

Government “Largesse” and Constitutional Rights: Some Paths Through and Around the Swamp

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In convening the panel out of which this paper grew, Professor Alexander suggested, in polite terms, that when it comes to the interaction between government benefits and constitutional rights the Supreme Court is stuck in a swamp. Theory regarding this area, he asserted, is “chaotic,” and “lacks an identifiable core.” My theses here are twofold: both that the swamp is narrower, and that it is more passable, than it appears at first glance. However, unlike some of the participants, I do not view the center of the swamp as an illusion which will dissolve in the light of modern, or post-modern constitutional theory.

A. Two Boundaries: Process and Structure

Before entering any swamp we should begin by ascertaining its boundaries. The idea that allocations of government “largesse” are subject to substantially different constitutional constraints than other government actions is hardly a new one in constitutional law.¹ Its

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1. The suggestion that the “unconstitutional conditions” problem is an artifact of the decline of the constitutional status of common law property rights in the aftermath of the New Deal is simply inaccurate. While the term “largesse” is a Frankfurterian coinage (*Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 149, 173 (1951) (Frankfurter, J., concurring)), the problem arises whenever government has discretionary authority to allocate benefits. Such authority is not confined to the modern welfare state.

In the early 18th century, the scheduling of creditors’ remedies was manipulated to attempt to extract waivers of the creditors rights under the legal tender clause. Townsend

roots in the folk wisdom, that “beggars can’t be choosers,” go deeper still.² Nonetheless, there are areas to which this perception is manifestly inapplicable.

If there is one case which defines the aspirations of American constitutional law and scholarship in the last generation, it is *Brown v. Board of Education*.³ Yet *Brown* is at its root a case about “largesse.” It does not quarrel with the proposition that the state has no obligation to provide public schools, but proclaims that “[s]uch an opportunity, where the state has undertaken to provide it . . . must be made available to all on equal terms.”⁴

This result has been replicated regularly over the last generation.⁵ Whether the “largesse” in question has been access to parks⁶ or to medical school,⁷ tax exemptions,⁸ social security payments,⁹ or government contracts,¹⁰ government actions in distributing “largesse”

v. Townsend, 7 Tenn. (Peck) 1 (1821). States used the power to license foreign corporations to prohibit or punish the invocation of federal diversity jurisdiction with varying success. *E.g.*, *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876); *Home Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874). In the throes of Reconstruction, both state and federal governments sought to impose loyalty oaths as conditions of obtaining professional licenses. *See, e.g.*, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866). And, the power to control access to the mails was used to suppress newspapers which carried accounts of lotteries. *In re Rapier*, 143 U.S. 110 (1892).

While the scope of the state’s discretionary authority to allocate benefits has expanded in the modern era, the terms in which the problem of allocational sanctions are analyzed by modern courts are notably reminiscent of the arguments of a century ago. For a history, see Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1301-51 (1984).

2. *Cf. FCC v. League of Women Voters*, 468 U.S. 384, 403 (1984) (Rehnquist, J., dissenting) (invoking “Faust and Mephistopheles”).

3. 347 U.S. 483 (1954).

4. *Id.* at 493.

5. *See, e.g.*, *Kadrmas v. Dickinson Public Schools*, 108 S. Ct. 2481 (1988); *Plyler v. Doe*, 457 U.S. 202 (1982); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *cf. West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 656, 657 (1943) (Frankfurter, J., dissenting) (suggesting that gratuitous character of public education removed first amendment difficulties from compulsory flag salute). *But cf. Cummings v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899).

It could be argued that *Brown* involved a characteristically sovereign activity linked to school attendance laws. However, such a claim reckons without the cases relied on in *Brown*, cases which involved higher education, as to which no attendance requirement applied. *See McLauren v. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (per curiam); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), as well as subsequent applications of *Brown* to other gratuitous public facilities.

6. *E.g.*, *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

7. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

8. *Kahn v. Shevin*, 416 U.S. 351 (1974).

9. *E.g.*, *Heckler v. Matthews*, 465 U.S. 728 (1984); *Califano v. Westcott*, 443 U.S. 76 (1979); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975).

10. *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989); *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

have been as fully subject to scrutiny under the equal protection clause as have invocations of sovereign force.

Conceptually, the conclusion is entirely sensible. If equal protection principles are construed as disabling government from acting on the basis of arbitrary hostility, racial animus, or insufficient public justification, the constraints apply whenever government makes a choice. Whether the choice concerns "largesse" or regulation is on its face irrelevant. The "evil eye . . . and unequal hand"¹¹ are forbidden, regardless of the powers they wield.

The point can be generalized. To the extent that constitutional constraints are directed to the process by which governmental decisions are made, the issue of whether the subject of those decisions is a penalty or a subsidy should be of no constitutional moment. If under the constitution we may regard only statutes adopted after presentment to the President as valid, a legislative veto is invalid whether it affects regulation or "largesse."¹² If, under the first amendment, government is forbidden to act out of a desire to suppress a point of view, then a case involving removal of schoolbooks, or denial of access to government property, which identifiably grows out of such a desire¹³ should be no more difficult than a case involving a criminal prohibition with the same roots.¹⁴ If due process requires reasonable notice, hearing, and an impartial decision-maker, a secret or self-interested decision without notice would be problematic, whether it concerned deprivation of welfare benefits or contingent remainder interests.¹⁵ To the legal mind, there should be no

11. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886).

12. *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) (Arguably, *Chadha* involved "largesse" in the sense that the suspension of deportation was a dispensation of a gratuitous benefit, as a matter of grace); *cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (dispensation of government funds unconstitutional where Federal Election Commission members were selected in violation of appointments clause).

13. *E.g., Cornelius v. NAACP Legal Defense and Educ. Fund Inc.*, 473 U.S. 788 (1985) (denial of access to federal consolidated charity drive campaign would be unconstitutional if based on desire to suppress a point of view); *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (removal of books based on desire to suppress a point of view would be unconstitutional).

14. *E.g., Boos v. Barry*, 108 S.Ct. 1157 (1988). So, too, the majority in *City of Lakewood v. Plain Dealer Pub. Co.*, 108 S. Ct. 2138 (1988), took the position that even where permits for news vending boxes could be denied entirely, a process of dispensing such permits by the unguided discretion of the mayor was inconsistent with the procedural protections against censorship required by the First Amendment. Even the dissenters were defensive about the majority's accusation of "embracing the greater-includes-the-lesser syllogism — one that this Court abandoned long ago." *Id.* at 2159 (White, J., dissenting).

15. *Compare Goldberg v. Kelly*, 397 U.S. 254 (1970) with *Mullane v. Central*

paradox here: the “right” to a fair trial is not dependent on a right to prevail in the verdict.¹⁶

There is another face to *Brown*, concerned not with the prohibition of racially hostile decision-making, but with the prevention of racial subordination. On this side as well, the impact on the “hearts and minds” of students and society was recognized in the distribution of “largesse,” no less than in the imposition of penalties.¹⁷ This legacy of *Brown* has found less hospitable reception in recent terms of the Court.¹⁸ But whether racially subordinating impact is accepted or rejected as a constitutional variable, the constitutional significance of such effects does not depend on whether the impact arises from penalties or subsidies.

This analysis, too, should present no theoretical difficulty. A constitutional theory keyed to the impact of government actions on the structure of society, whether out of a concern with avoiding the establishment of a permanent “underclass,”¹⁹ or a goal of minimizing government-imposed “stigma,”²⁰ is not likely to let much turn on whether such impacts are brought about by “largesse” or regulation.

This observation suggests another boundary to our quagmire. A large class of constitutional limitations preserve particular structures of relations between the state and citizen or within the government. Where a constitutional constraint is triggered by the impact of a government intervention on other governmental or social structures, the question of whether the impact is brought about by subsidies or penalties is constitutionally irrelevant. If, for example, we were serious about judicially enforcing a strict allocation of decision-making authority exclusively to the states in certain areas as a constitution-

Hanover Bank and Trust, 339 U.S. 306 (1950).

Frankfurter, of course, would not have agreed. His introduction of the concept of “largesse” in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring), was designed to embody the exclusion of governmental privileges from the demands of due process. The revolutionary nature of *Goldberg v. Kelly* was precisely its rejection of that exclusion.

16. Professor Alexander’s description of the problem as involving two “states of affairs”, with and without distribution of largesse, is thus seriously incomplete, for the constitution is often concerned with the process by which the state of affairs is brought about.

17. Compulsory attendance was not crucial to the result here, either. *Cf. Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964) (decision by school board to close the public schools rather than desegregate was impermissible).

18. *Compare, e.g., Lau v. Nichols*, 414 U.S. 563 (1974); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Norwood v. Harrison*, 413 U.S. 455 (1973) *with, e.g., McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976).

19. *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982).

20. *E.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361-62 (1978) (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring and dissenting); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *cf. Wright v. City Council of Emporia*, 407 U.S. 451 (1972); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

ally mandated structure, Justice Roberts would have been quite right in *United States v. Butler*²¹ to view a subsidy program whose impact falls in the state domain as illegitimate, and the dissenters would have been as correct in *South Dakota v. Dole*²² and *FERC v. Mississippi*.²³ If we believe today that a government censor astride the flow of political speech by former government employees is a mechanism antithetical to democratic government,²⁴ the mechanism should not be saved because the employees have acquiesced to it in exchange for the "largesse" of federal employment.²⁵ And, if one of

21. 297 U.S. 1 (1936).

22. 483 U.S. 203 (1987).

23. 456 U.S. 742 (1982), *reh'g denied*, 458 U.S. 1131 (1982); *cf.* *South Carolina v. Baker*, 108 S. Ct. 1355, 1362 (1988) (rejecting as a "mischievous proposition of law" the claim that "the United States [could] convert an unconstitutional tax into a constitutional one simply by making the tax conditional. Whether Congress could have imposed the condition by direct regulation is irrelevant; Congress cannot employ unconstitutional means to reach a constitutional end.").

Of course, most of the current Justices are not serious about judicial enforcement of federalism constraints against the political branches. Even Justice Rehnquist, who threatened in his dissent in *Garcia v. SAMTA*, 469 U.S. 528 (1985), to resurrect the doctrine of *National League of Cities v. Usery*, 426 U.S. 833 (1976), at the first available opportunity, wrote the majority decision in *Dole*, which seems to contemplate virtually no limits to the extension of federal hegemony under the spending power. 483 U.S. 203 (1987). Only Justice O'Connor seems to be consistent in her vision of an untrammelled role reserved to the states. *See, e.g.*, *South Carolina v. Baker*, 108 S. Ct. 1355, 1371 (1988) (O'Connor, J., dissenting); *Dole*, 483 U.S. at 212 (O'Connor, J. dissenting).

24. *Cf.* *Lamont v. Postmaster General*, 381 U.S. 301, 306 (1965) ("The Act sets administrative officials astride the flow of mail, to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. . . . This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights."); *Block v. Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) (Scalia, J.) ("It may well be that threat, and thus suppression would be the consequence of a scheme for systematic review of books and films by an official evaluator, in order that the government may label their content approved or condemned.").

25. *Compare* *Snepp v. United States*, 444 U.S. 507 (per curiam), *reh'g denied*, 445 U.S. 972 (1980) (implying that nondisclosure requirement could have been imposed on CIA employee even without agreement) *with* *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671 (D.D.C. 1988) (challenging lifetime nondisclosure agreements requiring federal approval of all subsequent writings by large class of federal employees with access to "classifiable documents"), *vacated and remanded sub nom.*, *American Foreign Service Assn. v. Garfinkel*, 109 S. Ct. 1693 (1989). One commentator estimates that 120,000 federal employees may be subject to lifetime censorship obligations, and almost 5,000,000 are subject to censorship obligations while they are federal employees. Burnham, *The Bureaucracy: Hear No Evil, See No Evil, Publish No Evil*, *Times*, Aug. 16, 1984, § B, at 14, col. 3.

I have argued elsewhere that efforts by the government to induce its employees to forego first amendment activities are a substantial impairment not only of the employees' free speech interests, but of the interests of the citizenry in self-government. Kreimer, *Government, Economic Power, and Free Speech: Can the State Buy Silence?*, 1988 *TEL AVIV U. STUD. IN L.* 265.

the functions of the establishment clause is to disable the government from symbolically allying itself with one religion, an endorsement in the form of public largesse is as problematic as an endorsement backed by a transfer of government authority.²⁶

This, too, is no new wisdom. In guarding the President's compensation against either reduction or increase during his term, the framers of the Constitution were fully cognizant of the tension between institutional independence and the allocation of "largesse." As Hamilton commented in Federalist 73, without limitation on congressional authority over presidential compensation:

[T]he separation of the executive from the legislative department would be merely nominal and nugatory. The legislature, with a discretionary power over the salary and emoluments, of the Chief Magistrate could render him as obsequious to their will as they might think it proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.²⁷

By contrast, a fixed salary precluded "pecuniary inducement to desert the independence intended by the constitution."²⁸

The more constitutional limitations are conceived of in terms of process or structure, the narrower the boundaries of the swamp become. At the extreme, if all constitutional limitations are thought to function in terms of process or structure, rather than as protecting individual autonomy, the problem will disappear entirely. Therefore, the most important initial questions the Court confronts in the area of "largesse" concern the proper conceptualization of the constitutional constraints before it.

B. Into the Swamp: Autonomy, Prediction, Equality, and History

This analysis suggests that the problem of "largesse" (or what I call "allocational sanctions"), if not its solution, does have an "identifiable core." We tend to conceive of certain constitutional rights as bound up with the liberty of individuals; they guard the autonomy of individual citizens' wills for their own sake. Indeed, if *Brown* was the

26. Compare, e.g., *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989) (sales tax exemptions limited to religious writings unconstitutional) with *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (effective delegation of veto power over liquor permits to religious institutions impermissible).

27. THE FEDERALIST NO. 73, at 441 (A. Hamilton) THE FEDERALIST PAPERS (C. Rossiter ed. 1961).

28. *Id.* at 442. It is worth noting that the Congressional attempts to block the President's efforts to require federal employees to agree to submit future writings to federal censorship as a condition of federal employment themselves took the form of imposing conditions on funding for the executive branch ("largesse"). Those efforts were held by the district court to violate separation of powers principles. *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671 (D.D.C. 1988), *vacated and remanded sub nom.*, *American Foreign Serv. Ass'n v. Garfinkel*, 109 S. Ct. 1693 (1989).

constitutional paradigm of the last generation, *Roe v. Wade*,²⁹ with its emphasis on substantive protection of individual privacy and liberty, has set the tone for the central controversies of this generation.³⁰ With respect to constitutional rights so conceived, the allocation of "largesse" contingent upon the exercise of those rights is constitutionally distinguishable from the imposition of coercive "penalties" imposed for similar conduct. An offer of "largesse," in exchange for waiver of a private autonomy right, provides the citizen with two options where before she had only one; the range of her autonomy has been increased. The prohibition of such offers would decrease the scope within which the citizen could exercise her autonomy. By contrast, a penalty exacted for exercise of the right narrows her options and restricts her autonomy. It is only the restriction that "abridges" a constitutional right identified with individual options.

An example drawn from a constitutional "liberty" which has enjoyed some vogue in the Burger and Rehnquist courts illustrates this point. In *Wooley v. Maynard*, the Court held that the state of New Hampshire could not constitutionally require its citizens the Wooleys

29. 410 U.S. 113 (1973).

30. A number of commentators have sought to ground the result in *Roe* in constitutional theories that rest outside of a protection of individual autonomy. Some efforts rely on arguments about the prerequisites of equality for women in our society. *E.g.*, Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-59 (1977); Hirshman, *Bronte, Bloom and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177, 209-24 (1988); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979). Some explicate limits on government's authority to shape the lives of its citizens rooted not in individual rights, but in conceptions of the good society. *E.g.*, Rubinfeld, *The Right of Privacy* 102 HARV. L. REV. 737, 788-91 (1989); Hirshman, *supra*, at 224-30. Some attempt to formulate the limitation in terms of decisions which are structurally inappropriate for political resolution. *E.g.*, Tribe, *The Supreme Court 1972 Term — Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 21-25 (1973); Pollak, *Advocating Civil Liberties: A Young Lawyer Before the Old Court*, 17 HARV. C.R.-C.L. L. REV. 7 (1982). Professor Tribe has since abandoned this tack in favor of a combination of autonomy-based and equality-based theories. L. TRIBE, *CONSTITUTIONAL LAW* 1350 (2d ed. 1988).

These sophistications have all, thus far, eluded the Supreme Court majority, which continues to write in terms of a "right of privacy." *Thornburgh v. ACOG*, 476 U.S. 747 (1986). The Court had another chance to refine its approach this term in *Webster*, but it failed to avail itself of the opportunity. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989).

To the extent that the Court rests a retention of the right to reproductive choice in either arguments about equality or about structure, the difficulties surrounding "largesse" will be elided in this area. Still, other manifestations of the "privacy" right are difficult to disentangle from claims of individual autonomy. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (dissent); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

to place the motto "Live Free or Die" on their license plates on pain of criminal penalty.³¹ An effort by the state to rent advertising space on the sides of the Wooleys' vehicle for a similar message, however, would presumably face no comparable constitutional impediments. The first amendment autonomy interest in the right to silence, which protects against penalties levied on silence, would not limit the ability to extend rental offers which expand the range of choices available to the citizen.

The swamplike aspect of the problem, however, arises when we recall that, "constitutionally speaking," the right to operate vehicles on a state's highways is "largesse." If New Hampshire had no constitutional duty to license the Wooleys' auto, why should we not conceive of the extension of the license as a "rental fee" for the use of their auto's communicative potential?

One might believe, as Professor Epstein seemed to advocate, that the key lies in the anticompetitive monopoly that New Hampshire holds over its roadways.³² Let us remember, however, that the next major invocation of the *Wooley* principle was the holding in *Abood*³³ (of which Epstein approves)³⁴ that a job (of which Epstein reminds us there are many)³⁵ could not be conditioned on payment of politically objectionable union dues. Nor is the key a general difference between the scrutiny accorded to prohibitory regulation backed by criminal sanction and allocational sanctions. In *Abood* and its progeny,³⁶ the sanction for nonpayment of the objectionable dues was the loss of a job, not a fine or imprisonment. The result should be no different if the sanction had been the loss of any other unrelated

31. *Wooley v. Maynard*, 430 U.S. 705 (1977); *cf., e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (requiring employee to pay dues used for union political activities to which member objects violates first amendment); *Pacific Gas and Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (requiring public utility to include consumer group's materials in billing envelope violates first amendment). *Riley v. National Fed'n of the Blind*, 108 S. Ct. 2667 (1989) (requiring non-profit fundraisers to state to potential donors the percentage of funds previously turned over to charity violated first amendment).

32. Epstein, *Foreword: Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 1, 16-21 (1988) (monopoly as justification for overriding contractual arrangements); *see id.* at 47 ("The first inquiry is to determine the extent of the government's monopoly power in its control of public highways."); *id.* at 56 ("Lake-wood differs from *Frost* because . . . city ownership of public streets gives government far less monopoly power."); *id.* at 71-73 (employment relations are inappropriate for unconstitutional conditions analysis because government has little monopoly power). Professor Epstein's contribution to this symposium seems to envision monopoly as only one of the relevant variables.

33. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

34. Epstein, *supra* note 32, at 92.

35. Epstein, *supra* note 32, at 71-73 ("little danger of monopoly" in government employment).

36. *Communications Workers of Am. v. Beck*, 108 S. Ct. 2641 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Brotherhood of Ry.*, 466 U.S. 435 (1984).

benefit. Conversely, there is wide acceptance of parole conditions like those imposed on the late Jimmy Hoffa, where immunity from the state's monopoly on legitimate coercive violence is conditioned on the nonexercise of conceded constitutional rights.³⁷

In analyzing the question of whether governmental conditions on "largesse" are properly regarded as impingements on constitutionally protected freedoms an initial ordering of intuitions can be achieved by attempting to determine whether the government's offer leaves the citizen with a broader range of choices than she would have had in the normal course of events.³⁸ To my mind, the reason it is implausible to characterize New Hampshire's condition as an offer to purchase space on the Wooleys' car is rooted in the expectations that surround vehicle licensing; in the normal course of events, licenses are granted ministerially. If New Hampshire were unable to condition its license on display of its message, it is unlikely that the licenses would be denied entirely. The leverage it has over the Wooleys is essentially free to the state; the Wooleys receive no compensation for the forfeiture of their rights.

This perception — that the prediction of what the state would do if purchasing constitutional rights were not an option is a crucial baseline from which to begin analysis — has both moral and func-

37. *Hoffa v. Saxbe*, 378 F. Supp. 1221 (D.D.C. 1974) (upholding parole condition requiring Hoffa to refrain from union politics); see *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *Schick v. Reed*, 419 U.S. 256 (1974).

38. Note that this is not the question of whether the citizen is better off than if no benefits were extended at all. Cf. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 201. If this were the test, a threat to discontinue employment in retaliation for criticism of the government would not be viewed as a violation of free speech. Cf. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Perry v. Sindermann*, 408 U.S. 593 (1972), and a threat to discontinue welfare benefits because of the exercise of abortion rights would be consistent with substantive due process. Cf. *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (noting difference between refusal to provide Medicaid funding for abortions and attempt "to withhold all Medicaid benefits from an otherwise eligible candidate because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy").

In arguing that the useful starting point in determining whether an offer should be viewed as impinging on liberty is the "normal" course of events, I adapt a definition pioneered by Professor Nozick. See Nozick, *coercion*, in *PHILOSOPHY, SCIENCE AND METHOD* 440, 447 (1969) (coercion exists when the threatened action will make one worse off than she "would have been in the normal or natural or expected course of events."). The phrase "normal course of events," of course, masks an array of difficulties. I suggest here, and at greater length in Kreimer, *supra* note 1, three variables a court should consider in evaluating what should be considered "normal": prediction, equality and history. Each variable draws, in a concededly eclectic fashion, on differing moral intuitions. My claim is that ignoring any of these variables leaves a decision-maker with an incomplete frame of reference.

tional roots. Morally, if we are to permit the sale of constitutional rights,³⁹ it seems inappropriate to allow the state to purchase them with fools' gold. If the government's offer to purchase private constitutional rights is justified because it expands the citizen's range of choice, an offer giving the citizen only what she would receive in any event cannot claim such justification. Conversely, the prohibition of a transaction in which the citizen gains nothing can hardly be viewed as putting her autonomy at risk.

Functionally, a state forced to make a real expenditure in the purchase of rights is likely to evaluate more carefully whether the purchase is actually necessary. Fiscal constraints will set some boundaries on the tendency of the majority to impose its will. It is precisely the frugality of being able to purchase citizens' rights with funds already committed for other purposes which makes the opportunity to condition "largesse" an invitation to tyranny.

To be sure, it will often be more difficult than it was in the *Wooley* case to predict the result of prohibiting a state's insistence on a forfeiture of rights.⁴⁰ But counter-factual prediction is not the only plausible guide to defining the normal course of events that should serve as a baseline. Our intuitions can be sharpened by examining the issue in light of the claims of equality. Consider the problem of subsidizing the exercise of constitutional rights by tax exemption, which has recurred regularly in Supreme Court cases of recent years.⁴¹ A tax exemption available to most charitable activities, but denied to a single subset of those activities by virtue of the exercise of constitutional rights, seems to be a penalty. It leaves the disfavored activities worse off than they would have been if they had been treated "normally," that is, in the same way as other charitable activities. By contrast, an exemption provided to a smaller subset of

39. There are often good arguments for regarding particular constitutional rights as either inalienable or, at least, not subject to sale to the government. The right to vote and the thirteenth amendment right against involuntary servitude are noncontroversial examples. I have reviewed the general arguments in Kreimer, *supra* note 1, and the particular arguments in the context of free expression rights in Kreimer, *supra* note 23.

Where a particular right is regarded as inalienable, for reasons peculiar to the right, there is yet another boundary to the reach of arguments from government "largesse." Given the relatively uncontroversial nature of government purchases of advertising, the rights at stake in *Wooley* are not of this variety.

40. I have some first-hand experience with the intractability of the real world. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851 (1988), is an effort to predict the effect of prohibiting the release-dismissal practice.

41. *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989); *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Regan v. Taxation With Representation*, 461 U.S. 540 (1983). Compare the problem of mailing privileges presented to the court in *Minnesota Newspaper Ass'n v. Postmaster Gen.*, 677 F. Supp. 1400 (D. Minn. 1987), *appeal dismissed*, 109 S. Ct. 632 (1989).

generally taxed activities seems best regarded as a subsidy. It expands the range of choices available to the favored activity beyond those normally available.⁴²

As a general matter, nothing prevents the government from providing a subsidy to activities it favors. Thus, in *Regan v. Taxation with Representation*,⁴³ the Court upheld a tax preference which allowed lobbying by nonprofit veterans groups without loss of tax deductible status, although other lobbying nonprofit groups were denied that status.⁴⁴ The distinction was held to be permissible on the ground that government was free to subsidize such activities. When government seeks to single out particular exercises of constitutional rights as grounds for denying tax benefits, as opposed to grounds for granting tax advantages, a different result is appropriate. In *Arkansas Writers Project v. Ragland*,⁴⁵ Arkansas' sales tax exemption structure, which exempted all magazines published in the state with the exception of the *Arkansas Times*, was successfully challenged as an abridgment of the freedoms of press and speech.⁴⁶

The Texas scheme before the Court in *Texas Monthly, Inc. v. Bullock*,⁴⁷ which exempted from sales taxes only a narrow class of publications "promulgating the teachings of a religious faith,"⁴⁸ presents a useful test case. Viewed from the baseline of equality, the scheme is not a penalty against the publications which are taxed; they are no worse off than they would be in the normal course of events, for most publications are subject to the sales tax.⁴⁹ But,

42. Note that this is an equality claim of a particular sort. Not all inequalities are impermissible, only those in which an exercise of constitutional rights is singled out for disadvantage. Prizes are permissible; penalties are not.

43. 461 U.S. 540 (1983).

44. The Court has interpreted *Regan's* holding to rest on the fact that nonprofit groups remained free to use private funds to lobby by means of nondeductible affiliates. *FCC v. League of Women Voters*, 468 U.S. 364 (1984). An effort to condition a subsidy on silence on particular topics raises different questions. *Id.* See Kreimer, *supra* note 25.

45. 481 U.S. 221 (1987).

46. *Id.*

47. 109 S.Ct. 890 (1989).

48. *Id.*

49. This need not mean, however, that the tax is by that token consistent with the guarantees of freedom of the press. Justice White's position (*Id.* at 905 (White, J., concurring in judgment)), like that of Justices Blackman and O'Connor (*Id.* at 894 (concurring in judgment)), is that taxes which discriminate on the basis of a publication's content are inconsistent with the press clause, absent compelling justification. *Cf. Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). Justice Brennan's plurality opinion does not address the issue. *Id.* at 901 n.7.

A view of the press clause which is rooted in the structural support that an independent press provides to the mechanisms of popular government might well regard the possibility of discriminatory taxation as so great a threat to press independence that discrim-

again, if we use equality as a baseline, it seems clear that religious publication have been singled out for preferential treatment and subsidy of religion runs afoul of the establishment clause. This, indeed, was the analysis of a majority of the Court.⁵⁰ What is crucial in setting the baseline is the breadth of the classes included or excluded.

Like the use of prediction, a baseline grounded in equality has both moral and functional roots. Morally, the claims of equality in an ethos of impartial respect for citizens are well-known. Exclusion from a generally available benefit is a denigration quite unlike a special grant of favor. Functionally, the broader the class subject to the relative disadvantage, the more powerful the political check exerted by the mechanisms of democracy itself.⁵¹

Equality, of course, carries with it a burden of normative exploration as heavy as the load of empirical investigation associated with prediction. It is old news that a requirement that similar cases be treated in a similar manner entails some metric to determine whether cases are indeed “similar.” In some cases, common sense and common understandings can be sufficient to answer the question, particularly when only a single case is treated anomalously. But whether abortions are “like” other medical treatments which are funded, for example, in that they benefit the health of the pregnant woman, or “unlike” such treatments because of their effect on potential life, is a question that implicates deeper issues of constitutional doctrine. Sometimes the answers may be constitutionally compelled,⁵² and sometimes they may be illuminated by the choices im-

ination is *per se* impermissible, whether it is used to subsidize or penalize. Compare notes 24-25 *supra*. However, if unadulterated this view would raise questions about a wide range of press subsidies, ranging from second-class mailing privileges to press passes. My own view is that if this analysis is to be credible, it must regard the vice of discriminatory taxation as lying in the confluence of its potentially devastating impact and the unchecked discretion it vests in the legislature.

50. *Bullock*, 109 S. Ct. at 894 (Brennan, J., joined by Blackmun, J., and Stevens, J.) (“It is difficult to view Texas’ narrow exemption as anything but state sponsorship of religious belief. . . . What is crucial is that any subsidy afforded religious organizations must be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups.”); *id.* at 905 (Blackmun, J., concurring in the judgment, joined by O’Connor, J.) (“Texas engaged in preferential support for the communication of religious messages [which] offends our most basic understanding of what the Establishment Clause is about.”).

Justice Scalia’s dissent (joined by Chief Justice Rehnquist and Justice Kennedy), however, took the position that the exemption was not a “subsidy” because it “merely refrained from diverting. . . income independently generated by the churches,” and was thus a permissible accommodation of religion. *Id.* at 907.

51. *See, e.g., Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (“Nothing opens the door to arbitrary action so effectively as to allow. . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”)

52. In *Bullock*, for example, the claim that religious publications were “different”

plicit in the funding program. Still, clean results will often be elusive. Arguments from a baseline of equality will often be fields on which broader normative issues are fought out.

We should, therefore, not discount the further insight that may be provided by history. It is often easier to determine what has happened in the past than to predict what will be done in the future or to agree on normative premises necessary for a definition of equality. Withdrawal of a benefit historically available is more problematic, both morally and functionally, than a failure to grant the benefit in the first place.

Morally, the baseline of history draws on both prediction and equality. The fact that government has granted a benefit in the past without the offensive conditions suggests, in the absence of changed circumstances, that the best prediction is that it could be expected to do so in the future. From the perspective of equality the grant of benefits in the past allows prospective beneficiaries to raise claims that they have a prima facie right to similar treatment. And history has a third moral claim: disruption of expectations is itself an evil.⁵³

Functionally, in addition to reflecting the constraints of prediction and equality, a focus on history is sensitive to the phenomenon of sunk costs. Deprivation of current "largesse" is more likely to disrupt existing systems for exercising constitutional rights than the failure to grant new benefits. A newspaper, for example, is likely to feel the pressure of a denial of mailing privileges more strongly than the denial of access to a newly available source of satellite data. Operating procedures and capital investments keyed to a given service in the first case are not constraints in the second.

Finally, history casts light on the situation of government as well as that of the citizens. A government that has entirely denied the proposed benefit in the past can more plausibly claim it seeks to exercise no greater control over its citizens when it conditions a benefit than can a government that had previously granted such benefits. Moreover, the judicial interventions required to preserve the previous status quo may be less intrusive than those required to construct alternate benefit structures which never previously existed.

was held to be constitutionally barred by the establishment clause. The state argued that it was constitutionally mandated to avoid state interference with religious activities. *Bullock*, 109 S.Ct. at 901.

53. Cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

C. Theory, Proof, and Judgment

These explorations of the swamp suggest, I think, certain discrete cartographic tasks for theory, proof, and judgment. For theory, the challenge is to search out the bases in process and structure which undergird particular constitutional limitations. To the extent that a limitation finds its root outside of claims for individual autonomy, we can bypass the swamp entirely. The more the limitation is rooted in individual will, the more the swamp will impede our progress.

Where we must traverse the swamp, we still need not be lost in the mire of trackless balancing, for, in terms of individual autonomy, the challenge is to investigate the relation of the conditioned "largesse" to the normal course of events. The tasks of proof and judgment are to explore the context of the particular "largesse" at issue, along paths guided by landmarks drawn from prediction, equality, and history. That those guideposts will not always be clear, and that they may, on occasion, point in different directions should not unduly trouble us. The task of constitutional commentary can do no more than highlight the relevant considerations which bear on a problem; it cannot make all problems easy. A judge cannot, in this area any more than in others, do without wisdom.