Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause

Michael W. McConnell

Follow this and additional works at: https://digital.sandiego.edu/sdlr

Part of the Law Commons

Recommended Citation


Available at: https://digital.sandiego.edu/sdlr/vol26/iss2/7

This Article is brought to you for free and open access by the Law School Journals at Digital USD. It has been accepted for inclusion in San Diego Law Review by an authorized editor of Digital USD. For more information, please contact digital@sandiego.edu.
One great advantage of a general theory of unconstitutional conditions is that it makes it more difficult for courts to disguise their antipathy or indifference toward the exercise of particular constitutional rights by manipulating undefined notions of "coercion" and "subsidy." The Supreme Court has held that the government may not deny benefits to a person who is out of work for religious reasons; but it may deny benefits to those who lose work because of pregnancy or participation in a labor dispute. It has held that government subsidies may (and in some instances must) be denied to corporations or organizations because they engage in lobbying or religious activity, or did not receive enough votes in a recent election, but may not be denied on the ground that a potential recipient engages in political editorializing, or publishes a magazine of "general interest" rather than a religious, professional, trade, or sports...
Presumably, some such selective funding schemes are constitutional and some are not. But it is not legitimate to distinguish between them by mere assertions that some are instances of “penalties” or “coercion” while others are simply refusals to extend “bene-

fits” or “subsidies.” A general theory of unconstitutional conditions forces courts and commentators to explain why they respond in different ways to similar burdens on different rights. In this essay I will contend that the courts’ treatment of funding of religious and secular institutions conflicts with the analysis of government funding schemes almost universally accepted in other contexts. In doing so, I will accept what has emerged as common ground across the ideological spectrum: that the crude distinction between penalties and subsidies now employed in constitutional law is misleading and will not work. My thesis is that the Supreme Court’s test for an establishment of religion, set forth in Lemon v. Kurtzman, relies squarely on this crude and misleading distinction and must therefore be rejected or reinterpreted.

I begin with a restatement of the core of the unconstitutional conditions consensus. This does not purport to be a comprehensive analysis of unconstitutional conditions, for it leaves unanswered a number of questions that are vital to resolving some unconstitutional conditions problems. In particular, I will not deal with the question of government justification, which often turns on the “germaneness” of the condition to the benefit. I can avoid this question because the only justification for refusal to fund religious institutions qua religious institutions is the Court’s mistaken conception of “subsidies.” Nor will I deal with the distinction between “bribes” and “threats.” Though relevant to some constitutional prohibitions, this distinction is not relevant to the religion clauses because they prohibit “bribes” (establishments) no less than “threats” (free exercise violations). To demonstrate the unsoundness of the Court’s religious


9. In McConnell, Political and Religious Disestablishment, 1986 B.Y.U. L. REV. 405, I compared the legal status of government-required contributions to political causes with that of government-required contributions to religious causes and concluded that a more consistent treatment of the areas would improve the law in both. In McConnell, The Selective Funding Problem: Abortions and Religious Education (forthcoming), I compare the parochial school and abortion funding cases. Portions of this essay are a summary of points developed at greater length in the forthcoming essay.


“aid” cases, all that is necessary is the basic core of the unconstitutional conditions doctrine.

I. UNCONSTITUTIONAL CONDITIONS: THE CONSENSUS

Virtually all judges and constitutional scholars now espouse some version of the unconstitutional conditions doctrine, however controversial its precise contours, function, or relevance might be. All reject the view that liberty is secure so long as the government does not take away the citizen’s own common law entitlements to life, liberty, and property. All agree that sometimes, though not always, the denial of a government “benefit,” a form of assistance that would not have been available under common law and which could be repealed in toto by the legislature at any time, is a “penalty” on the exercise of a constitutional right. The task of constitutional scholarship in this area is to work out when the failure to subsidize intrudes upon a constitutional right and when it does not.

The consensus just described is a negative consensus—an agreed rejection of the simplistic assumption that whenever the government extends a benefit to a person or group it is giving “aid,” no matter what the context may be. In Speiser v. Randall, a classic case, the state of California offered tax benefits to all World War II veterans except those who refused to sign an oath that they did not advocate the violent overthrow of California or the United States. Justice Clark’s dissenting opinion is an excellent example of the conception of “aid” that is now discredited:

This is not a criminal proceeding. Neither fine nor imprisonment is involved. So far as [the State is] concerned, appellants are free to speak as they wish, to advocate what they will. If they advocate the violent and forceful overthrow of the California Government, California will take no action against them under the tax provisions here in question. But it will refuse to take any action for them, in the sense of extending to them the legislative largesse that is inherent in the granting of any tax exemption or


15. My understanding of the role of the unconstitutional conditions doctrine in constitutional law is thus similar to Professor Sullivan’s. I refer readers to her article for elaboration of the point. See Sullivan, supra note 12 at 1491-21.

To Justice Clark, government is neutral when it neither imposes a criminal sanction nor extends "legislative largesse." The implicit baseline for government neutrality is the individual's own common law entitlements. When government adds to those entitlements it is giving a "subsidy"; when government takes away from those entitlements it is inflicting a "penalty."

This approach conceptualizes public law in traditional private law terms. The government, like a private person, owns money and other forms of property. Just as I cannot be injured by my neighbor's use and enjoyment of his property (unless he uses it to invade my private rights), so also I cannot be injured by the government's disposition of its property (subject to the same limitation). If the government chooses to confer a benefit upon me, I am better off for it. If the government chooses not to confer the benefit, I am no worse off for it. If the government offers a benefit conditioned upon my acting in a particular way, I am likewise no worse off; I will accept the offer if the benefit is worth more to me than compliance with the condition. My liberty is invaded only if the government uses force to take away my vested rights for refusing to comply with its directives.

There is a fundamental flaw in this argument. Some theorists will identify other flaws and will suggest further complications; but, at the core of the unconstitutional conditions doctrine is the identification of at least this fundamental problem.

The problem is that the traditional private law story treats "the government" as if "it" owns money and property for "its" own benefit. This is a misunderstanding of our form of government. The government obtains "its" money through taxation, a power which it exercises (at the federal level) only to "provide for the common Defense and general Welfare of the United States." "Its" money is really "our" money -- everyone's money. Even if government resources are procured by means other than taxation (shrewd bargains like the Louisiana Purchase, or spoils of war), the property is held for public use. "The government's" property is really "our" property, property held in trust for the common benefit.

17. Id. at 540-41 (Clark, J., dissenting) (emphasis in original).
18. For at least the past 100 years, this conception of rights has been contested even in the private sphere, and has in large part been abandoned by legislative action. Modern statutory law holds that B can injure A by refusing to deal with him (this is the premise of the civil rights laws and antitrust laws, among others) and that D can injure C by entering into a consensual transaction with him (this is the premise of the minimum wage, maximum hour, occupational safety, and rent control laws, among others). My analysis does not depend upon the traditional or any other conception of private rights in the abstract. My point is simply that the old private law conception never was valid for public law disputes.
Under our federal Constitution and the various state constitutions, the legislature has broad discretion to decide what expenditures and uses of property will promote the general welfare.\textsuperscript{20} This includes the power to engage in redistribution of wealth, where wealth is broadly defined as access to any sort of resource. Some forms of redistribution are widely considered praiseworthy — especially redistributions from the wealthy and the strong to the poor and the weak. For the most part, these redistributions are constitutional.\textsuperscript{21} Other forms of redistribution result from special interest deals that are wasteful and ethically repugnant. These, too, are generally constitutional, so long as the affected interest groups are not defined on suspect grounds, such as race.\textsuperscript{22} But, the Constitution does not permit redistributions of wealth from those who exercise a constitutional right to those who do not.

The main difference between private law and public law is that in disputes against the government, individuals have, in addition to their common law rights, a presumptively equal right to share in the benefits of government action. The equality is “presumptive” because the legislature can adjust these allocations in the public interest, just as it can, within limits, adjust common law rights in the public interest. However, the government can no more deprive a person of his presumptively equal share on account of his exercise of a constitutional right than it can deprive a person of a common law right on such a ground. The baseline for determining deprivations includes all of a person’s entitlements, including those to government “benefits,” not just common law rights. The deprivation of rights, whether common law or statutory, requires a legitimate justification;

\textsuperscript{20} “In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.” South Dakota v. Dole, 483 U.S. 203, 207 (1987); Helvering v. Davis, 301 U.S. 619 (1937). Indeed, so deferential is the standard of review that the Court has questioned whether the “general welfare” restriction is judicially enforceable. South Dakota v. Dole, 483 U.S. at 208 n.2; Buckley v. Valeo, 424 U.S. 1, 90-91 (1976); cf. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) (interpreting the “public use” requirement of the eminent domain power as equivalent in scope to the police power).

\textsuperscript{21} With two caveats: The principle of distribution must not be based on constitutionally-proscribed grounds, and the burden of the redistribution must be allocated among taxpayers in accordance with constitutional standards. Congress could not pass a bill requiring Joe Smith, and only Joe Smith, to give money to the poor.

\textsuperscript{22} It is said that classifications must have a “rational basis,” but this requirement is easily met. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970). Some commentators believe that democratic discretion to prefer some citizens over others is further limited by additional principles derived from political theory. See Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689 (1984); R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).
that a person has exercised a constitutional right is not, except in special circumstances, a legitimate justification.

In Speiser, the state of California chose to redistribute wealth from all the citizens to World War II veterans. That was a form of redistribution of wealth within the range of democratic choice. Once that decision was made, it became the baseline for neutrality. Veterans now had an entitlement to the tax benefit, in addition to their common law entitlement not to be “fined” or “imprisoned.” The state was asked to “take action for” the appellants only as veterans, not as advocates of the violent overthrow of the government. The government was not asked to “aid” their advocacy. Indeed, as Justice Brennan explained for the Court, denial of tax benefits to otherwise eligible veterans was a penalty:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellants are plainly mistaken in their argument that, because a tax exemption is a “privilege” or “bounty,” its denial may not infringe speech.\(^2\)

The general principle may be stated as follows: All citizens have a presumptively equal right to share in government benefits and a presumptively equal obligation to bear the burden of government action. The legislative branch may adjust the benefits and burdens of government action (redistribute wealth) in the interest of the democratically defined public good. But it may not redistribute wealth on the basis of an individual’s, or group’s, exercise of a constitutionally protected right, unless it can show that it has a legitimate justification for doing so.

II. EQUALITY, COERCION, AND UNCONSTITUTIONAL CONDITIONS

The doctrine of unconstitutional conditions may appear to be a special application of the antidiscrimination principle: the government is forbidden to discriminate on the basis of the exercise of a constitutional right, just as it is forbidden to discriminate on the basis of race and other similar invidious grounds. The antidiscrimination doctrine is distinct, however, from unconstitutional conditions doctrine in that the former is concerned with largely immutable characteristics while the latter is concerned with choice.\(^2\) Antidiscrimination doctrine is concerned with who you are; unconstitutional conditions doctrine is concerned with what you do.

\(^{23}\) Sometimes the exercise of a constitutional right is sufficiently related (germane) to a legitimate governmental interest that the interference is permitted. See Sullivan, supra note 12, at 1456-76.


\(^{25}\) I am not claiming that the immutability of the condition is what makes discrimination invidious, only that immutability is a characteristic of these cases.
Unconstitutional conditions are a hybrid between invidious discrimination and pure coercion. Invidious discrimination imposes a penalty, which is unequal treatment or deprivation of a benefit to which one would otherwise be entitled, whether by common law or by statute. But, invidious discrimination leaves the individual's freedom of choice unimpaired, since the ground for discrimination is an immutable characteristic which he has no power to change. By contrast, pure coercion destroys the individual's freedom of choice but, if successful, imposes no unequal treatment (no penalty). An unconstitutional condition, in contrast to both, poses a choice: the choice between foregoing a liberty or suffering unequal treatment.

These distinctions can be illustrated by three simple hypothetical laws, each of them unconstitutional but each for a different reason. Law Number 1: No blacks may receive police protection. Law Number 2: No one may celebrate the sacrament of communion (enforced by sending police to all the churches and forcibly blocking communion). Law Number 3: No one who celebrates the sacrament of communion will receive police protection. Under Law Number 1, there will be redistribution of wealth (everyone is taxed and only non-blacks will receive benefits), but there will be no effect on conduct. No one will cease to be black, because they cannot. Under Law Number 2, there will be an effect on conduct (no one will receive communion), but no redistribution of wealth. If everyone is forced to comply, there will be no sanctions. Under Law Number 3, some will forego communion and receive full and equal police protection, while others will take communion and suffer unequal treatment. The essence of an unconstitutional condition is that the individual faces the choice of altering behavior in an area of constitutionally protected liberty or suffering the penalty of an adverse redistribution of wealth.

III. Penalties, Subsidies, and Redistribution

An unconstitutional condition is thus defined as a choice between foregoing a constitutional right or suffering an adverse redistribution of wealth. This can be restated in the traditional, though often misused, terms of penalty and subsidy. The mistake is to view penalties and subsidies against the baseline of common law entitlements — to say that anything that improves upon common law entitlements is a subsidy and anything that detracts is a penalty. It is necessary, instead, to engage in a systematic analysis of the winners and losers in the population as a whole. A failure to look for systematic redistribu-
tions along constitutionally-forbidden lines accounts for much of the confusion that exists between impositions of unconstitutional conditions and mere failures to fund.

No one seriously contends that all government funding decisions discouraging the exercise of a constitutional right are unconstitutional. For example, the Supreme Court has recognized a constitutional right to interstate travel. Does it follow that it is unconstitutional for a state to charge a toll for traveling on an interstate highway? It is unquestionable that the toll will have the effect, on the margin, of discouraging interstate travel. It thus satisfies one-half of the unconstitutional conditions formula. It creates an incentive to forego a constitutional right. Yet I believe that no one would seriously contend that the toll is unconstitutional. Let us explore why.

The interstate tollway driver imposes certain costs on the state, both fixed and marginal, to build and maintain the highway and perhaps some indirect costs of government overhead. A toll roughly calculated to pay no more than these costs will equalize the costs and benefits to the state of maintaining the highway. Under these conditions, the toll is “neutral.” To charge less than cost would be to require other taxpayers to subsidize interstate travelers. To charge more than cost would require interstate travelers to subsidize others; this would be a penalty — a redistribution of wealth from those who exercise a constitutional right to those who do not.

The difference between the toll case and Speiser is that in Speiser the veterans who exercise their free speech right impose no additional cost on society. To charge them higher taxes than other veterans is redistribution without justification. If, for some reason, their speech did impose additional costs, then the case would be different.

The result is unchanged even if we assume that the state maintains a system of intrastate highways out of general revenues while charging tolls for the interstate. Again, it is unquestionable that the state is favoring intrastate over interstate transportation by requiring the citizens at large to subsidize intrastate transportation while requiring interstate travel to pay its own way. But it is not redistrib-

27. This would not be unconstitutional, though some may think it unfair and undesirable. This form of redistribution is within the broad redistributive powers of the state. As far as I can tell, no provision of the Constitution precludes the government from encouraging interstate travel; government is only precluded from discouraging it.
28. See Cox v. New Hampshire, 312 U.S. 569 (1941) (approving a licensing fee for a public demonstration, so long as the fee was calculated to defray the “public expense of policing” the event and was not “a revenue tax”); cf. Murdock v. Pennsylvania, 319 U.S. 105 (1943) (striking down a revenue tax on religious literature distributors).
uting wealth from interstate travelers to other persons; interstate travelers are not given a package of benefits less valuable than that given to intrastate travelers. Interstate travelers benefit no less than anyone else from the intrastate highways, and thus receive their fair share of the benefits of public expenditures. To the extent that they pay more, they also receive more. The redistribution is from all the taxpayers in the state to those who use the intrastate highways; it is neither from nor to those who exercise the right of interstate travel. Note that if interstate travelers were required to pay a toll for the use of intrastate highways, which were provided to intrastate travelers for free, or forbidden to use intrastate highways at all, there would then be a redistribution of wealth and an unconstitutional condition. The state is forbidden to impose a penalty on those who travel interstate; that is, it may not redistribute wealth from them to others. At the same time, the state is under no obligation to redistribute wealth from the citizens as a whole to interstate travelers.

Again, Speiser is different from the tollway hypothetical. In Speiser, like the tollway example, there is redistribution of wealth from the citizens as a whole to one group and not to another. But, in Speiser, the veterans who exercised their free speech rights were for that reason ineligible to benefit from the government program. In the tollway example, the interstate travelers are equally eligible to benefit from the subsidies for intrastate highways. They are not faced with the dilemma of the classic unconstitutional condition: waive your right or suffer adverse redistribution of wealth. Rather, their ability to share in the benefits of government action is unaffected by their exercise, or nonexercise, of the constitutional right.

The general point is this: To be useful for constitutional analysis, a subsidy must be defined as a systematic redistribution of wealth from others to the affected group and a penalty must be defined as a redistribution of wealth from the affected group to others. The challenged action cannot be viewed in isolation from the scheme of taxing and spending of which it is a part.

IV. SUBSIDIES TO RELIGION

The establishment clause introduces a different twist to the unconstitutional conditions analysis. In free speech cases (like Speiser) or in most other constitutional contexts (like the tollway example), the government is forbidden to penalize the exercise of the constitutional
right, but there is no general principle against subsidizing it. Under the religion clauses, however, the government may neither penalize nor subsidize the exercise of religion. Penalties are forbidden by the free exercise clause and subsidies by the establishment clause.

In *Lemon v. Kurtzman*, the Supreme Court stated that to be constitutional the “primary effect” of a government practice “must be one that neither advances nor inhibits religion.” This is the key element in the Court’s test for an establishment of religion. This test is functionally identical to a “subsidy” and “penalty” analysis: “advancement” is the same thing as “subsidy,” and “inhibition” is the same thing as “penalty.” If these terms were properly interpreted, the “effects” test of *Lemon* would be consistent with the doctrine of unconstitutional conditions as applied in other areas. The government “inhibits” religion when it forces the individual to choose between foregoing the exercise of his religion and suffering adverse consequences, usually a redistribution of wealth. The government “advances” religion when it offers the individual favorable treatment, usually a redistribution of wealth, provided he engages in a religious practice designated by the government.

Unfortunately, in its most important decisions regarding “subsidies” to religion, the parochial school funding cases, the Supreme Court has adopted precisely the crude understanding of subsidies (based on a common law rights baseline) that Justice Clark used in *Speiser* and that has been universally condemned in other contexts. If the unconstitutional conditions doctrine is accepted, the Supreme Court’s test for an establishment of religion must be scrapped. This is not to say that use of public resources for the benefit of religion is never unconstitutional, just that the present test is useless in determining which transfers are legitimate and which are not.

Consider this recent summary of the Court’s understanding:

In *Everson v. Board of Education*, 330 U.S. 1 (1947), the Court stated that “[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.” *Id.* at 16. With but one exception, our subsequent cases have struck down attempts by States to make payments out of public tax dollars directly to primary or secondary religious educational institutions. (Citing cases.)

---

29. The free speech example is complicated because of the requirement of content neutrality, which applies to subsidies as well as penalties.
31. A government practice must also have a “secular purpose” and it must not lead to an “excessive governmental entanglement with religion.” *Id.* Challenged government action rarely fails the “purpose” test (and never in the case of government funding programs). “Entanglement” is more important, but is relevant principally when the government takes intrusive steps to ensure that its “aid” to religious institutions will not have the “effect of advancing religion.” The “effects” test is therefore the key.
The Supreme Court treats “payments out of tax dollars” as “support for religion” — i.e., a “subsidy” — without regard to the larger context of the taxing-spending program. If a state chooses to provide money or other fungible forms of assistance to all elementary and secondary education, public as well as private, secular as well as religious, the Court deems the portion of the aid that goes to religious schools as “aid” to religion. The Court thus gets caught in a mass of inconsistencies and contradictions. “Penalizing” the exercise of first amendment rights is impermissible, the Court says, but withholding generally available subsidies from people who exercise those rights is not only permissible but required.

Recognition of the unconstitutional conditions doctrine in establishment clause cases would go a great distance toward resolving the “tension” — actually a flat contradiction — between the Court’s interpretation of the two religion clauses. In cases like *Sherbert v. Verber,* the Court has reckoned “burdens” on the free exercise of religion against the baseline of statutory entitlements. If the state provides unemployment compensation to all, then it cannot deny compensation to those whose unemployment is caused by following religious doctrine. Yet in establishment clause cases the Court usually clings to a baseline of common law entitlements. The result is that when government extends a secular benefit, like unemployment compensation or education, the establishment clause appears to require what the free exercise clause forbids: exclusion from the pro-

(1980) (upholding state payment for certain state-imposed testing and recordkeeping requirements of a nonreligious nature).

33. For description and analysis of the cases, see Garvey, Another Way of Looking at School Aid, 1985 Sup. Ct. Rev. 61; McConnell, Political and Religious Disestablishment, supra note 9.


35. *Sherbert* is actually much more complicated and the correct disposition less obvious than this summary would suggest. See McConnell & Posner, An Economic Approach to Issues of Religious Freedom, 56 U. Chi. L. Rev. 1, 35-36, 40-41 (1989); Epstein, supra note 14, at 79-87. Notwithstanding *Sherbert,* the Court has not consistently adhered to the baseline of presumptive equality of access to government services in free exercise cases. In a recent decision, *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 108 S. Ct. 1319 (1988), involving competing religious and nonreligious uses of Forest Service land, the Court lapsed into the private law modes of analysis: “Whatever rights the Indians may have to the use of the area, however, those rights to do not divest the Government of its right to use what is, after all, *its* land.” *Lyng,* 108 S. Ct. at 1327 (emphasis in original). Ironically, in *Lyng* the Court implicitly rejected the common law baseline for establishment clause purposes; all nine Justices agreed that the Forest Service could allow the Indians to use the land for religious purposes without thereby “subsidizing” their religion in violation of the establishment clause. For an analysis of the case, see McConnell & Posner, supra, at 43-44, 48 n.93.
gram on the basis of religious exercise. If subsidies and penalties were measured from the same baseline, there would be no such problem.

To be sure, the Court has shown signs of recognition that its subsidy-penalty line is not an adequate test when cash subsidies to religious institutions are not at issue. It has commented that "the Court has never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program."36 But the Court has suggested no substitute analysis. The question of subsidization, the Court has said, unhelpfully, is "one of degree."37 In actual practice, the Court has relied chiefly on unreflective analogies to "cash subsidies," an approach that implicitly accepts the same common law baseline used by Justice Clark in Speiser. For example, in a recent case involving whether a public school district could make available to students in parochial schools some of the supplemental secular courses already available to students in public schools, the Court reasoned, "This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause."38 But to say that educational assistance is a subsidy to religion when it goes to students who attend religious schools is like saying that a tax break for veterans is aid to subversive speech when it goes to veterans who advocate the violent overthrow of the government. Like Justice Clark, the present Court says to those who choose a religious education: We can neither "fine" you nor "imprison" you for your constitutionally protected choice, but we will not take any action "for you."

If the common law baseline should be abandoned in other areas of constitutional law, as is widely agreed, the Lemon test, so understood, should be abandoned as well. The Lemon test has the same perverse consequences that the crude subsidy-penalty line has in other areas. Instead, we must ask whether the provision of aid to parochial schools is equivalent to offering parents (or their children) a favorable redistribution of wealth, provided they agree to attend religious schools. If so, then parochial school aid "advances" religion and is unconstitutional.

An argument to this effect was made in Sloan v. Lemon.39 In Sloan, the Court held that a Pennsylvania program reimbursing parents for parochial school tuition up to $75 per elementary school child per year and $150 per high school child per year "advances

37. Id. (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).
38. Id. at 395. The author of this essay argued the losing side of the case in the Supreme Court.
religion" on these grounds:

The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward to having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions.40

Let us consider the logic of this holding. Has the state "singled out a class of its citizens for a special economic benefit"? Every individual in the State of Pennsylvania is entitled to one elementary and secondary education at public expense. Those who attend parochial schools receive no more than those who attend public schools (indeed, under the Sloan program, they receive far less). Some are given a free public education; others are given the money with which to buy a substitute. This cannot be deemed a "special economic benefit" in any sense of the term. It is simple equality. Does the program create an "incentive for parents to send their children to sectarian schools" or provide a "reward for having done so"? The alternative to sending one's child to a "sectarian school" is sending him to a public school, where the entire tuition is paid by the government. The Sloan program merely reduces the incentive that would otherwise exist for parents to send their children to a public school. Only if the government gave more valuable assistance to those attending religious schools than to those attending secular schools could this be said to create an "incentive" or a "reward."

Before public schools existed, parents were free to choose between secular and religious private schools, and the government’s posture of noninvolvement was perfectly neutral (assuming that religious parents were no better able to afford tuition than nonreligious parents, or vice versa). When the states decided to provide an education to each child at public expense, they imposed taxes to defray the cost. Religious no less than nonreligious parents paid the tax. But only those who chose to send their children to secular public schools received the benefit. The effect of private school aid is simply to redress this imbalance.

Nor is it possible to claim that aid to parochial schools forces some taxpayers to pay for a benefit that only the religious can enjoy. This argument, too, has been offered by justices on the Court. Justice Rutledge reasoned as follows:

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedral form, pay the New Jersey tax.

40.  Id. at 832.
When the money so raised is used to pay for transportation to religious schools, the Catholic taxpayer to the extent of his proportionate share pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic instruction. Each thus contributes to "the propagation of opinions which he disbelieves" in so far as their religions differ, as do others who accept no creed without regard to those differences. Each thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden since it denies "the comfortable liberty" of giving one's contribution to the particular agency of instruction he approves. 41

Is it accurate to state that the Catholic taxpayer pay for Lutheran or Jewish schooling, and that the Jews and Lutherans pay for Catholic schooling? Tax dollars are contributed by all the citizens, without regard to their religion. Education is provided to all the citizens, without regard to their religion. There is no reason to think that the pool of taxpayers has any different religious composition than the pool of schoolchildren. If each child is free to receive his education as he wishes (subject to neutral and objective standards of educational quality) then there is no systematic redistribution from one religious group to another. There is neither subsidy nor penalty, but only freedom of choice. That some parents wish their children to receive education in a religious environment should not deprive them of their fair share of the public resources devoted to education. So long as parochial schools perform at least as well as public schools and cost no more, their choice imposes no additional costs on anyone else. They are like the veterans in Speiser, who are free to use their subsidies to expound whatever doctrines they wish.

A still more realistic way to view publicly-funded education is that each individual receives one education early in life, and each person pays taxes later in life to repay the cost. There is no systematic redistribution whatsoever, but only the equivalent of a loan. Adults do not subsidize children, nor do the childless subsidize parents: every individual gets one education, and every individual pays one lifetime's worth of taxes. Under this view, the Lutheran does not pay for a Catholic education, or the Catholic for a Lutheran. Each person pays for his own. 42

In summary, all citizens are taxed equally (i.e., without regard to religion) for education. All have a constitutional right to be educated (or to educate their children) in a religious environment. The effect of the Lemon test is to require a systematic redistribution of wealth from those who exercise this constitutional right to those who do not.


The only justification for this unequal treatment is the claim that it is required by the establishment clause prohibition on “aid” to religion. But religious and nonreligious taxpayers contribute equally to the tax base, and if nonreligious and religious families receive equal shares of educational expenditures, there is no “subsidy” to religion (or vice versa). Only if religious schools receive more aid (measured on a per-pupil basis or any other consistent standard), or if religious schools do not provide the same public benefits (measured in terms of objective, secular criteria weighted neither for nor against religion), is there any unconstitutional subsidy. The key point is the absence of any redistribution along religious lines.

This means, at a minimum, that states which choose to defray the cost of nonpublic education, religious and nonreligious alike, subject only to objective criteria of educational quality, should be permitted under the establishment clause to do so. Against the baseline of a universal free education, there is no redistribution from the nonreligious to the religious, and hence no subsidy to religion. There is only subsidy to education, if there is subsidy at all.

Does it also follow that the state must provide equal funding for all schools that meet its neutral, objective educational standards, on the ground that reserving funds for public schools inflicts a “penalty” on the constitutionally-protected right to choose a religious school? The answer depends on the government’s interest in funding only public schools. There are reasons unrelated to religion why a state might believe that schools under its own control are preferable to schools under private control. The most important such reason is the promotion of racial and economic integration. The state might also believe that it can uniquely impart the values of citizenship and toleration. If a state reaches such a conclusion in good faith, then it has not drawn the line on the basis of religion. If these reasons are closely enough related to the purposes of educational funding, then they would justify a policy of funding only public schools. On the other hand, if it could be shown that the reason for the state’s refusal to fund nonpublic schools is simply that they teach religion (the Supreme Court’s only reason), then the public-schools-only funding scheme would be unconstitutional. In such a case, there would be a clear redistribution of wealth from those who exercise a constitu-

43. As discussed below, there may be a legitimate justification for funding only public schools, based on their peculiar strengths. This is distinguishable from a decision not to fund religious schools, based on the establishment clause. See the discussion infra pp. 269-70.
tional right to those who do not, without any legitimate justification. (Avoiding subsidies to religion cannot count as a reason, since equal treatment is not a subsidy.)

This does not mean, as the Supreme Court's decisions imply, that the public would be required to pay for the religious component of religious education. It means only that the public is required to pay for an education (defined in neutral, objective terms) and that the government may not refuse to pay for that education simply because the parent chooses a school that adds a religious component. The unconstitutional conditions doctrine does not mean that the government has an obligation to pay the cost of exercising a constitutional right, whether that right is interstate travel or religious education. If the religious components of parochial school education add to the cost, the parents or the school must make up the difference.

This approach to the parochial school issue depends upon the assumption that families are free to choose education from a variety of providers, secular as well as religious. The government cannot force beneficiaries of a program to receive government benefits only at the price of submitting to unwelcome religious indoctrination. That, too, would violate the unconstitutional conditions doctrine. Thus, if the government funds only one service provider (or a limited number), it must ensure that the provider does not use its preferred position to engage in religious indoctrination. The choice whether or not to receive religious instruction must be made by the beneficiaries and their families. This principle, though never articulated by the Court, provides a convincing explanation for some of the distinctions it has drawn.

Consider the difference between *Bowen v. Kendrick* and *Witters v. Department of Services.* In *Kendrick,* the government made two grants per state to public or private organizations that provide services related to adolescent pregnancy. The Court held that these grantees must be prohibited from teaching or promoting religion in the funded program. In *Witters,* the government paid for vocational instruction for the blind at any school in the state that would prepare the student for gainful employment. The Court held that these grants *could* be used for training for the ministry, including specifically religious courses. The Court offered no explanation for the difference in result, but it can be explained by the different range of choices facing the beneficiaries in the two cases. In *Kendrick* the beneficiaries had little choice of service provider (two grantees per state), and thus had need of protection from unwelcome indoctrination. In *Witters,* the beneficiaries had a full range of choices and, as

the Court stated, any religious content was the "result of the genuinely independent and private choices of aid recipients." 46

V. A HYPOTHEtical

Perhaps the point can best be illustrated with a hypothetical that involves none of the emotional commitments that religion and religious education tend to inspire. Suppose that some parents want their children to learn the art of basketweaving and that others consider this useless or unseemly. The state resolves to stay out of the controversy by neither promoting nor discouraging basketweaving. Now, the government decides to become involved in education. The first question is: Can the government subsidize education in reading, math, and science without subsidizing basketweaving? Answer: Yes, the state is entitled to fund activities it considers worthwhile without having to fund activities toward which it is indifferent (just as the state can subsidize intrastate highways but charge a toll for the interstate). So long as those who pursue basketweaving are equally entitled to the benefits of the reading, math, and science classes, they are not the victims of adverse redistribution.

Once the government establishes its schools, some parents propose to start their own school, which will include instruction in basketweaving along with the full curriculum in reading, math, and science. The second question is: May they pay any costs that basketweaving may entail, and successfully ask the state to pay the cost of the reading, math, and science instruction? Answer: Yes, their request should be granted, so long as the reading, math, and science instruction is at least as good as that offered in the nonbasketweaving school. The payment is not a subsidy for basketweaving, but for reading, math, and science; to refuse the request would penalize their choice to impart the art of basketweaving.

The next question arises when an opponent of basketweaving discovers that one of the reading texts contains stories about basketweaving or instructions for basketweaving. The opponent claims that public money is being used to subsidize basketweaving, in violation of the "indifference" policy. Answer: It is not a problem, so long as the text accomplishes the nonbasketweaving purpose (teaching reading) as well as the alternative texts. The state's sole interest is in subsidizing reading; it is indifferent to the effects on basketweaving.

On the other hand, if the basketweaving parents ask for additional

46. Id. at 487.
funding to be used for basketweaving, their request should be denied. Any additional funding would be a subsidy and would thus violate the indifferrence policy. And, if the basketweaving school fails to provide equally effective instruction in reading, math, and science, then the subsidy should be cut. But to refuse to pay for the reading, math, and science instruction on the ground that the school also teaches basketweaving would demonstrate hostility, not indifference, toward basketweaving.

VI. BUT WHAT ABOUT HISTORY?

Some might defend the Supreme Court’s interpretation of establishment on the ground that it was informed by an historical conception of establishment rather than by abstractions about “subsidies” and “penalties.” More than any other provision of the Bill of Rights, the religion clauses grew out of a known historical context and have been interpreted in light of that history. However informative the unconstitutional conditions doctrine is in other areas, it might be said it cannot overcome evidence of the original understanding.

However, the analysis here is entirely consistent with what we know of the understanding of “establishment” at the time of the framing and ratification of the Constitution. The controversy that most closely resembles modern religious funding cases— and on which the Supreme Court has repeatedly relied in its interpretation of the first amendment— was the dispute in Virginia and other states over the public funding of religious “teachers” or ministers.47 In the Virginia plan, sponsored by Patrick Henry, every property owner was to be assessed a surtax on the regular property tax, to be collected by the sheriff and paid to whichever Christian denomination was designated by the taxpayer, to be used for “a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship.”48 If a taxpayer did not designate a religious society to receive his portion of the assessment, the Bill directed the sheriff to pay those funds into the public treasury to be used “for the encouragement of seminaries of learning” in the taxpayer’s county.

As is well known, this proposal met with great public resistance, led in part by James Madison, who saw it as an attempt to “establish Christianity . . . in exclusion of all other Religions.” Under the unconstitutional conditions analysis I have outlined, Madison’s objection is well taken. The Bill did not require any person to contrib-

47. All quotations from the Bill and from Madison’s Memorial and Remonstrance are taken from the appendix to Justice Rutledge’s dissent in Everson v. Board of Educ., 330 U.S. 1 (1947), and will not be separately footnoted.

48. In the case of “Quakers and Menonists,” the funds could be used by the denomination however “they shall think best calculated to promote their particular mode of worship.”
ute to a religious society against his will, and therefore cannot be
described as pure coercion (an advance on prior mandatory tithing
laws). But it did require each property owner to choose between
making a payment to a religious society (and a Christian one, at
that) and making a like payment into the public treasury. Since all
citizens have a presumptively equal obligation to contribute to the
public treasury, this latter provision amounted to a requirement that
those who exercise their right not to contribute to a church bear a
disproportionate share of the burden of public expenditures. The tax-
payer was thus faced with the choice between complying with the
government's demands to support a church or subsidizing his fellow
citizens. It was a classic unconstitutional condition.49

The Massachusetts plan for supporting religion, which, unlike Vir-
ginia's, was passed and put into effect, was even worse. The Massa-
chusetts Constitution of 1780 required each town to "make suitable
provision" for "the institution of public worship of God and for the
support and maintenance of public Protestant teachers of piety, reli-
gion, and morality."50 It further provided that the taxpayer could
direct his payment to be made to his "own religious sect or denomina-
tion, provided there be any on whose instruction he attends," but
that otherwise the payment would go to support the church estab-
lished by the town.51 This system allowed each taxpayer to designate
which church he preferred, so long as he was in attendance at its
services, but did not allow any nonreligious alternative.

Other states either had, or considered and rejected, similar
plans.52 It is safe to say that one of the intended effects of the first
amendment was to preclude Congress from instituting any such
scheme at the federal level.53 The unconstitutional conditions analy-

49. The only difference from Speiser is that the condition involved the allocation of
50. Mass. Const. of 1780, art. III, reprinted in B. Poore, 1 The Federal and
State Constitutions, Colonial Charters, and Other Organic Laws of the
United States 957 (1878).
51. Id.
52. See generally T. Curry, The First Freedoms: Church and State in
America to the Passage of the First Amendment 134-92 (1986).
53. There are obviously problems with using disputes in individual states as the
basis for interpreting the meaning of limitations on federal power in the Bill of Rights.
See McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484,
1504-07 (1987) (discussing the founders' understanding of the relation between federal-
ism and individual rights, with specific reference to religion). But, as a matter of lan-
guage, it seems likely that the arrangements viewed as "establishments" in the states are
an indication of what was prohibited to Congress under the first amendment. See Lay-
sis presented here is consistent with this historical evidence.

Indeed, as an aspect of the complicated relation between “equality” and “rights” in our constitutional structure, the unconstitutional conditions doctrine has deep roots in the understanding of rights at the time of the framing of the Bill of Rights, including the religion clauses. The language used during the founding period reveals that those who adopted the individual rights conceptions in our Constitution understood that inequalities imposed on account of the exercise of rights are a form of invasion of those rights. Madison’s celebrated Memorial and Remonstrance Against Religious Assessments reasoned in these terms:

Because, the bill [requiring public support for teachers of religion] violates that equality which ought to be the basis of every law, and which is more indispensable, in proportion as the validity or expediency of any law is more liable to be impeached. If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an “equal title to the free exercise of Religion according to the dictates of conscience.” . . . As the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, granting to others peculiar exemptions.44

To say that individuals enter into society “on equal conditions” is to say that they have presumptively equal rights to public benefits; to say that government action can violate individual rights by “subjecting some to peculiar burdens” while granting others “peculiar exemptions,” on the basis of religion, is to say that not just coercion but also redistribution along religious lines is forbidden. Far from undermining the unconstitutional conditions analysis in this context, the history supports it.

VII. CONCLUSION

The doctrine of unconstitutional conditions has been widely accepted. We now recognize that to deprive a person of a statutory benefit on account of his exercise of a constitutional right, in the absence of a legitimate justification, is unconstitutional just as is deprivation of a common law entitlement of life, liberty, or property. This is because, in addition to common law rights, all citizens have a presumptively equal right to share in the benefits of government action. While the government can adjust the burdens and benefits of government action in pursuit of legitimate public objectives, it can-

not do so on account of the exercise of constitutional rights (unless that exercise is related to a legitimate justification).

These principles have not been applied when the issue is whether religious institutions or individuals can share in the fruits of government action. Instead, the Supreme Court has applied a crude understanding of "subsidy" under which receipt of their fair share of government benefits by religious persons is said to constitute "aid" to religion. This approach is particularly egregious in the parochial school funding cases, where religious individuals have been forced to forfeit the benefit of the largest single public benefit program (elementary and secondary education) if they wish to add a religious dimension to their education. This is a flagrant burden on their constitutionally protected right. While there may be legitimate reasons for maintaining a public school system without extending financial support to private schools, these reasons cannot include the mere fact that the private schools are religious. Most importantly, it cannot include the supposed constitutional requirement to avoid "subsidizing" religion. I fully agree that the government may not subsidize religion. But one thing that is agreed under the doctrine of unconstitutional conditions is that equal treatment is not a subsidy.