issue.[85] In *International Union* the Court applied the more deferential standard because it found no substantial impact on the exercise of the fundamental right in issue.[86] The Court's use of different standards prevents meaningful comparison of statutory construction or the relative importance of state interests because these two areas are evaluated differently, depending upon which standard applies.[87] The key to distinguishing *Thompson* from *International Union*, therefore, lies in understanding how the Court classifies burdens on fundamental rights.

C. The Supreme Court's Classifications of Burdens on Fundamental Rights

Analysis of Supreme Court decisions reveals that a fundamental

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81. *See Thompson*, 394 U.S. at 629-31.

82. The Court in *International Union* clarified the importance of the right of association by noting that " 'one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means . . . .' " *International Union*, 485 U.S. at 366 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982)).

83. *Thompson*, 394 U.S. at 637.

84. *See International Union*, 485 U.S. at 362-69.

85. *Thompson*, 394 U.S. at 638.

86. *International Union*, 485 U.S. at 362-69.

87. *See supra* notes 23-44 and accompanying text (discussing equal protection standards of review).

right may be burdened in one of three ways. First, the right can be restricted by proscription, imposed *before* and completely preventing exercise of the right.[88] Through proscription, the state places an obstacle in the path of a person seeking to exercise the right. Second, the restriction can be in the form of a sanction, or penalty, imposed only *after* the right has been exercised.[89] Since by definition this type of restriction is only imposed after exercise of the right, it can never be an obstacle to an individual seeking to exercise the right. Third, the restriction can be imposed by refusing to facilitate the exercise of a right.[90] Under the third type of restriction, the exercise of the right may be deterred, but it is not penalized. Examples of the three forms of state restriction help to classify the restriction in *International Union.*

In *Roe v. Wade*[91] the state of Texas prohibited women from terminating pregnancies by abortion unless abortion was necessary to save the mother's life. Since the law made the very exercise of the right unlawful, the right was theoretically not available. In *Thompson* a penalty was imposed upon the right to travel. The state of Connecticut refused to provide governmental assistance to applicants who had exercised their right to travel within the previous twelve months.[92] The sanction came only after the right was exercised, and removing it would not have made exercise of the right any more accessible, since the sanction was not an obstacle to travel. Regardless of whether the sanction made travel unattractive, it did not make travel unavailable.

In other cases, the Supreme Court has reviewed decisions by states to refuse to facilitate certain rights. Since *Roe v. Wade* courts have recognized a woman's constitutional right to terminate her pregnancy by abortion. In *Harris v. McRae*[93] and *Maher v. Roe*,[94] however, the Supreme Court considered whether a state could refuse to pay for the abortion once a woman had chosen to exercise that right. The *Maher* Court stated:

> [T]he right [protecting a] woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy

88. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (state statute prohibited marriage by certain class of persons).

89. *See, e.g., Thompson*, 394 U.S. at 622 n.2 (benefits denied persons moving into state).

90. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 316 (1980) (indigent childbirth funded, but not indigent abortion); Maher v. Roe, 432 U.S. 464, 466 n.2 (1977) (same).

91. 410 U.S. 113 (1973), *limited by* Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

92. *See Thompson*, 394 U.S. at 622-23.

93. 448 U.S. 297 (1980).

94. 432 U.S. 464 (1977).

> . . . implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.[95]

The appellees in *Maher* argued that Connecticut was obligated to "accord equal treatment to both abortion and childbirth, and [could] not evidence a policy preference by funding only the medical expenses incident to childbirth."[96] The Supreme Court, however, disagreed, stating that *Wade* did not create a constitutional right to an abortion.[97]

Based on these representative cases, it is clear that states may not unduly interfere with the exercise of a fundamental right by proscription (prior restriction)[98] or penalty (subsequent restriction),[99] but they may refuse to facilitate the exercise of the right by refusing to fund protected activities.[100] Had the *International Union* Court characterized the state action as a penalty, the denial of food stamps would not have been upheld under a *Thompson* analysis, assuming the federal government could not have demonstrated a compelling interest necessarily served. Thus, in order to uphold the challenged statute, the *International Union* Court either must have regarded the denial of food stamps in *International Union* as a refusal to fund rather than a penalty or proscription *or* it must have implicitly modified *Thompson.*

D. The Effect of International Union*: Deterrence Requirement Added to Penalty Analysis*

In *International Union*, just as in *Thompson*, the Supreme Court's equal protection analysis focused on whether the exercise of a fundamental right had been burdened. In *International Union*, however, the Court's definition of "burden" assumed a new requirement: the exercise of the right must actually be deterred. Thus, the critical difference between *Thompson* and *International Union* involves the concept of deterrence.

Justice Brennan, writing for the *Thompson* majority, applied strict scrutiny without mention of any requirement of deterrence to laws that allegedly penalized the exercise of a fundamental right.[101] There was no evidence in *Thompson* that the challenged laws actually deterred

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95. *Id.* at 473-74.

96. *Id.* at 470.

97. *Id.* at 473.

98. *See* Roe v. Wade, 410 U.S. 113 (1973), *limited by* Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).

99. *See* Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

100. *See Maher*, 432 U.S. at 474 (1977).

101. *See Thompson*, 394 U.S. at 631-32.

interstate migration, yet the Court declared the laws unconstitutional simply because they penalized travelers for exercising a fundamental right.[102] Thus, actual deterrence of the right in question was not required by the majority in *Thompson*. Likewise, in *Dunn v. Blumstein*[103] the Court did not require that the right of travel be deterred in order to find the challenged law unconstitutional.[104] In fact, the *Blumstein* Court stated explicitly that deterrence was not necessary to invoke the compelling state interest test:

> Tennessee seeks to avoid the clear command of [*Thompson*] by arguing that durational residence requirements for voting neither seek to nor actually do deter [interstate] travel. In essence, Tennessee argues that the right to travel is not abridged here in any constitutionally relevant sense.
>
> This view represents a fundamental misunderstanding of the law. It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. [*Thompson*] did not rest upon a finding that denial of welfare actually deterred travel.[105]

Nonetheless, in *International Union* Justice White implicitly rejected the theory of *Blumstein*, refusing to apply strict scrutiny because there was no evidence that the right of association had been deterred.[106] Relying on a case factually similar to *International Union*,[107] Justice White altered the standard of review for laws allegedly penalizing the exercise of a fundamental right.[108] Accordingly, after *International Union*, plaintiffs attacking state statutes as violative of equal protection must show not only that the statute penalizes the exercise of a fundamental right, but also that the statute actually deters per-

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102. *See id.*

103. 405 U.S. 330 (1972).

104. *Id.* at 339-40.

105. *Id.* at 339 (footnotes omitted).

106. *International Union*, 485 U.S. 360, 366 (1988) ("[I]t seems 'exceedingly unlikely' that this statute will prevent individuals from continuing to associate together in unions to promote their lawful objectives.").

107. Justice White relied on Lyng v. Castillo, 477 U.S. 635 (1986). In *Castillo*, just as in *International Union*, a law was challenged by family members alleging unequal treatment in the distribution of food stamps. *See id.* at 637.

108. *See International Union*, 485 U.S. at 365 (citing *Castillo*, 477 U.S. at 638). While the deterrence requirement so critical in *International Union* also was present in the earlier case, *Castillo*, *International Union* is more appropriate for study because it involved a wider range of fundamental rights. Since *International Union* involved the right to associate with family members and with the union, whereas *Castillo* only involved the right to associate with family members, *International Union* involved the first amendment right to free expression and thus provides a more comprehensive look at the Court's treatment of burdens on fundamental rights.

sons from exercising that right.[109] The standard of review after *International Union* thus became more stringent, since a law may now penalize the exercise of a fundamental right so long as it stops short of deterring its exercise.[110]

The Supreme Court's opinion in *International Union* implies that a penalty is constitutional unless it rises to the level of a deterrent. After *International Union*, therefore, the threshold question is not whether the penalty is constitutional, but whether the *effect* of the penalty is so great as to make the penalty unconstitutional.[111]

IV. EVOLUTION OF THE PENALTY ANALYSIS FOLLOWING *SHAPIRO V. THOMPSON*

International Union thus far has been construed as a direct attack on *Thompson*. Careful review of the cases after *Thompson*, however, reveals that such construction may be inaccurate. Instead, *International Union* may be understood better as the culmination of a subtle erosion which, over time, has limited *Thompson*'s precedential value.[112] In evaluating this view, the evolution of post-*Thompson* cases and the politics of the Court must be analyzed.

In *Shapiro v. Thompson* the Supreme Court made clear that any state-imposed penalty on the exercise of a fundamental right would be subjected to strict scrutiny. The Court was resolute in its adherence to *Thompson* for at least five years,[113] but in *Maher v. Roe*[114] the Court narrowed the definition of penalty and thus avoided having to apply

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109. *See id.* at 365-66.

110. *See id.* The following hypothetical helps illustrate this point. Consider a professional football player who spikes the ball after he scores a touchdown. If his team withholds part of his salary each time he spikes the ball, he is penalized for his action. Nevertheless he may continue to spike the ball and incur the penalty if the amount of salary withheld is relatively small. In such a case he would be penalized, but not deterred. Were the team to withhold his entire paycheck every week that he spiked the ball, however, he probably could not afford to continue the objectionable behavior and would stop spiking the ball. Thus, not only would the player have been penalized, but also deterred. Although the only difference between the deterring and the nondeterring action is the amount of the penalty, the two situations are distinguishable under the *International Union* test.

111. This "penalty plus deterrent" approach has been decried by at least one constitutional scholar. *See* L. TRIBE, *supra* note 16, § 16-8 n.18, at 1457 (declaring odd any " 'fundamental right' whose exercise government could penalize just a *bit* without any special justification").

112. For an explanation of the Court's evolution since *Thompson*, see *infra* text accompanying notes 113-52.

113. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); *see also infra* text accompanying notes 116-23.

114. 432 U.S. 464 (1977).

strict scrutiny. Although the Court avoided finding a penalty in many later cases, it never refused to apply strict scrutiny when a penalty was found to exist. In *International Union*, however, the Court implicitly modified *Thompson* by refusing to apply strict scrutiny where the penalty had not deterred the individual from exercising the fundamental right in question.

Justice Brennan, writing for the majority in *Thompson*, stated that a law is unconstitutional if it has "no other purpose . . . than to chill the assertion of constitutional rights."[115] Justice Brennan has consistently adhered to this standard, and his opinion in *Thompson* provides a reference point from which the Court's departure may be fully appreciated.

The dissenters in *Thompson*, Chief Justice Warren, Justice Black and Justice Harlan, had left the Court by the end of the 1971 term. Consequently, *International Union* cannot represent the eventual triumph of the *Thompson* minority. Replacing the *Thompson* dissenters were Chief Justice Burger, Justice Rehnquist and Justice Powell. In 1972 the new members of the Court were presented with their first durational residence case in *Dunn v. Blumstein*.[116] Justice Marshall, who had aligned with Justice Brennan three years earlier, wrote the majority opinion in which he stated that "[*Thompson*] and the compelling-state-interest test it articulates control this case."[117] By relying on the *Thompson* penalty analysis to invalidate the residence requirement that penalized the right of travel in *Blumstein*, the Court reaffirmed *Thompson*. Chief Justice Burger, who contributed to the gradual erosion of *Thompson* in subsequent years, filed a dissenting opinion.[118] Justices Rehnquist and Powell took no part in the decision.

In 1974 the Court decided yet another durational residence requirement case. In *Memorial Hospital v. Maricopa County*[119] a local government conditioned the receipt of nonemergency hospitalization or medical care by indigents upon one year's residence in the county. Justice Marshall's opinion for the majority struck down the statute, again relying upon *Thompson*.[120] Of the three justices who replaced the *Thompson* minority, only Rehnquist dissented in *Maricopa County*.[121]

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115. Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

116. 405 U.S. 330 (1972).

117. *Id.* at 339.

118. *See id.* at 363 (Burger, C.J., dissenting).

119. 415 U.S. 250 (1974).

120. Justice Marshall noted: "[A]ppellants urge that [*Thompson*] is controlling. We agree . . . that Arizona's durational residence requirement for free medical care must be justified by a compelling state interest and that, such interests being lacking, the requirement is unconstitutional." *Id.* at 254.

121. *See id.* at 277 (Rehnquist, J., dissenting).

Justice Powell joined the majority opinion, and Chief Justice Burger concurred in the result.[122] Thus, after *Maricopa County* the opposition to *Thompson* seemed to have fragmented, leaving *Thompson* a fixed point on the constitutional landscape.[123]

In *Maher v. Roe*,[124] however, the Court severely limited *Thompson*, allowing Connecticut to deny funding for elective abortions on the theory that the state had no obligation to fund the exercise of fundamental rights.[125] Justice Powell, a member of the majority supporting *Thompson* in *Maricopa County*, wrote for the majority in *Maher* and remarked that the "[a]ppellees' reliance on the penalty analysis of [*Thompson*] and *Maricopa County* [was] misplaced."[126] Justice Powell limited *Thompson* by carving out a major exception to permit states to refuse to fund fundamental rights.[127] Joining Justice Powell in the *Maher* majority were Chief Justice Burger and Justice Rehnquist, along with "swing votes" Justices Stewart and White of the *Thompson* majority.

The *Maher* minority, which had led the majority in the three previous cases, could not prevent Justice Powell from framing the issue in a way that avoided application of strict scrutiny as required by *Thompson*. Apparently, Justice Powell's strategy was to weaken *Thompson* without overruling it, so the swing votes on the Court could be convinced to vote against Justices Brennan, Marshall, and Blackmun.

The Court's next encounter with *Thompson* came in *Zablocki v. Redhail*.[128] The challenged statute in *Zablocki* prevented, instead of penalizing, the marriage of a certain class of persons[129] and was therefore a simple case to decide. The Court reiterated that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[130] The fact that *Zablocki* was not decided on the basis of

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122. *See id.* at 270.

123. *But see* Sosna v. Iowa, 419 U.S. 393 (1975) (Court's opinion upholding durational residence requirement for divorce avoided all language of strict scrutiny).

124. 432 U.S. 464 (1977).

125. *See id.* at 474 n.8.

126. *Id.*

127. *See id.*

128. 434 U.S. 374 (1978).

129. *Id.* at 375.

130. *Id.* at 388 (citing Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 262-63 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); Bullock v. Carter, 405 U.S. 134, 144 (1972)).

The Court did not mention *Thompson*, thus implicitly viewing the state action as a

Thompson does not justify its exclusion from this analysis, since *Zablocki* eventually proved to be the talisman needed to circumvent *Thompson*.[131]

In 1980 the Court resumed the penalty discussion with *Harris v. McRae*,[132] another abortion funding case. The Court in *McRae* upheld the constitutionality of the Hyde Amendment. Not surprisingly, the Court reinforced *Maher* in a decision notable mainly for the addition of Justice Stevens to the Brennan-Marshall-Blackmun minority.[133] The majority was comprised of the five justices from the *Maher* majority. The Hyde Amendment was similar to the statute in *Maher*, except that the Hyde Amendment further restricted benefits. While *Maher* held that a state could withhold funding for nontherapeutic abortions, *McRae* upheld a statute that permitted the state to withhold funding even when abortion was medically necessary.[134]

The appellee in *McRae* contended that "the Hyde Amendment affects a significant interest not present or asserted in *Maher*—the interest of the woman in protecting her health during pregnancy . . . ."[135] Justice Stewart, writing for the Court, replied:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason why was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation.[136]

In a later note, the Court observed: "The appellees argue that the Hyde Amendment is unconstitutional because it 'penalizes' the exercise of a woman's choice to terminate a pregnancy by abortion. This argument falls short of the mark."[137] Thus, the Court reviewed the penalty argument and allowed more governmental interference with the right in issue, but avoided expressly offending *Thompson* by char-

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classification violating equal protection, not a penalty on the exercise of a right.

131. The *International Union* Court relied on *Zablocki*'s less exacting standard, not on *Thompson*, to deal with the burden on union workers' rights, even though *Thompson* factually was more analogous. For further explanation of the *International Union* Court's use of *Zablocki*, see *infra* text accompanying notes 139-44.

132. 448 U.S. 297 (1980).

133. *See id.* at 349 (Stevens, J., dissenting).

134. *See id.* at 326.

135. *Id.* at 315.

136. *Id.* at 316.

137. *Id.* at 317 n.19 (citations omitted).

acterizing the infringement as a nonpenalty.[138] With *McRae*, the anti-*Thompson* majority approved of all but the most restrictive state actions—those that actually preclude the exercise of a fundamental right.

The Court in *International Union* implicitly followed *McRae* and made no reference to *Thompson*. The reason for the omission is unclear; a comparison to *Thompson* hardly would have been inapposite.[139] Justice White instead relied on *Zablocki* for the standard of review.[140] Regardless of the result it produced, Justice White's reliance on *Zablocki* may have been misplaced.

As previously noted, the Supreme Court has recognized three types of burdens on the exercise of fundamental rights[141] and has developed three different constitutional standards, one for each type of burden. In *Zablocki* the State of Wisconsin prohibited certain classes of people from marrying.[142] The Court's analysis in *Zablocki* therefore applies to prior restraints. In *Thompson* the Court set out the standard for subsequent burdens, or penalties, on the exercise of fundamental rights, and in *Maher* the Court provided the standard for analyzing a state's refusal to fund the exercise of a fundamental right. In *International Union* Justice White characterized the effect of the 1981 amendment to the Food Stamp Act *not* as a prior restraint, but as a refusal to fund, noting that the government has no obligation to pay for the exercise of a fundamental right.[143] Assuming Justice White properly char-

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138. *See id.*

139. The majority opinion in *International Union* failed to mention *Thompson*, which was argued by the union (appellee) but not by the Secretary of Agriculture. *See* Brief of Appellee at 19, 41, 42. Surprisingly, however, the case relied on by Justice White for the standard of review, *Zablocki*, was not argued in the briefs of either the union or the Secretary. Instead, the only mention of *Zablocki* came from an amicus curiae brief submitted by the American Civil Liberties Union Foundation in support of the union appellees. *See* Brief of Amicus Curiae at 22. It is ironic that the case ultimately used to support the decision against the union was argued only by amicus curiae on the union's behalf.

140. *See* Lyng v. International Union, UAW, 485 U.S. 360, 364 (1988). Justice White stated:

> We deal first with the District Court's holding that § 109 violates the associational and expressive rights of appellees under the First Amendment. These claimed constitutional infringements are also pressed as a basis for finding that appellees' rights of "fundamental importance" have been burdened, thus requiring this Court to examine appellees' equal protection claims under a heightened standard of review. *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978). Since we conclude that the statute does not infringe either the associational or expressive rights of appellees, we must reject both parts of this analysis.

Id. at 364 (parallel citations omitted).

141. *See supra* text accompanying notes 88-100.

142. *Zablocki*, 434 U.S. at 375.

143. *International Union*, 485 U.S. at 368.

acterized the effect of the amendment, the analysis of *Maher*, not *Zablocki*, should have been applied in *International Union*.

Despite Justice White's characterization of the amendment as a prior restraint, the amendment clearly imposed a burden *after* the workers went on strike, thus making the burden a penalty. The amendment did not *prohibit* a worker from striking, so it was not a prior restraint and should not have been analyzed under *Zablocki*. Likewise, the amendment did not refuse to pay for a worker's costs of striking,[144] so it should not have been analyzed according to *Maher*. Because it imposed a burden upon a worker who had already exercised his right to strike, the amendment should have been analyzed as a penalty under *Thompson*. Justice White's opinion illustrates that in 1988, despite the addition of several new justices, the *Thompson* analysis still dictated a standard of review unappealing to a majority of the Supreme Court.

Once the majority determined the statute did not warrant strict scrutiny, upholding it required no more than rote application of the rational relation test.[145] The dissent, however, authored by Justice Marshall and joined by Justices Brennan and Blackmun, would have invalidated the statute even under the rational relation test.[146] Logi-

144. At least there was no refusal in the sense of *Maher* and *McRae*, in which the benefits were needed by the applicant before exercise of the right, in order to make the right available. In *International Union* the right to strike was available, and the union members exercised that right. The union members did not apply for benefits before striking, and did not require the benefits in order to be able to strike.

145. *See id.* at 372-73.

146. *See id.* at 374 (Marshall, J., dissenting). Justice Marshall stated, "After canvassing the many absurdities that afflict the striker amendment, I conclude that it fails to pass constitutional muster under even the most deferential scrutiny." *Id.* Justice Marshall's dissent gave more attention to the arguments proffered by Secretary of Agriculture Lyng in support of the striker amendment than did the majority opinion. After analyzing the statistics presented by the Secretary, Marshall concluded that the amendment was not rationally related to the objective of reducing federal expenditures, because relatively few strikers resort to food stamps during a labor dispute. *Id.* at 377 (Marshall, J., dissenting). The majority opinion did not analyze any such statistics, noting only that "the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts." *Id.* at 373.

Likewise, even though the majority concluded the amendment was rationally related to the legitimate objective of promoting governmental neutrality in labor disputes, *see id.* at 371, Justice Marshall rejected this conclusion, criticizing the majority's reliance on Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471 (1977). In *Hodory*, the unemployment compensation received by strikers was funded in part by employer contributions. Justice Marshall thus found the majority's application of *Hodory* to the facts of *International Union* unwarranted. Accordingly, while the rational relation standard can be met in most instances, Justice Marshall effectively pointed out the cursory analysis by the majority and created a legitimate doubt as to whether the striker amendment at issue in *International Union* should have passed constitutional muster so easily.

cally, the dissent also doubted that the statute would survive strict scrutiny.[147]

The *International Union* Court, by requiring a penalty and deterrence when only a penalty was required before, narrowed the scope of *Thompson*'s application to cases in which the exercise of fundamental rights is deterred. According to the Court's logic, applying strict scrutiny when a fundamental right is penalized so slightly that the actor is not even deterred is unnecessary to protect fundamental rights under the Constitution.[148] Despite the Court's appealing logic, however, the effect of *International Union* is to withhold strict scrutiny review from all but the most compelling cases. The Court realistically could not have limited *Thompson* any further than it did in *International Union*. Failure to follow *Thompson* when a fundamental right actually is deterred would call into question the very existence of fundamental rights in our society.

The practical effect of *International Union* is to require individuals to forego the exercise of their fundamental rights in order that they might show deterrence. In order for a union member to prevail under the *International Union* standard, the union member would have to refuse to strike in order to provide evidence that the denial of food stamps deterred the exercise of the right. Such a requirement is inherently unfair to the worker, who is in a no-win situation. If the worker strikes, he can be penalized by being denied food stamps for as long as he continues to strike. Conversely, if the worker chooses not to strike he will not receive food stamps and will be forced to endure the conditions which motivated his desire to strike.[149]

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147. *See id.* at 375 n.1. (Marshall, J., dissenting) ("Because I conclude that the striker amendment fails the deferential rational basis test, I see no need to address whether stricter scrutiny should apply to protect the First Amendment interests asserted by appellees, although I am unconvinced by the Court's treatment of that issue as well.").

148. *But see supra* note 111 (penalty itself is objectionable, without regard to its magnitude or effect).

149. The reality of this no-win scenario is borne out by the Court's own reasoning in Lyng v. Castillo, 477 U.S. 635 (1986), which involved an alleged penalty on the right of association. The *Castillo* Court held that the definition of "household" under the Food Stamp Act, which limited the ability of extended families living together to receive more than one allotment of food stamps, did not penalize the family members' right of association, since it did not deter the family members from dining together. *Id.* at 636. Based on this lack of deterrence, no unconstitutional penalty was found to exist. The *Castillo* Court, however, noted later in its opinion that "[i]t is exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of food stamps, for the costs of separate housing would almost certainly exceed the incremental value of the additional stamps." *Id.* at 638. Thus, the *Castillo* Court required deterrence even when it acknowledged that deterrence probably would never be established because of practical considerations.

V. *INTERNATIONAL UNION*'s IMPACT ON THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

The equal protection clause governs, among other things, the ability of a state to withhold benefits from an individual who is otherwise entitled to those benefits, simply because that individual intends to exercise, or has already exercised, a fundamental right in a way the state does not favor. The equal protection clause does not purport to govern a state's ability to "bargain" with an individual in an effort to condition the receipt of a desired benefit upon forfeiture of a fundamental right. When the state seeks to impose such a condition upon the receipt of a benefit, the propriety of the state's action must be determined according to the doctrine of unconstitutional conditions.

"Conditioning the extension of a governmental benefit or 'privilege' upon the surrender of constitutional rights has long appealed to Congress and the state legislatures as a means of regulating private conduct."[150] Such lawmaking theoretically violates the doctrine of unconstitutional conditions. In a recent article, Professor Richard Epstein outlined the doctrine of unconstitutional conditions.[151] The doctrine, wrote Epstein, "holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."[152]

The doctrine is implicated in several different factual scenarios.[153]

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150. Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1595 (1960) (footnote omitted). The author explains the rationale behind this phenomenon as follows:

> This appeal is principally attributable to the superficially compelling logic of the arguments upon which the validity of such conditions is supposed to rest. It is contended that if the government may withhold the benefit in the first instance, without giving a reason, it may withhold or revoke the benefit even though its reason for doing so may be the individual's refusal to surrender his constitutional rights. This argument is often phrased in syllogistic terms: if the legislature may withhold a particular benefit, it may grant it in a limited form since the greater power of withholding absolutely must necessarily include the lesser power of granting with restrictions. As a corollary to this argument, the contention is made that the recipient of the benefit is not deprived of a right since he may retain it simply by rejecting the proffered benefit.

Id. at 1595-96 (footnotes omitted).

151. *See* Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-7 (1988).

152. *Id.*

153. *Id.* at 7. Epstein noted:

> [I]n the context of individual rights, the doctrine provides that on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution. In other instances, the doctrine prevents the govern-

"The problem of unconstitutional conditions arises whenever a government seeks to achieve its desired result by obtaining bargained-for *consent* of the party whose conduct is to be restricted."[154] When imposing an unconstitutional condition, the government effectively bargains with an individual, obtaining the individual's promise to exercise a right in a certain way in exchange for a benefit that corresponds to that right. When imposing a penalty, on the other hand, the government says nothing until after a particular right has been exercised, at which time it withholds a benefit as the result of the exercise of the right.

The doctrine of unconstitutional conditions often closely resembles equal protection,[155] but Professor Epstein's hypotheticals are especially helpful in understanding the distinction between the two. For example, he suggests a scenario in which a corporation desires to locate in a particular state that is averse to the corporation's business, but is unwilling to prohibit its entry. If the state allows the corporation to locate in the state but then denies the new corporation benefits that are available to other corporations located there, the state has penalized the exercise of the corporation's right to interstate migration and thereby denied the corporation equal protection of the law.[156] The state, however, has not obtained consent of the corporation for the denial of benefits, so the doctrine of unconstitutional conditions does not apply.

Thus, as Professor Epstein states, "although a state may absolutely forbid foreign corporations from doing business within its borders, it cannot allow them in on condition that they waive their right to federal diversity jurisdiction, any more than it could divest them of this right by statute."[157] This would amount to asking the corporation to surrender rights the state could not take directly. Likewise, requesting the corporation to submit to terms more onerous than those demanded of other corporations is an unconstitutional condition. Thus, the state which "may prevent foreign corporations from doing business in the state altogether . . . may not allow them to do business only on

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> ment from asking the individual to surrender by agreement rights that the government could not take by direct action. . . . In still other instances, the doctrine closely resembles equal protection, barring the state from making certain privileges available to individuals only if they consent to terms more onerous than those demanded when the same privileges are made available to others.

Id. (footnotes omitted).

154. *Id.*

155. *See supra* note 153.

156. This hypothetical assumes, *arguendo*, that a corporation has a right to interstate migration.

157. Epstein, *supra* note 151, at 7 (footnote omitted).

condition that they pay higher taxes than their local competitors."[158]

Accordingly, the essential difference between the two doctrines is that an unconstitutional condition, unlike an equal protection violation, requires the state to exact a promise from the individual that the individual will forego some right or will exercise a right in a certain way.[159] Although *International Union* did not involve a promise or bargain between the federal government and the union workers, the case may have a significant impact upon the doctrine of unconstitutional conditions.

A. Development of the Doctrine of Unconstitutional Conditions

The Supreme Court first embraced the doctrine of unconstitutional conditions in 1926 in *Frost v. Railroad Commission.*[160] The *Frost* Court held that as a general rule, a state having the constitutional authority to deny a privilege outright may grant the privilege subject to whatever conditions it chooses to impose.[161] "But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights."[162] The California statute challenged in *Frost* allowed a private freight carrier to travel upon the state's highways only if he dedicated his equipment to the business of public transportation and subjected himself to the legal restrictions and duties applicable to common carriers.[163] The Court struck down the statute as an unconstitutional condition, noting that "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[164]

Later the same year, the Court applied the doctrine of unconstitutional conditions in *Hanover Fire Insurance Co. v. Carr.*[165] *Hanover* involved Professor Epstein's paradigm corporation scenario. The Court held that "the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed."[166]

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158. *Id.*
159. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 404 (1963).
160. 271 U.S. 583 (1926).
161. *Id.* at 593.
162. *Id.* at 593-94.
163. *Id.* at 592.
164. *Id.* at 594.
165. 272 U.S. 494 (1926).
166. *Id.* at 507.

With the exception of *Lincoln National Life Insurance Co. v. Read*,[167] subsequent cases involving conditions on corporate activity in the state have followed the *Hanover* rule.[168] In *Lincoln National* the Court "seemed to adopt precisely the argument that was rejected in *Hanover Fire Insurance Co.*: 'that a State may discriminate against foreign corporations by admitting them under more onerous conditions than it exacts from domestic companies . . . .' "[169] *Lincoln National*, however, proved to be an aberration which the Court refused to follow. Instead, the Court in subsequent decisions returned to the doctrine of unconstitutional conditions.[170]

The doctrine of unconstitutional conditions also has been considered in the context of the first amendment cases.[171] In *Speiser v. Randall*[172] the Court struck down a California law requiring applicants for a veterans' property-tax exemption to sign an oath that they did not advocate the unlawful overthrow of the government of the state of California or of the United States.[173] Although Justice Brennan, the author of the majority opinion, did not expressly mention *Frost*, he used the doctrine to complete the Court's analysis.[174] The Court concluded that "when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition."[175] Because California could not justify its inhibition on speech, the Court concluded that the procedure requiring the oath against anti-government speech as a condition for the receipt of a tax exemption was unconstitutional.[176]

In fact, the most recent Supreme Court cases on unconstitutional conditions have focused primarily on first amendment rights,[177] relying

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167. 325 U.S. 673 (1945).

168. *See, e.g.*, Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 664-67 (1981).

169. *Id.* at 665 (quoting *Lincoln Nat'l*, 325 U.S. at 677).

170. *See, e.g., id.* at 667 (noting that, based upon the Court's decisions "before and after *Lincoln National*, it is difficult to view that decision as other than an anachronism"); WHYY, Inc. v. Borough of Glassboro, 393 U.S. 117 (1968) (corporations admitted to do business in state must be treated as domestic corporations, at least with regard to property taxes); Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) (state's power to license or exclude out-of-state corporations is limited by Constitution).

171. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

172. 357 U.S. 513 (1958).

173. *Id.* at 529.

174. *See id.*

175. *Id.* at 528-29.

176. *Id.* at 529.

177. *See* Rankin v. McPherson, 483 U.S. 378 (1987); Hobbie v. Unemployment Ap-

upon the guidelines set forth in *Sherbert v. Verner*.[178] In *Sherbert* "a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith."[179] After trying unsuccessfully to obtain other employment, she filed for unemployment compensation benefits according to state law.[180] Her application was denied by the Employment Security Commission in administrative proceedings[181] provided for by the South Carolina Unemployment Compensation Act.[182] The Commission decision was affirmed by the South Carolina Supreme Court, but was overturned by the United States Supreme Court.[183] The Court's decision again was announced by Justice Brennan, who six years later authored *Thompson*. He wrote:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[184]

Furthermore, Justice Brennan stated, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by

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peals Comm'n, 480 U.S. 136 (1987); Connick v. Myers, 461 U.S. 138 (1983); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); *see also* Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. 97, 98 n.6 (1988-89) (noting recent federal court cases in which the doctrine has been employed). In his article, Fuhr suggests that the increased number of conditions on government benefits limiting first and fourth amendment rights have led a number of courts in addition to the Supreme Court to renew their interest in the doctrine of unconstitutional conditions. *See id.*

178. 374 U.S. 398 (1963).

179. *Id.* at 399 (footnote omitted). Justice Brennan, writing for the Court, noted:

> Appellant became a member of the Seventh-day Adventist Church in 1957, at a time when her employer, a textile-mill operator, permitted her to work a five-day week. It was not until 1959 that the work week was changed to six days, including Saturday, for all three shifts in the employer's mill.

Id. at 399 n.1.

180. *Id.* at 399-400.

181. *See id.* at 401.

182. S.C. CODE ANN. §§ 41-27-10 to -41-50 (Law. Co-op. 1986) (formerly S.C. CODE OF LAWS §§ 68-1 to -404 (1962)). The Act provides that a claimant, in order to be eligible for benefits, must be "able to work and . . . available for work . . . ." *Id.* § 41-35-110(3). The Act also provides that a claimant is *not* eligible "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered to him by the employment office or an employer . . . ." *Id.* § 41-35-120(3)(a)(ii).

183. *Sherbert*, 374 U.S. at 402.

184. *Id.* at 404.

the denial of or placing of conditions upon a benefit or privilege."[185]

In 1981 the Supreme Court reaffirmed *Sherbert* in *Thomas v. Review Board of Indiana Employment Security Division.*[186] The *Thomas* Court held that the state's denial of benefits to an individual who quit his job because his religious beliefs forbade participation in the manufacture of armaments violated the employee's first amendment right to exercise his religion.[187]

The doctrine of unconstitutional conditions was once again affirmed in a 1987 case involving facts almost identical to those of *Sherbert.* In *Hobbie v. Unemployment Appeals Commission*[188] a Seventh-day Adventist was discharged when she refused to work on Saturday, her Sabbath.[189] Hobbie applied for unemployment benefits, but the benefits were denied. The Florida courts refused her request for relief, but the Supreme Court reversed. Justice Brennan's majority opinion in *Hobbie* was a forthright affirmance of both *Sherbert* and *Thomas.*[190] Thus, the doctrine seems to have survived until at least 1987, but it may have met its demise in *International Union.*

B. *Unconstitutional Conditions Analysis Avoided by the Supreme Court in* International Union

In *International Union,* the union and its members relied on *Sherbert,* arguing that the state's denial of food stamps to the strikers amounted to an unconstitutional condition imposed on the exercise of union members' right to associate.[191] Upholding the challenged statute, Justice White distinguished *Sherbert,* but in doing so he threatened to limit *Sherbert*'s effect to cases involving the right to free exercise of religion.[192]

The Supreme Court often has relied on *Sherbert* as authority for the doctrine of unconstitutional conditions,[193] but the decision has never been limited to cases involving the free exercise of religion. It seems strange, therefore, that the Court should balk when confronted

185. *Id.*

186. 450 U.S. 707 (1981).

187. *Id.* at 720.

188. 480 U.S. 136 (1987).

189. *Id.* at 138.

190. In reaffirming *Thomas,* the *Hobbie* Court, quoting from *Thomas,* stated, " 'Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . a burden on religion exists.' " *Id.* at 141 (quoting *Thomas,* 450 U.S. at 717).

191. *See* Lyng v. International Union, UAW, 485 U.S. 360, 369 n.7 (1988).

192. *See id.*

193. *See Hobbie,* 480 U.S. at 140; *Thomas,* 450 U.S. at 717-18; Perry v. Sindermann, 408 U.S. 593, 597 (1972).

with the *Sherbert* rule in *International Union.* Despite the similarities between the two cases,[194] Justice White wrote that *Sherbert* was inapposite to the facts of *International Union* because *Sherbert* " 'was decided in the significantly different context of a constitutionally imposed "governmental obligation of neutrality" originating in the Establishment and Freedom of Religion Clauses of the First Amendment.' "[195] Thus, despite any prior thinking on the scope of *Sherbert,* the decision seemingly is limited by *International Union.* Before *International Union* the doctrine of unconstitutional conditions applied to the rights of association and the free exercise of religion. After *International Union,* however, *Sherbert* may apply only to the free exercise of religion. If the doctrine does apply to cases other than those involving the free exercise clause, the result in *International Union* should have been different.

If an unconstitutional condition analysis had been applied in *International Union,* the Court probably would have concluded that union workers were coerced into giving up their right to associate as union members in order to receive food stamp assistance.[196] Instead, the *International Union* Court relied on *Zablocki v. Redhail,*[197] which dictated equal protection analysis without consideration of the doctrine of unconstitutional conditions.[198] In so doing, the Court exhibited an apparent unwillingness to apply the doctrine of unconstitutional conditions.

The history of the doctrine of unconstitutional conditions has been eventful. After *Frost v. Railroad Commission,*[199] the doctrine of unconstitutional conditions became an effective tool for the Supreme Court to use in protecting individual liberties.[200] Although it has fallen out of use in many fundamental rights cases, the doctrine has retained its

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194. The cases are essentially analogous but for the right alleged to be burdened by the state action. In both cases, a worker was denied welfare benefits because of the exercise of his or her fundamental right. The *Sherbert* Court granted relief to the worker based on the worker's right to free exercise of religion, but in *International Union* the Court denied relief to the worker, despite the worker's claimed right to associate.

195. *International Union,* 485 U.S. at 369 n.7 (quoting Maher v. Roe, 432 U.S. 464, 475 (1977)).

196. While the workers technically were giving up only an *incident* of the right of association, namely their right to strike as union members, this privilege is a significant part of the right of association in union contexts, since the threat of strike is used as leverage in negotiations with management.

197. 434 U.S. 374 (1978).

198. *See International Union,* 485 U.S. at 364.

199. 271 U.S. 583 (1926).

200. *See* O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 CALIF. L. REV. 443, 457 (1966) (identifying *Frost* as the "critical turning point" in the evolution of the law of unconstitutional conditions).

practical usefulness in first amendment cases, especially those involving the free exercise of religion.[201]

After *International Union*, the precise scope of the doctrine of unconstitutional conditions is unclear. Justice White refused to apply the doctrine in *International Union* because the case did not involve a "'governmental obligation of neutrality'"[202] violating the establishment and free exercise clauses of the first amendment. Justice White's justification for ignoring the doctrine of unconstitutional conditions, however, also makes that doctrine inapplicable to speech cases, such as *Speiser v. Randall*.[203] Furthermore, Justice White's language arguably excludes all corporation cases, since they do not involve the requisite governmental neutrality involved in religion cases. The Court's requirement of a "governmental obligation of neutrality" is inconsistent with the theory of the doctrine of unconstitutional conditions, and will remain a troubling precedent until further clarified by the Court in later decisions.

VI. CONCLUSION

The full effects of *International Union* will not be known until it is applied in subsequent cases, but it has clearly affected the important concept of strict scrutiny under equal protection. In the Court's own language, a burden must now have a "substantial impact" on a fundamental right in order to be unconstitutional.[204] Essentially, *International Union* permits any penalty on the exercise of a fundamental right so long as the penalty does not deter the exercise of the right. If the Court uses *International Union* as the standard in future cases involving penalties on the exercise of fundamental rights, then it will have effectively eviscerated *Thompson* and managed to replace strict scrutiny review in penalty cases with the outcome-determinative rational basis test.

International Union also seems to have restricted application of the doctrine of unconstitutional conditions. By requiring a "governmental obligation of neutrality," Justice White apparently limited the doctrine to freedom of religion cases, and not to the first amendment right of association implicated in *International Union*.

J. Thornton Kirby

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201. *See, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981).

202. *International Union*, 485 U.S. at 369 n.7 (quoting Maher v. Roe, 432 U.S. 464, 475 n.8 (1977)).

203. 357 U.S. 513 (1958).

204. Lyng v. International Union, UAW, 485 U.S. 360, 370 (1988).