

Understanding Constitutional Rights in a World of Optional Baselines

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Here is the problem. It is well settled in constitutional doctrine that there are certain governmental programs that are constitutionally permissible but not constitutionally required. The most notable examples are the explicitly wealth redistributive programs such as welfare, public housing, public health care, and public schools. But the examples extend well beyond these and include programs of capital creation (e.g., roads, dams, waterways), most governmental jobs, and indeed most governmental regulation. Any governmental program or regulation that is, under settled doctrine, neither constitutionally forbidden nor required — that is, most governmental programs and regulations — falls into this category.

If current constitutional doctrine is correct — if there are in fact programs that are constitutionally optional — then there are alternative states of affairs in which no one has any valid complaint of unconstitutional treatment. If redistributive, regulatory, or employment program, *P*, is constitutionally optional, then, if government acts constitutionally in all other respects, no one can have a constitutional objection to the state of affairs that includes *P* or to the state of affairs that does not. The state of affairs that includes *P* is constitutionally permissible, and so is that same state of affairs minus *P*. They both are constitutionally optional baselines.

Couple this understanding of constitutionally optional baselines with rights whose recognition by government is not constitutionally optional, rights such as freedom of speech, freedom of religion, and privacy. Is it possible to construct a model of such rights that can be

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married coherently to the notion of constitutionally optional baselines?

This problem affects an enormous expanse of constitutional doctrine. But I will restrict my analysis to one example that I believe is a serviceable representative of the entire problematic area.

The example is that of teaching a partisan value in the public schools, perhaps Darwinism, perhaps teenage sexual abstinence, perhaps the superiority of democratic capitalism, perhaps the superiority of the Republican candidate for governor. Education always involves advancing certain values in preference to others. The values not preferred are usually values that people have constitutional rights to hold, to express, and, within limits, to promote. That is surely the case with such hypothetically nonpreferred values as Creationism, sex, socialism, and a Democratic governor.

Does teaching values in the public schools violate the constitutional rights of those who dissent from the governmentally preferred values? The argument that it does is easy enough to discern. When the government sponsors education favoring certain values, it compels the taxpayers, including the value dissenters among them, to hand over part of their wealth for this purpose. It also compels those seeking teaching jobs to forego espousing their own values during class time and to express values they may oppose. A law explicitly denying the right to spend more than a specific amount of money, or to speak during certain hours of the day, on behalf of Creationism or the Democratic candidate for governor would undoubtedly be held unconstitutional, even if the penalty were only a small fine.¹ So, too, would be a law mandating contributions from all taxpayers to pro-Darwinist publications or to the Republican gubernatorial campaign.² But is value education in the public schools not functionally equivalent to laws of this type? Are we not, in effect, mandating a redistribution from Creationists, etc., to Darwinists, etc., and mandating that Creationist biology teachers, for example, espouse ideas they believe are false on pain of losing their jobs?

The contrary argument might follow these lines. On the one hand, poor Creationists, etc., and would-be Creationist teachers, etc., might prefer to have modestly funded public schools that teach Darwinism to having no public schools at all. The move from no public schools — a constitutionally optional baseline — to public schools that teach Darwinism is a Pareto superior move for them, even

1. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (unconstitutional to limit expenditures on behalf of political candidates in order to serve the goal of equalizing political influence).

2. *See, e.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 210 (1977) (nonmembers of union may not constitutionally be legally compelled to contribute to union's political activities).

though a move to modestly funded public schools that teach Creationism, or to extravagantly funded public schools that teach both, would be even more desirable from their standpoint. On the other hand, wealthy Creationists might prefer modestly funded public schools that teach Darwinism to extravagantly funded public schools that do not. If extravagantly funded public schools are a constitutionally optional baseline, then none of the Creationists, poor or wealthy, can complain that they are worse off than they would be were the government to exercise a concededly constitutionally permissible option.³ (At least that is so if their being worse off is measured by their preferences.) And, if they are not worse off than they *could* be constitutionally, how can they claim infringement of their constitutional rights?

As I see it, there are six major approaches that have been put forward to deal with this question. The first approach is the "greater power includes the lesser" approach. The second approach is to deny the basic premise, that is, that there are optional (i.e., alternative) constitutionally permissible baselines. The third through sixth approaches all accept the premises that there are constitutionally optional benefits and baselines, and that the greater power does not necessarily include the lesser. The third approach attempts to develop a conception of coercion vis-a-vis constitutional rights that would distinguish constitutional from unconstitutional conditions on the award of optional benefits. The fourth approach argues that "germane" conditions on the award of optional benefits are constitutionally permissible, even if rights-restrictive, whereas "nongermane" conditions, if rights-restrictive, are impermissible. The fifth approach argues that some constitutional rights may not be alienated in exchange for optional benefits. The sixth approach attempts to distinguish constitutional from unconstitutional conditions through a theory of constitutional rights-neutrality or equality. I shall take up each approach in turn.

The "greater power includes the lesser" approach, one not represented in this symposium, essentially asserts that if the government could make the complaining party worse off than it was without violating the party's constitutional rights, that party cannot raise a constitutional complaint about any more favorable state of affairs. In

3. That is so because one constitutionally permissible option — no public schools — is worse for poor Creationists and Creationist teachers, and another constitutionally permissible option — extravagantly funded public schools that teach both Creationism and Darwinism (or neither) — is worse for wealthy Creationists.

our example, because the poor Creationists would have been worse off with no public schools, and the wealthy creationist would have been worse off with more extravagant public schools, neither can make out a constitutional objection to the state of affairs in which Darwinism is taught in the public schools.

The “greater power includes the lesser” approach to our problem, though not without a certain appeal as a matter of logical symmetry, would, if adopted, lead to a complete reconceptualization of equal protection. Ordinarily we assume that a state can remedy an equal protection violation either by extending the benefit to (or lifting the burden from) the plaintiff, or by withdrawing the benefit from (or extending the burden to) the comparison class. The problem in equal protection cases is not that the plaintiff is treated worse than she can be in some absolute sense, but that others are improperly treated better than she is being treated. Equal protection analysis thus assumes that the “greater power includes the lesser” approach is not always correct, or to put it differently, that the right to equal treatment forbids (in some circumstances) giving some less of a benefit than others, even if the benefit is not otherwise constitutionally mandated. And although it is always possible that equal protection analysis is wrongheaded, we should be wary of too quickly accepting the “greater power includes the lesser” approach and junking the current understanding of equal protection.⁴

Moreover, outside the area of pure equal protection, the courts have read into the rights of freedom of speech, religion, etc., an “equal protection” right that is logically inconsistent with a pure “greater power includes the lesser” approach.⁵ Of course, to point this out is not to justify it, and it is the task of these papers to provide a justification, if any exists. Still, the “greater power includes the lesser” approach, inconsistent as it is with vast areas of settled doctrine, should not be embraced before exhausting analyses more consistent with that doctrine.

Our second approach, the “one constitutionally valid baseline” approach, comes in various forms. The strongest form of which we have examples is perhaps that outlined by Richard Epstein. Epstein argues that a correct interpretation of the Constitution produces a blueprint of a single constitutionally valid set of laws and consequent state of affairs. That state of affairs is one in which the common law

4. John Garvey’s article in this symposium demonstrates that the “greater power includes the lesser” approach fits more comfortably with an older, now discarded view of constitutional rights as primarily marking the limits of governmental powers. Garvey, *The Powers and the Duties of Government*, 26 SAN DIEGO L. REV. 209 (1989).

5. See *Larson v. Valente*, 456 U.S. 228 (1982) (mandate of denominational equality); *Widmar v. Vincent*, 454 U.S. 263 (1981) (mandate of equality between religious and nonreligious speech); *Police Dep’t v. Mosley*, 408 U.S. 92 (1972) (mandate of viewpoint equality).

(and the distribution of wealth it produces) prevails, subject to some modification through the exercise of the police power and the eminent domain power.⁶

Epstein's basic scheme is well known and has been widely debated.⁷ What is of concern here is that his scheme is a blueprint for constitutional action and leaves no theoretical room for governmental choice, hence, leaving no room for politics in the normal sense. Any appearance to the contrary comes from one of two possible sources. First, because there will be honest disagreements over legislative facts, the courts will often be unable to determine the single constitutionally mandated course of action, and will instead permit government to choose among the options that fall within the range of factual uncertainty. Second, some constitutionally compelled policies need not be judicially mandated. Rather, if the courts prohibit those options that, if permitted, would induce wasteful, rent-seeking legislative behavior, then government can be trusted without judicial intervention to choose the constitutionally required option from among those that remain.⁸ Thus, if the constitutionally required option is in the upper left of the prisoners' dilemma matrix,⁹ and the constitutionally forbidden rent-seeking options are in the lower left and upper right, the courts need not prohibit the lower right matrix as well, since it is dominated by the upper left and will never be preferred to it. In other words, though Epstein's scheme entails a single and complete constitutional blueprint, the judiciary need not enforce the entire blueprint, and hence, the illusion of constitutional options

6. See R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 SAN DIEGO L. REV. 189 (1989); Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 5 (1988) [hereinafter *Foreword*].

7. See *Takings: Private Property and the Power of Eminent Domain*, 41 U. MIAMI L. REV. 1 (1986).

8. See Epstein, *Foreword*, *supra* note 6, at 14-28. See also Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1418-25 nn.17, 18 (1989).

9. In the classic prisoners' dilemma, which is the model for a large number of related problems of rational decision-making, prisoners Row and Column, partners in crime, each must decide whether to remain silent or to confess during their separate interrogatories. If both remain silent (upper left hand quadrant of the matrix representing their possible decisions), they each will receive a light penalty. If they both confess (lower right hand quadrant), they each will receive a moderately severe penalty. And if one confesses and the other remains silent, the former will get off with no penalty while the latter will receive a very severe penalty. They are jointly better off by remaining silent, but it is optimal for each to confess no matter what the other chooses to do. Unless the options of one confessing and the other remaining silent (the lower left hand and upper right hand quadrants) are eliminated, their separate attempts to maximize their own welfare by confessing will result in a suboptimal result for both.

remains.

Under Epstein's approach, the response to our example of "value education" would be to ask what level of support of public education, if any, represents a valid exercise of the police power or the provision of a public good. Any support beyond that level would be constitutionally forbidden, as would be any curriculum that represents a redistribution of wealth to those who support particular ideas from those who do not. The problem is, given the inevitable redistributive effects of public education, it is difficult to see how Epstein could support it to any extent, even if it is a public good, at least if the public good aspect of education is inseverable from some ideological wrapper but none in particular. Perhaps vouchers would be the only constitutionally proper means of supplying this public good. Only if the public good aspect of education was linked to a particular ideological position would taxing dissenters appear to be permissible. Given such a link, however, would not the dissenters' position be a public "bad," a negative externality, and thus prohibitible? In other words, where teaching a certain ideology is a public good that is undermined by competing ideologies, why would proscription of competing ideologies be forbidden by the constitutional mandate of freedom of speech?¹⁰

Seth Kreimer offers a different version of the one baseline approach. Kreimer views privileges as a baseline, not a theoretically unified set of policies, but rather whatever set of policies is viewed as the "normal" state of affairs.¹¹ Kreimer's baseline is thus positive, not normative, or rather the positive baseline is normative for Kreimer.

Put somewhat crudely, under Kreimer's approach, if a governmental policy makes exercises of constitutional rights more difficult than they would be in the baseline state of affairs, those constitutional rights have been infringed. In our public school example, if the normal state of affairs is a certain level of funding and a specific curriculum, any change that worsens anyone's condition with respect to the exercise of constitutional rights is itself unconstitutional (in the absence of a justification that would ordinarily suffice to justify such an infringement). If the state is currently funding public schools at a certain level, it may not condition continued support at that level on

10. The argument that government's support of an idea is different from its ban on support of competing ideas must rest on the assumption that so long as the idea has been disseminated, the public has been adequately inoculated against its antithesis, no matter how frequently voiced. But such an assumption undermines, by minimizing the importance of, the right to voice the opposing idea.

11. See Kreimer, *Government "Largesse" and Constitutional Rights: Some Paths Through and Around the Swamp*, 26 SAN DIEGO L. REV. 229 (1989); Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

the acquiescence of poor Creationists to the inclusion of more Darwinism in the curriculum, but it may condition increased financial support for the schools on such acquiescence. On the other hand, increased financial support plus additional Darwinism would apparently infringe the rights of the wealthy Creationists, who can refuse to acquiesce in this change for the worse from the status quo ante.

Epstein's solution to our problem requires one to buy into a "single normative theory" version of our Constitution. The solution works if we are willing to pay that price. I doubt that Kreimer's solution works at all, since I believe that there is no way of defining the normally expected state of affairs without begging the question, at least if one purports to be giving a positive and not a normative definition. Even more serious are my doubts about whether positive baselines can carry the normative weight Kreimer gives them. These two comments are related: Kreimer's approach tends to lock government into the normally expected baseline by virtue of the fact that changes in any direction will affect some people's exercises of constitutional rights adversely; this in turn tends to load the definition of the normally expected baseline with a normative weight it cannot bear.

The third basic approach to our problem is one that seeks to develop a notion of "unconstitutional coercion." Actually, Kreimer's "normal" baseline approach is probably best categorized as an attempt to develop a test for unconstitutional coercion. If the government would not close the public schools were it forbidden to teach more Darwinism, then it may not "threaten" Creationists with closing the public schools (or "offer" them the "benefits" of leaving the public schools open) to buy their acquiescence in teaching more Darwinism.

Ken Simons also develops a test for unconstitutional coercion, one that initially focuses on the distinction between "threats" and "offers."¹² A "threat," as Simons defines it, is a governmental proposal to make a citizen worse off than she would otherwise be if she refuses to accept a condition limiting the exercise of her constitutional rights. An "offer" is a proposal to make her better off than she would otherwise be if she accepts such a condition. The "otherwise be" baseline is the predicted level of benefits the government will bestow if the government is forbidden to attach the condition to its proposal.

The problem with the unconstitutional coercion approaches is that

12. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289 (1989).

they fail to explain why the purely descriptive or predictive baseline and its associated notions of “threat” and “offer” carry the normative weight that they must in order to invalidate or validate governmental conditions. Simons admits that some “threats” are legitimate (e.g., a work requirement as a condition for welfare benefits where the government would not cut back welfare were the work requirement invalidated), and some “offers” are illegitimate (e.g., an offer by the government of additional welfare benefits to those who join the Republican Party). But if so, then everything hangs on what is legitimate and what is not, and a purely descriptive or predictive notion of “threats” and “offers” does not deliver an answer.¹³

Simons recognizes that the “threat or offer” distinction can not do the complete job here. He supplements the “threat or offer” test with a “germaneness” test. A “threat” in the form of a “nongermane” condition attached to an optional benefit is a “pure” threat and presumptively illegitimate. In our example, a “nongermane” condition would be a requirement that would-be teachers and students in public schools cease attending Creationist churches. On the other hand, a “germane” condition, such as a requirement that students and teachers not discuss Creationism versus Darwinism in math class, raises no special constitutional problem even if it is a “threat” — that is, even if government would go ahead and grant the optional benefit even if denied the right to so condition it.

“Germaneness” then, and not the “threat or offer” distinction, appears to be doing most of the work in the analysis. But “germaneness,” the fourth approach to unconstitutional conditions, is quite problematic. Programs rarely, if ever, serve single purposes, and there is no reason to believe that the Constitution limits the types of purposes particular programs may serve¹⁴ (beyond, of course, declaring that certain purposes are unconstitutional *no matter to which programs they are attached*).

Therefore, either the “germaneness” test is indeterminate, or else it is, like Simons’ “threat or offer” test, a placeholder for an inquiry into the legitimacy of governmental purposes. Indeed, the way Simons yokes the “germaneness” test to the “threat or offer” test indicates that, at bottom, he is looking for tests that will smoke out illegitimate governmental purposes such as, perhaps, naked hostility to the exercise of constitutional rights. A “pure” threat (when the

13. Simons admits that his unconstitutional coercion approach is not directed at notions like overbearing the will, voluntariness, or deterring or inducing behavior. Unconstitutional coercion can exist even if compliance with the conditions is fully voluntary in the sense of “voluntary” used elsewhere in law and morality, and it can exist even if it induces absolutely no change in anyone’s behavior.

14. See Seidman, *Reflections on Context and the Constitution*, 73 MINN. L. REV. 73, 77-78 (1988); Sullivan, *Unconstitutional Conditions*, *supra* note 8, at 1473-76.

government attaches a “nongermane” condition to an optional benefit that it would still grant if denied the ability to attach the condition) evidences no purpose but pure hostility; the “nongermaneness” of the condition demonstrates that government could have chosen any benefit — e.g., absence of fine or jail — not just an optional one, as the benefit to which to attach the condition. “Impure” threats (those attaching germane conditions to optional benefits that government would still grant if required to do so unconditionally) and offers (when without the condition, germane or not, the government would not grant the optional benefit) are less problematic because they are less likely to be the products of hostility to the exercise of constitutional rights.

The third and fourth approaches — the coercion, or the “threat or offer” approach, and the “germaneness” approach — then point us toward an inquiry into the legitimacy of various governmental purposes. The fifth approach — the inalienability of certain constitutional rights — is different. Its focus is on the *effects* of conditions on optional benefits and *not* on the governmental *purposes* behind them. That approach in our public schools hypothetical would ask whether the rights to devote money and speech to Creationism are alienable. If not, then they may not be exchanged for the optional benefits of tax-supported education and jobs.

The problems with the inalienability approach need not detain us long. Kathleen Sullivan deals with them quite adequately, both in her contribution to this symposium and in her longer and excellent treatment of unconstitutional conditions in an earlier article.¹⁵ What they boil down to, quite simply, is this. Most of the constitutional rights at issue in the theory of unconstitutional conditions are autonomy rights. They are rights that protect choices, such as the choice to be a Creationist or to espouse Creationism. But those protected choices also include the choice not to be a Creationist or to espouse Creationism. If government may not condition some optional benefits on the relinquishment of certain constitutional rights, the explanation will in most cases not lie in the general inalienability of the objects of choice those rights protect.¹⁶

15. Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 SAN DIEGO L. REV. 327 (1989); Sullivan, *Unconstitutional Conditions*, *supra* note 8.

16. Of course, some constitutional liberties may not be alienable because of concern about the effects of alienation on third parties or on the basic structure of the government. Those reasons explain why we cannot pass good title to our right to vote as citizens, our right to legislate as legislators, or our right publicly to reveal grave governmental abuses, even though we are under no constitutional duty to vote or to reveal

We come now to the sixth approach, the rights-neutrality or rights-equality approach. This approach posits that although government may choose among optional programs and baselines, it may not tailor such programs in any way that is not "neutral," that is, in any way that does not treat all exercises of constitutional rights with equal concern and respect.¹⁷ In our example, any public school policy that was tailored to redistribute either tangible or intangible wealth from Creationists to Darwinists (or vice versa) would be unconstitutional, even if there were an alternative, constitutionally optional, public school policy under which the comparatively disfavored individuals were absolutely worse off.

In the present symposium, both Michael McConnell and Kathleen Sullivan can be viewed as exponents of some sort of neutrality approach to unconstitutional conditions.¹⁸ (Richard Epstein also employs this approach as an adjunct to the second approach, the denial of constitutional optional baselines; for Epstein, the ban on redistributing wealth from those exercising one constitutionally protected choice to those exercising another prevents wasteful rent-seeking and channels governmental action toward the single constitutionally preferred state of affairs.¹⁹) Moreover, both the third and fourth approaches — the coercion and "germaneness" approaches — can be seen as resting at bottom on a proscription of governmental nonneutrality toward the exercise of constitutional rights.

I believe that the neutrality approach is the most promising, at least if one rejects the second approach and accepts the reality, and not just the appearance, of constitutionally optional baselines. But the difficulties such an approach must cope with are quite formidable.

First, the requirement of rights neutrality or equality can be viewed as question-begging. Are our rights regarding speech, religion, and privacy, for example, really rights to governmental impartiality with respect to *all* exercises of those rights? The government cannot prohibit espousing flat-earth research or Naziism or exhibiting atrocious art. Do these constitutional prohibitions entail that government fund flat-earth research, teach Nazi principles, and buy atrocious art for its buildings if it funds any research, teaches any

abuses. See Rosenthal, *Conditional Federal Spending as a Regulatory Device*, 26 SAN DIEGO L. REV. 277, 282-83 (1989); Fuhr, *The Doctrine of Unconstitutional Conditions and the First Amendment*, 39 CASE W. RES. L. REV. 97, 107 (1989).

17. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 273-78 (1977).

18. McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989); Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, *supra* note 15; Sullivan, *Unconstitutional Conditions*, *supra* note 8. See also McConnell & Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

19. See *supra* text accompanying notes 6-11.

political principles, or buys any art?²⁰ The controversy over *Maier v. Roe*²¹ and *Harris v. McRae*²² can be viewed as a controversy over whether the right to an abortion is a right to such impartiality.²³

Second, the "rightness" of the rights-neutrality approach is not self-evident. One can always ask *why* government must be neutral when no one can complain that government has left her worse off than she would have been under some constitutionally permissible set of policies. Consequentialist explanations end up either denying that there *are* constitutionally optional baselines or denying that no one is worse off than she would be under all concededly constitutionally optional sets of policies. Epstein's justification for neutrality — the utilitarian concern about wasteful rent-seeking — is an example of a justification that denies true constitutional optionality. Justifications that point to the competitive effects of favoring some exercises of constitutional rights over others are examples of justifications that deny that no one is worse off than she would be under a concededly constitutional set of policies. For example, a governmental program for funding elections that gives two dollars to the Republican Party for every one dollar given to the Democratic Party may leave the latter worse off than it would be were neither party receiving any public funding, a concededly permissible state of affairs.²⁴ Effects on third parties,²⁵ the creation of socially unhealthy castes,²⁶ the long-term elimination of a healthy plurality of ideas, religions, and life styles,²⁷ and so forth, may be nonobvious consequences of government nonneutrality that leave some people worse off than they would be under *any* concededly permissible set of policies.

If the mandate of rights-neutrality goes beyond consequentialist concerns for nonobvious effects of inequalities, effects that may produce worse states of affairs for some than any optional baseline per-

20. See V. HAKSAR, EQUALITY, LIBERTY, AND PERFECTIONISM 187-88, 233 (1979); Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 853-58 (1981).

21. 432 U.S. 464 (1977).

22. 448 U.S. 297 (1980).

23. See Perry, *Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae*, 32 STAN. L. REV. 1113 (1980).

24. See Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 35-36 (1981) [hereinafter *Equal Protection Theories*]; Alexander, *Introduction: Motivation and Constitutionality*, 15 SAN DIEGO L. REV. 925, 940-41 n.54 (1978).

25. See *supra* note 16.

26. See Sullivan, *Unconstitutional Conditions*, *supra* note 8, at 1497-99.

27. See J. RAZ, THE MORALITY OF FREEDOM 395-99, 424-29 (1986); Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-802 (1989).

mits, then it must be based on some deontological principle that government nonneutrality is wrong irrespective of its noncomparative effects. But accepting such a principle presents us with further difficulties. First, as my examples regarding flat-earth theory, Naziism, and atrocious art indicate, the implications of such a deontological mandate of neutrality would be quite far-reaching, especially since no consequentialist exceptions and qualifications would be available. Just to take some obvious examples, would the National Endowment for the Arts or the National Endowment for the Humanities be constitutional under such a theory? Indeed, even more importantly, would the public schools be constitutional? What would "neutral" education look like?²⁸

Second, and relatedly, is neutrality even possible? This, of course, is a major controversy within and about liberalism. On the one hand, there is good reason to doubt that any governmental policy can be justified by "neutral" reasons, reasons that do not rest on premises inconsistent with otherwise protected world views and visions of the good.²⁹ On the other hand, and paradoxically, although the value of neutrality must rest on the importance of the competing world views and visions of the good among which neutrality is required — why treat neutrality toward unimportant things as important? — those world views and visions of the good may not and likely will not

28. See S. ARONS, *THE SEPARATION OF SCHOOL AND STATE: PIERCE RECONSIDERED* (Institute for Humane Studies, Inc. Studies in Education No. 3, 1977); Alexander, *supra* note 20, at 853-58.

29. See K. GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); Alexander & Schwarschild, *Liberalism, Neutrality, and Equality of Welfare v. Equality of Resources*, 16 PHIL. & PUB. AFF. 85, 96-103, 109-10 (1987); Garvey, *A Comment on "Religious Convictions and Lawmaking,"* 84 MICH. L. REV. 1288 (1986); Greenawalt, *Religious Convictions and Lawmaking*, 84 MICH. L. REV. 352 (1985); Nagel, *Moral Conflict and Political Legitimacy*, 16 PHIL. & PUB. AFF. 216 (1987).

Moving beyond the obvious issues of neutrality in school curriculum and aid to sectarian schools, there are an indefinite number of constitutional controversies that can be viewed as the consequence of the demand for governmental neutrality coupled with the impossibility of attainment. For instance, when is a school library collection neutral? *Board of Educ. v. Pico*, 457 U.S. 853 (1982). Is a school newspaper the voice of the school officials or the voice of the student editors, and what does neutrality require in either case? *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). What is a neutral definition of a "public forum," and what does neutrality require within a "public forum"? *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Perry Educator's Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983). What does governmental neutrality vis-a-vis the media require? *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *cf. Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986); *FCC v. League of Women Voters*, 468 U.S. 364 (1984). If public schools cannot be neutral in the choice of curriculum, is the choice to subject children's education to parental control (backed up by state force, of course) any more neutral? *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting); Alexander, *supra* note 20; Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U.L. Rev. 1319, 1351-54 (1983).

ascribe to governmental neutrality the value it claims.³⁰ The importance of these nonliberal world views is both what makes liberal neutrality important and at the same time denies its importance.

Moreover, we care about government's reasons for action and their "neutrality," ultimately, because we care about the actual effects of governmental policies.³¹ (We would be indifferent to governmental reasons — motives — if they had no effects in the world beyond the halls of government.) We know that every change in governmental policy and every change in the distribution of wealth, whether brought about directly by governmental action or indirectly through government's rules regarding market transactions, ultimately affects who speaks, what they say, what experiences they can draw upon, and so forth. Is government neutral when it bans posting signs on utility poles, knowing that this, *like all laws*, though facially content-neutral, will affect the content of what gets said and heard?³² Even if there is a tenable concept of liberal neutrality, can it accommodate governmental options, or does it lead inevitably to the one-permissible-set-of-laws blueprint model of constitutional law?

I conclude that the relation between constitutional rights and constitutionally optional baselines, like so many areas of constitutional doctrine, leads the theorist ultimately to some vexing and perhaps intractable problems. Although I believe that as a result of the contributions to this symposium, we have a better idea of what a theory of that relation must look like, I also believe that there is much more work to be done.

30. See Nagel, *Moral Conflict and Political Legitimacy*, *supra* note 29; Alexander, *supra* note 20, at 853-58.

31. See Alexander & Horton, *supra* note 29, at 1336-46; Alexander, *Equal Protection Theories*, *supra* note 24, at 21-23.

32. See *Taxpayers for Vincent*, 466 U.S. at 789; Alexander & Horton, *supra* note 29, at 1344, 1352, 1354.

