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THE MEEK SHALL INHERIT THE EARTH: A POWER-BASED THEORY OF UNCONSTITUTIONAL CONDITIONS ON RELIGION

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My mother used to tell me that it was easier to catch flies with honey than with vinegar. The government long ago learned that lesson. It often tries to influence behavior by offering benefits in exchange for the desired conduct. Depending on the desired outcome, the Court variously describes these transactions as penalties,[1] subsidies,[2] or non-subsidies.[3] The way we describe these practices carries persuasive force,[4] so more vividly we might call these deals threats, bribes, or offers. Some dispute exists over whether the unconstitutional conditions doctrine governs the allocation of benefits or burdens.[5] However, benefits and burdens are merely different ways of describing the same thing. Relieving a burden is a form of a benefit. Similarly, creating benefits for one class necessarily creates burdens for others.

The practice becomes problematic when the government uses conditions to divest constitutional rights. The doctrine of unconstitutional conditions holds that the government cannot make an individual choose between getting a state conferred benefit and giving up a constitutional right. For example, individuals qualified for unemployment compensation may not be forced to choose between unemployment benefits and the free exercise of their religion.[6]

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1. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 626 (1978) (holding that prohibiting a minister from elective office penalizes him for his religious vocation).

2. *See, e.g.*, School Dist. v. Ball, 473 U.S. 373, 385 (1985) (holding that state funded special education teachers in parochial schools subsidized religion).

3. *See, e.g.*, Harris v. McRae, 448 U.S. 297 (1980) (holding that the refusal to permit Medicaid funds to be used for medically necessary abortions did not place obstacles in a woman's path to exercise her rights of free choice, but merely refused to subsidize such a choice); Maher v. Roe, 432 U.S. 464 (1977) (holding that the state could encourage women to choose not to have elective abortions by refusing to subsidize them).

4. For a discussion on the impact of the choice of such terms, see generally Peter Westen, *"Freedom" and "Coercion"—Virtue Words and Vice Words*, 1985 DUKE L.J. 541.

5. This distinction drives the debate over the use of the doctrine in the Takings Clause. *See* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); *see also* Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994).

6. *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). *But see* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (holding that a state could condition unemployment benefits on complying with a criminal statute that prohibited peyote use even in Native American religious ceremonies).

Expressed in that form, the doctrine seems to focus on the issue of coercion. It may be tempting to simplify the definition of coercion to limit it to force that leaves the victim with no choice at all. Such a narrow definition of coercion fails to account for the real world of constrained choices. Contrary to the classic liberal view of individuals as purely autonomous actors, most individuals have circumscribed power to exercise autonomy. As Professor Kathryn Abrams explains, individuals possess partial agency in which actors can exert some control, but are subject to limiting pressures.[7] This notion of partial coercion recognizes the individual actor's choices, but also accounts for societal pressure to choose.

Some choices are more constrained than others. For example, public housing residents who must choose between homelessness and waiving their Fourth Amendment right to be free from unreasonable searches are more constrained than government contractors who agree to plant inspections.[8] Therefore, the doctrine of unconstitutional conditions also recognizes the problem of undue influence. Individuals can be pressured to relinquish constitutionally protected freedoms with both penalties and benefits.

Some scholars like William Marshall and Cass Sunstein have suggested that we don't really need to debate the nature of the unconstitutional conditions doctrine.[9] Marshall argues that the analysis collapses into a discussion of the particular constitutional right impinged. For instance, the doctrine of unconstitutional conditions in the context of religion boils down to whether the government has violated either the Free Exercise Clause or the Establishment Clause. That view is bolstered by the Supreme Court's decision in *Rosenberger v. Rector & Visitors of the University of Virginia*[10] which overturned financial benefits conditioned on non-religious speech without mentioning the doctrine of unconstitutional conditions.

Although the final result in unconstitutional conditions cases ultimately may turn on the constitutionality of the underlying conduct, the doctrine of unconstitutional conditions highlights three distinct elements of the debate. First, it establishes the rule that the government cannot achieve indirectly what it is forbidden to do directly.[11] Thus, it refutes the argument that the greater

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7. *See* Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 353 (1995) (arguing for a theory of partial agency in which women are seen as oppressed, but still capable of making limited choices).

8. For a discussion of unconstitutional conditions in the context of public housing, see William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553 (1992); Jason S. Thaler, Note, *Public Housing Consent Clauses: Unconstitutional Condition or Constitutional Necessity?*, 63 FORDHAM L. REV. 1777 (1995); Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority "Sweeping" Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103 (1992).

9. *See* William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

10. 115 S. Ct. 2510 (1995)

11. *See, e.g.*, McDaniel v. Paty, 435 U.S. 618, 619 (1978) ("The fact that the law does not directly prohibit religious exercise but merely conditions eligibility for office on its abandonment does not alter the protection afforded by the Free Exercise Clause."). *But see* South Dakota v. Dole, 483 U.S. 203 (1987) (holding that the federal government can indirectly regulate the

power to dismantle the benefit program altogether includes the lesser power to retract a benefit unless a constitutional right is relinquished.[12] Second, the doctrine shifts the focus from individual entitlements to structural limits on power.[13] Third, the doctrine of unconstitutional conditions introduces the notion that the government can intrude on a constitutional right without completely violating the right. Thus, it creates a sliding scale so that the more the government infringes on the right, the more justification it needs.[14]

When viewed through the lens of individual rights, unconstitutional conditions doctrine lends little to the basic constitutional analysis that would be applied anyway. Once the Court has acknowledged that states cannot do indirectly what they are prohibited from doing directly, the only issue that remains is whether the burden on the constitutional right amounts to a violation, and whether it is justified by the appropriate level of scrutiny.

From a more structural perspective, however, it matters a great deal. It is precisely because the state has far more power in the regulatory welfare state than anticipated at the time of the founding, that we must be more concerned with use of that unforeseen power. Therefore, one eminent scholar has argued that the unconstitutional conditions doctrine should focus on limiting power.[15] As Kathleen Sullivan suggests, when the government places conditions on benefits, it affects various balances of power. First, by getting individuals to relinquish their rights, unconstitutional conditions augment government power over individuals in general. Second, such conditions may affect the balance of power between individuals. Those who gain benefits may have a competitive advantage over those who are denied benefits.[16] Third, the allocation of benefits may change how individuals relate to intermediate institutions like the church. For example, granting religious institutions an exemption from employment discrimination laws gives religions more power to discriminate than other employers and gives them more power over their employees.[17]

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drinking age by conditioning highway funding on compliance with an elevated age for drinking).

12. Justice Oliver Wendell Holmes is often described as the greatest proponent of this formalistic argument that the greater power to create a benefit or an institution includes the lesser power to place conditions on it. *See, e.g.*, Sunstein, *supra* note 9, at 597; Charles R. Bogle, Note, *"Unconscionable" Conditions: A Contractual Analysis of Conditions on Public Assistance Benefits*, 94 COLUM. L. REV. 193, 197 n.14 (1994). For a more complete discussion of the argument that the greater includes the lesser, see generally Robert Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 B.Y.U. L. REV. 227. *Compare* Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328, 345-46 (1986) (endorsing the greater includes the lesser argument to uphold a statute that prohibited advertizing of casinos) *with* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (rejecting the argument in a takings case).

13. *See generally* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

14. *See, e.g*, Epstein, *supra* note 5 (arguing that the doctrine of unconstitutional conditions is most imperative when the risk of serious abuse is greatest).

15. *See generally* Sullivan, *supra* note 13.

16. For example, merchants whose religious practices coincide with Sunday closing laws are permitted to keep their businesses open six days a week and still comply with their sabbath requirements. These merchants get a competitive advantage over Jewish merchants who cannot open their stores on Saturday because of religious restrictions and are prohibited from opening their stores on Sundays because of Sunday closing laws. This argument was rejected in McGowan v. Maryland, 366 U.S. 420 (1961).

17. *See* Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483

My thesis is that whether a governmentally imposed condition is constitutional depends on the relative power of the individuals or groups affected by the condition. Because the greatest risks arise from the largest power disparities, the more a condition entrenches or expands power disparities, the more likely it is to be unconstitutional.[18] Such a sliding scale for unconstitutional conditions helps avoid the formal and arguably false dichotomy between strict scrutiny and the rational basis test. Because the sliding scale is based on some measurement of relative power, we need to define power.

Power means "possession of control, authority, or influence over others."[19] This definition includes two different kinds of power: (1) power "over" people or things, a source of control or dominance; and (2) power "to" do things, a source of energy or cooperative strength.[20] The famous sociologist Max Weber defined power solely in terms of hierarchial force.[21] Political scientist Robert Dahl defined power a little more broadly to include the possibility of influence as well as control.[22] Coercive power "over" others is nec-

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U.S. 327 (1987). In *Amos*, the church had fired a custodian who worked at a gymnasium because he was not a Mormon. The Court upheld the constitutionality of the Title VII exception that permits churches to discriminate on the basis of religion. The Court failed to focus on how that decision would affect individuals meant to be protected by Title VII. In a state like Utah, where the church controls many of the available jobs, permitting such discrimination may seriously limit the job prospects of non-Mormons. The Court never even considered whether the exception violated the Equal Protection Clause. As a result, the Court lends state power to encourage individuals to join the Mormon Church.

Although *Amos* is a troubling case, it does not raise the specter of dual discrimination. The custodian only complained of religious discrimination. In contrast, some employment discrimination claimants complain of age, disability, sex, or race discrimination. *See, e.g.*, Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184 (7th Cir.), *cert. denied*, 115 S. Ct. 3201 (1994) (race and sex discrimination); Scharon v. St. Luke's Episcopal Presbyterian Hosps., 929 F.2d 360 (8th Cir. 1991) (age and sex discrimination). It is more reasonable to accommodate religion by permitting it to prefer members of its own denomination, than to permit it to discriminate against members of its own denomination on the basis of race, sex, age, or disability.

18. For a similar argument, see Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1 (1992) (arguing that government actions that entrench or expand power disparities violate due process, while those that improve the balance of power provide due process).

19. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 922 (1984). For a similar comparative definition of power, see Rutherford, *supra* note 18, at 78.

20. For discussions of the difference between the power "to" and power "over," see MARILYN FRENCH, BEYOND POWER: ON WOMEN, MEN, AND MORALS 505 (1985); STEVEN LUKES, POWER: A RADICAL VIEW 28-31 (1974); Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 491 (1992) [hereinafter Crain, *Images*]; Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1874 (1991); Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 773 (1994); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 53 n.66 (1993); Linda K. Kerber, *A Constitutional Right to be Treated Like . . . Ladies: Women, Civic Obligation, and Military Service*, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 107 n.37 (1993); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 28 (1993); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 48 (1988).

21. "In general, we understand by 'power' the chance of a man or a number of men to realize their own will in a social action even against the resistance of others who are participating in the action." 2 MAX WEBER, ECONOMY AND SOCIETY 926 (1968).

22. "*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do." Robert A. Dahl, *The Concept of Power*, *in* 2 BEHAVIORAL SCIENCE 201 (1957), *reprinted in* POLITICAL POWER: A READER IN THEORY AND RESEARCH 79, 81 (Roderick Bell et al. eds., 1969). For descriptions of the pluralist approach to political power, see Nelson W. Polsby, *How to Study Community Power: The Pluralist Alternative*, 22 J. POL. 474 (1960), *reprinted in* POLITICAL POWER: A READER IN THEORY AND RESEARCH, *supra*, at 123.

essarily hierarchial. Powerful individuals have the capacity to compel obedience of those below them in the social order. The liberal tradition sees power as hierarchical and therefore emphasizes individual rights as necessary to secure liberty defined in terms of autonomy.

Power need not be rooted in compulsion, however. It may also arise from the ability to persuade others to act in concert for a common goal.[23] As the famous scholar Hannah Arendt noted, power

> corresponds to the human ability not just to act but to act in concert. Power is never the property of an individual; it belongs to a group and remains in existence only so long as the group keeps together. When we say of somebody that he is "in power" we actually refer to his being empowered by a certain number of people to act in their name.[24]

This cooperative power "to" accomplish things reflects a civic republican tradition that finds freedom through participation in a community in which the public good is more important than individual interests.[25] Both traditions are embedded in American constitutional history.[26]

The power to dominate may also arise from control of scarce resources. Those who control rare goods can extract concessions from those who need the resources. Dominance power is inherently hierarchial. Some necessarily have more power than others. In contrast, cooperative power need not be hierarchial. The power arises from the shared efforts of a group. It is the relationship between members of the group that creates the power. Those who exercise the most power "over" others sit at the top of a pyramid. Those who exercise the most power "to" get cooperation sit in the middle of a web con-

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23. *See* DENNIS H. WRONG, POWER: ITS FORMS, BASES AND USES 21 (1979).

24. HANNAH ARENDT, ON VIOLENCE 48 (1970), *quoted in* LUKES, *supra* note 20, at 28.

25. For a discussion of the difference between power "to" and power "over," see *supra* note 20 and accompanying text. For a discussion of civic republicanism, see Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379 (1991); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

26. The liberal tradition emerges from John Locke's political philosophy that conceives of liberty as an individual right to life and property secured from others by government. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., student ed. 1988) (3d ed. 1698). This philosophy influenced the federalists who wrote the original Constitution and viewed the document as merely setting limits on government power. *See* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA 9 (1955). In contrast, the civic republican tradition traces its roots to Jean-Jacques Rousseau and Aristotle who sought to define communal public virtue through participation in government. HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981). Republican political theory influenced the anti-federalists who insisted that the original Constitution be amended with a bill of rights. *See generally* JOHN G.A. POCOCK, POLITICS, LANGUAGE AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY (1971). For a description of these two traditions, cast as "negative" and "positive" rights, see ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969). For analyses of the civic republican viewpoint, see Hirshman, *supra* note 25; Michelman, *supra* note 25; Sunstein, *supra* note 25.

nected to many others.[27] Because many webs can be interconnected, many different individuals may share power in complex ways.

Sometimes these various kinds of power can be exchanged. Thus, those who have cooperative power may be able to organize well to generate funding. Funding, a scarce resource, enables them to exercise hierarchical power as well. Similarly, those with hierarchical power may be able to use their scarce resources to purchase the cooperative skills of an organizer. Both hierarchical power and cooperative power are themselves scarce resources.

Therefore, power is a relative term. The definition of "power" establishes a comparison. Some have more power to either dominate or to persuade others. For example, a religious institution might be fairly small and powerless vis-à-vis the government, but quite powerful over an employee or a religious adherent. Similarly, various individuals or groups hold differing amounts of financial and political power in particular contexts. In evaluating a particular bargain the government offers to an individual or group, we need to evaluate the relative power of those involved—those who are offered the condition, those who sought to create the condition, and the government itself. Generally, however, the government wields the most power because of its access to tax dollars to fund benefits programs and its regulatory authority to control the behavior of both individuals and institutions.

Religions also may be very powerful. They can offer both moral authority and a committed block of voters to augment the power of government. The government has enormous hierarchical power backed by resources of tax dollars and law enforcement. Therefore, we should be concerned about the combined power of church and state. When religion and government act in concert either to benefit religion or to disadvantage a competitor, they jointly wield considerable power.

Indeed, we favor religious pluralism to avoid the combined power of church and state. That principle acknowledges the power of the church as well as the power of the state. Because both governments and religions can be powerful, we need both the Free Exercise and the Establishment Clauses. The Establishment Clause helps avoid the combined power of church and state,[28] while the Free Exercise Clause limits the power of the church by dividing that power into many sources,[29] and assuring individuals the right to follow their consciences.

Literally, the Establishment Clause directs that "Congress shall make no law respecting an establishment of religion. . . ."[30] The founders feared an es-

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27. Crain, *Images*, *supra* note 20, at 511. For a fuller development of these contrasting views, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

28. William P. Marshall, *The Inequality of Anti-Establishment*, 1993 B.Y.U. L. REV. 63, 68-71.

29. THE FEDERALIST No. 51 (James Madison). *Cf.* Sheldon v. Fannin, 221 F. Supp. 766, 774-75 (D. Ariz. 1963) ("[L]ack of violation of the 'establishment clause' does not ipso facto preclude violation of the 'free exercise clause.' For the former looks to the majority's concept of the term religion, the latter the minority's.").

30. U.S. CONST. amend. I.

tablished church for three reasons: (1) it would be corrupted by government;[31] (2) it would repress competing views;[32] and (3) it would promote sectarian violence.[33] Madison's solution was to limit religious power by creating a structure designed to encourage a multitude of sects.[34] Hence, Madison favored religious liberty, in part, because it helped balance power.

Thomas Jefferson seemed to espouse Roger William's view that the church could be corrupted by interacting with government, noting that individuals could be "brib[ed] with a monopoly of worldly honours and emoluments."[35] However, he thought the problem was limited to an established church like the Church of England. The framers did not foresee the development of the modern welfare state in which the government is a major source of goods and benefits. Consequently, few structural limits were placed in the Constitution to restrict the abuse of such power outside the context of an established church.

This combination of church and state power is particularly ominous when it targets a disfavored group. For our purposes, a disfavored group is one that shares immutable qualities, was historically discriminated against, and has diminished political clout.[36] Some currently disfavored groups include minority religions, Native Americans, racial groups, women, the disabled, and the aged. When the combined power of church and state is amassed against a disfavored group, the conditions imposed must be subject to the strictest scrutiny. For example, the exemptions given to religious institutions for employment discrimination are highly suspect.[37]

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31. *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments* No. 7 (1785), *in* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY 104 (1990) ("[E]cclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."). Madison may have been influenced by Roger Williams who argued that the separation of church and state is a means of protecting religion from the corruption of the government. *See* GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 341-53 (1990); Marshall, *supra* note 28, at 68.

32. Hence, Thomas Jefferson opposed the Virginia bill to establish religious teachers in part because it "assumed dominion over the faith of others . . . and . . . destroys religious liberty." Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1785), *in* ADAMS & EMMERICH, *supra* note 31, at 110.

33. For example, Madison wrote: "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm, to extinguish Religious discord, by proscribing all difference in Religious opinion." James Madison, *Memorial and Remonstrance Against Religious Assessments* No. 11 (1785), *in* ADAMS & EMMERICH, *supra* note 31, at 108.

34. "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source." THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

> In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects.

Id. NO. 51, at 324 (James Madison).

35. Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1785), *in* ADAMS & EMMERICH, *supra* note 31, at 111.

36. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144 (1938).

37. For discussions of the problem of religious institutions that discriminate in employment, see Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514 (1979); Joanne C. Brant,

The combined power of church and state also raises Establishment Clause concerns even when those affected are not members of disfavored groups. For instance, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[38] establishment problems arose because a state university forced students who did not share the religious perspective of a Christian group to pay to publish the avowedly Christian texts. Objecting students may not be part of any disfavored minority, and because they are a diffuse population with no common cohesive group, they may have had difficulty organizing. In this sense, these students had relatively little cooperative power available compared to the well-organized Christian group.

So far we have been looking at conditions that might offend the Establishment Clause. Sometimes, free exercise concerns cause us to worry about the exercise of government power as well. It is especially troubling when those excluded from benefits on the basis of the religion clauses are also members of other groups with a history of discrimination. For example, in *Employment Division, Department of Human Resources v. Smith*,[39] the Court held that Native Americans could be denied unemployment benefits when they were fired for sacramental use of peyote. This case is troubling not only because a government benefit was conditioned on the surrender of a free exercise right, but also because the targeted religion was one well outside the mainstream.

Indeed, Native Americans often lose religion clause cases.[40] Tribes may be less powerful for several reasons. First, although individual tribes may constitute cohesive groups with common goals, Native Americans have different religious views and perspectives. Thus, the degree of cooperative power is somewhat minimized. Moreover, Native Americans lack access to some of the resources that would help them use their cooperative skills. Because they are near the bottom of the economic scale, they have difficulty fund-raising from their ranks. Hence, they lack the kind of hierarchial power that some other faiths have acquired. Religions more familiar to the ruling classes are more likely to be protected both because their religious views are more easily recognized and because the religious adherents have more access to hierarchial power.[41]

"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate, 21 HASTINGS CONST. L.Q. 275 (1994); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of the Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Law to Religion*, 81 CORNELL L. REV. (forthcoming January 1996).

38. 115 S. Ct. 2510 (1995).

39. 494 U.S. 872 (1990).

40. *See, e.g., id.* (permitting a state to interfere with Native American sacred ceremonies involving peyote); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (permitting the federal government to build a road through territory sacred to Native Americans); *see also* Kristen L. Boyles, *Saving Sacred Sites: The 1989 Proposed Amendment to the American Indian Religious Freedom Act*, 76 CORNELL L. REV. 1117 (1991); Colloquy, *The Native American Struggle: Conquering the Rule of Law*, 20 N.Y.U. REV. L. & SOC. CHANGE 199 (1993).

41. Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335, 359 (1994).

By concentrating on individual free exercise questions, rather than the larger issue of the balance of power between a marginalized faith and the state, the Court missed one of the central purposes of the religion clauses: to disperse power. Hence, *Smith* was decided on the wrong grounds. The Court should have been concerned about whether the government was using its superior power to place Native American religious adherents at a disadvantage. Other individuals had been permitted to collect unemployment insurance claims when they lost jobs because of compliance with religious duties.[42] Similarly, during prohibition, Christians and Jews were permitted sacramental use of wine.[43]

Thus, the question in *Smith* should have been whether the law treated substance abuse in Native American religions (sacramental peyote use) differently than substance abuse in mainstream Christian religions (sacramental alcohol consumption by minors).[44] Viewed as a targeting case, *Smith* would have come out the other way. Under my power-based analysis, these cases raise more concerns because Native Americans share inborn immutable traits, are relatively powerless, and share a history of discrimination. By concentrating on the balance of power, we avoid the fruitless debate over the level of scrutiny applied and recast the dialogue in more principled terms.

Most constitutional rights protect individuals. The dialogue on unconstitutional conditions focuses on the deals government offers individuals. As a result, the doctrine tends to concentrate on issues of coercion. However, constitutional rights also have a communal element as well.[45] They are designed as part of a structure that limits government power for the common good. For purposes of limiting power, whether a particular individual is coerced may be less important than how the transaction affects the balance of power.[46] When individuals relinquish their rights, the rights are asserted less frequently, and the value of the rights in general diminishes for all of us.

The founders designed the Constitution to limit power by dividing it among different power bases. Hence, they balanced state and national power by creating a complex federal system,[47] and divided national power among the branches of government.[48] Similarly, the framers were concerned with limiting government power over religion and religious power over government. The First Amendment was designed to constrain the power of government to limit religious freedom or to establish religion.[49]

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42. Sherbert v. Verner, 374 U.S. 398 (1963) (holding that a Seventh Day Adventist could not be denied unemployment benefits for refusing to be available to work on Saturdays).

43. *Smith*, 494 U.S. at 913 n.6 (Blackmun, J., dissenting).

44. *See* Karst, *supra* note 41.

45. *See* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990).

46. *See* Sullivan, *supra* note 13.

47. *See* THE FEDERALIST NO. 51 (James Madison).

48. *See* U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1; THE FEDERALIST NO. 9 (Alexander Hamilton).

49. U.S. CONST. amend. I. Although this rule originally was meant to apply to federal government, some of the framers already were engaged in opposing state establishments of religion. For example, James Madison and Thomas Jefferson actively opposed a bill to use state funds to hire religious teachers in Virginia. *See, e.g.*, Madison, *supra* note 31. By the time that the

The modern doctrine of unconstitutional conditions confines the power to manipulate government benefits. When we think of unconstitutional conditions in the context of religion, we tend to think of the unemployment compensation cases,[50] or limits on government funding of religious enterprises.[51] In these cases, the government is allocating a benefit and conditioning it in ways that may intrude on the free exercise of religion. Thus far, the analysis is much like that of any other unconstitutional conditions case. In the case of religion, however, the Establishment Clause may present a further constraint. If the government refuses the benefit, it may intrude on free exercise, or discriminate against religion. If the government provides the benefit, it may subsidize religion and violate the Establishment Clause. Generally, the unconstitutional conditions cases have ruled that the government is free to choose what to subsidize, but that it cannot penalize a constitutional right. As the welfare/regulatory state grows, the tension between the religion clauses expands.[52] The religion clauses are interesting because the tension between the Free Exercise Clause and the Establishment Clause seems to constitutionalize the distinction between penalties and non-subsidies.

Under the Free Exercise Clause it may be unconstitutional to penalize religious activity.[53] Under the Establishment Clause, it may be

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Fourteenth Amendment was adopted after the Civil War, virtually all states had disestablished any state churches. In 1947, the Supreme Court held that the Establishment Clause was incorporated through the Fourteenth Amendment to apply to the states. Everson v. Board of Educ., 330 U.S. 1 (1947). Hence, the strictures of the Establishment Clause now apply to both the state and federal governments.

50. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

51. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995).

52. *See* Karst, *supra* note 41.

53. The Court's standard for free exercise violations has vacillated between deference to religion and deference to state regulation. Hence, a few cases claim to apply strict scrutiny to government rules or conditions that interfere with the free exercise of religion, requiring a compelling state interest to justify the rules. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (applying strict scrutiny to invalidate an unemployment statute). However, the compelling interest test has never been as strict as that applied in the equal protection cases, nor has it been applied as uniformly.

More recent cases have deferred to state regulations of religion, applying a "neutrality" test. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994). In these cases, the Court held that government should act neutrally toward religion, creating general rules not designed to benefit or burden particular faiths. Neutrality can be a troublesome concept. In one sense, no "neutral" position exists. All laws necessarily either apply to or exempt religion. Hence, neutrality in that sense is impossible. The Court defines neutral rules to be: (1) generally applicable, and (2) not targeted at particular faiths. In *Smith*, the Court veered so far toward neutrality that it seemingly overruled the compelling state interest test altogether. There, the Court ruled that Native American free exercise rights could not protect believers from a "valid neutral law of general applicability" that prohibited the use of peyote even for sacramental purposes. Few free exercise claims could survive this test. In order to meet it, a claimant would have to demonstrate that the government intended to target a given religion. Consequently, *Smith* swung the pendulum away from deference to religious authority, back toward government neutrality to religion.

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb (Supp. V 1993), restored the compelling state interest test. It remains unclear, however, how stringently the compelling interest test will be applied. RFRA may merely reinstate the weak form of the test

unconstitutional to subsidize religion.[54] Arguably, therefore, it is only constitutional to impose a condition if it is neither a penalty nor a subsidy. Because most conditions can be construed to be one or both, we would expect almost all conditions that affect religions to be unconstitutional. In fact, however, the cases are divided and apparently inconsistent.[55] The problem is that we cannot coherently distinguish a penalty from a non-subsidy.[56] Consequently, the cases seem in disarray.

The same conduct can be considered either a penalty, or a refusal to subsidize. For example, in *Rosenberger v. Rector & Visitors of the University of Virginia*,[57] the issue was whether a state university must provide student activity fees for a religious publication. The petitioner argued that providing such fees to other publications that discuss the same issues from a secular perspective, but denying them to a religious publication, amounts to a penalty for a religious viewpoint. In contrast, the respondent argued that funding student activities is a direct state subsidy that would violate the Establishment Clause if provided to a religious group. Merely changing the formal label from "penalty" to "subsidy" does not help decide which bargains offend the Constitution.

Individuals denied a subsidy that everyone else receives are penalized. The Free Exercise Clause suggests that the government should not be able to use its power to exclude religious individuals from benefits available to all others. Thus, *Rosenberger* is consistent with prior cases that prohibited conditions that discriminated on the basis of religion. For example, in *McDaniel v. Paty*,[58] the Court held that a state could not exclude members of the clergy from the opportunity to hold political office. Arguably, the plaintiff was not precluded from running for office because he had a "choice" to be either a candidate or a member of the clergy. The Court rejected the idea that

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used by courts prior to *Smith*. The Supreme Court seems to continue to support the neutrality principle of *Smith* and cites it approvingly in dicta in *Church of the Lukumi Babalu Aye* and more openly in *Grumet*. Even under the neutrality principle of *Smith*, it still would be unconstitutional to penalize a free exercise right under some circumstances.

54. *See, e.g.*, School Dist. v. Ball, 473 U.S. 373 (1985) (special education teachers in sectarian schools amount to a subsidy); Wolman v. Walter, 433 U.S. 229 (1977) (buses for fieldtrips are an unconstitutional subsidy); Meek v. Pittinger, 421 U.S. 349 (1975) (maps, charts, and special education teachers supplied to parochial schools are unconstitutional subsidies). *But see* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995) (student activity fees for a religious magazine is not a subsidy); Everson v. Board of Educ., 330 U.S. 1 (1947) (buses for transportation to sectarian schools are not an unconstitutional subsidy).

55. *Compare* School Dist. v. Ball, 473 U.S. 373 (1985) (special education teachers in sectarian schools amount to a subsidy) *and* Wolman v. Walter, 433 U.S. 229 (1977) (buses for fieldtrips are an unconstitutional subsidy) *and* Meek v. Pittinger, 421 U.S. 349 (1975) (maps, charts, and special education teachers supplied to parochial schools is an unconstitutional subsidy) *with* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993) (permitting a sign language interpreter in a parochial school) *and* Muller v. Allen, 463 U.S. 388 (1983) (permitting tax deductions for parochial school tuition) *and* Everson v. Board of Educ., 330 U.S. 1 (1947) (permitting school buses to transport children to and from parochial schools).

56. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Sullivan, *supra* note 13.

57. 115 S. Ct. 2510 (1995).

58. 435 U.S. 618 (1978).

a government could condition political office on relinquishing the constitutional right to freely exercise religion as a member of the clergy. Although *McDaniel v. Paty* seems a particularly strong case both because the right to hold office was constitutionally guaranteed, and because it did not involve the payment of state funds, the Court has extended the reasoning of *McDaniel* to other government financial benefits that are not constitutionally mandated. For instance, in *Witters v. Washington Department of Services for the Blind*,[59] the Court held that a state program for the benefit of the blind could not be denied to an individual studying to become a minister. Therefore, it would seem that the government cannot condition a state benefit on surrendering free exercise rights.

However, the Court has not applied this standard consistently. The aid to parochial school cases serve as prime examples. These cases vary dramatically and seem to turn on nearly impossible distinctions. For example, in three cases the Court held that the state could provide benefits including vocational help,[60] sign language interpreters,[61] or diagnostic speech and language tests[62] to handicapped students enrolled in religious schools. In three other cases, the Court denied benefits for special education students including maps, charts, tape recorders,[63] or special education teachers[64] in parochial schools. Similarly, in one case the Court held that the state could finance bus transportation for parochial students to and from school,[65] while in another it held that the state could not finance buses for field trips.[66]

Part of the problem in these cases is the tension between the Free Exercise Clause and the Establishment Clause. One view of parochial aid sees it as a benefit conditioned on waiving religious education, much like *Witters*. That creates a free exercise issue. Refusing to provide aid to religious education penalizes those who choose it. They have to pay twice, once for public schools they don't use, and again for parochial schools. Others view aid to sectarian schools as a subsidy that allows religions to divert funds they otherwise would spend on education to other religious purposes. That creates an Establishment Clause issue. Those who view the aid as a subsidy note that religious children have the same right to a free education as everyone else. As a number of scholars have suggested, no principled analysis can distinguish between penalties and subsidies,[67] so there is no coherent way to decide which conditions on religion are permissible.

The hard cases involve aid for sectarian education of disabled students. Although the facile answer would distinguish this group from more suspect classes by noting that they do not currently merit strict scrutiny,[68] they are

59. 474 U.S. 481 (1986).
60. *Witters*, 474 U.S. at 489.
61. Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993).
62. Wolman v. Walter, 433 U.S. 229 (1977).
63. Meek v. Pittinger, 421 U.S. 349 (1975).
64. Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. v. Ball, 473 U.S. 373 (1985).
65. Everson v. Board of Educ., 330 U.S. 1 (1947).
66. Wolman v. Walter, 433 U.S. 229 (1977).
67. Bandes, *supra* note 56; Kreimer, *supra* note 56; Sullivan, *supra* note 13.
68. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (holding that

doubly disadvantaged when they are excluded from services unless they forfeit their religious options.[69] They are excluded because their handicap requires expensive assistance not available to unsubsidized parochial schools. Hence, they are excluded both on the basis of ability to pay and on the basis of handicap.

Consider, for example, the *Board of Education of Kiryas Joel Village School District v. Grumet*,[70] where the issue was whether a community of Orthodox Jews called the Satmar could create their own public school district for their special education students. Satmar children were eligible to attend special education classes in existing public school districts and some Satmar children had attended these schools. Those children had been ostracized. Most Satmar children attended private, religiously affiliated, sex segregated schools, but those schools did not offer help for children with special needs.

The Court did not treat the case as one involving unconstitutional conditions. The town of Kiryas Joel, the boundaries of which had been drawn to include only Satmars, went to the New York legislature and negotiated for their own school district. The issue seemed a straightforward question of establishment. Could a religious community create and control a political subdivision of the state, in this instance a school district, in order to avoid being included in a more diverse school district? The question centered around the delegation of government authority to a religious group. However, the case could be construed as an unconstitutional conditions case. The original state statute implicitly conditioned state funding for special education on religious integration.

At first glance, it seems like the least powerful in this situation are the disabled Satmar children. If they attend the public schools available to them, they are likely to be isolated and harassed both for their disabilities and their religious minority status. For small children, it would be difficult enough to dress differently and have different dietary habits and rules about social interactions, without also having to struggle with intolerance for handicaps.[71]

Justice Stevens' response is to stress that it is the duty of the public schools to protect students from such harassment.[72] Although Justice Stevens may be overly optimistic about the ability of the public schools to control student ostracism, he makes an important point. His view is remarkedly consistent with civic republican ideals that stress the duty of the polity to inculcate public virtues like tolerance and inclusion. According to this view, the presence of the Satmar children in public schools offers a benefit to all children from all the relevant communities. They provide the opportunity for practical lessons about tolerance and multi-culturalism.

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disability did not trigger strict scrutiny under the Equal Protection Clause).

69. For a fuller discussion of this problem of double exclusion on the basis of being both a disfavored class and a religious minority, see Rutherford, *supra* note 37; *see also* Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered*, 28 OSGOODE HALL L.J. 409 (1990).

70. 114 S. Ct. 2481 (1994).

71. For an excellent description of the Satmar perspective, see Martha Minow, *The Constitution and the Subgroup Question*, 71 IND. L.J. (forthcoming Winter 1995).

72. *Grumet*, 114 S. Ct. at 2495 (Stevens, J., concurring).

In almost any context children have the least power, but they may be protected by their parents and their communities. In contrast to the Satmar children, their parents and the community seem much more powerful. The community is relatively wealthy because it is largely composed of diamond merchants and importers.[73] The community is also well-organized and politically connected enough to get the law changed in their favor.[74] The fact that the Satmars had been able to create their own municipality is evidence of their cooperative power and access to political clout. Other similarly situated religious groups may have found it far more difficult to do the same.[75] As a result, the statute enabling the Satmars to create their school looks like special interest legislation.

The question of whether to focus on the children or their parents in religious disputes over education previously was addressed in *Wisconsin v. Yoder*.[76] There, the issue was whether the Amish should be required to stay in school until the age of sixteen. The majority held that Wisconsin had to grant a free exercise exemption to the Amish from the mandatory attendance rule. In dissent, Justice Douglas argued that the Court should focus on the impact on the children, rather than the parents' religious preferences.[77]

Yoder is different from *Grumet*, however. In *Yoder*, Douglas was arguing for including the children in a wider world than their own: "[T]he child will be forever barred from entry into the new and amazing world of diversity. . . ."[78] In *Grumet*, those who focus on the children are arguing for excluding them from the perspectives of the broader world.[79] The Satmar children who are educated in their own public school district are not only segregated from other cultural, religious, and racial groups, they are also effectively segregated from other Satmar children who do not require special education, since virtually all the other children attend private sectarian schools. In *Yoder*, the Court sustained the Amish community's right to keep itself separate from the mainstream culture, but the separation was maintained without government participation or financial support. In contrast, in *Grumet*, the Court refused to let the Satmar community use public schools to enforce its isolation. Thus, one of the crucial differences is that *Yoder* was not even implicitly an unconstitutional conditions case. *Grumet* involved a state benefit at least implicitly conditioned on integration.

Because the parents in *Yoder* were not receiving a state benefit, the case more clearly involves coercion. They were forced to send their children to

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73. *See* Minow, *supra* note 71.

74. The Satmar were not only able to create their own municipality and school district, they were able to convince the New York legislature to amend the statute to try to comply with the Supreme Court opinion in *Grumet*. *Id.*

75. Professor Kenneth Karst has suggested that some religious groups like Catholics and Jews that previously had diminished political power have gradually acquired legislative clout, while other groups such as the Krishnas, Seventh Day Adventists, and Jehovah's Witnesses still must rely on courts instead of legislatures to protect their interests. Karst, *supra* note 41, at 353.

76. 406 U.S. 205 (1972).

77. *Yoder*, 406 U.S. at 245.

78. *Id.*

79. *See* Minow, *supra* note 71.

high school under threat of criminal prosecution. Unlike the forced integration of *Yoder*, the Satmar were free to send their children either to separate parochial schools, or integrated public schools. The Satmar parents either did not want to pay the cost of segregated special education for their children, or were unable to do so.

Consequently, if we measure the balance of power in terms of disadvantage, it is difficult to distinguish merely poor children who cannot afford parochial school, from middle class disabled children who cannot afford such schools if they have to pay for enabling services. One distinction is that poverty is not an immutable characteristic. However, it is certainly beyond the power of the children to change. Although the Court never has held that poverty triggers strict scrutiny, it has ruled that the government cannot impose burdens on indigents that preclude them from exercising fundamental rights.[80]

In ruling on the aid to parochial education, the Court rarely discusses the fact that the refusal to fund sectarian schools most adversely affects poor and disabled children. At least six of the Supreme Court cases concerning the constitutionality of aid to parochial schools involve funding for special needs students.[81] The Court's analysis of these cases often focuses on the form the benefit takes. If governmental power is delegated to a religious group, then an establishment occurs, as in *Grumet*.[82] If the money is given to the students or their parents, then religion is not subsidized.[83] If the government pays the printer rather than the religious entity for the religious tracts, then it is not a subsidy.[84] If, however, the state skips the families or suppliers as intermediaries, then it is likely to be an illegal subsidy.[85] Moreover, the government

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80. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that the state could not prevent indigents from marrying by imposing a burden on the right to marry); Boddie v. Connecticut, 401 U.S. 371 (1971) (exempting indigents from filing fees in divorce cases where the fee would prevent the poor from getting access to court); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that states could not impose residency requirements on welfare recipients that would burden the fundamental right of indigents to travel).

Professor Lynn Baker relies on these cases to argue that, despite the formalistic rhetoric about penalties and subsidies, the Court only invalidates conditions imposed on those at or below subsistence level incomes to raise the price of fundamental rights beyond their reach. Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990). Unfortunately, the Court does not invalidate all such financial burdens. For example, the Court has been willing to let impoverished women be priced out of the market for their fundamental right to abort. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977). Recently, the unconstitutional conditions doctrine only seems to protect the relatively wealthy from regulatory takings of their property. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

81. *See* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993) (permitting a sign language interpreter in a parochial school); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986); School Dist. v. Ball, 473 U.S. 373, 385 (1985) (holding that state funded special education teachers in parochial schools subsidized religion); Aguilar v. Felton, 473 U.S. 402 (1985); Meek v. Pittinger, 421 U.S. 349 (1975) (maps, charts, and special education teachers supplied to parochial schools are unconstitutional subsidies); Wheeler v. Barrera, 417 U.S. 402 (1974).

82. *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481 (1994).

83. *See* Muller v. Allen, 463 U.S. 388 (1983) (upholding a state tax deduction for tuition at parochial schools).

84. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995).

85. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that direct aid to parochial schools violates the Establishment Clause).

cannot condition the money on being used in secular settings.[86] This formal set of distinctions makes little sense. The real issue ought to turn on who is excluded and why.

Once government decides to spend money on education, it must either make it available to religious schools or not. It has only three choices: (1) spend it solely on religious education; (2) spend it solely on secular public education; or (3) spend it on both. All three choices significantly impact both religious education and public schools. The first choice is precluded by the Establishment Clause that prevents the government from preferring religion to non-religion.[87] The second choice seems to be permissible, but raises the cost of religious education. The third choice remains controversial, but arguably constitutional.[88]

Aid to religious schools seems to treat different religions and secular interests equally, but it ultimately may decrease diversity in ways that are most costly to the least powerful. If sufficient numbers of average and above average students leave the public schools to attend religious schools that can be more selective, only those students at greatest academic risk remain. Because these students are more expensive to educate, they need to be included in schools that can partially pay for their costs with the savings from educating more easily educated students. Moreover, as the public schools decline in quality, the pressure on secular students to select a religious school in order to obtain a quality education mounts.

Once again, either providing a subsidy or denying it will pressure individuals to act contrary to their religious interests. Subsidized religious schools pressure secular students, while unsubsidized ones pressure religious students. In both instances, the costs will be borne by those with the least financial and academic power.

Religious persecution and governmentally established churches were the problems of the day at the time the First Amendment was drafted. The same problems of inclusion and exclusion now get played out in a subtler way. The current question is not limited to direct persecution or formally established churches, but also includes the incentives the government creates for individuals or institutions to modify their religious beliefs or behavior.

Strict separationists might argue that the state should not have any influence over religion at all. However, where the state allocates substantial resources, its decision to include or exclude religion necessarily must have an

86. *See* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

87. *See, e.g.*, Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (invalidating a preference for religious publications); Toasco v. Watkins, 367 U.S. 488 (1961) (invalidating a requirement that state officials declare a belief in God as imposing religious belief on nonbelievers).

88. *See* Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980); Mark J. Beutler, *Public Funding of Sectarian Education and the Free Exercise Clause Implications* 2 GEO. MASON INDEP. L. REV. 7 (1993); Michael J. Stick, *Educational Vouchers: A Constitutional Analysis*, 28 COLUM. J. L. & SOC. PROBS. 423 (1995); Peter J. Weishaar, *School Choice Vouchers and the Establishment Clause*, 58 ALB. L. REV. 543 (1994); James B. Egle, Comment, *The Constitutional Implications of School Choice*, 1992 WIS. L. REV. 495.

impact. A better analysis would look at the particular balance of power that results from the imposition of the condition.

Consider, for example, *Bob Jones University v. United States*.[89] There, the Internal Revenue Service imposed a condition that in order to receive tax exempt status, an institution could not racially discriminate. The university was affiliated with a fundamentalist Christian faith that believed that African-Americans carried the mark of Cain. As a result, the university prohibited interracial dating. The IRS denied the university tax exempt status because it refused to change its dating rules. The Supreme Court upheld the IRS position, emphasizing that the government had a compelling state interest in eradicating racial discrimination that outweighed the university's free exercise claims.

Bob Jones seems to be the classic unconstitutional conditions case. Using the traditional analysis, the tax exemption could be considered a subsidy for religion. If tax exemptions are viewed as subsidies, then the exemptions may violate the Establishment Clause. In *Walz v. Tax Commission*,[90] the Court upheld the constitutionality of tax exemptions without considering whether the exemption amounted to a subsidy. Instead, the Court relied on the long-standing historical practice of tax exemptions for churches. Professor William Nelson reads cases like *Walz* that privilege institutional religion as judicial attempts to foster equality. According to Nelson, the equality sought in these cases is defined not in terms of individual entitlement, but rather in terms of group empowerment.[91] Justice Brennan's concurrence expressly mentions a multi-cultural purpose, noting that such exemptions "uniquely contribute to the pluralism of American society."[92] This goal of expanding diversity hints at a power-based analysis. Those subsidies that encourage diversity help to diminish the power of any single institution and are therefore permissible. This view is remarkably consistent with Madison's desire to create a multitude of sects.

If the government had denied the tax exemption in *Walz*, the religion could have claimed that it was being penalized for its religious practice. Accordingly, in *Bob Jones*, the question of whether the condition penalized religion remains. The government conditioned a benefit (tax exempt status) on following a norm inconsistent with a particular faith. That seems like a free exercise violation. The Court could have ruled, as it later did in *Smith*, that the government could create neutral rules of general applicability so long as it did not purposely target a given religion. Although that narrows the scope of free exercise claims dramatically, it solves the unconstitutional conditions problem nicely. A condition is only unconstitutional if the religion can show that it was purposely targeted for discriminatory treatment. Since that kind of proof is difficult, most conditions would be permitted.

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89. 461 U.S. 574 (1983).

90. 397 U.S. 664 (1970).

91. William E. Nelson, *The Changing Meaning of Equality in Twentieth Century Constitutional Laws*, 52 WASH. & LEE L. REV. 3 (1995).

92. *Walz*, 397 U.S. at 689 (Brennan, J., concurring).

The Court did not take that tack, however. Instead, it held that the intrusion on free exercise rights was justified because the state's interest in eliminating racial discrimination was compelling.[93] As Professor Marci Hamilton has suggested, it is dangerous to permit the government to decide whether religious conduct is more or less compelling than any particular state interest.[94] In contrast, a power-based set of norms serves the purpose of cabining power without judging the relative merits of religious doctrine and secular goals.

According to my thesis, whether a governmentally imposed condition is constitutional depends on the relative power of the groups affected. The condition in *Bob Jones* is justified because of the need to protect African-Americans from subordination by other more powerful groups. Implicit is the conclusion that fundamentalist Christians are relatively more powerful than African-Americans in this context. That view may be supported in three ways. First, the institutional power the university has over students supports this assumption. Second, the history of slavery and racial discrimination makes racial groups particularly susceptible to subordination. Third, religious groups are by their nature more cohesive, better organized, and less diffuse than racial groups, and hence, are able to build a nucleus of cooperative power more easily. If the Court had ruled the other way, it would have selectively endorsed discrimination by religious institutions. Such a ruling would not only have given religions greater power to discriminate, it would also have disadvantaged other disfavored groups by reinforcing subordination. Because the condition in this context was used to diminish existing power disparities, it is a constitutional application of the doctrine.

Unlike more recent unconstitutional condition cases where the Court has held that conditions must be closely related to the government purpose,[95] the Court in *Bob Jones* seemed completely unconcerned that the condition imposed was unrelated to the exemption being granted. Nondiscrimination is not necessarily connected to tax exemptions, except to the extent such exemptions are granted for diversity purposes. Consequently, the notion that the condition must be "germane" to the purpose of the regulation or subsidy never arose.[96] Although it is always risky to posit why a particular line of analysis is missing from a case, at least three explanations are possible. First, the Court may not have thought too much about the need for a sufficient nexus between the conditions and the purposes served. Second, the Court may have viewed the need for a nexus as limited to Takings Clause conditions. There, germaneness may be an instrument to limit state power because

93. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983). At least one scholar has criticized even the compelling state interest test for free exercise claims, arguing that balancing state interests against religious views is inappropriate. *See* Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81 (1994). In essence, Hamilton defines free exercise as completely free from all coercion or influence. Accordingly, even the rules of the Establishment Clause prohibiting discrimination among religions should not apply to free exercise claims.

94. *See* Hamilton, *supra* note 93.

95. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

96. *Id.*

diversity issues are less apposite. Third, germaneness may be less relevant under the religion clauses where the preservation of diversity is a stated goal.

Applying my power-based theory of unconstitutional conditions to religion does not make *Rosenberger v. Rector & Visitors of the University of Virginia*[97] an easy case. *Rosenberger*, like *Bob Jones*, involves conditions imposed on government largesse (use of student activities fees). Similarly, the decision to include or exclude religious groups affects the interests of competing secular groups. Unlike *Bob Jones*, however, those groups do not necessarily have any greater claim to protection, other than that provided by the Establishment Clause. Nevertheless, the student fees are mandatory so the non-Christian students are coerced into supporting faiths they find repugnant.

Moreover, *Rosenberger* is more problematic because it involves a cash subsidy, something the Establishment Clause has prohibited for some time.[98] Nevertheless, the fact that *Rosenberger* involves a cash subsidy is not a sufficient reason to distinguish *Bob Jones*. At most, the difference between the subsidy in *Rosenberger* and the exemption in *Bob Jones* is a formal one. The actual amount of the subsidy is vastly smaller than the value of tax exempt status for a university.

Among other reasons, subsidies are considered invidious because they seem to "endorse" religion. However, as Justice O'Connor noted in *Rosenberger*, the university attached a disclaimer reading: "Although this organization has members who are University of Virginia students (faculty) (employees), the organization is independent of the corporation which is the University and which is not responsible for organization's contracts, acts, or omissions."[99]

A subsidy available to all offers few problems of endorsement, but subsidies are unlikely to be equally available. Only three possibilities exist: (1) the money will be given equally to all; (2) it will be distributed differentially; or (3) no money will be available. Under the first scenario, the subsidy will have diminished impact, because the amounts will be so small. In a world of finite resources, even division often results in minuscule benefits. If the money is selectively distributed, the amounts may be more significant but the chance of discrimination is also greater. Even seemingly neutral rules can be manipulated. For example, a "first come-first served" rule could be orchestrated with inside information as to the time and place to apply. If the information is provided equally to all, then all may apply at once, and the matter collapses into the first option of a *de minimis* resource. Finally, in the third scenario, although all groups are treated equally, no one benefits because no funds are disbursed.

A more fundamental problem is that subsidies increase the power of fringe groups, while simultaneously marginalizing larger, less organized groups like secular individuals. Small cohesive groups can organize

97. 115 S. Ct. 2510 (1995).

98. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (invalidating a direct subsidy to parochial schools).

99. *Rosenberger*, 115 S. Ct. at 2527 (O'Connor, J., concurring).

efficiently.[100] These groups can increase their power by block voting to assure more benefits. In contrast, more diffuse groups are less likely to organize, and, therefore, are less likely to vote as a block or obtain the subsidy. Hence, a system of subsidized speech is likely to over-represent the ideas of small cohesive groups in the marketplace of ideas. Often, religious groups are more cohesive than larger, isolated, and more disorganized groups of individuals defined by race, gender, disability, or secular views. Thus, religious institutions may have more cooperative power.

This problem is exacerbated when the small groups have been given other advantages in the marketplace of ideas. Religions, unlike other groups, are permitted to get tax deductible contributions for lobbying. In contrast, other groups must segregate their lobbying functions, and can only get deductions for contributions for their charitable activities. Therefore, religions already have greater access to the public fora than other groups.

If *Rosenberger* is viewed as an equal access case, it may seem difficult to distinguish it from *Lamb's Chapel v. Center Moriches Union Free School District*,[101] and *Widmar v. Vincent*,[102] which held that schools that opened their classrooms to other, outside activities were limited public fora that could not exclude groups based on the religious nature of their speech. Like those cases, the amount of the public expenditures is minimal and excluding the religious group can be construed to discriminate against a religious viewpoint.[103]

Some might argue that a cash subsidy cannot be considered a forum. This argument arises not from the fact that the benefit is a subsidy, but rather, from the problem of equal access to a limited public forum. Defining government benefits as fora may open all government subsidies to question. The Court is on very shaky ground here. Once the Court acknowledges that a speaker may need a subsidy to place her ideas in the marketplace, the very notion of an open unregulated marketplace is subject to question.[104] If the powerless need subsidies to participate in the market, then arguably, the government is constitutionally compelled to evaluate which speakers need help, and provide the means. Such a system would pose an enormous risk of government favoritism for particular ideas.

This problem highlights another difficulty with the *Rosenberger* case. Although the Establishment Clause analysis may justify balancing power to prevent the combined power of church and state, or to protect the free exercise

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100. For an excellent discussion of these principles of political organization and the strength that comes with small, cohesive groups, see Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 718-28 (1985).

101. 113 S. Ct. 2141 (1993).

102. 454 U.S. 263 (1981).

103. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 115 S. Ct. 2510, 2519-20 (1995).

104. For arguments that inequality of access vitiates the notion of a marketplace of ideas, see CATHARINE MACKINNON, THE WORD (1994); CATHARINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 155-56 (1987); Judith Baat-Ada (Reisman), *Freedom of Speech as Mythology or Quill Pen and Parchment in an Electronic Environment*, 8 N.Y.U. REV. L. & SOC. CHANGE 271, 275-79 (1979).

of the religion, the free speech principles may disfavor any such balancing. Indeed, in the context of speech, more speech is deemed to be inherently better, regardless of the source or the impact on the balance of power. For example, although government is admittedly the most powerful speaker, it still has the right to speak. Similarly, fear of cohesive, well-organized groups being over-represented should be met by more speech, not by limits on speech. Otherwise, limits on cohesive groups undoubtedly will be directed at disfavored political groups like Communists or Nazis.

Although the Christian group did not get its funding, it was able to publish its magazine anyway. Thus, its views were available in the marketplace of ideas. In this sense, this case is not much different from the parochial school cases in which affluent parents must choose between a free public school and a tuition-driven sectarian school. The parents can take advantage of the free education and merely pay for religious training on the side. Hence, they are not excluded from either their religion or from the benefits of public education. It would be a much harder case if the religious group had been unable to raise the money to publish their magazine. Then they might claim not only that their right to freely exercise their faith had been threatened by the condition, but also that the ideas were stifled.

The marketplace of ideas is supposed to determine the value of a particular idea. The problem is that the marketplace of ideas is inefficient. Bad ideas may be well-funded, and good ideas may be underfunded. However, some might argue that the ability to raise money is a rough measure of the value of an idea. If "the test of truth is the power of the thought to get itself accepted in the competition of the market,"[105] then good ideas will be able to attract funding. This view of the market assumes that the market is trying to establish "truth."

If, instead, the market of ideas is seen as a mechanism to increase participation, then speech is valuable because it is a form of participation that operates in favor of inclusiveness and diversity. Under this theory, the real issue should be who is included or excluded. That issue returns to the power-based model of unconstitutional conditions.

In this instance, the Christian students may claim to be the less powerful and excluded group. Whether they are less powerful is a question of fact that depends on how power is defined. Christians may outnumber non-Christians on campus. They already have formed an organization and identified themselves, so they may hold more cooperative power, albeit less hierarchial power. Nevertheless, they are the ones excluded from participation and in some communities they are discriminated against. If the Christian group is the least powerful, providing benefits to them on an equal basis with all others enhances diversity and helps to balance power. Although the Court should be skeptical about whether funds really will be disbursed equally, that risk should not disadvantage the minority religion or its speech until an unequal division is established. The best the Court can hope to do is focus on the more limited

105. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

question of equality among religions, although it is unclear why equal protection of religions is entitled to any greater protection than equal protection of other disfavored groups.[106]

A few caveats are in order. Even though the Christian coalition might be less powerful in this context, in another setting it might be an advantaged group. Hence, applying a power-based theory of unconstitutional conditions will have to be an individualized process with a great deal of attention paid to the facts of each case. For example, the outcome suggested for the *Rosenberger* case should not start the slippery slope towards generalized aid to parochial schools.

The disadvantage of a power-based theory of unconstitutional conditions is that it requires detailed trials on constitutional issues. Some scholars, like Kenneth Karst, would welcome such careful investigation into the history and context of challenged legislation.[107] Only by carefully considering such history and context can judges understand what is at stake for the individuals and groups involved. The theory is less predictive than principled. The power-based theory of unconstitutional conditions returns to the purpose of the First and Fourteenth Amendments: assuring a balance of power that enables individuals to participate both in the polity and their religious communities.

CONCLUSION

Constitutional law must be concerned with the power of government and how the government is authorized to use its power. One of the central purposes of the First and Fourteenth Amendments was to foster equal participation by all citizens. Hence, constitutional conditions should be evaluated in light of their impact on the balance of power. Because the greatest risks arise from the largest power disparities, the more a condition entrenches or expands power disparities, the more likely it is to be unconstitutional. Therefore, conditions that expand diversity and participation of less empowered groups are constitutional, and those that limit diversity and participation are unconstitutional.

106. *See* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987).

107. *See* Karst, *supra* note 41.