

# Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses

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The current academic discussion of unconstitutional conditions has two distinct components. The first is critical; it attacks the proposition ascribed to Justice Oliver Wendell Holmes, among others, that because there is no "right" to government benefits, the government may condition the grant of those benefits free of constitutional restraint.<sup>1</sup> The second is more positive. It offers broad theoretical understandings of the unconstitutional conditions question and attempts to develop a comprehensive framework for resolving

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1. Holmes' most famous articulation of this principle is found in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892):

This petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for him in which the servant does not agree to suspend his constitutional right of free speech, as well as idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.

*Id.* at 220, 29 N.E. at 517-18.

The Holmes' position has been attacked in Epstein, *The Supreme Court 1987 Term Foreword: Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304-14, 1380-87 (1984); Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1120-23 (1987); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). See also Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

unconstitutional conditions issues.<sup>2</sup>

The commentary has been remarkably effective in its criticism. The contention that constitutional protection does not apply to government strictures tied to the granting of benefits or other forms of governmental largesse has been completely discredited.<sup>3</sup> The writers have shown that constitutional protection does not automatically end because government regulation is tied to the receipt of a benefit. Government may exercise as much, if not more, control over individual freedom when it chooses to affirmatively dispense its resources as it does when it chooses to influence conduct by direct prohibition.<sup>4</sup> Moreover, as has also been shown, the distinction between benefits and deprivations holds no value in an activist welfare state because the boundaries between benefits and deprivations are often not susceptible to clear definition.<sup>5</sup>

The commentary has been less successful, however, in its attempts to develop a general theory. Because the government's remedial programs have touched virtually all areas of social and economic life, the problem of unconstitutional conditions arises in a myriad of contexts and affects the full spectrum of constitutional rights.<sup>6</sup> Any attempt to fashion a comprehensive theory of unconstitutional conditions would be quite far-reaching. It would literally suggest a unifying theory cutting across all of constitutional law.

It is my conclusion that despite, or perhaps because of, its ambition the search for a comprehensive theory of unconstitutional conditions is ultimately futile. Rather, whether a governmentally imposed condition upon the receipt of a benefit is unconstitutional depends upon the definition of the particular constitutional protection involved and not upon the application of an independent theory purportedly universal to all unconstitutional conditions analysis.

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2. Epstein, *supra* note 1, at 15-28; Kreimer, *supra* note 1, at 1351-95; Rosenthal, *supra* note 1, at 1120-24.

3. See McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO. L. REV. 255 (1989) (concluding that virtually all scholars and judges now reject the Holmes position).

4. Kreimer, *supra* note 1, at 1324-26, 1333-47; Rosenthal, *supra* note 1, at 1142-61; Van Alstyne, *supra* note 1, at 1449-51.

5. Professor Kreimer, for example, has noted that:

the reach of legitimate government action has extended far into areas previously reserved to the family, market and church, and this extension confounds easy definition of positive and negative rights . . . [i]f we are to distinguish sensibly among allocations that results in impacts on the exercise of constitutional rights, the mere invocation of a line between positive and negative rights will not do the job.

Kreimer, *supra* note 1, at 1326. See also Rosenthal, *supra* note 1, at 1142-61; Van Alstyne, *supra* note 1, at 1449-58.

6. Epstein's article, for example, applies unconstitutional conditions analysis to such diverse areas of constitutional law as federalism, the takings clause, and the first amendment. See Epstein, *supra* note 1.

My skepticism as to the validity of a broad theory of unconstitutional conditions arose when I began to envision the application of such a theory to the jurisprudence surrounding the religion clauses of the first amendment. The religion clauses seemed particularly well-suited to this task since they comprise the one constitutional law area which is concerned not only with measuring unconstitutional deprivations but also with measuring unconstitutional benefits. The establishment clause, of course, has been generally construed as providing constitutional limits on aid<sup>7</sup> while the free exercise clause concerns constitutional limits on deprivation.<sup>8</sup> As such, the clauses seemed to be a particularly fruitful point for investigating whether an unconstitutional conditions analysis might accurately uncover the holy grail of baselines from which constitutional violations are to be measured.

I first turned to the establishment clause. Initially, the possibility that an unconstitutional conditions theory might help elucidate this legendarily vague area seemed promising. If the government's refusal to grant a benefit to religious organizations that it provides to nonreligious groups is construed as a penalty, it would suggest that the granting of that benefit to religious organizations could not be considered aid.<sup>9</sup> The grant should not raise the specter of advancement or sponsorship of religion — the paradigmatic establishment concern.<sup>10</sup> Instead, the grant to the religious organization would be seen simply as neutral or perhaps even as constitutionally required.<sup>11</sup>

The problem, however, is that while this aid/penalty discovery may help us in certain cases, it certainly is not the end-all on the meaning of establishment. As I shall discuss subsequently,<sup>12</sup> it posits that whether a government benefit program works as a penalty or

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7. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Strictly speaking the Court's establishment test also applies to government actions that "inhibit" as well as those which address religion. However, the Court has yet to utilize the establishment clause to strike down any legislative provision that purposefully inhibits religion and the use of the inhibits language in the test is "something of a loose end." See Marshall & Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L. J. 293, 294 (1986).

8. See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963).

9. McConnell, *supra* note 3, at 266.

10. See, e.g., Marshall, "We Know It When We See It" *The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986).

11. See *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1979). See also *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). See generally *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (state vocational aid to blind student at Christian college did not advance religion).

12. See *infra* notes 22-25 and accompanying text.

aid to a religious organization should be judged in light of the availability of the benefit program to nonreligious entities, a highly controversial assumption. Moreover, for establishment clause purposes, it appears that the form of the benefit to religious organizations may be just as significant, if not more significant, than the question of whether a particular grant to a religious organization is "aid" vis-à-vis benefits provided to nonreligious entities.

For example, in *Larkin v. Grendel's Den*,<sup>13</sup> the Court found the form of the aid to the religious organization rather than the extent of the aid to be the constitutionally dispositive factor. At issue in *Grendel's Den* was a Massachusetts provision which granted to churches and schools the right to prevent the liquor licensing of an establishment located within 500 feet of the organization's premises. Although conceding that a flat ban on liquor licensing near churches might be constitutional,<sup>14</sup> the Court struck down the statute on the grounds that it purportedly vested in the church an ostensible zoning veto which, according to the Court, "enmeshe[d] churches in the process of government."<sup>15</sup> The issue of whether the benefit was affirmative "aid" or not was largely irrelevant to the Court's analysis.

The parochial school aid cases also demonstrate that the establishment issue is often less a question of the amount of aid than it is a question of the form of support and the symbolic message of the union of church and state (or lack thereof) that the form of aid purportedly sends. The significance of the form of aid and the irrelevance of the degree of aid was recognized implicitly by the Court in a number of cases including *Wolman v. Walter*<sup>16</sup> and *Meek v. Pittenger*,<sup>17</sup> in which the constitutionality of a parochial school aid program was held to depend entirely upon the location where the state aid was provided. If the aid was provided off the parochial school's premises it was valid; if provided on the school grounds it was unconstitutional.<sup>18</sup> More recently, the Court has explicitly recognized the

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13. 459 U.S. 116 (1983).

14. *Id.* at 123-24.

15. *Id.* at 127.

16. 433 U.S. 229 (1977).

17. 421 U.S. 349 (1975).

18. The *Meek* Court concluded that a state may not provide counseling services to parochial school children on parochial school grounds. *See id.* at 367-72. The *Wolman* court maintained that a state could provide the same services to parochial students in a mobile home across the street from the school. Counseling provided at this apparently neutral site would retain its secular character, whereas counseling within the parochial school would be imbued with religious overtones. *Wolman*, 433 U.S. at 247.

Similarly, in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), a program permitting public school students to be released from school classes to attend religious classes held within the public school building was struck down. However, in *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court upheld a similar release time program when the religious classes were held in separate buildings owned or operated by the religious institution.

significance of the form of aid over its substance. In *Grand Rapids District v. Ball*,<sup>19</sup> the Court invalidated a program in which the state provided classes (on secular subjects) to parochial students during the school day in rooms leased from the parochial schools. The Court found the program created an "impermissible effect under the Establishment Clause"; specifically "the symbolic union of government and religion in one sectarian enterprise."<sup>20</sup> Again, the question of whether the program constituted affirmative aid to religion was not the critical component in the constitutional analysis.

Perhaps the parochial school aid cases may be distinguished on the grounds that the question of whether the state in those cases provided special benefits to religion or simply equalized the benefits available to parochial students with those available to other students was not clear.<sup>21</sup> Nevertheless, I would suggest that even when an unconstitutional conditions analysis would lead indisputably to the conclusion that a failure to provide a grant was a penalty, the concern with the form of the aid might lead to a finding that in appropriate cases the establishment clause had been violated.

Assume a government arts agency provides a building grant as an award to the organization that submits the most creative architectural design. One would suppose that if the agency refused to give the award to an otherwise meritorious applicant because that applicant was a Democrat, the agency action would be found unconstitutional as a penalty imposed upon the applicant's political affiliation.<sup>22</sup> Assume, however, that a neutral application of the creative standard would result in the decision that the award should be given to a church to finance the construction of a new chapel. In such a case, even though the failure to award the grant to the church may be construed as a penalty in the unconstitutional conditions sense, establishment principles would still prevent the granting of the award. A money grant to a church to use in a decidedly religious enterprise is the archetypical establishment violation.<sup>23</sup>

19. 473 U.S. 373 (1985).

20. *Id.* at 392.

21. The Court, in *Mueller v. Allen*, 463 U.S. 388 (1983), for example, apparently found it significant that the program at issue in that case benefited all school children including those attending public schools. Parochial aid programs, generally, although they may be an attempt to equalize benefits available to parochial students with those available to public school children, are usually addressed only to nonpublic school benefactors/beneficiaries. They may be thought therefore to single out parochial schools for beneficial treatment.

22. Kreimer, *supra* note 1, at 1338.

23. *See Grand Rapids School Dist.*, 473 U.S. at 385; *see also* *Witters v. Washing-*

Of course, at this point one objection is that any arts award example is not well taken since it assumes that awards to secular organizations should be treated similarly to awards to religious organizations. The failure to give the award to the church is a penalty only if one assumes that churches and other religious entities are to be treated similarly to nonreligious organizations. Thus it might be argued that the establishment clause requires different treatment for religious entities and, therefore, it is not a disruption of unconstitutional conditions analysis to suggest that the church be denied the design award.

This criticism, however, is exactly the point. The establishment clause indicates that there are different considerations governing government aid to religious organizations that do not exist with respect to government aid to nonreligious organizations.<sup>24</sup> A theory of unconstitutional conditions cannot unify a problem which is essentially in disunity.

A second objection may be leveled from an opposite perspective. Essentially this argument posits that if the failure to provide the award is a penalty under an unconstitutional conditions analysis, it must be permissible under the establishment clause. Accordingly, there would be something wrong with the establishment clause test if it is construed to prohibit the award. How could the establishment clause require an organization to suffer a penalty?

The problem with this line of attack, however, is that its use of unconstitutional conditions analysis inherently assumes its own meaning of establishment. It is, in essence, a circular argument. To illustrate, let us return to the arts agency example, where we have concluded that failure to give the award to the church constitutes a penalty. That conclusion, however, depends upon the premise that the government may not distinguish between religious and nonreligious beneficiaries. This premise, in turn, depends upon a fundamental understanding of establishment and it is an understanding, moreover, that is at the least controversial. Government can and sometimes must treat religion differently. The state cannot elect to begin its school day with the reading of a twenty-one word Regent's Prayer<sup>25</sup> although it may start the day with twenty-one word, non-religious passages from Keats, Shakespeare, or Adam Smith.

This is not to deny that powerful arguments exist which advocate that the disunity between religion and nonreligion should not extend

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ton Dep't of Servs. for the Blind, 474 U.S. 373 (1986); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). *But see* *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980).

24. *Buckley v. Valeo*, 424 U.S. 1, 92-93 (1978); Kameshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979).

25. *Engel v. Vitale*, 370 U.S. 421 (1961).

to arts agency grants or similar programs, and that with respect to those programs religious and nonreligious organizations should be treated equally. But those arguments must distinguish the contexts where religion and nonreligion are appropriately treated differently and, more importantly, those arguments are ones that must be constructed and debated in establishment terms. They cannot be short-circuited by any appeal to the doctrine of unconstitutional conditions. The application of an unconstitutional conditions understanding becomes useful only if we accept that the establishment clause demands equality in the treatment of grant beneficiaries. Moreover, even in this circumstance, unconstitutional conditions analysis is merely a secondary analytical tool aiding the interpretation of the substantive right. It is not the focus of the interpretation.

A similar conclusion also arises in the application of unconstitutional conditions analysis to the free exercise clause. The Supreme Court, in its free exercise jurisprudence, has been remarkably miserly in finding constitutional violations. In fact, despite a number of factually sympathetic cases,<sup>26</sup> the Court has found free exercise violations only in two areas. The first of these — freedom from compulsory education (sometimes subtitled the special place of the Amish in constitutional law)<sup>27</sup> — is not particularly significant here. The second, however, which involves the right not to be excluded from the receipt of unemployment compensation benefits, is the paradigmatic unconstitutional conditions case. *Sherbert v. Verner*,<sup>28</sup> the first of what are now four free exercise unemployment compensation cases,<sup>29</sup> is one of the classic examples of unconstitutional conditions cases. In *Sherbert*, the Court held that the disqualification from unemployment compensation eligibility of a person who was unavailable for work because of religious conviction was a penalty on the claimant's right of free exercise.<sup>30</sup> *Sherbert* thus stands for the proposition that a condition tied to a benefit can, in certain circum-

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26. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (forest traditionally used for Indian religious exercise not protected from harvesting or road construction); *Goldman v. Weinberger*, 475 U.S. 563 (1986) (military regulation prohibiting wearing of religious headgear while on duty not a violation of the first amendment); *United States v. Lee*, 455 U.S. 252 (1982) (upholding Congress's failure to exempt employers of Amish faith from payment of Social Security tax).

27. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

28. 374 U.S. 398 (1963).

29. In addition to *Sherbert* the other cases are: *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Thomas v. Review Bd.*, 450 U.S. 707 (1981).

30. *Sherbert*, 374 U.S. at 406.

stances, amount to a free exercise violation.

The *Sherbert* conclusion that the grant of benefits is not immune from constitutional scrutiny, however, appears to stand at the limit of the utility of unconstitutional conditions analysis in free exercise interpretation. Unconstitutional conditions theory does not tell us, for example, why free exercise challenges so infrequently prevail nor does it inform us as to the basic definition of the free exercise protection itself.

As with establishment, the nature of free exercise must be separately identified in order to determine whether a government action amounts to a constitutional violation. It may be that an unconstitutional conditions analysis may help us understand that a denial of a benefit should be construed as a deprivation, but that matter alone does not end the inquiry. According to the Court in the recent *Lyng* case,<sup>31</sup> for example, an absolute deprivation of free exercise rights, if incidentally imposed by the government, may not be as constitutionally suspect as a coercive deprivation which rewards or encourages behavior antagonistic to one's own religious beliefs.<sup>32</sup> What *Lyng* has to say about free exercise deprivations is interesting. *Lyng's* suggestion that the heart of the free exercise protection pertains to government actions that influence rather than those that incidentally inhibit religious exercise is a critically important statement on the nature of the first amendment right.<sup>33</sup> It may even suggest that the demands of free exercise are such that the Holmes position<sup>34</sup> is completely inverted — government programs which tie conditions to the receipt of government benefits may be more constitutionally suspect than are direct government infringements.<sup>35</sup> On the other hand, the mere conclusion that someone in some sense has suffered a deprivation is neither interesting nor important. It must be shown that the deprivation is constitutionally significant.<sup>36</sup> And while *Sherbert* tells us that a deprivation may occur even if it is posed in terms of a grant, it does not tell us when that deprivation is of constitutional

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31. *Lyng v. Northwest Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988).

32. *Id.* at 1326. *Lyng* might be read more narrowly as only holding "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Id.* at 1325 (quoting *Bowen v. Roy*, 476 U.S. 693, 699 (1986)).

33. It may even explain the distinction between such cases as *Sherbert v. Verner*, 374 U.S. 398 (1963), and *United States v. Lee*, 455 U.S. 252 (1982).

34. *See supra* note 1.

35. A possible rationale behind the distinction is that free exercise values may be seen to be more threatened when the government actively influences religious belief by setting up a system of rewards and penalties, than it does when it simply makes a particular religious practice illegal or more difficult to exercise.

36. For a recent, thoughtful discussion of burden under the free exercise clause, see Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).



import.

At this point I suppose two additional criticisms could be made of my critique. First, it could be argued that to the extent that I am relying on cases in my analysis I am missing the point. If unconstitutional conditions were properly understood, the cases would have been decided differently. (Indeed, I suppose that the most telling argument could be that anyone's critique which relies on Supreme Court religious clause cases for anything, other than as an example of unprincipled jurisprudence, is automatically suspect.) My point, however, is not to defend the cases. It is that unconstitutional conditions theory cannot explain the various types of constitutional problems that the religion clauses address. The question of establishment is more complex than the question "is there aid?" The question of free exercise is more complex than the question "has there been a deprivation?"

The second counter-criticism could be that perhaps the religion clauses are not, as initially posited, appropriate candidates for unconstitutional conditions theory. It might be argued that because the clauses uniquely impose proscriptions on both deprivations and aid, a strict adherence to a rigid baseline may be inappropriate. As Professor McConnell has argued there must be some room between where one constitutional proscription ends and the other begins.<sup>37</sup> Yet, that room might not exist if there were a strict allegiance to a demarcation line between aid and penalties.

It may be that the religion clauses are unique, in some respects, but not, I would submit, in illustrating the invalidity of a broad unifying theory of unconstitutional conditions. Unconstitutional conditions theory, as Professor Epstein has acknowledged, is essentially a search for baselines.<sup>38</sup> Such a search, of course, is appropriate if by baseline one simply means the point at which government action is construed as an intrusion into the realm of constitutionally protected activity. In that sense, one could say that all constitutional law is a search for baselines.

The theory of unconstitutional conditions goes awry, however, when it suggests that baselines can be determined by a set of universal factors. First, lines from which we judge benefits and deprivations vary with respect to the particular constitutional provisions. Consider two women, both of whom have been refused state-funded abortions. Assume that one has been denied because the state refuses

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37. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 3.

38. Epstein, *supra* note 1, at 1.

to fund all abortions, while the other, a prochoice activist, has been denied because the state refuses to fund abortions only to those women who advocate abortion rights. In both cases the deprivation is the same but the “baseline” of the constitutional liberties involved, freedom of speech and substantive due process, are vastly different.<sup>39</sup> Speech imposes a “baseline” of content neutrality — substantive due process apparently does not. Accordingly, a different set of factors will have to be considered in order to determine the constitutional issues involved.

Second, any notion of universal baselines is belied by the fact that baselines may not even remain constant within one constitutional protection. As Professor Sunstein has pointed out in his article on *Lochner*, baselines may vary according to the historical period in which the constitutional protection is viewed.<sup>40</sup> As Sunstein has illustrated, for example, a change in the understanding of economic substantive due process occurred, at least in part, because of the common law view that business regulation was an infringement on the rights of employers. That is, the nonregulation “baseline” changed as state regulation became the norm.<sup>41</sup> Obviously, then, if baselines change, it cannot be maintained that they are definable by a set of constant factors.

Third, the religion clauses are typical in illustrating that a resort to a universal system of baselines — other than the “baseline” which is essentially the understanding of the constitutional provision itself — is too simplistic. Unconstitutional conditions theory implicitly suggests that there are constant points of demarcation from which constitutional deprivations may be judged. Even Professor Kreimer’s analysis, which includes a recognition of three baselines, appears to suggest that the point of demarcation may be found by somehow combining the three baselines into one linear mode.<sup>42</sup> Yet a number of “baselines” running through a particular constitutional problem may exist at any one time and some, unfortunately, may be at cross purposes.

For example, establishment clause jurisprudence has recognized a number of points of reference that might be termed baselines from which constitutional violations are to be judged. These include neutrality, the appearance of sponsorship, the avoidance of direct aid, and accommodation. Strict adherence to any of these baselines, how-

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39. Compare *Speiser v. Randall*, 357 U.S. 513 (1987) (striking down a California provision giving property tax exemptions to war veterans on the condition they sign a loyalty oath) with *Harris v. McRae*, 448 U.S. 297 (1979) (state may refuse to fund medically necessary abortions).

40. Sunstein, *Lochner’s Legacy*, 87 *COL. L. REV.* 873, 875, 916 (1987).

41. *Id.* at 876.

42. Kreimer, *supra* note 1.

ever, might lead to running afoul of one of the others.<sup>43</sup> This is one of the reasons why the establishment clause jurisprudence is as convoluted as it is. The establishment phenomenon, quite simply, is not linear. Neither, I suspect, is most of constitutional law.<sup>44</sup>

To conclude, there is no question we owe a great deal to the commentators in that they have effectively destroyed yet another one of Holmes' aphorisms. They have not, however, found the unifying principle of constitutional law for which they have searched. I suppose, in ending, I should say that when I talked to Professor Epstein about his article before it appeared,<sup>45</sup> he said that not developing a comprehensive theory was not significantly challenging. He may be right. The conclusion that there is no underlying theory of unconstitutional conditions is the easy one to reach. Facility aside, I also think it is the correct one.

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43. See generally Marshall, *supra* note 10, at 513.

44. Another constitutional provision which, because of its inconsistent baselines, is also nonlinear is freedom of speech. On the one hand, within speech jurisprudence there is a "baseline" of content neutrality. See generally Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone & Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583. On the other hand, a baseline also exists which demands that no speech should be driven from the marketplace. These two baselines may occasionally work at cross-purposes, as when an organization requires a special content based exemption from an otherwise content neutral regulation in order to be able to survive in the marketplace of ideas. *Id.*

Indeed, the speech freedom may present even more complex "baseline" conflicts. Assume a state arts agency conditions a bicentennial grant to an artist based upon the requirement that the artist depict the Constitution in a favorable light. Further, assume that the artist's work turns out to be critical of the Constitution and the grant is revoked. If the artist sues, alleging a violation of freedom of speech, is there only one baseline involved in this case? If so, what is it? Certainly our grantee has suffered a deprivation that could amount to a first amendment violation in certain circumstances (if, for example, the artist's grant was revoked because he was not a Democrat or had failed to take a loyalty oath). But there are a number of "baselines" running through this hypothetical, including content neutrality, historical acceptance, and wealth redistribution. Concluding there has been a deprivation on one set of criteria does not tell us whether that deprivation is constitutionally significant with respect to an overall assessment of the speech freedom. The ultimate constitutional resolution depends only upon a detailed understanding of freedom of speech, not upon a universal theory of unconstitutional conditions.

45. Epstein, *supra* note 1.

