
Michael E. Hartmann
CLEANING UP WITH BANQUO'S GHOST IN THE DAIRYLAND?

A BRIEF (ECONOMIC) ANALYSIS OF THE MILWAUKEE PARENTAL CHOICE PROGRAM'S UNCONSTITUTIONAL CONDITIONING OF ITS AID ON AN EFFECTIVE WAIVER OF A RECIPIENT'S FREE EXERCISE OF RELIGION: PROFESSOR RICHARD A. EPSTEIN'S BARGAINING WITH THE STATE AND MILLER V. BENSON

by

MICHAEL E. HARTMANN*

I. INTRODUCTION

University of Chicago Law Professor Richard Epstein’s seminal 1985 book Takings¹ championed the libertarian notion of the U.S. Constitution’s fifth-amendment takings clause² as a bulwark against all sorts of state intrusions on individual liberty, including most forms of regulation and social-welfare programs.³ This government activity, Epstein convincingly argued, literally and constitutionally “takes” too much from private individuals for the supposed public good to go uncompensated. A bold and stark position, this. Epstein’s recent Bargaining with the State⁴ promotes an admittedly

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² “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.
³ “Indeed, given the limits the Founders placed on government [including the takings clause], it is difficult to understand how anyone could argue the Constitution authorizes the kind of expansive government we have today.” Roger Pilon, Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles, in Market Liberalism: A Paradigm for the 21st Century 21, 28 (David Boaz & Edward H. Crane eds. 1993).

second-best corollary notion, long traceable in U.S. Supreme Court jurisprudence, of what the libertarian response should be to government activity that "gives" aid to private individuals for the perceived public good: if the state gives such aid, it must not attach conditions that coerce, pressure, or induce an individual to in return waive any of his or her constitutional rights. The state cannot "bargain" that way.

If a state gives school-choice aid to individual parents, for instance, can it constitutionally attach a condition coercing, pressuring, or inducing such a parent to in return effectively waive the free exercise of religion by preventing the use of that aid — by, again, an individual — for tuition at a sectarian school? A pending federal lawsuit by Kansas City's Landmark Legal Foundation on behalf of five low-income parents and their children essentially asks this question of Wisconsin's four-year-old Milwaukee Parental Choice Program (M.P.C.P.), as does this short piece. The following section, then, by way of further introduction, encapsulates law professor/economist Epstein's interpretation of the doctrine of unconstitutional conditions and briefly summarizes the M.P.C.P. Section III equally briefly describes cases from other, similar contexts in which the Court has relied on the doctrine, and applies Epstein's interpretation to them, then to the more-specific contexts of education-funding, and finally to the M.P.C.P. in particular; the conclusion is § IV.

5 "One gets the sense that Epstein is not very pleased to be writing this book, which lacks the ringing conclusions of its illustrious predecessor [EPSTEIN, supra note 1]." Ellen Frankel Paul, Dealing with the Devil, REASON, Mar. 1994, at 59, 60 (reviewing RICHARD A. EPSTEIN, BARGAINING WITH THE STATE). "Both [Epstein's] libertarian admirers and his mainstream detractors may be surprised by his relatively pragmatic tone." Daniel Farber, With Liberty for Some: A scholar ponders how and why the Constitution limits conditions on Government benefits, N.Y. TIMES BOOK REV., Feb. 13, 1994, at 28 (reviewing RICHARD A. EPSTEIN, BARGAINING WITH THE STATE). See infra note 22 and note 47 and accompanying text.

6 See Complaint, Miller v. Benson, No. 93-C-1063 (E.D. Wis. Sept. 30, 1993). The case has been assigned to Judge John W. Reynolds. The named defendant is John T. Benson, the state Superintendent of Public Instruction. Id.

Landmark played a role in successfully defending the school-choice program against previous state constitutional attacks. See Davis v. Grover, 480 N.W.2d 460 (1992) (the M.P.C.P complies with Wisconsin's public-purpose doctrine); Davis v. Grover, 464 N.W.2d 220 (Wis. Ct. App. 1990) rev'd, 480 N.W.2d 460 (Wis. 1992). (Both Landmark and Wisconsin Policy Research Institute have been awarded grants for general operating expenses from the Lynde and Harry Bradley Foundation in Milwaukee. See REPORT OF THE LYNDE AND HARRY BRADLEY FOUNDATION: AUGUST, 1990 - DECEMBER, 1992 40, 67 (1993)).

7 See infra § II.A. (notes 13-48 and accompanying text).

8 See infra § II.B. (notes 49-68 and accompanying text).

9 See infra § III.A. (notes 74-92 and accompanying text).

10 See infra notes 113-17 and accompanying text.

11 See infra § III.B.2.a. (notes 118-33 and accompanying text).

12 See infra § IV (notes 134-40 and accompanying text).
II. OF MOPS AND THE MILWAUKEE SCHOOL-CHOICE PLAN

A. If . . ., Then . . .: The Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions recognizes that

the government . . . may be able to withhold certain benefits absolutely from a person, or it may be able to confer those benefits to a person unconditionally. Although it is possible for the government to adopt either of these two extreme positions, the doctrine of unconstitutional conditions nonetheless insists that the state is not entitled to take certain intermediate positions, whereby it conditions the transfer it makes upon the individual waiver of constitutional rights. 13

The state cannot bargain like that. This doctrine of unconstitutional conditions, unlike the highly weakened takings clause, is not in the Constitution itself, but then neither is the at least equally highly strengthened state "police power" by which property is so often taken. 14 "It roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others." 15

The unconstitutional-conditions doctrine — the basic premise of which, according to another legal scholar, enjoys overwhelming consensus 16 —

reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit

13 Epstein, Bargaining, supra note 4, at 5; see Epstein, Foreword, supra note 4, at 6-7; Richard A. Epstein, No New Property, 56 Brook. L. Rev. 747, 762 (1990) ("While the state may decide to remove the entire system of support at its free will and pleasure, it does not have a similar degree of freedom with respect to benefits paid to any individual under the system."). See also 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, 593-94 n.2 (1990) ("[T]he doctrine holds that although government may choose not to provide certain benefits altogether, it may not condition the conferral of a benefit, once provided, on a beneficiary's waiver of a constitutional right.") (emphasis added) (citing Laurence H. Tribe, American Constitutional Law § 10-8, at 681 & n.29 (2d ed. 1988)).

14 Epstein, Bargaining, supra note 4, at 9; Epstein, Foreword, supra note 4, at 10.

15 Epstein, Bargaining, supra note 4, at 9; Epstein, Foreword, supra note 4, at 10-11. "It has been used as an aid in construing the scope of Congress' spending power and of the states' police power. It has been engrafted onto substantive protections afforded to speech, religion, and property. It also has found expression in decisions under the equal protection and due process clauses." Epstein, Bargaining, supra note 4, at 9-10 (footnotes omitted; emphasis added); Epstein, Foreword, supra note 4, at 10-11 (footnotes omitted; emphasis added). (In Macbeth — recall, from somewhere — Banquo was murdered by Macbeth. In the next scene, Banquo’s ghost shows up at a banquet, seen only by Macbeth. Macbeth “addresses the apparition and is in danger of exposing [Macbeth’s] crimes completely. . . . Banquo’s murder — Macbeth’s final success — has brought about his undoing.” Cliff’s Notes On Shakespeare’s Macbeth 35 (1960).

16 See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1415 n.1 (1989). See also Sullivan, supra note 4, at 327.
includes the lesser power to impose a condition on its receipt. Consensus that the better view won, however, has not put an end to confusion about its application.\(^{17}\)

The doctrine has been, writes yet another legal scholar who wants it abandoned,\(^{18}\) "an awkward and never fully explicated effort to protect constitutional rights in [the] dramatically different institutional environment" of "the modern regulatory state."\(^{19}\) According to a fourth legal scholar, "Despite wide acknowledgement of the doctrine's importance in modern constitutional law, attempts to explain how it arises or what it does have been largely unsuccessful. **In cases involving public assistance benefits . . . [the Court has provided no coherent explication of when and how it will apply the doctrine . . . .**\(^{20}\)

"[T]he unconstitutional conditions doctrine," writes the scholar who thought its basic premise enjoyed overwhelming consensus, "is a doctrine in search of a theory."\(^{21}\)

1. In Search of: The Maximization of Social Surplus

"[T]he Pareto principle for measuring social welfare," however, *seemingly* "makes it unnecessary to adopt any doctrine of unconstitutional conditions," much less a theory to support the doctrine, writes Epstein,\(^{22}\) before providing a theory to support it. The strict Pareto test allows every self-interested person (everyone) to compare his or her own private welfare before and after any transaction or legal change: if no person in post-transaction/legal change State A is worse off than he was at the pre-transaction/legal change State B baseline, and at least one person is better off in State A than he was in the State B baseline, then State A must be judged as superior to State B.\(^ {23}\) State A is Pareto optimal. If the government is considered such a self-interested person, and one of its


\(^{18}\) SUNSTEIN, *supra* note 17, at 292; Sunstein, *supra* note 13, at 594.

\(^{19}\) SUNSTEIN, *supra* note 17, at 292; Sunstein, *supra* note 13, at 594. "The unconstitutional conditions doctrine cannot, in short, do much of the work expected of it. It is far too crude and general a way to address the multiple possible collisions between constitutional protections and the modern regulatory state." Sunstein, *supra* note 4, at 338. "The doctrine grows out of the same ideas about neutrality and action that predated the New Deal, and it is hopelessly ill suited to modern government." SUNSTEIN, *supra* note 17, at 292.


\(^{21}\) Sullivan, *supra* note 4, at 327.

\(^{22}\) Epstein, BARGAINING, *supra* note 4, at 8. The principle is named after Italian economist and sociologist Vilfredo Pareto (1848-1923), who developed it.

See Paul, *supra* note 5, at 60 ("While the opening, theoretical chapters of Takings combined a natural-rights principle with a utilitarian, social-surplus maximization principle, Bargaining jettisons natural rights and fully embraces the law-and-economics paradigm of Pareto superiority, wealth maximization, prisoner’s dilemma games, transaction costs, strategic bargaining, and externalities.").

\(^{23}\) See Epstein, BARGAINING, *supra* note 4, at 8.
proposed legal changes is rejected, "then it will be no worse off than before;" if accepted, "then it will be better off." In both cases the stringent Pareto conditions are satisfied so that there is no reason to worry about the terms and conditions that the government attaches to its legal changes. The test has nothing to say about the allocation or distribution of any "surplus" entrusted to the government by individuals—almost always, of course, through some form(s) of taxation—to support its performance of the tasks designated to it by them cooperatively and collectively. It has something to say only about the maximization of this social surplus.

The just-compensation requirement, detailed in Takings, preserves a sense of fairness across parties that is captured in the Paretian formula by forcing those who are better off in a post-legal change State A, those who have gained from the change, to justly (and fully) compensate those who are worse off after the change, those who have been deprived in some way by it. The requirement ensures that no single individual or faction bears the cost of a particular government action said to be for the universal common good—most probably, of course, said so by those better off after the change. Just compensation also has a clear economic function: to keep the government from undertaking foolish projects (i.e., those that cause more harm than they do good). It does this by the simple constitutional expedient of making the government show that there are no individual losers. Like the Pareto test, the requirement has something to say only about the maximization of any surplus entrusted to the government for designated tasks, nothing about its subsequent allocation or distribution.

"How then should surplus be maximized? . . . To develop a rule that allows the transaction”—or, if one of the parties is a government, the legal change—"to go forward so long as no one is left worse off and someone is made better off will satisfy all the concerns of the just compensation requirement and the strict rules of Pareto optimality on which it rests." Under a rule like this, it would seem to still be possible for a government with the greater power to deny a benefit to exercise the lesser power

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24 Id. at 9.
25 Id.
26 Id.
27 Id. at 81.
28 EPSTEIN, supra note 1.
29 EPSTEIN, BARGAINING, supra note 4, at 85.
30 Id.
31 Id.
32 "It becomes important to try to distinguish between legislation that advances the common good . . . from that which advances only a factional interest . . . . The just compensation requirement responds to that challenge." Id. at 85.
33 Id.
34 Id. at 81.
35 Id. at 93 (emphasis added).
of imposing a condition on its receipt; at least those willing to meet the condition will be better off.

2. The Allocation of Social Surplus

The question, though, is whether those who are not willing to meet the condition are better or worse off— for the answer to which it is useful to ask yet another, larger question: what method of allocation would all self-interested parties (everyone) prefer at the State B baseline, before they knew whether a particular method would make them better or worse off in what would be a post-legal change State A? A market-based, non-collective (non-governmental), purely and totally competitive approach, Epstein believes, should always be pursued if possible, "given the increase in total output that it achieves. . . . There are," though, "many contexts in which noncompetitive means may be resorted to in order to increase the total output of the system"— one of which is "the imposition of well-defined property rights over a common pool situation, such as a fishery or an oil and gas field." In such an "absence of any clean market solution," he believes, we "choose that allocation of the surplus that maximizes the likelihood that . . . beneficial social change will be brought about." Therefore, if there is some reason to believe that these social gains can be achieved by adopting some alternative rule— here (say) one that calls for the pro rata allocation of the gains, across all participants— then so much the better. Epstein posits six scenarios, the two most relevant of which are reproduced in slightly revised and expanded form as Tables 1 and 2, showing when there is reason to believe the maximization of social gains can be achieved by adopting a pro-rata rule of allocation.

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36 See supra note 13 and accompanying text.
37 EPSTEIN, BARGAINING, supra note 4, at 94.
38 Id. at 94. This "cannot arise from a simple government decree that secures open access to all comers within a competitive market. Instead there has to be a conscious effort to undo the existing set of rights and to substitute another in its place." Id.
39 Id. at 94-95. "[T]he object of the legal system is not merely to make sure that people are not hurt by the proposal, relative to the baseline of their prior entitlements. It is also an effort to maximize the total gain in question." Id. at 96. "Second, minimize the administrative costs associated with the operation of the system." Id. at 95.
40 See supra § II.A.1. (notes 22-35 and accompanying text).
In his oppressive-conditions scenario, the transaction or legal change without some hypothetically coercive condition passes the Pareto test (b); everyone is better off. With such an offending condition, however, the test recommends against the change because those in Group B are worse off (c), or at least for just compensation to Group B (d). No reason exists to believe an alternative pro-rata rule of allocation is necessary to maximize overall social welfare.

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**TABLE 1 Oppressive-Conditions Scenario**

<table>
<thead>
<tr>
<th>(Allocation)</th>
<th>(Maximization)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SOCIAL SURPLUS</strong></td>
<td></td>
</tr>
<tr>
<td>Group A</td>
<td>Group B</td>
</tr>
<tr>
<td>----------</td>
<td>---------</td>
</tr>
<tr>
<td>(a) Before legal change (State B baseline)</td>
<td>$x$</td>
</tr>
<tr>
<td>(b) After legal change (State A)</td>
<td>$x + 5$</td>
</tr>
<tr>
<td>(c) Legal change with condition flunking Pareto test (or)</td>
<td>$x + 7$</td>
</tr>
<tr>
<td>(d) Legal change with condition and costly but just compensation</td>
<td>$x + 5.5$</td>
</tr>
</tbody>
</table>

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See id. at 99 (This table represents Epstein’s “Scenario 3: Oppressive Conditions”) Id.; Epstein, Bargaining Breakdown, supra note 4, at 199 (“Scenario III: Oppressive conditions”). Epstein’s preceding Scenarios 1 and 2 are included as Tables a and b. Epstein, Bargaining, supra note 4, at 99; Epstein, Bargaining Breakdown, supra note 4, at 199. “[Scenario 1] is appropriate because it advances the welfare of the members of both groups.” Epstein, Bargaining, supra note 4, at 99; Epstein, Bargaining Breakdown, supra note 4, at 199-200.

**TABLE a** Epstein’s “Scenario 1: No conditions”

<table>
<thead>
<tr>
<th>Before regulation</th>
<th>After regulation</th>
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</thead>
<tbody>
<tr>
<td>Group A</td>
<td>100</td>
</tr>
<tr>
<td>Group B</td>
<td>100</td>
</tr>
</tbody>
</table>

**TABLE b** Epstein’s “Scenario 2: Virtuous conditions”

<table>
<thead>
<tr>
<th>Before regulation</th>
<th>After regulation</th>
<th>With regulation and good condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Group A</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>Group B</td>
<td>100</td>
<td>150</td>
</tr>
</tbody>
</table>

Epstein, Bargaining, supra note 4, at 99; Epstein, Bargaining Breakdown, supra note 4, at 199. “Scenario 2 [is] good because [it] improve[s] the situation either from the prior state of affairs, or from the regulatory intervention without the attached condition.” Epstein, Bargaining, supra note 4, at 98; see Epstein, Bargaining Breakdown, supra note 4, at 200.

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41 See id. at 99 (This table represents Epstein’s “Scenario 3: Oppressive Conditions”) Id.; Epstein, Bargaining Breakdown, supra note 4, at 199 (“Scenario III: Oppressive conditions”). Epstein’s preceding Scenarios 1 and 2 are included as Tables a and b. Epstein, Bargaining, supra note 4, at 99; Epstein, Bargaining Breakdown, supra note 4, at 199. “[Scenario 1] is appropriate because it advances the welfare of the members of both groups.” Epstein, Bargaining, supra note 4, at 99; Epstein, Bargaining Breakdown, supra note 4, at 199-200.

42 Epstein, Bargaining, supra note 4, at 100.
The case here does not concern the distribution of cooperative surplus, but rather the simpler question of whether members of group B can claim that they have not received just compensation . . . . The case is therefore amenable to invalidation under an ordinary takings analysis, without ever reaching any concern about the size or distribution of the cooperative surplus. 43

In the unconstitutional-conditions scenario, however, reason does exist to believe the pro-rata rule of allocation is necessary to maximize social welfare.

TABLE 2 Unconstitutional-Conditions Scenario44

<table>
<thead>
<tr>
<th>SOCIAL SURPLUS</th>
<th>(Allocation)</th>
<th>(Maximization)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Group A</td>
<td>Group B</td>
</tr>
<tr>
<td>(a) Before legal change</td>
<td>x</td>
<td>x</td>
</tr>
<tr>
<td>(b) After legal change</td>
<td>x + 5</td>
<td>x + 5</td>
</tr>
<tr>
<td>(State B baseline)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) Legal change with condition (State A)</td>
<td>x + 6</td>
<td>x + 3</td>
</tr>
</tbody>
</table>

Scenario 4, the unconstitutional conditions scenario, is designed to prevent the unfortunate move from (b) to (d) of Scenario 3. In essence the doctrine treats the outcome in (b) as the appropriate [State B] baseline against which the success or failure of the subsequent condition is measured. It is as though the process took place in two stages. First the basic regulation was imposed, and only thereafter was the condition in (c) attached [State A]. If the condition flunks the Pareto test relative to the [State B] baseline in (b), then the condition is struck down, even if the members of Group B are better off in . . . (c) [State A] \(x + 3 > x\) than they were in . . . (a) . . .

This case is one where mutual gains from a prior historical baseline do not establish the social optimum, and therefore should not be respected. It thus becomes clear why the greater/lesser argument is improper. It presupposes that the relevant comparison . . . is between (a) and (c) [State A] when

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43 Epstein, Bargaining Breakdown, supra note 4, at 200.

44 See EPSTEIN, BARGAINING, supra note 4, at 99 ("Scenario 4: Unconstitutional Conditions"); see also Epstein, Bargaining Breakdown, supra note 4, at 199 ("Scenario IV: Unconstitutional conditions").
in fact the right comparison is between (b) [the State B baseline] and (c) [State A].45

In other words, the condition is now considered the legal change to which the Pareto test is applied. The condition moves the scenario from the State B baseline to State A — which is, again, Pareto optimal only if no party is worse off than before, or without, the condition. This is done because "[t]he question is whether the condition advances overall social welfare, and there is no guarantee that this will happen just because it is consented to by the individual actor. . . . By blocking certain bargains between the individual and the state, it becomes possible to improve overall social welfare [(2x + 10) > (2x + 9)]."46

So much the better.

45 Id. at 100; see Epstein, Bargaining Breakdown, supra note 4, at 200. See supra notes 17 and 36, and accompanying text.
46 Id. at 101; see also Epstein, Bargaining Breakdown, supra note 4, at 200.

There is no question that the final state of affairs [(c)] is Pareto superior to the initial state of affairs [(a)]. . . . Nonetheless, there is both less of an aggregate increase than there was in the regulation without the condition, as in (a), and a skewing of the benefits to Group A. The two phenomena are closely related. The doctrine of unconstitutional conditions therefore restricts the alternatives available to the state . . . to a choice between the initial unregulated situation and the unconditioned legislation. . . . The doctrine of unconstitutional conditions thus operates to good social purpose when there is a Pareto improvement over the initial state of affairs. This is the paradigmatic case where the greater/lesser power arguments lose their normative force.

Epstein, Bargaining Breakdown, supra note 4, at 200.

Epstein’s succeeding Scenarios 5 and 6 are included as Tables c and d.

TABLE c

<table>
<thead>
<tr>
<th></th>
<th>Group A</th>
<th>Group B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before regulation</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>With regulation</td>
<td>150</td>
<td>150</td>
</tr>
<tr>
<td>With regulation and efficient condition</td>
<td>160</td>
<td>170</td>
</tr>
</tbody>
</table>

EPSTEIN, BARGAINING, supra note 4, at 99.

Scenario 5 . . . produces gains that are not pro rata on the one hand, but which maximize the overall size of the pie on the other . . . . Perhaps the presumption that Scenario 5 is an empty set should not be made absolute, but it surely should be overridden only with very powerful evidence under some compelling state interest.”

Id. at 101. See infra § III.A.2. (notes 100-112 and accompanying text). See also infra note 139 and accompanying text.

TABLE d

<table>
<thead>
<tr>
<th></th>
<th>Group A</th>
<th>Group B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before regulation</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>With regulation</td>
<td>150</td>
<td>150</td>
</tr>
<tr>
<td>With regulation and perverse condition</td>
<td>130</td>
<td>130</td>
</tr>
</tbody>
</table>

EPSTEIN, BARGAINING, supra note 4, at 99. Scenario 6 “satisfies the pro rata test, but . . . leaves everyone equally worse off.” Id. at 101.
The unconstitutional-conditions doctrine — it is important to note, as Epstein does — is

a "second-best" approach to controlling government discretion. ... In some cases, the doctrine . . . is used to 'take back' some of the power which had been conferred upon government officials in the first place. In principle, the doctrine's application would be unnecessary if the Court had restricted the scope of government power in the first place.\footnote{id. at 23; see also Epstein, Foreword, supra note 4, at 28.}

It is, in other words (of Epstein's), "a mop-up doctrine" available for use "when other forms of constitutional restraint have been abandoned."\footnote{EPSTEIN, BARGAINING, supra note 4, at 23.} Less bold, less stark; something of a fall-back position.

So, then, to the barricades?

B. Wisconsin's Milwaukee Parental Choice Program

Take the well-known Milwaukee Parental Choice Program, passed by Wisconsin's legislature in March 1990 at the behest of Democratic State Rep. Annette "Polly" Williams and, as part of a budget bill, signed by Republican Gov. Tommy Thompson the following month. The program — against which, principally because of the properly perceived danger of its inviting the ultimately stifling government overregulation of existing successful private schools, there have been strong libertarian-conservative dissenting arguments\footnote{See, e.g., Charlotte Allen, Choice: A Burkean Dissent, AM. SPECTATOR, Nov. 1993, at 62. See also Seymour Fliegel, Public School Choice Works - Look at East Harlem, WALL ST. J., Oct. 29, 1992, at A15 ("Counterpoint") ("The voucher argument is a funding issue. It clouds the choice issue.").} — allows parents of "a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level" to send their children to "any nonsectarian private school located in the city" using state tax money equal to what the state would have given the Milwaukee Public Schools district.
(M.P.S.)\textsuperscript{30} per pupil, provided certain criteria are met by the student, his or her family, and the participating private school.\textsuperscript{51}

Table 3 shows the increasing degree of participation — by students and nonsectarian, private schools — in the M.P.C.P. during the four academic years since its inception.

\textsuperscript{30} See Susan Mitchell, Why MPS Doesn't Work: Barriers to Reform in the Milwaukee Public Schools, 7:1 WIS. POL.'Y RES. INST. REP. (1994) (although M.P.S. is constantly setting new goals and promising reforms, its own bureaucracy is the primary enemy of useful change and improved education); see also Susan Mitchell, Tinkering with schools won't work: shift control to parents, BUS. J., Jan. 22, 1994, at 5; Dan Parks, MPS woes blamed on bureaucracy, MILWAUKEE SENTINEL, Jan. 6, 1993, at 1A; MPS not following up on its goals, study says, MILWAUKEE SENTINEL, Jan. 6, 1993, at 10A; MPS report card: System must upgrade, regardless of Choice, MILWAUKEE SENTINEL, Jan. 7, 1994, p. 12A ("Editorials"); Finding fault won't cure MPS, MILWAUKEE J., Jan. 11, 1994, at A10 ("Journal Views"). See also Curtis Lawrence, MPS reform efforts fail to pay off in grades, test scores, MILWAUKEE J., Jan. 20, 1994, at A1.


Recent legislative efforts to expand M.P.C.P.'s universe of choice to include parochial schools - supported by Democratic Milwaukee Mayor John O. Norquist, a former state legislator himself - have not met with success. See Amy Rinard, Light rail advances; Choice expansion denied, MILWAUKEE SENTINEL, Mar. 11, 1994, at 5A. See also Dan Parks, Religious schools eyed for Choice: Move may add 4,000 students, MILWAUKEE SENTINEL, Feb. 17, 1994, at 1A; Mike Nichols, Coalition fights choice expansion: Religious and education groups oppose inclusion of sectarian schools, MILWAUKEE J., Feb. 17, 1994, at B1; Choice for church schools unjust, MILWAUKEE J., Feb. 18, 1994, at A10 ("Journal Views"); Curtis Lawrence Bill to seek parochial choice: Welch says structure for quality education is already in place, MILWAUKEE J., Feb. 9, 1994, at B5.

A bill that would have expanded the universe of school choice to include any public school in the state with available capacity was approved by the Finance Committee, 9-4, and sent to the Senate. Daniel Bice, Broaden Choice plan advances, Key tuition compromise worked out by Joint Finance Committee, MILWAUKEE SENTINEL, Feb. 24, 1994, at 1A; Tim Kelley, Committee supports school choice plan: Proponents like idea of competition, WIS. ST. J., Feb. 14, 1994, at 3B; Richard P. Jones, Public school choice bill advances: Amendment aims to ease burden on poorer districts, MILWAUKEE J., Feb. 24, 1994, at B1. See Richard P. Jones, Bill would let students pick school districts: But it would also make poor districts pay to send kids to wealthy districts, MILWAUKEE J., Feb. 9, 1994, at A8.
TABLE 3 Participation by Students and Private Schools in the M.P.C.P.52

<table>
<thead>
<tr>
<th></th>
<th></th>
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<td>Eligible students</td>
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<td>946</td>
<td>950</td>
<td>968</td>
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<tr>
<td>Applications</td>
<td>577</td>
<td>689</td>
<td>998</td>
<td>1,049</td>
</tr>
<tr>
<td>Available seats</td>
<td>406</td>
<td>546</td>
<td>691</td>
<td>811</td>
</tr>
<tr>
<td>Participating students</td>
<td>341</td>
<td>521</td>
<td>620</td>
<td>742</td>
</tr>
<tr>
<td>Participating schools</td>
<td>7</td>
<td>6</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>Private, nonsectarian schools in Milwaukee</td>
<td>22</td>
<td>22</td>
<td>23</td>
<td>23</td>
</tr>
</tbody>
</table>

(This data and the high (and increasing) degree of participation in a one-year-old, private, non-state, school-choice program in Milwaukee—"Partners Advancing Values in Edu-

52 From John F. Witte, Andrea B. Bailey & Christopher A. Thorn, Third-Year Report, Milwaukee Parental Choice Program, Department of Political Science and The Robert La Follette Institute of Public Affairs, University of Wisconsin-Madison 33 (1993) (table 1) [hereinafter Witte]. See Daniel Bice, Study gives Choice program mixed reviews: Math scores up this year, but reading achievement dropped, MILWAUKEE SENTINEL, Dec. 23, 1993, at 7A; Dave Daley, Choice having little effect on test scores, study shows: But parents are pleased and involved with program, MILWAUKEE J., Dec. 23, 1993, at A1; Verdict still out on choice schools, MILWAUKEE J., Dec. 23, 1993, at A6 ("Journal Views"). The M.P.C.P. statute requires the state Department of Public Instruction (D.PI) to submit an annual report on the program to the state legislature and participating schools. Wis. Stat. § 119.23(5)(d)(1990). The D.PI. chose Professor Witte to conduct the research for and write these reports. Regarding Witte's first such report, see contra Mitchell, supra note 51, at 17-41.

53 The M.P.C.P. statute restricts the number of students eligible for the program to "[n]o more than 1% of the [M.P.S.] school district's membership ... in any school year." Wis. Stat. § 119.23(2)(b)1(1990). This will increase to 1.5% in 1994-95. Witte, supra note 52, at iv. (the information appears at iv. in the "Executive Summary" as well as on page 1 and page [33] in Figure 1.) The legislation that would have expanded the M.P.C.P. to include parochial schools would also have increased this number to five percent in 1994-95. See supra note 51.

54 "Officials at participating [M.P.C.P.] schools say that because state reimbursement does not cover their operating costs they cannot afford to expand so more students can attend." Mitchell, supra note 51, at 14. This funding limit and a statutory limit that students in the M.P.C.P. cannot exceed 49% of a school's total enrollment, Wis. Stat. § 119.23(2)(b)2, combine to keep hundreds of students out of the program. Mitchell, supra note 51, at 14. From results of survey reported in id. (Table 5). See id. at n.36. The 49% limit will increase to 65% in 1994-95. Witte, supra note 52, at iii. (the information appears at iii in the "Executive Summary" as well as page 1 and page [33] in Figure 1.).

55 This data is as of the September of each academic year. There have also been January and June "counts" for each year, five out of the existing six of which (data from the January and June counts for the current academic year are not yet available) resulted in lower numbers than in September. Id. at [33] (Table 1).

56 The M.P.C.P. may be an indirect cause of the Milwaukee Archdiocese's abolishing of its three-school Central City Catholic School System (C.C.C.S.S.) at the end of 1993-94. Ernst-UlrichFranzen, Catholic school system to be closed: Archdiocese cites high costs, low enrollment for shut down, MILWAUKEE SENTINEL, Jan. 27, 1994, at 1A, 6A. The M.P.C.P. has "been hurtful to us," according to C.C.C.S.S. administrator Michaelina Young. Id. The students "get to go somewhere else for free, but they still have to pay if they stay with us." Id. Total enrollment in the C.C.C.S.S. schools dropped from 778 in 1989 to 360 in the fall of 1993. Marie Rohde, Closing of 3 schools stirs strong reaction: Outraged administrator says she's unlikely to work for church again, MILWAUKEE J., Jan. 28, 1994, at B3. See Marie Rohde, Archdiocese closing 3 central city schools: 2 will reopen to house new program serving whole families, MILWAUKEE J., Jan. 27, 1994, at B1. See also Sad demise of inner city schools, MILWAUKEE J., Jan. 29, 1994, at A8 ("Journal Views"). "Though we rue these closings, we remain opposed to public funding for sectarian schools, directly or indirectly; entangling state and religion is unhealthy for both parties. Id. We wish private funding had been able to rescue these schools." Id. Regarding the latter, see infra note 57.
cation" (P.A.V.E.)—demonstrate the desire of inner-city, poor parents for school choice. A majority of Wisconsin residents agree with them, according to polls by the Gordon S. Black Corporation for the Wisconsin Policy Research Institute in Milwaukee.

Table 4 shows the amount of state aid that would have gone to the M.P.S. system, but instead has gone to or is going to these private schools, during the M.P.C.P.'s four years.

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The [P.A.V.E.] program awards grant covering half the yearly tuition of private, sectarian, or independent schools to eligible families. To qualify for the program, families must fill out an application and be eligible for the federal school-lunch program. In the 1992-93 academic year, 4,094 students applied for PAVE assistance. A total of 2,089 grants, 1,087 for elementary students and 282 for secondary students, worth $1,278,932 were awarded on a first-come, first-serve basis. Of the 2,089 students who received PAVE scholarships, 1,151 were new to private schools and 938 had previously attended private schools. Currently, 79 private elementary and 7 high schools participate in the PAVE program.

Table e shows this support.

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Support for vouchers is highest among Blacks (78%), Catholics (59%), residents of Milwaukee (67%), 18-24 years [sic] olds (63%), and parents with children in private parochial school (81%). But even among parents with children in public schools, 62% support a voucher system.

. . . Sixty-one percent endorsed making available to all parents in Wisconsin a choice plan similar to that offered in Milwaukee . . . [meaning one by which] parents can send their children to a local public or private school but not to a parochial school. [See supra note 51 (S.B. 415).]

More than two-thirds (68%) endorsed making such a plan available to all parents in Wisconsin if it included local parochial as well as local public and private schools. . . .

Support for voucher-based choice systems is bolstered by the belief among most Wisconsin residents (66%) that the competition resulting from a choice program will improve the quality of education available to all children.

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Id.
TABLE 4 State Aid Transferred from M.P.S. to Private Schools in the M.P.C.P.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount per student</td>
<td>$2,446</td>
<td>$2,643</td>
<td>$2,745</td>
<td>$2,987</td>
</tr>
<tr>
<td>Total transferred</td>
<td>$733,800</td>
<td>$1,353,216</td>
<td>$1,630,334</td>
<td>$2,216,354</td>
</tr>
</tbody>
</table>

Students benefiting from the M.P.C.P. have been and are, as intended, predominantly from low-income families; they are also mostly non-white. Table 5 shows the family incomes of students in the M.P.C.P., in the M.P.S. system overall, and in the M.P.S. from low-income families.

TABLE 5 Family Income of M.P.C.P. and M.P.S. Students

<table>
<thead>
<tr>
<th>M.P.C.P.</th>
<th>M.P.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Low-income</td>
<td>Low-income</td>
</tr>
<tr>
<td>Overall</td>
<td>Overall</td>
</tr>
<tr>
<td>Mean income</td>
<td>Mean income</td>
</tr>
<tr>
<td>$0-$4,999</td>
<td>$0-$4,999</td>
</tr>
<tr>
<td>17%</td>
<td>13%</td>
</tr>
<tr>
<td>$5,000-$9,999</td>
<td>$5,000-$9,999</td>
</tr>
<tr>
<td>42%</td>
<td>41%</td>
</tr>
<tr>
<td>$10,000-$19,999</td>
<td>$10,000-$19,999</td>
</tr>
<tr>
<td>28%</td>
<td>21%</td>
</tr>
<tr>
<td>$20,000-$29,999</td>
<td>$20,000-$29,999</td>
</tr>
<tr>
<td>14%</td>
<td>14%</td>
</tr>
<tr>
<td>$35,000-$49,999</td>
<td>$35,000-$49,999</td>
</tr>
<tr>
<td>0%</td>
<td>8%</td>
</tr>
<tr>
<td>$50,000+</td>
<td>$50,000+</td>
</tr>
<tr>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Mean income</td>
<td>Mean income</td>
</tr>
<tr>
<td>$11,625</td>
<td>$22,000</td>
</tr>
<tr>
<td>$12,130</td>
<td></td>
</tr>
</tbody>
</table>

60 Wis. Department of Pub. Instruction, Milwaukee Parental Choice Program Payment Summary, 1991-92, cited in Mitchell, supra note 51, at 11 n.27 (Table 4).

"Amount per student" is from Witte, supra note 52, at iii. (the information appears at iii. in the "Executive Summary" as well as at page 1 and page 33 at Table 1.). "Total transferred" is from author’s calculation, multiplying amount per student by the number of participating students, as of September 1993, as reported by Witte. See supra note 55 and accompanying entries in Table 3.

The "total transferred" for the first three academic years does not necessarily equal the "amount per student" multiplied by the number of "participating students" as reported in Table 3 because the latter figure is, recall, as of September only; the number of participating students fluctuates throughout any particular academic year. See Mitchell, supra note 51, at 11 n.27 (Table 4).

63 "[D]efined as qualifying for free or reduced lunch. The income level for reduced lunch is 1.85 times the poverty..."
Table 6 shows the race of students in the M.P.C.P. and the M.P.S. system.

### TABLE 6 Race of M.P.C.P. and M.P.S. Students

<table>
<thead>
<tr>
<th>Race</th>
<th>M.P.C.P.</th>
<th>M.P.S.</th>
</tr>
</thead>
<tbody>
<tr>
<td>African American</td>
<td>77.6%</td>
<td>55.3%</td>
</tr>
<tr>
<td>Hispanic</td>
<td>16.9%</td>
<td>9.7%</td>
</tr>
<tr>
<td>Native American</td>
<td>0.9%</td>
<td>0.9%</td>
</tr>
<tr>
<td>Asian American</td>
<td>0.2%</td>
<td>3.8%</td>
</tr>
<tr>
<td>White</td>
<td>3.4%</td>
<td>29.3%</td>
</tr>
<tr>
<td>Other</td>
<td>1.2%</td>
<td>1.0%</td>
</tr>
</tbody>
</table>

Wisconsin, through the M.P.C.P., bargains with the low-income Milwaukee parents of the mostly non-white students like these: *on the condition that you effectively waive your free-exercise rights by agreeing to not spend it at religious schools, we'll give you the now almost $3,000 we would've given M.P.S. to educate your child* and let you spend it at any other school of your liking.

### III. BANQUO'S ROAMING GHOST: MOVING TO MILWAUKEE?

The Landmark Legal Foundation — as stated, already at the barricades (or at least at the bar) — has initiated a federal suit against this type of bargaining on behalf of five families denied the choice to spend M.P.C.P. aid at *sectarian* schools. In the pending *Miller v. Benson*, Landmark argues this denial violates the parents' free-exercise and equal-protection rights guaranteed by the U.S. Constitution's first and fourteenth amendments, respectively; that it is, essentially, an unconstitutional

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* From, moreover, a "fund" (the state's general revenues) into which the parents, through income taxation, paid in the first place. See infra notes 69, 130, and accompanying text.

* Indeed," "we have seen the jurisprudence" of concentrating "not on ensuring freedom but on enhancing the democratic process" "solidify . . . by the unwillingness of opponents to challenge [it] on constitutional grounds." Pilon, supra note 3, at 48.

condition. The unconstitutional-conditions doctrine’s pro-rata rule of allocation thus will, nearer the conclusion hereof, be applied to the facts of Miller.

A. The Ghost Roams: The Free-Exercise Clause, Unemployment-Compensation Cases

The Court has held in four cases that a state unconstitutionally conditioned aid to an individual on an effective waiver of free-exercise rights in the unemployment-compensation context — to the facts of each of which will also later be applied the unconstitutional-conditions doctrine’s pro-rata rule of allocation. In 1963’s Sherbert v. Verner decision, 1987’s Hobbie v. Unemployment Appeals Commission of Florida decision, and 1989’s Frazee v. Illinois Department of Employment Security — applying the once-and-future strict-scrutiny, compelling-interest standard for state infringements on the free exercise of religion — the Court held that a state could not constitutionally deny unemployment-compensation benefits to someone who became unemployed for refusing to work on the Sabbath because of religious belief. In 1981’s Thomas v. Review

72 Should the portion of the M.P.C.P. statute excluding religious schools be declared unconstitutional, the rest of the statute may survive under what is known as the doctrine of “severability.” In the federal courts (and almost all state courts), “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left if fully operative as a law.” Alaska Airlines v. Brock, 480 U.S. 678, 684 (1987). In Califano v. Westcott, 443 U.S. 76 (1979), for example, the Court held that a statute providing benefits to families whose dependent children are denied parental support because of unemployment of the father, but not of the mother, was unconstitutionally discriminatory. The Court suggested continued extension of the benefits — without the discrimination — was the preferred course over nullification. Id. at 90-91.

73 See infra notes 127-33 and accompanying Table 8 and text.

74 “Half of the ten public assistance cases in which the Court found a condition unconstitutional concerned the claimant’s rights under the free exercise clause of the first amendment.” Baker, supra note 20, at 1243.

Regarding equal protection rights, which are not directly addressed here, in a similar context (and with the same judge as in Miller), see Milwaukee Montessori School v. Percy, 473 F. Supp. 1358 (E.D. Wis. 1979), in which a Wisconsin statute exempting public and parochial schools from certain day-care licensing requirements was held an unconstitutional denial of equal protection; there was no rational basis for the distinction between private parochial schools and other private schools. Id. at 1360. The Milwaukee Montessori School also made first amendment claims, but since the statute did not survive even rational-basis scrutiny under the fourteenth amendment, the court need not have addressed them. Id. at 1359.

75 Unemployment compensation is perhaps — perhaps someday sometime soon with school-choice aid — a paradigmatic example of an entitlement constituting what Charles A. Reich coined in 1964 “the new property.” Charles A. Reich, The New Property, 73 YALR L.J. 733, 733 (1964) (“Increasingly, Americans live on government largess — allocated by government on its own terms, and held by recipients subject to conditions which express ‘the public interest.’”) Contra Epstein, Property, supra note 13.

76 See infra notes 115-17 and accompanying Table 7 and text.


80 See infra § III.A.2. (notes 100-112 and accompanying text).
Board of the Indiana Employment Security Division, under the same strict-scrutiny standard, Indiana could not deny aid to someone who became unemployed for refusing to participate in the production of armaments because of religious belief.

1. Four Steps Forward

In Sherbert, plaintiff Adell Sherbert, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath day of her faith. Sherbert was then denied the unemployment-compensation benefits otherwise available to her because this religiously driven behavior constituted a “failure, without good cause, to accept suitable when offered” rendering her ineligible for the benefits. Justice William Brennan implicitly relied on the doctrine of unconstitutional conditions, in reasoning also subsequently relied upon and language quoted in both Thomas and Hobbie: “[N]ot only is it apparent that appellant’s declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.” According to Brennan,

The ruling [disqualifying Mrs. Sherbert from benefits because of her refusal to work on Saturday in violation of her faith] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . ., on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

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82 Sherbert, 374 U.S. at 399.
83 Id. at 401.
84 Id. at 404, quoted in Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 140 (1987); Thomas, 450 U.S. at 716-17; Epstein, Bargaining, supra note 4, at 259; see Epstein, Foreword, supra note 4, at 81-82.
85 Sherbert, 374 U.S. at 404, quoted in Hobbie, 480 U.S. at 140; Thomas, 450 U.S. at 716-17; Epstein, Bargaining, supra note 4, at 259; Epstein, Foreword, supra note 4, at 81-82. (The brackets are used only in Thomas). See also Baker, supra note 20, at 1203:

This . . . then, gives rise to a further, critical question: On what basis does the Court distinguish a condition that burdens or impinges on a constitutional right from one that does not? . . . A condition that “coerces” claimants or is likely to deter them from exercising a constitutional right simultaneously (and impermissibly) burdens those claimants. In contrast, a condition that is empirically unlikely to affect a claimant’s exercise of a right constitutes no such burden. This . . ., of course, is not an answer to, but rather a restatement of, the original question . . .

Id. (footnotes omitted).

See also Ira C. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933 (1989) (courts should consider a government policy burdensome to the free exercise of religion if an analogous act committed by an individual would violate generally accepted common-law norms). “[Sherbert, Thomas, and Hobbie] can be squared with the common law approach to defining free exercise burdens by supplementing the traditional common law conception of property with the concept of ‘entitlement.’” Id. at 977 (footnote omitted). (See supra note 75 (Reich’s “new property”)).
This burden/"fine" could not be justified by an interest sufficiently compelling enough to survive the Court's strict scrutiny.86

In Thomas, plaintiff Eddie Thomas, a Jehovah's Witness whose religious beliefs prevented him from participating in the production of weapons, was initially hired by the Blaw-Knox Foundry & Machinery Co. to work in a foundry producing steel for a variety of industrial uses.87 After Blaw-Knox closed that foundry, the only departments remaining in the company were all engaged directly in the production of weapons; Thomas was transferred to a department that fabricated turrets for military tanks.88 He quit, and was then denied unemployment-compensation benefits because he did not have "good cause" for what was considered this "voluntary termination."89 After quoting the above Brennan language in Sherbert, Chief Justice Burger wrote:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.90

Under the strict-scrutiny standard, none "of the interests advanced [by Indiana for its denial of aid] is sufficiently compelling to justify the burden upon Thomas' religious liberty. Accordingly, Thomas is entitled to receive benefits unless . . . such payment would violate the Establishment Clause."91

In Hobbie, plaintiff Paula Hobbie was hired by Lawton and Company, a Florida jeweler, and then three years later was baptized into the Seventh-day Adventist Church.92 Hobbie was thus then, for religious reasons, unable to work on her Sabbath.93 Lawton's general manager informed her "that she could either work her scheduled shifts [including on the Sabbath] or submit her resignation to the company."94 When Hobbie refused to do

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86 Sherbert, 374 U.S. at 406-09. "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences . . . ." Id. at 409.
87 Thomas, 450 U.S. at 710.
88 Id.
89 Id. at 709-12.
90 Id. at 717-18, quoted in Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987).
91 Thomas, 450 U.S. at 719.
92 Hobbie, 480 U.S. at 138.
93 Id.
94 Id.
either, Lawton discharged her.\textsuperscript{95} Florida could not offer the Court a state interest sufficiently compelling enough to survive the necessary strict scrutiny for free-exercise cases.\textsuperscript{96}

And in \textit{Frazee}, very similarly, plaintiff William Frazee refused to work on Sunday — which he, though not a member of a formally organized religion, called “the Lord’s day” — and thus could not accept the offer of a temporary retail position by Kelly Services.\textsuperscript{97} Frazee’s application for unemployment-compensation aid was denied because, according to the Illinois Department of Employment Security’s Board of Review, “[w]hen a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination” and not “on an individual’s personal belief.”\textsuperscript{98} While “there may exist state interest sufficiently compelling to override a legitimate claim to the free exercise of religion,” Justice Byron White wrote for the Court, “[n]o such interest has been presented here.”\textsuperscript{99}

2. Other, More-Recent Steps

a. One step back

In 1990’s \textit{Employment Division, Department of Human Resources of Oregon v. Smith},\textsuperscript{100} in “a tremendous blow against religious liberty,”\textsuperscript{101} the Court refused to apply the up-to-then requisite strict-scrutiny standard to a denial of aid to Native American Church members who became unemployed for ingesting peyote in religious ceremonies.\textsuperscript{102} In \textit{Smith}, Alfred Smith and Galen Black, members of the Native American Church, “were fired from their jobs with a private drug rehabilitation organization because they ingested peyote [a criminally prohibited “controlled substance” under Oregon statutes] at a ceremony” of their church, as described by Justice Scalia.\textsuperscript{103} “[T]hey were determined to be ineligible for [unemployment-compensation] benefits because

\textsuperscript{95} \textit{Id.}

\textsuperscript{96} \textit{Id.} at 141-42. In so doing, the Court again rejected the argument “that the awarding of benefits to Hobbie would violate the Establishment Clause.” \textit{Id.} at 144.

\textsuperscript{97} \textit{Frazee v. Illinois Dep’t of Employment Sec.}, 489 U.S. 829, 830.

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.} at 835.

\textsuperscript{100} 494 U.S. 872 (1990).

\textsuperscript{101} CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM 105 (1993).

\textsuperscript{102} \textit{Smith}, 494 U.S. at 885.

\textsuperscript{103} \textit{Id.} at 874.
they had been discharged for work-related 'misconduct' — a denial that did not, according to Scalia, violate their free-exercise rights. Smith's and Galen's claim for relief, Scalia wrote,

rests on our decisions in Sherbert . . ., Thomas . . ., and Hobbie . . ., in which we [using the strict-scrutiny, compelling-interest standard] held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. . . . However, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical. . . .

b. One step back forward

However, the Religious Freedom Restoration Act (R.F.R.A.) of 1993 — relatively quietly signed, amid all the hubbub over the North American Free Trade Agreement (N.A.F.T.A.), in mid-November by President Bill Clinton — explicitly restores the

104 Id. at 875.
105 Id. at 890. In so holding, the Court went beyond allowing the state to forbid this sacred religious practice. It silently overturned decades of case precedents and announced a new rule that could severely limit religious liberty in many other contexts. Henceforth, as long as the challenged government regulation is not aimed at religion and affects only religious practices, not beliefs, a law of general applicability is valid regardless of its impact on religious liberty.

BOLICK, supra note 101, at 105. See Kenneth Marin, Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine, 40 AM. U.L. REV. 1431 (1991) ([A]bandoning strict scrutiny of free exercise claims eliminates a significant safeguard of religious liberty; "removal of the state's burden to satisfy strict scrutiny will have the highly undesirable effect of generating legislative indifference toward religious beliefs").

See also Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. CHI. L. REV. 1109 (1990). Religious exercise is no longer to be treated as a preferred freedom; so long as it is treated no worse than commercial or other secular activity, religion can ask no more. The needs of minority religion are no longer to be legally entitled to equal consideration from the state. If practitioners of minority religions cannot protect themselves, that is the "consequence of democratic government," which they should recognize as "unavoidable."


106 Smith, 494 U.S. at 876. "In recent years we have abstained from applying the Sherbert test (outside the unemployment-compensation field) at all . . . . Even if we were inclined to breathe into Sherbert some life beyond the unemployment-compensation field, we would not apply it to require exemptions from a generally applicable criminal law." Id. at 883-84.

"The Smith Court began its discussion of these [unemployment-compensation] cases by noting that the compelling interest test had not led to the invalidation of any government action 'except the denial of unemployment compensation,' as if that were a coherent distinction." McConnell, supra note 97, at 1122-23 (footnote omitted). "Mysteriously, the Smith Court said there were only three" such unemployment-compensation cases, omitting Frazee without explanation. Id. at 1122 n.56.


strict-scrutiny standard used in *Sherbert, Thomas, Hobbie,* and *Frazee* for cases in which free-exercise rights are burdened:

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS. — The Congress finds that —

***

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests.\(^{109}\)

(b) PURPOSES. — The purposes of this Act are —

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.\(^{110}\)

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED

***

(b) EXCEPTION. — Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —

(1) is essential to further a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

\(^{109}\) Pub. L. No. 103-141 § 2(a)(5).

\(^{110}\) Id. § 2(a)(5)(b).

\(^{111}\) Id. § 3(b).
(c) JUDICIAL RELIEF. — A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.\(^{112}\)

B. From . . ., To . . .: An (Economic) Analysis of Establishment- and Free-Exercise Clause, Unconstitutional-Conditions Cases

"[A]ssume," "economist" Epstein, analyzing Sherbert and echoing his rationale for the unconditional-conditions doctrine's pro-rata rule of allocation,\(^{113}\) writes,

that all the contributions to the unemployment system are collected from a tax imposed directly or indirectly on the workers and the firm. Assume further that random distributions of wealth between, say, plumbers and pipefitters, are permitted under ordinary unemployment compensation programs. Now divide the world into two classes of people, those who might quit jobs for religious reasons and those who would not. The question that the [first amendment's establishment ("no law respecting an establishment of religion . . .") and free-exercise (". . . or prohibiting the free exercise thereof")] religion clauses ask is whether there is an implicit redistribution of wealth across those two classes — either way. If the redistribution runs from religious persons to nonreligious persons, then we have a free exercise clause violation. If it runs in the opposite direction, then we have an establishment-clause violation. Which is it?\(^{114}\)

\(^{112}\) Id. § 3(c). The R.F.R.A. also contains a provisim for an offending government to pay attorneys' fees to a prevailing party. Id. § 4. Regarding "substantially burdens," see supra note 84.

Mordecai Lee, executive director of the Milwaukee Jewish Council for Community Relations - which has announced its intention to join in an amicus curiae brief against Landmark's challenge to the M.P.C.P.'s exclusion of sectarian schools, State Jewish group joins Choice dispute, MILWAUKEE SENTINEL, Nov. 15, 1993, at 13A - has favorably cited the R.F.R.A. in speaking against an exclusive Milwaukee suburb's active unwillingness to allow a synagogue to be built there. Belling and Company (WISN-TV, Ch. 12, Milwaukee, television broadcast, Jan. 30, 1994). See, e.g., David Thorne, Village board will listen to more testimony on temple, MILWAUKEE J., Feb. 22, 1994, at B8; David Thome, Decision on synagogue is at least a month off, MILWAUKEE J., Jan. 27, 1994, at B1; Lisa Sink, Hearing on synagogue draws 300, MILWAUKEE SENTINEL, Jan. 27, 1994, at 8A; Friends of synagogue place ads, MILWAUKEE SENTINEL, Jan. 26, 1994, at 4A.

\(^{113}\) See supra § II.A.2. (notes 36-46 and accompanying text).

\(^{114}\) EPSTEIN, BARGAINING, supra note 4, at 261 (emphasis in original; brackets, including parentheticals therein citing U.S. CONST. amend. I, supplied); see Epstein, Foreword, supra note 4, at 84; see also Epstein, Religious Liberty in the Welfare State, 31 WM. & MARY L. REV. 375, 391 (1990) ("Forcing the nonreligious to subsidize the religious . . . injects the possibility of one-way transfers across the deep divide of separate factions or groups - a recipe for political dynamite."). Contra SUNSTEIN, supra note 17, at 297-98.

[N]o constitutional provision generally forbids "redistribution." Since the [period of Lochner v. New York, 198 U.S. 45 (1905) (invalidating a 10-hour/day statute for certain classes of bakers)], the Constitution has been construed to authorize a wide range of changes benefiting some groups and burdening others, largely on the understanding that existing distributions of wealth and property are not sacrosanct. When a redistribution is found unconstitutional, it is judged to be so not because of
1. The Unemployment-Compensation Cases

In Sherbert, Thomas, Hobbie, and Frazee, it was a free-exercise violation; the redistribution, the Court found, ran from religious persons to nonreligious persons. Sherbert, Hobbie, Thomas, and Frazee, respectively, were unconstitutionally forced to subsidize nonreligious workers when their states conditioned any unemployment-compensation benefits to be paid to them — from a governmentally collected pool of resources, an unemployment-compensation fund, into which they and their firms paid — on foregoing certain religiously driven behavior. The state could not bargain with them that way, according to the Court.

To do so created, in each case, the unconstitutional-conditions scenario of Table 7, showing that a pro-rata rule of allocating the benefits maximized overall social gain.

TABLE 7 The Unemployment-Compensation Programs in Sherbert, Thomas, Hobbie, and Frazee and Their Unconstitutional Conditioning of Aid on an Effective Waiver of a Recipient’s Free Exercise of Religion

<table>
<thead>
<tr>
<th>UNEMPLOYMENT-COMPENSATION AID (SOCIAL SURPLUS)</th>
<th>(Allocation)</th>
<th>(Maximization)</th>
<th>Overall social welfare</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Non-religious” recipients</td>
<td>Sherbert, Hobbie, Thomas, and Frazee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Before programs</td>
<td>x</td>
<td>x</td>
<td>2x</td>
</tr>
<tr>
<td>(b) After programs (State B baseline)</td>
<td>x + aid for which all are eligible (“5”)</td>
<td>x + aid for which all are eligible (“5”)</td>
<td>2x + “10”</td>
</tr>
<tr>
<td>(c) Programs with unconstitutional conditioning of aid on foregoing certain religiously driven behavior (State A)</td>
<td>x + aid for which “non-religious” recipients are eligible (“6”)</td>
<td>x + aid for which religious recipients are eligible (“3”)</td>
<td>2x + “9”</td>
</tr>
</tbody>
</table>

any general constitutional disability, but because particular constitutional provisions rule off-limits particular government acts, some of them admittedly redistributive.

. . . [U]nless we are to return to Lochner, redistributive and paternalistic programs are no longer constitutionally out of bounds.

Id. (footnote omitted). See supra note 19.

115 Tables 7 and 8 are, like Tables 1 and 2 herein, revised and expanded forms of Epstein’s tables. See supra note 41 and accompanying Table 1 and note 44 and accompanying Table 2, and infra note 120 and accompanying Table 8.
Treating the outcome in (b) as the appropriate State B baseline against which the conditioning of aid on foregoing certain religiously driven behavior in State A (c) is measured, the condition in (c) fails the Pareto test along with the strict-scrutiny standard; Sherbert, Thomas, Hobbie, and Frazee are worse off in State A than they were at the State B baseline. The condition is struck down—even though Sherbert, Thomas, Hobbie, and Frazee would have been better off in State A (c) than without the compensation programs at all. "The question," recall, "is whether the condition advances overall social welfare, and there is no guarantee that this will happen just because it is consented to by the individual actor. . . . By blocking certain bargains between the individual and the state, it becomes possible to improve overall social welfare."117

2. Another Step Forward?

In the school-choice context, similarly, divide Wisconsin taxpayers into two classes of people, those who would send their children to sectarian schools and those who would not. The question the religion clauses ask of the M.P.C.P. is whether there is an implicit redistribution of wealth across these two classes, either way. If the redistribution runs from religious persons to nonreligious persons, then we have a free-exercise violation. If it runs from nonreligious persons to religious persons, then we have an establishment-clause violation.

Which is it?

a. Recent education-funding, establishment-clause cases

A lawsuit by a Puerto Rican teachers’ association and supported by, among others, the American Civil Liberties Union, against that commonwealth’s school-choice plan, which includes religious schools within its universe of choice, asserts the plan is thus an establishment-clause violation.118 Based on past decisions in the general context of

114 See supra note 23 and accompanying text.
115 See supra note 46 and accompanying text (quoting EPSTEIN, BARGAINING, supra note 4, at 100-01).
116 See Rick Henderson, School Switch: Puerto Rico’s Voucher Program, REASON, Feb. 1994, at 13; Clint Bolick, Puerto Rico: Leading the Way in School Choice, WALL ST. J., Jan. 14, 1994, at All (“The Americas”). A commonwealth superior court on April 19, 1994, held the plan unconstitutional under a provision in the commonwealth constitution “which provides that no public funds or properties shall be used for the education in, or for the sustenance ['sostenimiento'] or benefit of schools or educational institutions which are not those of the state.” Teachers Ass’n of Puerto Rico v. Torres, No. KAC 93-1268, at 2 (Apr. 19, 1994) (translation from Spanish by the Institute for Justice, a public interest legal organization in Washington D.C., helping to defend the plan). The decision will be appealed to Puerto Rico’s highest court. The superior court noted that because this provision of the commonwealth constitution is broader in its prohibition than the “establishment clause” of the First Amendment of the Constitution of the United States . . . , the vast jurisprudence of the Supreme Court of the United States interpreting what is and is not allowed under the more limited scope and reach of the prohibition in the First Amendment is not of full application to the controversy at hand.

Id. at 19 (citations omitted)
education funding, however, the Court — as in the above free-exercise, unemployment-compensation cases — would likely not consider the use by religious persons as individuals of wealth from a “fund” into which nonreligious person contributed (through taxation) an establishment-clause violation. “Where, as here [and, importantly, as with the M.P.C.P.], aid to parochial schools is available only as a result of decisions of individual parents, no ‘imprimatur of state approval’ can be deemed to have been conferred on any particular religion, or on religion generally” then-Justice William Rehnquist wrote in 1983’s *Mueller v. Allen*, in which the Court held that Minnesota state tax deductions for expenses incurred in sending children to parochial schools did not violate the establishment clause. Any redistribution from nonreligious persons to religious persons wasn’t at the state’s behest, the Court found, but rather at that of one acting in his or her individual capacity.

In 1986’s *Witters v. Washington Department of Services for the Blind*, similarly, the Court rejected an establishment-clause challenge to state assistance for a blind person studying at a Christian college “only as a result of the genuinely independent and private choices of the aid recipient,” in the words of Justice Thurgood Marshall, who knew something about constitutional guarantees and schools. “[T]he fact that aid goes to individuals means that the decision to support religious education is made by the individual persons wasn’t at the state’s behest, the Court found, but rather at that of one acting in his or her individual capacity.

Should any potential future legislation expanding the M.P.C.P. to include religious schools, see supra note 51, pass and be signed into law by Governor Thompson (or a successor), there would likely be a similar establishment-clause challenge by local and/or national organizations to the new and larger program - including on state constitutional grounds. “The Wisconsin Constitution is much tougher on the separation of church and state than the federal constitution.” Mordecai Lee, Member, Steering Committee, Wisconsin Coalition for Public Education, and Executive Director, Milwaukee Jewish Council (see supra note 112), quoted in Nichols, *Coalition fights choice expansion*, supra note 51. “Many states, have establishment clauses that are more restrictive than the federal establishment clause,” Garnett v. Renton School Dist. No. 403, 987 F.2d 641, 646 (9th Cir. 1993), citing Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 632-33 (1985) - including Wisconsin. Indeed, independent Messmer High School, run by the Archdiocese of Milwaukee until 1984, was held ineligible for the M.P.C.P. by state hearing examiner Thomas R. Orogan on May 7, 1993, because it was “pervasively sectarian” and thus its inclusion would violate the state’s establishment clause. Lee Sherman Dreyfus (Interim State Superintendent, Wisconsin Department of Public Instruction), *In the Matter of the Eligibility of Messmer High School for Participation in the Milwaukee Parental Choice Program as established under §119.23, Wis. Stats., May 25, 1993; see Parochial-school ban in voucher plan halted*, CHI. TRIB., May 21, 1993, at 7 (Americans United for the Separation of Church and State, which had filed brief with state hearing examiner opposing Messmer’s inclusion, hailed examiner’s decision to exclude Messmer).

Now, the federal free-exercise clause, of course, would - if it ever came to this - be more powerful than the state establishment clause (or, in the case of Puerto Rico, the commonwealth education-funding clause). In other words, a successful federal free-exercise challenge to the original M.P.C.P.’s exclusion of sectarian schools would “trump” a successful state establishment-clause challenge to an expanded M.P.C.P.’s inclusion of sectarian schools. Cf. Garnett, 987 F.2d at 646 (while “[a] state constitutions can be more protective of individual rights than the federal Constitution . . . states cannot abridge rights granted by federal law”) (citations omitted; emphasis added).

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199 See supra § III.A.1, especially notes 86 and 96. See also generally Jon S. Lerner, *The Constitutional Case for Universal School Choice in Minnesota*, Center of the American Experiment, Minneapolis, Minn., October 1993.


121 Id. at 402-03.

122 Id. at 399.

individual, not the State." Again, any redistribution from nonreligious persons to religious persons wasn’t at the state’s behest, but at that of an individual (who, in this case, paid along with everyone else into the pool of resources collected by the Washington state government from which the aid was drawn).

And in last term’s *Zobrest v. Catalina Foothills School District*, the Court held that the public provision of a sign-language interpreter for a student in a Catholic school under the federal Individuals with Disabilities Education Act (I.D.E.A.) did not violate the establishment clause “just because sectarian institutions may also receive an attenuated financial benefit,” in the words of Chief Justice Rehnquist:*

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124 Id. “For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier, and the State may do so even knowing that the employee so intends to dispose of his salary.” Id. at 486-87 (footnote omitted). For another (perhaps somewhat more pointed) example, according to a recent computer analysis of 1990 census data by the University of Wisconsin at Madison’s Applied Population Laboratory done at the request of *The Milwaukee Journal*, half the public-school teachers who live in Milwaukee’s central city sent their children to public schools, including religious ones. Richard F. Jones, * Teachers choose private schools*, MILWAUKEE J., Nov. 14, 1993, at 1, 4. “We’ve got a lot of members who are very religious,” said Chuck Howard, president of the Milwaukee Teachers’ Education Association, “and they decide to send their children to religious schools.” Id. at 4. Added Richard Collins, president of the Wisconsin Education Association Council: “I’ve known public school teachers who just feel they want to send their kids for religious instruction.” *Id.*

Public funds provided to individuals, of course, are already constitutionally spent at religious institutions in the child-care and college-grant contexts. See, e.g., Susan Mitchell, *Educational Choice in Wisconsin: Public Funds for Private Schools, Early Childhood through Post-Secondary*, 6:4 WIS. POL’Y. RES. INST. REP. (1993). “Thousands of participants” in Wisconsin programs providing public funds to individuals for private education already “use public funds to attend church-affiliated institutions.” Id. at 2. The college-level Wisconsin Tuition Grant Program, for example, “has provided more than $200 million through about 194,000 grants for students at private, nonprofit universities in Wisconsin. The majority are church-affiliated,” id. at 29 - including, among others, (alphabetically) Cardinal Stritch, Marian, Marquette, Mount Mary, St. Norbert, and Wisconsin Lutheran, id. at 32.


The district was the result of a political compromise with the Hasidim, who were seeking public education for their handicapped children. Grumet v. Board of Education 592 N.Y.S. 2d 123, 125 (N.Y. App. Div. 1992). The decision from which they are appealing cited *Mueller*, but “[c]onsidering the entire contest in which the statute was enacted,” thought the “symbolic impact” of the arrangement too strong. *Id.* at 127 (citing the establishment clause’s tripartite analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); see Grumet v. New York State Education Department, 579 N.Y.S. 2d 1004 (Sup. 1992).

*See also* William Bentley Ball, *A Chance to Untangle the Law*, CRISIS, Feb. 1994, at 16 (“The *Kiryas Joel* case highlights the mass of contradictions which the Court’s church-state jurisprudence has become.” “One hopes (but rather doubts) that the Supreme Court . . . will at least face up to the fictions and absurdities of *Lemon v. Kurtzman*, which has been the great instrument employed by our courts for two decades in secularizing our society”) (parentheses in original); *Another church-state riddle*, CTR. TRIB., Jan. 9, 1994, § 4, at 2 (“New York went too far to accommodate the Hasidim, partly because the Supreme Court eliminated more reasonable options”).
By according parents freedom to select a school of their choice, the statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents. In other words, because the IDEA creates no financial incentive for parents to choose a sectarian school, an interpreter's presence there cannot be attributed to state decisionmaking.126

Any redistribution, once again, was at the behest of an individual (who, also again, paid into the — here, federally collected — resource pool from which the aid was drawn).

b. A free-exercise, education-funding case: Miller

Would the Court consider the M.P.C.P., as Landmark essentially urges, an unconstitutional redistribution of wealth127 from religious persons to nonreligious persons and thus a free-exercise violation? To deny its school-choice aid to the low-income parents wishing to send their children to sectarian schools solely because those parents will not satisfy the condition that such aid only be spent at nonsectarian schools — to bargain with them like that, as unconstitutionally done in Sherbert, Hobbie, Thomas, and Frazeel28 — the M.P.C.P. is effectively forcing them to subsidize other parents nor wishing to send their children to sectarian schools.129 (Now, Landmark's low-income parental plaintiffs’...
incomes are probably so low that they do not, in relative terms, contribute much to the Wisconsin general revenues from which the aid funding the M.P.C.P. is drawn. The state, however, is still unconstitutionally bargaining with these families — arguably, because of their low-income status, with even more heavy-handed undue leverage over them and their free-exercise rights). The state cannot bargain with them that way.

To do so creates the unconstitutional-conditions scenario of Table 8, showing that a pro-rata rule of allocating M.P.C.P. aid maximizes overall social gain.

... Religious parents do not seek to be absolved from paying their fair share toward the public good of education: their objection is to being excluded from that good.

Id. Sunstein's and McConnell's scenario, mind you, is not exactly the same as the one in Miller - in which the state has already established a choice program including private schools, but just not parochial schools. See also STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZES RELIGIOUS DEVOTION 200 (1993).

Should a voucher program ever be established - and I am by no means saying that it should be - parents who choose to send their children to religious schools should be eligible alongside parents who send their children elsewhere. In a technical sense, this does indeed constitute government support for religion, for a voucher is nothing but a direct subsidy from government revenues. But it is support without discrimination - all religious schools would be equally eligible, and none would have any advantage over nonreligious schools. For the government to subsidize some private schools but refuse to subsidize the religious ones would make religious schools more costly and would thus constitute a government-created disincentive to use them. In other areas of constitutional law, we do not call such disincentives “neutrality”; we call them “discrimination.”

Id. (emphasis added; footnote omitted).

Contra Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195, 221, 222 (1992). (“[I]t is a mistake to see these developments as a penalty on religiousists who would rather handle education and charity their own way. .... Religiousists gain from the provision of universal public education even if they withdraw their children to private schools .... [Vouchers are not compelled].”); Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism, supra note 13, at 610 (“A system in which government may fund public schools but not private schools, and allows its citizenry to opt out of the public school system at its own expense, seems to be the best reconciliation of the competing interests.”).

130 See supra note 63 and accompanying Table 5. According to Wisconsin Department of Revenue estimates (taking known 1992 figures and accounting for inflation), the 1994 poverty level for a single-parent, one-child family is approximately $10,250. Multiplying by 1.75, this family must have a total family income not exceeding $17,900 to be eligible for the M.P.C.P. This family, through its income taxes, would pay about $543 to the state general revenues from which the aid funding the program is drawn. The 1994 poverty level for a two-parent, two-child family is approximately $15,100. Multiplying by 1.75, this family must have a total family income not exceeding $26,400 to be eligible for the M.P.C.P. This family, through its income taxes, would pay about $937 to the state general revenues from which the aid funding the program is drawn. Telephone conversation with Dennis Collier, Director, Bureau of State Tax Policy, Division of Research and Analysis, Department of Revenue, State of Wisconsin, Madison, Wis. (Dec. 16, 1993).

131 See Baker, supra note 20.

[Baker] presents a positive theory of the unconstitutional conditions doctrine in challenges involving public assistance benefits. The theory proposes that the Court, sub silentio, has been employing a straightforward test in deciding nearly all conditional allocations cases involving these benefits: The Court declines to defer to the legislature only when the challenged condition requires persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income. The theory rests on two critical facts: The exercise of many constitutional rights carries a price for the individual; and statutory conditions on benefits can adversely and discriminatorily affect that price.
The M.P.C.P. in *Miller* and its Unconstitutional Conditioning of Aid on an Effective Waiver of a Recipient’s Free Exercise of Religion

<table>
<thead>
<tr>
<th>M.P.C.P. AID (SOCIAL SURPLUS)</th>
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</thead>
<tbody>
<tr>
<td><strong>(Allocation)</strong></td>
</tr>
<tr>
<td>“Non-religious” recipients</td>
</tr>
<tr>
<td>Social welfare of all recipients</td>
</tr>
</tbody>
</table>

(a) Before M.P.C.P.  
(x) (x) 2x

(b) After M.P.C.P. (State B baseline)  
(x + aid for which all are eligible (“5”)  
2x + “10”)

(c) M.P.C.P. with unconstitutional conditioning of aid on waiver of right to send children to religious school with that aid (State A)  
(x + aid for which “non-religious” recipients (Miller plaintiffs) are eligible (“6”))  
2x + “9”

Treating the outcome in (b) as the appropriate State B baseline against which the conditioning of M.P.C.P. aid on foregoing sending an eligible child to a religious school with it in the existing State A (c) is measured, the condition in (c) fails the Pareto test along

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*Id. at 1188. See also supra note 129 (“[A system allowing] citizenry to opt out of public school system at its own expense” is best). Sunstein, supra note 13, at 610.*


For a century or more, two concepts of freedom have dominated political debate. One is that freedom consists of the absence of government restraint; you are free to travel to France if the government doesn’t prevent you from doing so. The other understanding of freedom is that it consists of the power to do something; you are free to travel to France if you have the means to go. The first implies a minimal government and is the one most often embraced by conservatives. The latter concept is usually associated with activist and interventionist government.

School choice has turned this political and intellectual lineup upside down. On this issue, it is conservatives who are asserting that the legal freedom to attend a private school is insufficient; government should provide “real freedom,” that is, the same means that are available to the affluent. Meanwhile, liberals are insisting that the legal freedom to attend private schools is all that government should provide; government should not empower parents and children to attend their choice of schools.

*Id.*

129 See supra note 44 and accompanying Table 2; see also supra note 115 and accompanying Table 7.
with the again-requisite, strict-scrutiny standard; the Miller plaintiffs are worse off in existing State A than they are at the State B baseline. The condition should be struck down, even though the plaintiffs are better off now than without M.P.C.P. at all. "The question"—recall, again—"is whether the condition advances overall social welfare, and there is no guarantee that this will happen just because it is consented to by the individual actor... By blocking certain bargains between the individual and the state, it becomes possible to improve overall social welfare."133

IV. CONCLUSION

"Together the religion clauses function to prohibit redistribution, in either direction, between religious and nonreligious persons... In the days of limited government action, the somewhat stricter separation of religious and government activities reduced the possibilities of redistribution,"134 writes Epstein, who recall earlier labeled the doctrine of unconstitutional conditions a "second-best," "mop-up doctrine."135 "Now with the pooling of resources through government ventures, combating redistribution on religious lines is far more difficult, for the benefits and burdens to both groups must be both identified and measured."136

The Court has identified and measured the benefits and burdens of such redistribution in the establishment-clause cases of Mueller, Witters, and Zobrest137 in a way favorable to the individual rights of the religious. Landmark's case provides the opportunity to as equally favor the individual rights of the religious in the free-exercise context—

133 See supra note 46 and accompanying text (quoting Epstein, Bargaining, supra note 4, at 101).
134 Epstein, Bargaining, supra note 4, at 265; see Epstein, Foreword, supra note 4, at 87.
135 See supra notes 47-48 and accompanying text.
136 Epstein, Bargaining, supra note 4, at 265; see Epstein, Foreword, supra note 4, at 87. See also Epstein, Religious Liberty in the Welfare State, supra note 103, at 375 ("some fraction of [the] constant stream of legislation will pose a challenge, if not a threat, to the autonomy of religious institutions."). Contra Anita L. Allen, Alive and Well: Religious Freedom in the Welfare State, 31 WM. & MARY L. REV. 409, 409 (1990) ("because Epstein's well-known libertarian interpretations of liberty, property and contract point so uncompromisingly in the direction of the minimal night watchman state, the traditional aspects of his perspective [on religious liberty] prove equally radical as well") (footnote omitted); Bruce Fein, Threat to Religious Liberty by the Welfare State: An Illusion, 31 WM. & MARY L. REV. 423, 423 (1990) ("[r]eligious institutions and religious adherents enjoy sufficient political clout to forestall the hypothesized evils Epstein depicts" and "the federal judiciary is eminently capable of drawing constitutional lines that protect against religious oppression, even if those demarcations are not theoretically pure"); Charles H. Koch, Jr., Cooperative Surplus: The Efficiency Justification for Active Government, 31 WM. & MARY L. REV. 431, 431 (1990) ("Epstein's zeal for economic freedom ignores the very purpose of our joining together into a cooperative society").
137 See supra § III.B.2. a. (notes 118-126 and accompanying text).
138 See supra notes 73-98, 113-17, and accompanying text.
again, as in *Sherbert, Hobbie, Thomas*, and *Frazee*\(^{139}\) (the strict-scrutiny, compelling-interest reasoning of which is now, post-*R.F.R.A.*\(^{139}\), restored by statute). A government venture, like Wisconsin’s M.P.C.P. school-choice program, bargaining in a way so as to condition the giving of aid from its pool of resources to eligible parents on the effective waiver in return of their free-exercise right to send their children to sectarian schools is an unconstitutional redistribution on religious lines to be combated.

To the barricades, then. With mops.\(^{140}\)

\(^{139}\) *See supra* § III.A.2.b. (notes 107-12 and accompanying text).

\(^{140}\) *See supra* note 48 and accompanying text.