Unconstitutional Conditions and the Distribution of Liberty

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In the battle of slogans in unconstitutional conditions cases, all would agree that "government cannot do indirectly what it cannot do directly" has won out over "the greater power to deny includes the lesser power to grant upon condition." That is, the Supreme Court commonly states as a truism that government may not grant even a gratuitous benefit on condition that the beneficiary relinquish a constitutional right. While government allocation of benefits is normally accorded deference, stronger justification is required if an allocation discriminates on the basis of the exercise of a right. This is the key proposition of unconstitutional conditions doctrine.

But the unconstitutional conditions doctrine is a doctrine in search of a theory. Three persistent candidates have proved strangely unsatisfying. This essay first describes those candidate theories and their shortcomings, and then suggests an alternative approach, which it finally applies to several techniques for discouraging abortion "indirectly."

I. Three Leading Theories

The first theory treats unconstitutional conditions as a problem of coercion. Government may influence our decisions about how to exercise our rights, but it may not make us rights-pressuring offers that we cannot refuse, or would prefer never to have received. This problem is frequently depicted in cases as one depending on the degree of

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psychological pressure: a rights-pressuring offer of benefits becomes void when it "pass[es] the point at which 'pressure turns into compulsion.' "[1] It surfaces in commentary as a matter of distinguishing "threats" from "offers" — that is, distinguishing proposals that worsen from those that better the lot of the offeree, in relation to some baseline course of events that the offeree expects or deserves.[2]

Searching for coercion in the unconstitutional conditions setting, however, is misguided for two reasons. First, it is intractable. Distinguishing offers that coerce from those that merely tempt, persuade, or induce is an irreducibly normative inquiry: it depends on a theory of when choice is *wrongly* constrained. This point is commonly acknowledged in other contexts, such as the distinction between duress and permissible forms of advantage-taking in contract,[3] or the distinction between blackmail and legitimate forms of commercial exchange.[4] In other words, a "threat" cannot be distinguished from an "offer" without some notion of why the offeree is entitled to expect better than what is being extended to her.

But such a notion is fatally elusive in unconstitutional conditions cases, where the government benefits at issue are gratuitous. In a constitutional order where most government redistribution is permissible, but virtually none is compelled, welfare, tax benefits, and the like are matters of political grace. Where no reliance interests are recognized[5] and all minimally rational allocation patterns are permitted,[6] there simply is no normally or morally expected course of events from which "coercive" departures can be measured. In a world without baselines, coercion cannot be tracked.

Even if coercion could be tracked, the coercion inquiry is misguided here for a second reason: it is too narrow. Some constitutional liberties protect us specifically against coercion; the fifth amendment's command that no person be "compelled" to incriminate himself is the best example. But most others protect more: the first amendment protects speech not only from coercion but also from chill; the abortion right has been construed to bar not only criminal

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1. South Dakota v. Dole, 483 U.S. 203, 211 (1987) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

2. The terminology here is from Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440 (S. Morgenbesser, P. Suppes & M. White eds. 1969), as thoughtfully applied to the unconstitutional conditions problem in Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1353-55 (1984).

3. *See, e.g.*, C. FRIED, CONTRACT AS PROMISE 97 (1981); Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

4. *See, e.g.*, Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984).

5. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 608-11 (1960).

6. *See, e.g.*, United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

sanctions but also far less coercive deterrents. Government infringement of constitutional rights normally need not rise to the level of coercion to be improper. If "direct" regulations are struck down short of the "point where pressure turns into compulsion," why demand more before invalidating "indirect" restraints?

These difficulties prompt consideration of a second leading candidate for the theory underlying the unconstitutional conditions doctrine. This theory would focus not on whether the beneficiary is free to refuse an offer, but on whether government should be free to make it. This approach would invalidate conditions that reflect defects in legislative process. A recurrent formulation of this approach holds that government may not "extort" or "manipulate" beneficiaries by attaching nongermane conditions to benefits. The best recent example is the Court's qualified condemnation of development exactions in *Nollan v. California Coastal Commission.*[7] That decision held California's offer to exchange a beachhouse building permit for a public right of way through the owner's backyard to be an impermissible end-run around the takings clause. But the majority suggested that making the same trade for a public "viewing spot" would have been just fine — even though the public would have occupied the land equally whether walking or looking.[8] What was the difference? Because preserving the public's view of the sea might have been a good reason to deny the building permit outright, trading the permit for a viewing spot was germane. In contrast, a lateral passageway became an " 'extortion[ate]' " taking because insufficiently related to the purposes for which the building permit could have been denied.[9]

Germaneness, however, is a poor benchmark for distinguishing constitutional from unconstitutional conditions. When nongermane conditions serve legitimate public ends other than those served by the benefit, why should they automatically be suspect? Such legislative package deals may reflect simple logrolling as usual.[10] Addition-

7. 483 U.S. 825 (1987).

8. *Id.* at 836.

9. *Id.* at 837. For an analysis of germaneness in the context of conditions on access to public highways quite parallel to Justice Scalia's in *Nollan*, see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 350-52 (1935).

10. The Court has relaxed its suspicion of such logrolling since the New Deal, when no entrenched political disadvantage has been shown. *See generally* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Cases like Smith v. Cahoon, 283 U.S. 553 (1931), which invalidated a break for farmers from highway safety regulations on the ground of nongermaneness, must therefore now be regarded as relics.

ally, why should germane conditions automatically be treated as benign? Whether government uses its zoning leverage to exact a viewing spot *or* a lateral passageway, the political safeguards of the eminent domain process are missing.[11]

A third possible theory for the unconstitutional conditions doctrine would treat constitutional rights as inalienable: some reason keeps them off the government benefits "market." This theory is suggested by Justice Douglas's remark that government should not be permitted "to 'buy up' rights guaranteed by the Constitution."[12] But such a general theory is difficult to defend, for the liberties pressured in unconstitutional conditions cases protect autonomous decision-making that a general rule of inalienability would contradict.[13] The real question in unconstitutional conditions cases is not whether constitutional liberties may ever be alienated; it is whether they may be alienated to government. The inquiry, in other words, must be not about paternalism, efficiency, or personhood, which are frequently the bases for inalienability arguments;[14] it must be about distribution. The next section outlines such a theory.

II. An Alternative Theory

Preferred constitutional liberties do not simply protect individual autonomy, but serve three important distributive functions as well: First, they check the power of the state by preserving a private order; second, they impose obligations of government evenhandedness or neutrality among rightholders who, for example, speak, worship, or procreate according to different lights; and third, they bar a system of constitutional caste among rightholders. The unconstitutional conditions doctrine is best understood as necessary to preserve all three distributive functions.

The first function, state-checking, in no way depends on a natural or prepolitical definition of the boundary between public and private spheres. That boundary is obviously a social construct; a state-checking approach simply asserts that it is a boundary worth drawing. In this approach, whatever the value of free speech to self-actualization, it is surely valuable to permit the expression of deviant or dissenting views that keep the state from replicating itself. Likewise, in this approach, whatever the value of the right of privacy to self-defini-

11. *Cf.* Pennell v. City of San Jose,485 U.S. 1, 19-20 (1988) (Scalia, J., concurring in part and dissenting in part) (distinguishing political safeguards of regulation from those of eminent domain).

12. Wyman v. James, 400 U.S. 309, 328 (1971) (Douglas, J., dissenting).

13. Speech and privacy are paradigm examples. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the right of privacy protects from governmental intrusion "the decision whether to bear or beget a child").

14. *See generally* Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

tion,[15] it is surely valuable to prevent the state from cloning orthodox citizens from a single intimate associational mold.[16]

Rights-pressuring conditions on government benefits affect the balance of power by shifting private exercises of rights in a direction favored by the state. The magnitude of the shift will not depend on whether citizens view government offers as coercion or mere temptation; incumbents are entrenched, for example, whether they use bribes or fines to induce their opponents to switch sides. Rather, the magnitude of the shift will depend on factors such as the extent to which the government has displaced private alternative providers of a benefit. In the extreme case, when government has a complete monopoly over a benefit essential to the exercise of a liberty, it may even have some limited affirmative obligation to maintain the minimal preconditions necessary for the liberty's exercise; leaving unpaved a unique Native American worship site in a national forest might be one such example.[17] But even short of such a monopoly, whenever government has taken services (such as education, provisions of minimal subsistence, or medical insurance to the indigent) significantly out of private control, it attains proportionate power to crowd out deviance and dissent through benefit conditions.

The second function, requiring government evenhandedness among holders of preferred constitutional liberties, is best exemplified by speech. It is underscored by the Supreme Court's repeated dictum in unconstitutional conditions cases that government may not impose benefit conditions that discriminate on the basis of viewpoint, or "'"ai[m] at the suppression of dangerous ideas."'"[18] If a Democratic regime offers tax benefits to Republicans who convert, the structural harm is not only that the existing government entrenches itself by eroding its critics' ground, as discussed above, but also that opposing viewpoints are treated unequally. Speaking power is redistributed as readily through partisan favoritism in the allocation of benefits as through punitive measures against the opposition.

The third function, preventing constitutional caste among

15. *See* Bowers v. Hardwick, 478 U.S. 186, 204-05 (1986) (Blackmun, J., dissenting).

16. *See* Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989).

17. *Cf.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (rejecting a similar free exercise claim on the ground that government "coercion" was absent).

18. Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983) (quoting Cammarano v. United States, 358 U.S. 498, 513 (1969) (quoting Speiser v. Randall, 357 U.S. 513, 519 (1958)).

rightholders, concerns a different sort of evenhandedness, of a vertical rather than a horizontal kind. As the fundamental rights branch of equal protection doctrine suggests, some rights may be too important to be allocated according to a hierarchy of relative dependence on government. For example, if marriage is a fundamental right, then debtors should be as free as the well-off to divorce and remarry.[19] Conditions on benefits can pose a similar danger of hierarchy. Conditioning public assistance to mothers with dependent children on sterilization after the third child, for example, would mark out an inferior reproductive caste just as the state scheme struck down in *Skinner v. Oklahoma* did by putting the surgeon's knife to recidivist thieves.[20]

III. Applications to "Indirect" Abortion Restrictions

The distributive functions of the unconstitutional conditions doctrine are best illustrated by example. Consider these possible methods for a government, bent on discouraging abortions, to do so through "indirect" rather than "direct" regulation.

First, to discourage abortion, government can furnish public insurance for the medical costs of pregnancy and childbirth but not abortion. This sort of selective subsidy was upheld in the abortion funding cases.[21] Second, it can bar public hospitals or public employees from performing abortions — even if they are paid for wholly by the patient's private funds rather than by taxpayers' funds. This was one of the sorts of regulation the Supreme Court upheld in *Webster v. Reproductive Health Service*.[22] Third, it can furnish subsidies to family planning clinics on condition that recipients do not "encourage, promote, or advocate" abortion as a method of family planning. This is a type of government regulation whose constitutionality has divided several lower courts.[23] Which, if any, of these schemes should be subjected to heightened scrutiny under the doctrine of unconstitutional conditions?

Contrary to the Court's rulings in the abortion funding cases, the

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19. *See* Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971).

20. 316 U.S. 535 (1942).

21. *See* Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

22. 109 S. Ct. 3040 (1989).

23. *Compare* Massachusetts v. Bowen, 679 F. Supp. 137 (D. Mass. 1988) (invalidating such a condition), *en banc reh'q granted*, No. 88-1279 (1st Cir. Aug. 9, 1989) *with* New York v. Bowen, 690 F. Supp. 1261 (S.D.N.Y. 1988) (upholding that condition), *aff'd sub nom.* New York v. Sullivan, No. 88-6204 (2d Cir. Nov. 1, 1989) (WESTLAW, 1989 W.L. 131669). The eighth circuit, in *Webster*, also invalidated a restriction of this third kind — a ban on the encouragement or counseling of abortion in public facilities or by public employees, but the Supreme Court reversed that holding. 109 S. Ct. 3040 (1989).

first scheme — selective subsidies for the medical costs of pregnancy and childbirth but not abortion — should have been an easy candidate for strict review. The Court's reasoning was simply that the government has committed no coercive act. As argued above, however, coercion analysis is treacherous in the unconstitutional conditions area, and the Court's conclusory analysis in the abortion funding cases illustrates its perils. In concluding that selective subsidies imposed no "penalty," but merely embodied a "refusal to fund protected activity,"[24] the Court wrongly ignored the scheme's deterrent effects on abortion even if they fell short of coercion.[25] The Court also assumed, without argument, a questionable baseline: to be sure, the government made poor women no worse off if the appropriate baseline was no funding, but it did make them worse off (and thus arguably coerced them) if the appropriate baseline was funding for all medical needs (including those related to reproduction).

If distributive analysis is substituted for the treacheous coercion inquiry, the abortion funding cases can be seen as clearly wrongly decided. Giving heightened constitutional protection to autonomous private decision-making over reproduction serves a state-checking goal; it takes the state out of the business of reproductive choice. To the extent the selective subsidy scheme shifts the reproductive choices of a substantial segment of the pregnant population in a direction favored by the government, it extends unacceptable leverage to the state over what ought to be private decision-making. It might be objected that this leverage is limited so long as well-off women may continue to satisfy preferences for abortion that indigent women may not.

But even if that were so, the other two distributive concerns discussed above (evenhandedness and preventing constitutional caste among rightholders) would nonetheless warrant subjecting the selective subsidy scheme to heightened review. *Roe v. Wade*[26] should be understood as requiring government neutrality toward a given woman's reproductive choice, and thus as requiring government even-

24. *Harris*, 448 U.S. at 317 n.19.

25. In other contexts, by contrast, the Court treated deterrence (foregoing the right to get the benefit) as an interchangeable surrogate for a "penalty" (foregoing the benefit to preserve the right) worked by an unconstitutional condition. *See, e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250, 257-58 (1974). Moreover, the Court has rightly struck down "direct" regulations of abortion whose deterrent effect hardly rose to the coercive level of criminal sanctions. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

26. 410 U.S. 113 (1973).

handedness between pregnant women seeking abortion and those seeking delivery. Privacy rights, no less than speech rights, protect against government-induced orthodoxy; privacy should entail government evenhandedness between the choice of abortion or childbirth, just as freedom of speech entails viewpoint-neutrality. The government's selective subsidy program redistributes power from abortion-seekers to child-bearers in violation of this evenhandedness obligation.[27] Finally, even if neither of the first two arguments were accepted, the abortion funding cases present the danger of constitutional caste in classic form: fundamental rights that the government may not restrict for all should not be restricted for those over whom government has special leverage because of their dependency.

The second scheme to discourage abortion — closing public health care to abortion — should even more readily merit strict scrutiny. The evenhandedness and caste arguments are parallel to those just made, but the state-leverage argument is perhaps even stronger: having set up a system of public health care that substantially displaces private alternatives, government should be estopped from banishing abortion physically as well as financially to the remaining private sector.[28]

The third scheme — the anti-abortion-counseling condition on family planning funds — should also be strictly scrutinized. To the extent that this restriction on the medical advice given by public health clinics burdens the right to abortion itself,[29] it should be strictly scrutinized as an infringement of privacy. It is a privacy infringement, despite its limitation to the fourteen and one-half million women who use the services of federally funded clinics, for the same reasons as the selective subsidy scheme just discussed.

But even if the abortion funding rulings preclude such an argument, the second scheme should nonetheless be strictly scrutinized as an infringement of the providers' right to speak and their clients' right to hear. Even in rejecting unconstitutional conditions challenges, the Court has always reiterated that government may not purchase one-sided ventriloquy for its causes through viewpoint discrimination when allocating benefits.[30] Applying each of the three

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27. This argument parallels the account of appropriate government neutrality toward religious education presented in McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

28. The public forum doctrine reflects analogous considerations in the realm of speech. *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Schneider v. New Jersey, 308 U.S. 147 (1939).

29. *Cf.* Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 760-63 (1986) (invalidating a state law requiring all physicians to present patients seeking abortions with detailed information about fetal development and alternatives to abortion).

30. *See* Regan v. Taxation with Representation, 461 U.S. 540, 548 (1983). The one-sidedness of the family planning regulations currently under challenge is underscored

distributive concerns discussed above to the anti-abortion counseling scheme helps illustrate why. First, by eliminating a significant number of pro-abortion messages at their point of greatest impact, government redistributes speaking power in a direction favored by the state and so undercuts dissent. Second, government's obligation of evenhandedness is arguably even stronger with respect to funding speech about abortion than with respect to funding abortions themselves. And third, the regulation divides pregnant women into two castes: those who can get full medical information from their doctors and those whose dependency on government relegates them to hearing only half the story.

It is no answer to argue, as the federal government has in the currently pending cases, that public health clinics are free to continue abortion referrals or counseling from facilities "physically and financially separate" from their federally funded ones.[31] For the Court has previously recognized that rigid administrative segregation requirements can in themselves impermissibly burden speech,[32] and in the absence of strong justification, government should no more be able to purchase such segregation than to command it.[33]

In sum, the unconstitutional conditions doctrine should extend strict scrutiny to all three of these governmental techniques for redistributing power away from those who would favor or seek abortion. Several caveats are in order. To say this much is not to condemn every program that might marginally decrease the incentive to

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by the fact that they not only ban speech counseling abortion, but require speech promoting "the welfare of the mother and unborn child." *See* Massachusetts v. Bowen, 679 F. Supp. 137, 139 (D. Mass. 1988), *en banc reh'g granted*, No. 88-1279 (1st Cir. Aug. 9, 1989).

31. *Compare* Massachusetts v. Bowen, 679 F. Supp. at 146-47 (rejecting this argument) *with* New York v. Bowen, 690 F. Supp. 1261, 1274 (S.D.N.Y. 1988), *aff'd sub nom.* New York v. Sullivan, No. 88-6204 (2d Cir. Nov. 1, 1989) (WESTLAW, 1989 W.L. 131669) (accepting it).

32. *See* FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) (invalidating a requirement that political funds be segregated in corporate treasuries, as applied to political nonprofit corporation).

33. To be sure, *Massachusetts Citizens* is in some tension with *Taxation with Representation*, which in effect approved the segregation of lobbying from nonlobbying activities by nonprofit organizations seeking maximum tax benefits under the tax code. *See Taxation with Representation*, 461 U.S. at 544; *id.* at 552-53 (Blackmun, J., concurring). But the Court's attempt to distinguish the cases by fiat is wholly unconvincing. *See Massachusetts Citizens*, 479 U.S. at 256 n.9. In any event, the Court has recognized, in at least one case since *Taxation with Representation*, that requiring public funding recipients to segregate their activities would impermissibly burden speech. *See* FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984). On the potential difficulties of segregation of religious from secular activities, see McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405.

choose abortion over childbirth; publicly funded nutritional supplements to indigent pregnant women, for example, should not fall on account of any such incidental byproduct. All three programs discussed here, however, have as their overt intent and foreseeably significant consequence that women dependent on government programs will forego abortions they otherwise would have had; in such cases, no such problems of marginal overbreadth arise.[34] Additionally, to recognize that rights are burdened in these cases is not to decide the constitutionality of the condition; the question of justification remains. Protecting taxpayers from violation of conscience through actual or symbolic entanglement of public programs with abortion might be offered as a compelling justification for the programs described.[35] But the possibility of such a justification should not be confused with the absence of a burden in the first place.

IV. Conclusion

The unconstitutional conditions doctrine should be liberated from conclusory distinctions between coercion and consent, threats and offers, penalties and nonsubsidies, germane and nongermane conditions, or alienable and inalienable rights. A distributive analysis of unconstitutional conditions that considers the balance of power and freedom in the polity as a whole has considerable advantages over analyses that focus on whether individual beneficiaries have been coerced, legislatures have strayed from proper deliberation, or rights are exchangeable in the abstract.

34. A small adoption tax credit enacted with express antiabortion intent would exemplify a harder intermediate case, for it would couple the intent to deter abortion with a relatively trivial probable effect.

35. On balance, such an argument should fail because even if such taxpayers' interests were recognized, as they are not in other contexts (*see, e.g.*, Massachusetts v. Mellon, 262 U.S. 447 (1923)), they could be accommodated by less restrictive means such as earmarking.