Is There an Unconstitutional Conditions Doctrine?†

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I

In a number of areas of public law, a set of issues is organized around a "doctrine" that purports to give order and regularity to problems that might otherwise be treated as discrete and unrelated. Ordinarily, organizing strategies of this sort are no cause for alarm; they help provide structure and direction in areas that are indeed closely connected. But on occasion, such strategies are highly misleading. By combining problems that are quite discrete, and by treating them at a high level of generality, they deflect attention from more particular considerations that ought to be the central focus of judicial attention.

One of the most prominent examples here is the "political question doctrine" — a doctrine that is said to help courts decide when to remove themselves from nonlegal controversies. To be sure, some decisions should not be subject to judicial resolution, but not because of a unitary or general "political question doctrine."[1] When decisions are immunized from the courts, it is because no particular constitutional provision forbids the governmental action at issue — a point

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Some of the ideas in this essay are discussed in more detail, and from a different angle, in Sunstein, *Why the Unconstitutional Conditions Doctrine Is An Anachronism* (forthcoming).

1. This is the central argument in Henkin, *Is There A Political Question Doctrine?*, 85 YALE L.J. 597 (1976).

recognized by Chief Justice Marshall in the original decision giving rise to that doctrine.[2] In resolving issues of this sort, it is far better to attend to the nature of the constitutional disability in the particular case, rather than to a supposed "political question doctrine." The question is whether the government's action violates a constitutional provision, and that question is one on the merits.[3]

Similar considerations apply to the doctrine of "standing." Much of the confusion of the last generation has been a product of a belief that there is something called a unitary standing doctrine, one that is independent of the particular rights created under particular constitutional and statutory provisions.[4] Whether there is standing depends on whether positive law has created a right to relief — sometimes a complex question, to be sure, but one that will yield different answers in different contexts.

Much of the same is true of the unconstitutional conditions doctrine. Whether a condition is permissible is a function of the particular constitutional provision at issue; on that score, anything so general as an unconstitutional conditions doctrine is likely to be quite unhelpful. The due process clause might well, for example, forbid states from denying Medicare benefits to those who have had abortions; but if this is so, it is because the best interpretation of the clause leads to that result, and not because of anything especially revealing in the idea that some conditions are unconstitutional. 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. Indeed, many of those collisions have been approached in highly misleading ways, and ironically, the unconstitutional conditions doctrine is the source of the difficulty.

I will be arguing, in short, for particularism in cases involving unconstitutional conditions: for an inquiry, not into whether the greater power includes the lesser, or whether the government can do "indirectly" what it cannot do "directly," but instead into whether the particular infringement affects a protected interest in a constitutionally troublesome way, and, if so, whether the government is able to justify any such effect. In order to ask and answer these questions, it will be necessary to venture far beyond the unconstitutional conditions doctrine.

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2. The case is Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3. To say this is not to deny that, on occasion, prudential concerns should stay the judicial hand even if the particular case involves an otherwise plausible legal claim.

4. *See* Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432 (1988).

II

We might begin to explore the confrontation between constitutional rights and government expenditures through three possible cases of unconstitutional conditions. In case one, the government makes welfare benefits available to those, and only those, who have spoken and who agree to speak favorably of the Democratic party. In case two, the government says that it will pay for public schools but not for private schools. In case three, the government funds all medically necessary expenditures except those associated with abortion.

In all of these cases, government has failed to intrude on rights protected by the common law; in all of them, complaining citizens are better off with the program (even including the condition) than they would be if the program as a whole were eliminated. In all three cases, the source of the difficulty lies in the possibility that government might (a) be attempting to influence or (b) in fact be influencing the decision to exercise a constitutional right. The two possibilities are quite different. The first would point to an illicit governmental motivation: to use federal funds in a way designed to discourage people from availing themselves of a constitutional protection. The second would point to an impermissible effect: the use of governmental funds in a way that pressures or coerces the exercise of a right.

Both of these possibilities played a large role in the original development of the unconstitutional conditions doctrine, in which the Supreme Court attempted largely to protect *Lochner*-like rights from invasion through the regulatory state.[5] In this respect, the unconstitutional conditions doctrine owes its origins to a judicial effort, in a period of transition from the common law, to protect common-law rights from a new form of interference. That effort was rooted in an understanding that such rights could be pressured by something other than common-law coercion — as, for example, when government made licenses or other benefits available on its own terms, by subjecting them to conditions that led citizens not to exercise what would otherwise be protected rights. Thus, in all three cases, it is no longer sufficient to argue: (a) that the supposedly greater power not

5. The development is traced in Epstein, *The Supreme Court, 1987 Term - Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988). Epstein's own analysis is marked above all by its foundations in a *Lochner*-like conception of the relationship between the citizen and the state. For a discussion, see Sunstein, *supra* note *.

to create or to abolish the program includes the supposedly lesser power to create the program with the condition; (b) that the citizen voluntarily accepted the condition because he willingly participated in the program in the first instance; and (c) that the citizen cannot complain because the program makes him better off than he would be without it.[6]

But in all three cases, what sort of help does the unconstitutional conditions doctrine offer? The doctrine operates as a shorthand response to these otherwise plausible arguments from the greater power and waiver; sometimes it provides the basis for a broadside attack on arguably unconstitutional conditions, on the theory that government cannot do "indirectly" what it cannot do "directly." But in order to resolve the three cases, or any other problem of this sort, it is necessary to ask far more particular questions about the nature of the constitutional right in the cases.

Case one, for example, is relatively simple. The reason is that the first amendment, properly interpreted, does not permit government to pressure the right to free expression in this way. That conclusion is in turn a product of two subsidiary ideas: (1) The pressure imposed on the right to free expression through the use of monetary incentives is a constitutionally significant burden, in light of the nature of the free expression interest, which calls for governmental neutrality among different points of view; and (2) the government, in the welfare setting, does not have available to it distinctive, finance-related interests that justify the imposition of that burden. It is therefore impermissible, under the first amendment, for government to make welfare available on the basis of this kind of selectivity.

Case two is also a simple one, at least under current law, and it goes in precisely the opposite direction. To be sure, there is, under *Pierce v. Society of Sisters*,[7] a constitutional right to send one's children to private school. But there is no right to government funding of that right even if the government does in fact fund the public schools. For those who believe in a unitary unconstitutional conditions doctrine, the different results in cases one and two must be a puzzle. The pressure exerted on the right by the government is precisely the same in both settings. Why is the government able to treat speech rights in a way that it cannot treat the right to educate one's children?

If there is an answer, it lies not in anything with which the uncon-

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6. Although these arguments are insufficient, it is necessary, and not altogether simple, to explain why this is so. *See* Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309. For discussion of and response to those arguments, see generally Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Epstein, *supra* note 5.

7. 268 U.S. 510 (1925).

stitutional conditions doctrine can be helpful, but instead in the different nature of the rights in the two cases. If current law is correct, it is because the right to send one's children to private schools is a distinctive one. It might be distinctive in the sense that it is not a right to governmental neutrality in general or in the abstract, but instead merely a right to be free from criminal coercion in the private education of one's children. On this view, the right to educate one's children does not require governmental neutrality as between public and private schools, and it does not proscribe the use of funding to pressure that choice. This may or may not be a correct interpretation of the relevant right. But if it is incorrect, it is because of nothing in the unconstitutional conditions doctrine, but instead because of something in the nature of the right.

If this distinction between the right recognized in *Pierce* and the free speech right is unpersuasive, current law might nonetheless be correct for a quite independent reason. Perhaps the differential use of financial incentives in the setting of private schools is constitutionally troubling, and government must therefore come up with a powerful argument in its defense; but perhaps such an argument is available. The argument would go like this. Many taxpayers would have severe objections to the public funding of religious schools. Those objections are not only severe, but closely tied up with, and indeed are an inextricable part of, the rationale behind the establishment clause. In these circumstances, an interpretation of the right to educate one's children that would compel governmental neutrality would wreak havoc with the deeper logic of the constitutional text. Governmental neutrality would, in short, bring about violations of the establishment clause. One might add here that any government has strong and legitimate reasons to favor public over private education, in order (for example) to foster the development of an integrated national (or state) polity. These reasons may well be insufficient to permit prohibition of private schools without being so weak as to be insufficient to permit the funding of public but not private schools.[8]

All this should be enough to suggest that it is at least plausible to understand the right to educate one's children in private schools as not including a prohibition on the funding of public but not private schools. If this is so, case one and case two properly come out differ-

8. Considerations of the sort suggested in this paragraph explain my uneasiness with Professor McConnell's contribution to this symposium. *See* McConnell *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255 (1989).

ently. The reason lies in the distinctive nature of the constitutional rights in the two cases, and the availability of unusual justifications in case two, justifications that permit government to invoke additional considerations in its support.

What of case three?[9] Here an initial instinct would be to suggest that it necessarily falls within case one. *Roe v. Wade*[10] recognized a right to reproductive freedom, and that right, it would be argued, cannot exist if government is permitted to fund childbirth but not abortion. Such a distribution of financial incentives necessarily pressures the choice — particularly in the case at hand, which involves indigent women.

This basic argument derives support from a current staple of modern unconstitutional conditions arguments — the distinction between penalties and refusals to subsidize.[11] A refusal to subsidize, on this view, amounts to a constitutionally unobjectionable unwillingness to ensure the exercise of a right. By contrast, a penalty represents a sanction exacted by making citizens worse off than they would be if the program were not created; a penalty is therefore constitutionally suspect. In case three, it might be said, there is an impermissible penalty since government is depriving citizens of something that they would otherwise receive, that is, funding for all medically necessary expenditures.[12]

Ironically, these arguments reveal precisely what is wrong with a general or unitary unconstitutional conditions doctrine; and it is possible to reach this conclusion without thinking that the arguments are necessarily wrong. There are three points here. The first is that the asserted characterization of the right in *Roe v. Wade* is by no means self-evidently correct. Whether the right is one to governmental neutrality, or instead to freedom from criminal coercion, is not a question that can be answered on the basis of the holding or rationale in *Roe* itself.[13] That question depends on a far more complex inquiry into the best argument available for the *Roe* outcome. There is nothing illogical in reading *Roe* more narrowly, even if such a reading would be incorrect on balance. On that view, the *Roe* right would be akin to the right in *Pierce.*

The second point is that in the setting of financial expenditures, government possibly has available to it distinctive finance-related justifications that serve to legitimate any burdens on the relevant

9. The case is, of course, drawn from Harris v. McRae, 448 U.S. 297 (1980).
10. 410 U.S. 113 (1973).
11. The distinction is made central in *Harris.* For a general discussion, see Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State,* 132 U. PA. L. REV. 1293 (1984).
12. This is the argument in Kreimer, *supra* note 11.
13. *Roe,* 410 U.S. at 113.

right. Many taxpayers would severely object to the use of taxpayer money to fund an activity that they consider the moral analogue of murder. These objections do not have the weight that would ground a serious free exercise objection to the use of federal funds to pay for abortion. But the objections might well make it permissible — not necessary, but permissible — for government to decide not to fund abortions even if it cannot criminalize them.

The third point is that the question whether the denial of funds for abortion is a "penalty" or a "refusal to subsidize" is both difficult to answer and — more importantly — constitutionally irrelevant. To decide the penalty-subsidy question, it is necessary to identify some status quo, or baseline, in order to conceive of the alternative universe from which the current deviation is to be measured.[14] In a period in which governmental regulatory programs interact with common-law rights in complex ways, that question is almost impossible to sort out. More fundamentally, the question whether a denial of funding operates as a "penalty" or as a "refusal to subsidize" is not, for constitutional purposes, the important one. The question is instead whether the governmental action at issue intrudes on the relevant right in a constitutionally troublesome way, and if so, whether the government has available legitimate justifications that are sufficiently weighty to justify any such intrusion. The penalty or subsidy inquiry does not help to answer this question.

These considerations hardly supply a decisive argument in favor of government programs that subsidize childbirth but not medically necessary abortions. It might well be that the right in *Roe* should in fact be characterized as a right to governmental neutrality — an argument that would draw strength if one accepts the view that the *Roe* outcome is best understood as a case involving sex discrimination and predictable adverse consequences for poor women.[15] It might well be that taxpayers' moral objections to public funding of abortion are not, in view of the best characterization of the relevant right, sufficiently weighty to justify the intrusion. This view might be supported by analogy to cases involving speech, religious, and nondiscrimination rights, where, as a general rule, the moral objections of the taxpaying public are insufficient to permit selectivity in funding.

These are complex questions, and they cannot be answered here.

14. *See* Sullivan, *supra* note 6; Kreimer, *supra* note 11.

15. *See* Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

For present purposes, the central point is that in our three cases involving arguably unconstitutional conditions — under current law, the first an easy call for the citizen, the second an easy call for the government, and the third a difficult call that produced a split Supreme Court — the unconstitutional conditions doctrine has been entirely unhelpful. Cases that fall within the general category of unconstitutional conditions problems require a quite particular analysis of the nature of the relevant right. Whether there is a penalty or a subsidy is immaterial. Sometimes the government may do indirectly what it cannot do directly. The relevant cases must be argued on the merits, in terms of the appropriate conception of the relevant right; the unconstitutional conditions doctrine cannot do any of the necessary work.

All this is not to suggest that the doctrine has served no function, and it is hardly to say that cases involving conditions on governmental programs do not call up distinctive considerations. The doctrine has been helpful in answering familiar objections to the use of constitutional review in this area, and those objections are indeed misguided.[16] Moreover, reviews of funding programs do share distinctive common inquiries — as we have seen — into the nature of the right and the character of governmental justifications. The principal problem with the unconstitutional conditions doctrine is that it tends to focus attention away from these questions, which are the correct ones, to other questions altogether — questions that probably cannot be answered and that in any case need not be asked.

III

We have seen that the unconstitutional conditions doctrine is an awkward and crude effort to bring under constitutional scrutiny a range of measures that affect constitutional rights in serious ways, but that would not otherwise be subject to serious judicial review. The doctrine does help to identify a technique of burdening constitutional rights,[17] and thus to alert courts that a serious constitutional issue may be present notwithstanding both the absence of common-law "coercion"[18] and the possibility that the person who has accepted both the benefit and the burden is on balance better off as a result of the deal. In coming to terms with the questions raised by the relevant cases, however, the unconstitutional conditions doctrine is inadequate in two fundamental ways.

First, it focuses attention on the largely immaterial question

16. For discussion, see Sullivan, *supra* note 6; Epstein, *supra* note 5.

17. A point emphasized in Sullivan, *supra* note 6.

18. For a discussion of the unfortunate legacy and surprising persistence of this idea, see Sunstein, *supra* note *.

whether there is a "threat" (penalty) or an "offer" (subsidy). This is an extraordinarily complex question that courts are unlikely to be able sensibly to unpack. More importantly, the question is not the one that, as a general rule, the Constitution tells courts to ask.

Second, and most fundamentally, the unconstitutional conditions doctrine tends to lead courts to disregard the extraordinary particularity of the settings in which problems under this rubric tend to arise. Whether a condition is unconstitutional depends on whether the relevant clause, properly interpreted, makes the particular burden a constitutionally troubesome one, and, if so, whether the government has available to it — because of the setting — distinctive justifications that make its action permissible. These are not simple questions, but they are the relevant ones. We do not need an unconstitutional conditions doctrine in order to ask them.