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WHY THE UNCONSTITUTIONAL CONDITIONS DOCTRINE IS AN ANACHRONISM (WITH PARTICULAR REFERENCE TO RELIGION, SPEECH, AND ABORTION)

CASS R. SUNSTEIN*

Many of the most vexing questions in constitutional law result from the rise of the modern regulatory state, which has allowed government to affect constitutional rights, not through criminal sanctions, but instead through spending, licensing, and employment.[1] It may well be in these areas that constitutional doctrine is least well developed. It is here that constitutional law promises to receive its most serious tests in the next generation.

Under current law, the unconstitutional conditions doctrine serves to mediate the boundary between constitutional rights and government prerogatives in the areas of spending, licensing, and employment.[2] The doctrine operates as a shorthand response to the view that those who voluntarily par-

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I would like to give special thanks to Richard Epstein, Michael McConnell, and Kathleen Sullivan for their conversation (and writings) on this subject. I am also grateful to Bruce Ackerman, Mary Becker, Frank Easterbrook, Larry Kramer, Frederick Schauer, Joseph Singer, and David Strauss for helpful comments.

[1] Many years ago, Justice Jackson made the basic point:

> [T]he task of translating the majestic generalities of the Bill of Rights . . . into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual['s] . . . liberty was attainable through mere absence of governmental restraints . . . . We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639-40 (1943).

[2] In brief, the doctrine holds that although government may choose not to provide certain benefits altogether, it may not condition the conferral of a benefit, once provided,

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ticipate in government programs have "waived" their constitutional objections, and also to the claim that the government's power not to create a regulatory program necessarily includes the power to impose on that program whatever conditions it chooses. The various puzzles produced by the doctrine have created considerable doctrinal confusion and provoked a wide range of commentary.[3] It is notable that for all their differences, participants in the debate, both on and off the bench, treat the unconstitutional conditions doctrine as the appropriate device for approaching disputed questions. The differences can be found not on that point, but only in the description of the scope and nature of the doctrine.[4]

This Article comes in two parts. In Part I, I argue that the unconstitutional conditions doctrine should be abandoned. The doctrine, I suggest, is an anachronism; it cannot do the work expected of it. During the transition from the common law system to the modern regulatory state,[5] the unconstitutional conditions doctrine represented an awkward and never fully explicated effort to protect constitutional rights in a dramatically different institutional environment. The peculiar legacy of this transition and its outmoded foundations continue to pervade current approaches to the problem of unconstitutional conditions. The idea that the system of common law and criminal prohibition provides the basic, even natural state of affairs, and that

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on a beneficiary's waiver of a constitutional right. *See, e.g.*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 681 & n.29 (2d ed. 1988).

[3] *See, e.g.*, L. TRIBE, *supra* note 2, § 10-8, at 681-85, § 10-9, at 685-87 (discussing the subsidy-penalty distinction); Epstein, *Foreword: Unconstitutional Conditions, State Power and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (arguing that the doctrine serves as a second-best means of prohibiting illegitimate redistributions of wealth); Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359 (1984) (proposing three baselines from which to assess the validity of allocational sanctions); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1419 (1989) (arguing that the doctrine serves an important function by "identify[ing] a characteristic technique by which government appears not to, but in fact does burden . . . liberties"); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1448 (1968) (noting that "government-connected activity . . . may make otherwise unreasonable conditions quite reasonable").

[4] The analysis in Sullivan, *supra* note 3, is closest to that suggested here, particularly in her rejection of the subsidy-penalty distinction. *Id.* at 1433-38. My claim is that arguments of the sort that she offers, properly understood, would lead in the direction of abandonment of the doctrine altogether.

[5] I use the term "regulatory state" because it is the usual one, but the term should not be taken to suggest that the common law system that preceded it was not "regulatory" or "governmental" in largely the same sense. Indeed, the idea that the common law was a regulatory system, and not merely facilitative of private desires, played a role in the creation of the modern state. *See* Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437 (1987) (noting that many New Deal reformers regarded the common law itself as a regulatory scheme).

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regulatory and spending programs are occasional and somewhat jarring additions, affects all sides of the debate.

Indeed, the very idea of a unitary unconstitutional conditions doctrine is a product of the view that the common law is the ordinary course and that governmental "intervention"—the regulatory state—is exceptional.[6] Despite its pervasiveness,[7] this view is misconceived. It is inconsistent with both the realities of contemporary government and the principles that gave rise to it. Instead of a general unconstitutional conditions doctrine asking whether there has been "coercion" or "penalty," what is necessary is a highly particular, constitutionally-centered model of reasons: an approach that asks whether, under the provision at issue, the government has constitutionally sufficient justifications for affecting constitutionally protected interests.

In the second part of this Article, I explore the constitutional issues raised in several areas of selective funding. My goal is to show the sort of analysis that would be used in a legal system that has abandoned the unconstitutional conditions doctrine. I conclude that government may constitutionally fund public but not private schools; that government has broad discretion to be selective in funding art and other projects involving speech; and, perhaps most controversially, that government is under a constitutional duty to fund abortion in cases of rape and incest, at least if it is funding childbirth in such cases. Whether or not these conclusions are correct, the relevant outcomes should depend on reasons entirely independent of a general unconstitutional conditions doctrine. It is on that broader point, rather than the particular conclusions, that I will be insisting here.

I. CURRENT DOCTRINE AND ITS LIMITS

To make the analysis as concrete as possible, I will focus throughout on three cases involving selective funding. In the first, government decides to fund public schools but not private schools, and it does so even though there is a constitutional right to send one's children to private schools.[8] In the second case, government funds some artistic projects but not others, excluding, for example, projects containing sex or nudity, criticizing the government, or proclaiming the virtues of Nazism or Communism. In the third, government funds childbirth but not abortion in cases in which pregnancy results from rape or incest. In this section, I explore what sort of directions the current understandings of the unconstitutional conditions doctrine might provide in these cases.

[6] For an elaboration of this point, see Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987).

[7] *Id.* at 875.

[8] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

A. *The Rise of the Regulatory State and the Unconstitutional Conditions Doctrine*

I have said that the unconstitutional conditions doctrine is an artifact of the collision of the regulatory-welfare state with the preexisting common law framework. To understand that claim, it will be useful briefly to review the collision. Most of the story will be familiar.

In the early days of the regulatory state, legislation that is now generally taken as constitutionally uncontroversial—for example, minimum wage and maximum hour legislation—was subject to attack under the due process clause, usually as a form of an impermissible "taking" from one person for the benefit of another.[9] On this account, the distribution of wealth and entitlements pursuant to the common law and market ordering was treated as a part of nature, or at least as the baseline from which to assess whether government had violated its obligation of neutrality. It was on this premise that the idea of impermissible redistribution was made plausible.[10] The *Lochner* decision, invalidating maximum hour laws, has come to be the symbol of this approach to constitutional law.

Before and during the New Deal period, this framework came under assault. The common law system began to be seen not as a natural or impartial order, but as a set of collective choices. Because market outcomes were at least in large part a function of the law itself, employers were no longer seen to have an antecedent entitlement to market wages and market hours.[11] Thus Franklin Roosevelt contended, "We must lay hold of the fact that the laws of economics are not made by nature. They are made by human beings."[12] The rise of the regulatory state represented a general understand-

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[9] *See* Lochner v. New York, 198 U.S. 45 (1905) (overturning state legislation setting maximum hours for bakers); Adkins v. Childrens Hosp., 261 U.S. 525, 557-58 (1923) (striking down a minimum wage statute as "a compulsory exaction from the employer for the support of a partially indigent person").

[10] Of course not all redistribution was out of bounds; welfare statutes were permitted. But redistribution through regulation was quite frequently invalidated. Note, however, that such efforts do in fact have perverse effects in many cases. For a catalogue, see Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990).

[11] *See* West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937) (rejecting *Lochner*'s freedom of contract premise and stating that "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers").

[12] F.D. Roosevelt, Annual Message to Congress (Jan. 3, 1936), in 5 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, THE PEOPLE APPROVE 13 (1938). This was also a prominent theme in the legal realist movement. *See, e.g.*, Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478 (1923) (arguing that the distribution of income "depends on the relative power of coercion which the different members of the community can exert against one another"). A large failure of the realists was that they thought that this insight did more work than in fact it does. To say that existing distributions are a product of law or a "social construct" is not to supply an argument against them. Some such argument, sounding in

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ing that the common law and private markets were regulatory systems and that those systems sometimes produced both inefficiency and injustice.

At its inception, the unconstitutional conditions doctrine was a product of *Lochner*-like, pre-New Deal understandings. Its overriding purpose was to protect common law rights in the face of threats to those rights created by the rise of the regulatory state.[13] The doctrine arose when it became clear that regulatory and spending activities might produce an impermissible "redistribution" of the *Lochner* variety,[14] and that doctrines could be designed to control these novel intrusions into what had previously been regarded as a private sphere. The Court might, for example, invalidate a statute conditioning the receipt of funds on compliance with minimum wage laws. From its inception, then, the unconstitutional conditions doctrine grew out of a system that sought to protect common law interests and market ordering from the novel threats created by the regulatory state. Each of the three principal positions about the scope and nature of the unconstitutional conditions doctrine continue to reflect the roots of the doctrine in the uneasy encounter of constitutional courts with the regulatory state.

1. Holmesianism

The first position, traceable to Justice Holmes[15] but with several modern incarnations,[16] suggests that courts should never, or almost never, invalidate arguably unconstitutional conditions. On this view, the supposedly greater power not to create the program includes the supposedly lesser power to impose the condition. The Holmesian view begins by acknowledging that an

efficiency or distributive justice, is necessary to support displacement of freedom of contract or indeed of any system.

[13] *See* Epstein, *supra* note 3, at 10 (stating that the doctrine, with roots in the nineteenth century, is "no new judicial concoction in the post-New Deal welfare state"); Sullivan, *supra* note 3, at 1416 (noting that "the *Lochner* Court first fashioned the doctrine").

[14] *See infra* text accompanying notes 21-31 for a discussion of how this theme survives in current doctrine.

[15] *See, e.g.*, Myers v. United States, 272 U.S. 52 (1926) (Holmes, J., dissenting) (arguing that if Congress may create an office at will, it may also condition termination from that office); Western Union Tel. Co. v. Kansas, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."); McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 518 (1892) ("There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech . . . by the terms of his contract.").

[16] *See, e.g.*, Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 344-52 (discussing with approval the unconstitutional conditions doctrine as applied to *Snepp v. United States*, 444 U.S. 507 (1980), in which the Court enforced the CIA's contractual right to censor books by its former agents); Lyng v. International Union, 485 U.S. 360 (1988) (upholding legislation denying distribution of food stamps to striking workers).

important lesson of the *Lochner* period was that constitutional courts should not treat the existing distribution of entitlements pursuant to the common law as sacrosanct. Justice Holmes treated the rejection of the *Lochner* framework—the basic ordering principle for the unconstitutional conditions doctrine—as entailing the abandonment of the doctrine as well.

On this view, the only logical replacement for the doctrine is untrammeled governmental discretion in the areas of employment, licensing, and funding. That is: when a citizen participates in a program to which there is no antecedent entitlement, the Constitution imposes no constraints on the government's decision to impose conditions. It would follow that, for example, the government might award grants to artists as it chooses. Indeed, under the Holmesian view, all three of the cases with which I started become simple ones. The government wins.

This position represents a distinctive reaction to the rise of the regulatory state. It takes the New Deal repudiation of common law baselines as a reason to abandon baselines, and to this (significant) extent constitutionalism, altogether. But for familiar reasons, the rise of the regulatory state need not compel the complete elimination of constraints on governmental activities that pressure what would otherwise qualify as constitutional rights.[17] The Constitution constrains not simply criminal law, but all governmental conduct. If government could, for example, limit spending programs to those who speak favorably of the party in power, there would be a serious distortion of deliberative processes—one that creates precisely the same dangers, in terms of both purposes and effects, against which the first amendment was originally supposed to guard. Governmental conditions on the receipt of licenses or funds may have powerful distorting effects on (for example) freedom of expression[18] or racial equality.[19] All this suggests that in its broadest forms, the Holmesian position is unacceptable. It eliminates constitutional protections from spending, licensing, and employment decisions, without providing a plausible explanation for so doing.

More fundamentally, and perhaps surprisingly, the Holmesian position is a legacy of precisely the pre-New Deal understandings that it purports to repudiate. On the Holmesian view, coercive governmental entry into the

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[17] There has been broad agreement on the importance of inquiring into the burdens that governmental activities place on rights. *See, e.g.*, Epstein, *supra* note 3, at 7-8; Sullivan, *supra* note 3, at 1500; Van Alstyne, *supra* note 3, at 1442. *See also infra* text accompanying notes 46-53.

[18] *See, e.g.*, FCC v. League of Woman Voters, 468 U.S. 364 (1984) (holding that a federal regulation conditioning the award of grants upon public broadcasters' willingness to refrain from editorializing violates the first amendment).

[19] *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (striking down a municipal ordinance prohibiting the construction of wooden laundries without a license, where the effect of the condition was to discriminate against Chinese applicants). On the inadequacy of "the greater includes the lesser" position, see *infra* note 48 and text accompanying notes 47-54.

realm of private autonomy may raise constitutional objections; spending and benefit programs do not. This view thus implements constitutional principles by reference to the discredited distinction between a pre-political sphere of common law autonomy and a post-political sphere of governmental action.[20] After the New Deal, however, governmental benefit and spending programs cannot plausibly be viewed as a regulatory system superimposed upon a set of spontaneous or natural arrangements—a central lesson of the demise of *Lochner*. If this is so, the sharp line that the Holmesian position draws between the common law and the regulatory sphere depends on assumptions and values that are inconsistent with those of modern government.

2. Anti-redistribution

The second position was prominent in the early twentieth century; though it has echoes in many places,[21] it has perhaps only one full-fledged defender today.[22] Here the connection between the unconstitutional conditions doctrine and its earliest pre-New Deal manifestations is perhaps clearest.

This view conceives the basic goal of the doctrine as preservation and protection of *Lochner*-like rights, such as contractual liberty and private property, under new circumstances. As elaborated at length by Richard Epstein,[23] the unconstitutional conditions doctrine operates as a second-best surrogate for outright prohibition, on constitutional grounds, of spending and taxing programs.[24] Sometimes, for example, the doctrine applies for the same reason that the underlying program is unconstitutional as "redistribution";[25] sometimes it applies because even if courts were to uphold such a redistributive program, they can minimize the redistributive consequences through control of the "indirect" constraints imposed by the conditions. In its early twentieth-century incarnation, and in Epstein's own version, this idea grows out of the same framework that accounted for *Lochner v. New York* and various other decisions invalidating modern legislation.[26]

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20 *See* Sunstein, *Lochner's Legacy*, *supra* note 6, at 882.

21 For a recent example, see Nollan v. California Coastal Comm'n, 438 U.S. 825 (1987) (holding the Commission's conditioning the right to develop private beachfront property on landowner's providing public easement to be an invalid taking of property).

22 *See* Epstein, *supra* note 3, for the basic statement and defense.

23 *Id.*

24 Epstein writes that the doctrine functions to " 'take back' some of the power which had been conferred upon government officials in the first instance." *Id.* at 28.

25 For example, Epstein argues that "government regulation and taxation are means to effect implicit transfers of wealth between individuals." *Id.* at 103. As one commentator has noted, for Epstein "as a matter of principle, the whole social security and welfare safety net is unconstitutional." Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 23 (1986).

26 *See, e.g.*, *Adkins*, 261 U.S. at 557-58 (minimum wage statute is a "compulsory exaction from the employer for the support of a partially indigent person"). Of course Epstein would accord constitutional protection, under the unconstitutional conditions

This understanding of the doctrine would suggest—to take one example—that a government that funds public schools must also fund private schools. On this account, some version of a voucher system, in which the government would also finance students who chose to attend religious schools, would be constitutionally compelled.[27] If government funds only public schools, it works an impermissible redistribution from one group of taxpayers to another; and it is redistribution against which the doctrine must guard.

It should not be difficult to see why this approach is unacceptable. First, no constitutional provision forbids "redistribution."[28] After the demise of the *Lochner* period,[29] the Constitution has been interpreted to authorize a wide range of transfers from some groups to others, largely on the understanding that existing distributions of wealth and property are not sacrosanct. When a "redistribution" is unconstitutional, it is not because of any general constitutional disability, but because particular constitutional provisions rule particular government acts, some of them of course "redistributive," off-limits. For example, a welfare program limited to members of the Republican party is impermissible because of the specific constraints of the first amendment. An unconstitutional conditions doctrine rooted in an anti-redistributive norm is simply too general a framework for approaching a constitutional system that offers quite concrete prohibitions.

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doctrine, to rights of free speech and free exercise as well as to rights of property ownership and contractual freedom. In all cases, however, the basic reason for protection is his fear of governmental "redistribution"—an impermissible goal that, in Epstein's framework, cuts across a wide range of constitutional protections. Because Epstein would grant protection to modern rights of this sort, his approach is not limited to *Lochner*-like rights of property and contract; but the reasons for the protection of other rights stem precisely from the *Lochner* framework. That framework accounts for some other oddities in his analysis as well, such as the suggestion that taxpayers with religious objections have a constitutional right to prevent their funds from being used for abortion. Epstein, *supra* note 3, at 97.

[27] *See* L. TRIBE, *supra* note 2, at 1275.

[28] The takings clause is of course anti-redistributive, but it has never been and should not be taken as a wholesale assault on all governmental action with redistributive consequences. For a contrary view, see R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (arguing that the concept of private property is inconsistent with a welfare state and that the takings clause itself prohibits public transfers and welfare programs).

The notion of "redistribution" itself depends on a theory of antecedent entitlements. If existing distributions are themselves without prepolitical status, and if they are questionable from the standpoint of justice, efforts to change them will not appear to be "redistribution" at all. *See* T. POGGE, REALIZING RAWLS (1989) (arguing that institutional orders themselves establish inequities that result from collective actions in creating and perpetuating these orders).

[29] Notably, there was no general barrier to redistribution in the founding period. *See* Grey, *supra* note 25, at 41-42 (arguing that the "duty of public support for the destitute" is a consistent theme in Western thought and that the framers left this "familiar system" undisturbed).

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More fundamentally, the second position, rooted as it is in *Lochner*, depends on conceptions of the purpose of the state and the correlative judicial role[30] that have been roundly repudiated in the twentieth century, and for good reasons.[31] It is here that one can find a surprising but firm alliance between Holmesianism, minimally intrusive on governmental power, and the anti-redistributive position, maximally intrusive on such power. For all their differences, both positions draw a sharp distinction between the realm of common law autonomy and the realm of public law. Both positions understand the unconstitutional conditions doctrine by reference to precisely that distinction. But barring a return to *Lochner*, redistributive and paternalistic programs are no longer constitutionally out-of-bounds. An unconstitutional conditions doctrine built on pre-New Deal foundations is poorly adapted to the regulatory state.

3. Subsidy vs. Penalty

The third position, represented by the current constitutional mainstream,[32] sees the unconstitutional conditions doctrine as an effort to preserve legal requirements of governmental neutrality under different social and economic conditions. It is in this requirement of government neutrality that one finds the staples of the unconstitutional conditions doctrine: the government may not do indirectly what it may not do directly; government may not "penalize" the exercise of constitutional rights; and government may not coerce people into relinquishing constitutional rights through regulation, spending, and licensing, any more than it may do so through criminal sanctions.

These are the conventional arguments in the cases.[33] In some respects,

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[30] For Epstein, that role is to preserve economic liberties and private property. Epstein, *supra* note 3, at 103.

[31] J. RAWLS, A THEORY OF JUSTICE (1971) and B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) provide philosophical treatments within the liberal tradition. For an analysis along similar lines with particular focus on the appropriate scope of regulation, see C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION (1990).

[32] Every Supreme Court justice has set forth a position of this sort within the last two decades. For a careful elaboration of the basic principles here, see Kreimer, *supra* note 3.

[33] *See, e.g.*, Arkansas Writers' Project v. Ragland, 481 U.S. 221, 229 (1987) (holding invalid a tax benefitting "fledgling" publisher because it burdens the first amendment rights of other publishers); FCC v. League of Women Voters, 468 U.S. 364 (1983) (invalidating a section of the Public Broadcasting Act of 1967 which banned noncommercial television stations who receive grants from the Corporation for Public Broadcasting from "editorializing"); Harris v. McRae, 448 U.S. 297 (1980) (holding that due process does not require states to pay for medically necessary abortions for indigents); Sherbert v. Verner, 374 U.S. 398 (1963) (holding that conditioning receipt of unemployment benefits on recipient's willingness to work on the Sabbath contrary to religious beliefs violates the first amendment); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that conditioning receipt of welfare benefits on durational residency requirements violates the equal protection clause).

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they are highly salutary, especially insofar as they recognize the possibility that non-criminal sanctions often affect constitutional rights in ways that government is unable to justify. Above all, these ideas operate as a corrective both to approaches that see common law rights as the general baseline against which an unconstitutional conditions doctrine must operate, and those who, following Holmes, suggest that courts should not limit the intrusions on constitutional rights that occur through spending and employment decisions.

In many respects, however, this third approach is vulnerable, not least because in finding the regulatory state a strange and intermittent intruder, it has far more in common with *Lochner*-like ideas than appears at first glance. The approach thus poses several problems. The first is that generating the appropriate baselines from which to distinguish subsidies from penalties is exceptionally difficult.[34] *Harris v. McRae*,[35] in which the Supreme Court upheld a government decision to fund childbirth but not to fund medically necessary abortions, illustrates the problem. There the Court said that Congress' decision not to fund abortions through the Medicaid program was permissible because it amounted to a mere refusal to subsidize. The Court acknowledged that a "penalty" would be unconstitutional because it would impermissibly burden a woman's constitutionally protected right to an abortion. For example, a decision to withdraw welfare benefits from everyone who has had an abortion would, the Court noted, raise "a substantial constitutional question."[36]

But how does one decide whether the refusal to pay for medically necessary abortions is a "subsidy" or a "penalty" in the face of government funding of childbirth and almost all other medically necessary expenditures? Perhaps government action should be deemed a penalty rather than a subsidy when the government prevents someone from obtaining something to which she would "otherwise" be entitled. This formulation, however, makes the distinction between "subsidy" and "penalty," like the very category of "coercion," rely on a baseline defining the ordinary or desirable state of affairs.[37] The courts must rely on some status quo to decide what people would "otherwise" receive. In a post-Medicaid world, is not a poor woman seeking an abortion "otherwise" entitled to payment for medically necessary expenditures, including abortions? The *Harris* dissenters made precisely this

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[34] *See* Sullivan, *supra* note 3, at 1416-17.

[35] 448 U.S. 297 (1980).

[36] *Id.* at 317 n.19.

[37] *See, e.g.*, Kreimer, *supra* note 3, at 1358-59 ("Our problem . . . lies in the challenge to specify an appropriate normal course of events from which to judge deviations."); Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 447 (S. Morgenbesser, P. Suppes & M. White eds. 1969) (suggesting that "threats" involve a departure from a baseline of the "normal course of events," that detriment the recipient); Sullivan, *supra* note 3, at 1439-40 (arguing that outcomes change depending on how baselines are defined).

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argument.[38] The majority replied that there had never been a general entitlement to funding of all medically necessary treatments.[39] The dissenters might have answered that the existence of a Medicaid program altered the baseline to one containing such a general entitlement. But the majority might have responded: Why?

All this suggests that the development of the relevant baseline is enormously difficult. In *Harris*, the Court appeared quite reflexively to use a common law baseline that assumed government funding to be exceptional rather than ordinary,[40] but the common law may simply no longer be appropriate in these cases. Once the common law touchstone is abandoned, however, it is not at all clear what standard is to replace it. If the subsidy-penalty line is crucial, development of proper baselines is the key issue; but it is also an issue on which the unconstitutional conditions doctrine and the subsidy-penalty distinction, standing by themselves, have absolutely nothing to say.[41]

The problem goes deeper. Sometimes, as I argue below, the government can legitimately "penalize" the exercise of constitutional rights through selective funding.[42] Some constitutional provisions do indeed permit regulation through funding but not through criminalization. It is hardly self-evident, in any case, that all penalties must be unconstitutional.

This point leads to the broader conclusion that the development of a baseline to distinguish between penalties and subsidies is neither necessary nor sufficient.[43] The Constitution offers no general protection against the imposition of penalties on the exercise of rights. Instead, the question the Constitution ordinarily makes it necessary to ask is whether government has intruded on a right in a way that is constitutionally troublesome and, if so, whether government can justify its intrusion under the appropriate standard of review. The view that there is a unitary category of intrusions called "unconstitutional conditions" is the product of a belief that in a certain set of cases, another question—"subsidy/penalty"—displaces the ordinary inquiry altogether. But it is not at all clear why this displacement should occur.

Even more fundamentally, the very notion that one should approach these cases with a distinction between penalties and subsidies has much in com-

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[38] *Harris*, 448 U.S. at 330-32 (Brennan, J., dissenting); *see also* Kreimer, *supra* note 3, at 1375-76 (noting that "[a]s a matter of history," abortions were funded prior to *Harris*).

[39] *Harris*, 448 U.S. at 317-18.

[40] Thus the *Harris* majority writes that "[t]he Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all." *Id.* at 316.

[41] *See* Sullivan, *supra* note 3, at 1420.

[42] The clearest example is government's decision not to fund private schools. *See infra* text accompanying notes 54-59.

[43] *See* Sullivan, *supra* note 3, at 1450.

mon with the two positions that appear to be its adversaries. As with the Holmesian and anti-redistributive approaches, the subsidy-penalty distinction appears to depend on the notion that the regulatory state is an artificial supplement to an otherwise well-defined status quo. The distinction simply cannot be administered without some such notion.[44] Moreover, the distinction cannot be sustained in light of the omnipresence of government spending and funding. A set of doctrines that assumes that spending programs are an artificial supplement to a system of common law ordering—in short, an inquiry into subsidy or penalty—is inconsistent with the values and operation of modern government.

All three of the prominant approaches to the subject are too general to be helpful in dealing with cases involving particular prohibitions on government activity. Moreover, they are anachronisms. And they are anachronisms in precisely the same sense: they treat common law ordering as the usual state of affairs and see governmental funding as a questionable interference with an otherwise stable status quo. To be sure, such interference might well raise serious constitutional problems. But nothing in the unconstitutional conditions doctrine is likely to be helpful in resolving those problems.

B. *Plausible Functions of Current Doctrine, and Why They Can Be Served in Other Ways*

The discussion thus far suggests that the unconstitutional conditions doctrine has taken the shape that it has and produced the debates that it has only in reaction to a set of particular, quite distinctive historical conditions. In short, the doctrine filled a particular gap in post-New Deal constitutional theory by offering a means of placing limits on novel governmental activities. We might make this point by imagining a different society in which collective constraints were, from time immemorial, carried out through licensing, funding, and employment decisions. In such a society, the criminal law would be absent, and constitutional safeguards would be applied to the familiar kinds of sanctions. Suppose that after many generations, the society created a new set of sanctions—call them criminal fines and confinement—as a supplement to its basic regulatory system.

Such a society might at that point find it necessary to create a set of doctrines to control this novel kind of intrusion, one that sometimes adversely

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[44] Although this is usually so, it is not necessarily so as a logical matter. At least in theory, one could define the status quo not by reference to current practice or to history, but instead by reference to some baseline justified as a matter of principle. But there would be enormous difficulties in establishing the foundations for any such justification. *Cf.* Kreimer, *supra* note 3, at 1359-74 (developing a baseline analysis grounded in considerations of history, equality, and prediction); Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289 (1989) (arguing that the proper baseline for measuring threats and offers is what the government would have provided if it could not impose conditions).

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affected constitutional rights. Once the society matured, however, the category of criminalization would no longer be administered as a unitary doctrine. It would instead take its place alongside the more familiar constitutional safeguards that inquire into the nature of the burden on the relevant rights and the available government justifications for imposing that burden.

For modern observers, then, the question has to do with what genuine, nonobfuscating work the unconstitutional conditions doctrine is necessary to perform. I suggest here that it is possible to identify three such functions. But because the unconstitutional conditions doctrine is not necessary to discharge these tasks, and because the tasks can be carried out through other, more particular, approaches, I argue that the unconstitutional conditions doctrine should be abandoned.[45]

1. Identifying a Technique of Burdening

The first function the unconstitutional conditions doctrine performs is to identify a technique by which government affects or burdens constitutional rights.[46] The doctrine serves to alert courts to the fact that a government spending decision—for example, a decision to condition the receipt of welfare benefits on a waiver of first or fourth amendment rights—often affects constitutional rights in ways that call for persuasive justification or perhaps invalidation.

The doctrine thus reminds courts that it would be quite wrong to disregard the effects that spending decisions may have on constitutional rights, even if there is an apparent or real individual waiver. But the fact that spending decisions do affect constitutional rights should hardly be thought surprising or unusual. A reminder of the possibility that constitutionally troublesome burdens can be imposed through spending, licensing, or regulation is necessary only to those who hold an outmoded view of what modern government does.

2. Responding to Persistent Arguments

The second function of the unconstitutional conditions doctrine is to provide a shorthand and sometimes persuasive response to two familiar arguments. The first is that if government has no duty to create a program at all, it may create the program with certain conditions. The greater power, in short, necessarily includes the lesser. The second argument invokes the language of voluntariness. If, for example, a person has freely chosen to forego

[45] It would follow that the approaches in Kreimer, *supra* note 3, and L. TRIBE, *supra* note 2, are misguided, and for the same reason. It remains true, however, that there will be some commonalities in judicial treatment of constitutional attacks on funding and licensing decisions, once those attacks are seen as raising not unconstitutional conditions questions, but instead, for example, first, fifth, and fourteenth amendment questions.

[46] Emphasized in Sullivan, *supra* note 3, at 1419.

rights of free speech in order to work for the government, it might be thought that the courts have no reason to intervene.

Unpacking what is right and what is wrong in these two arguments requires substantial work.[47] The unconstitutional conditions doctrine serves as a brief response to these arguments in their crudest forms. It responds to the implausible idea that the government's power not to create the program necessarily includes the power to impose whatever condition it chooses, and to the equally implausible idea that there can never be a constitutional obstacle to an arguably or actually voluntary individual choice. But the implausibility of these arguments, in their broadest forms, should be self-evident under modern conditions. The short response is that it is often irrelevant that the government need not fund at all or that the recipient accepted the condition. The Constitution limits the reasons for which government may act and the effects of its actions. A welfare program limited to Democrats is unconstitutional because of the first amendment; points about voluntary participation and the "greater power" are simply a diversion.[48] Courts do not need an unconstitutional conditions doctrine in order to make the necessary response. Whether the greater power includes the lesser, and whether there is a legal obstacle to an apparently free choice, depend on a reading of the constitutional provision at issue, not on shorthand phrases.

3. The Character of Substantive Rights and the Nature of Government Justifications

The third function of the unconstitutional conditions doctrine is to reveal something true, important, and perhaps surprising about the character of some substantive rights and the nature of government justifications. In short, the doctrine reveals that some constitutional rights are not rights to government neutrality at all. In some contexts, government has available to it certain justifications that allow it to be selective in decisions with respect to funding, licensing, or employment.

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[47] *See* Epstein, *supra* note 3, at 60-64; Sullivan, *supra* note 3, at 1420.

[48] To say this is not to deny the need to develop quite concrete responses, which will vary with context. For example, a citizen might voluntarily agree to waive her right to free speech in return for welfare benefits, and be better off as a result. The constitutional question, however, is not whether she is better off in the abstract, but instead whether she is better off, or equally well off, *with respect to the right in question*. The fact that an offer to purchase the right to free speech in return for welfare benefits might make the recipient better off under Paretian criteria hardly disposes of the constitutional question—at least not if the right is to government neutrality.

To take another example: Waivers of constitutional rights may be individually rational but have large adverse structural or systemic consequences. That is, governmental purchase of the right to vote, or the right to free speech, undermines the first amendment's broad protection not only of individual autonomy, but also of certain forms of government. *See* Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 915 (1986).

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The point is a bit obscure in the abstract, but it emerges quite naturally from the cases. Consider, for example, a statute through which the government provides medical benefits only to those who agree to speak for a Democratic presidential candidate, and to speak against the Republican candidate. Such a statute would be unconstitutional. The right to free expression is a right to government neutrality as among competing ideas. It does not matter whether government violates the neutrality requirement by imposing criminal prohibitions or by providing cash payments.

By contrast, imagine a case in which the government pays for secondary education, but only for those who send their children to the public schools. The Supreme Court has interpreted the Constitution to include a right to send one's children to private schools;[49] but that right operates only against criminal sanctions,[50] and not against the incentive effects to which parents are subject when government funds public but not private education. This understanding of the relevant right is controversial, but it is perfectly intelligible. In some cases, the government has legitimate and distinctive interests that permit it to engage in conduct on the spending side that would be impermissible on the criminal side. In the spending context, the government may be able to invoke justifications that are tightly connected to, and become legitimate because of, the very fact that it is engaging in those activities. In the public school setting, for example, government can plausibly justify its selectivity by the need to ensure that public funds are not spent on religious activities.

There are other examples as well. In *Snepp v. United States*,[51] the Supreme Court upheld the use of secrecy agreements to regulate speech by employees of the Central Intelligence Agency. The best argument for this result is that in its capacity as manager of an intelligence agency, the government has legitimate interests, not related to censorship in the ordinary sense, that justify restrictions on the speech of those who have access to sensitive information. Similarly, a possible argument, taken up below, for the outcome in *Harris* would be that the government can properly consider taxpayers' religious and moral objections to the practice of abortion in deciding what sorts of medically necessary operations it will fund.[52]

Lyng v. International Union[53] offers a final example. In *Lyng*, the Supreme Court upheld an amendment to the Food Stamp Act prohibiting strikers from receiving food stamp benefits. A plausible argument for this outcome would rely on the proposition that even if the government cannot

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[49] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[50] In *Pierce*, the sanction involved a state statute making it a misdemeanor for parents not to send their children to public schools. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the state may not enforce a criminal statute against Amish families refusing to send children to public school beyond the eighth grade).

[51] 444 U.S. 507 (1980).

[52] *See infra* text accompanying notes 69-77.

[53] 485 U.S. 360 (1988).

forbid strikes through criminal punishment, it may allocate scarce resources to those who are genuinely in need. The government, on this view, may legitimately conclude that strikers are not in need in the same sense as are most unemployed people.

To say all this is not to supply a decisive argument in favor of *Snepp*, *Harris*, or *Lyng*. It is, however, to suggest that whether the issue is one of funding, licensing, or employment, the government may have distinctive and unusual justifications to support what are by hypothesis constitutionally troubling burdens on protected rights. It is on this point that current doctrine contains a core and unavoidable insight: Funding, regulating, and licensing decisions are indeed sometimes different from criminal punishment.

But is an unconstitutional conditions doctrine necessary to accomplish this task? It would be far more straightforward to ask whether the government has available to it distinctive justifications because of the context in which the relevant burden is imposed. Nothing in the unconstitutional conditions doctrine is helpful in answering that question, or even in suggesting the need to ask it. The doctrine should be abandoned.

II. Beyond the Unconstitutional Conditions Doctrine

Thus far my discussion has been quite general. I have argued in favor of a shift from an emphasis on whether there has been "coercion" or "penalty" to an inquiry into the nature of the interest affected by government and the reasons offered by government for its intrusion. The inquiry into both interests and reasons is not unconstrained. The Constitution identifies a restricted category of protected rights and limits the category of justifications that government may offer.

In this Part, I attempt to give more particular content to these general suggestions. The discussion will be tentative and exploratory, attempting to structure inquiries rather than to offer final answers. One might of course accept my general claims about the anachronistic and unhelpful character of the unconstitutional conditions doctrine, and about the need to shift from coercion to reasons, without at the same time accepting my particular conclusions.

There will be two cross-cutting themes. The first and most important is the need for attention to the constitutional provision at issue. In all of the cases, the question is whether the measure at issue interferes with a constitutional right, properly characterized, and, if so, whether the government has sufficient justification for its interference. These questions cannot be answered in the abstract. Different conclusions will be appropriate under different provisions. A major problem with the unconstitutional conditions doctrine is that it diverts attention from this fact, and indeed from the particular provision in question.

The second theme concerns the relevance for constitutional purposes of moral or conscientious objections to spending decisions by segments of the

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taxpaying public. In general, such objections often provide a legitimate reason for funding decisions. What is the status of those objections in funding that involves constitutionally troublesome areas? Perhaps surprisingly, I argue that for the most part, moral objections ought not to play a significant role.

A. *Public Schools, Private Schools*

We have seen that under current law, government is constitutionally obliged to permit people to send their children to private schools; but it is under no obligation to fund private schools even if it pays for public schools. Neutrality as between public and private schools is not a constitutional imperative.[54] Financial pressures that induce people to send their children to public school raise no constitutional problem.

The fact that the Constitution permits nonneutrality here is something of a puzzle. But for two reasons, the conventional wisdom is probably correct. First, the right to send one's children to private schools—rooted in the free exercise clause[55]—is an unusual one in light of the functions of the establishment clause. By prohibiting the government from establishing religion, the first amendment imposes a special disability on religion. In that sense, the Constitution is not neutral as between religion and nonreligion. Under the establishment clause, an exaction from the taxpayers for the support of religious organizations is a distinctive harm, one that is peculiarly likely to lead to religious divisions and factional strife.

If this is so, it follows that governmental neutrality as between public and private schools is not a constitutional imperative. Many taxpayers would have severe objections to the public funding of religious schools. Indeed, those objections are an inextricable part of the rationale behind the establishment clause. An interpretation of the right to educate one's children that would compel governmental neutrality would be inconsistent with the logic of the religious guarantees themselves. Governmental neutrality would probably not violate the establishment clause, but it would raise problems sufficient to provide a justification for selective funding.[56]

The second reason for this general conclusion is 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, to promote citizenship,[57] and to break down barriers of race,

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[54] *See* L.TRIBE, *supra* note 2, at 1275 & n.138.

[55] *Pierce*, 268 U.S. at 510.

[56] A possible response to this argument is that private schools are not necessarily religious schools, and that as a result, a decision not to fund private schools cannot be supported by the desire to prevent taxpayer funding of religion. But it is probably sufficient for these purposes that the vast majority of private schools are religious. It would of course follow that there would be no constitutional problem if the government decided to fund only secular schools, whether public or private.

[57] Meyer v. Nebraska, 262 U.S. 390, 401 ("That the state may do much, go very far,

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religion, and class.[58] These reasons are of course insufficient to permit an outright governmental prohibition of private schools. But they are significant enough to permit the government to fund public but not private schools, and through that route to encourage attendance at public schools.[59]

Government is thus constitutionally authorized to be neutral toward private and public schools, but it is under no obligation to do so. 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—understood through the lens of the constitutional structure generally and the first amendment in particular. In this context, then, governmental selectivity is permitted, not because of the absence of "penalty," but because of the presence of legitimate justifications.

B. *Governmentally Funded Speech and Art*

The question of governmentally funded speech and art has become especially controversial in recent years, because of troublesome selectivity in funding decisions in the first instance and because of several highly visible efforts to withdraw federal or state money from publicly disapproved projects.[60] The general issue is likely to become even more heated in the future. Government is quite frequently implicated in the funding and promotion of the arts, and there are both legitimate and illegitimate reasons for refusing to fund or withdrawing funds from certain programs. Some of these cases are exceptionally difficult, and my conclusions should be regarded as especially tentative.

It will be useful to begin by illustrating some permissible funding decisions. The central point here is that government has limited resources with

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indeed, in order to improve the quality of its citizens, physically, mentally and morally is clear . . . .").

[58] These ideas have a long legacy; they are ultimately traceable to Thomas Jefferson, among others. *See Notes on Virginia* in THE PORTABLE THOMAS JEFFERSON 196-97 (M. Peterson ed. 1975).

In fact, however, the history of the actual practice suggests that the public schools were generic protestant institutions created because of antipathy to Catholics, most of whom were immigrants. All this raises some doubts about the conclusion ventured in the text. If the public schools are an effort to create an orthodoxy rather than to break down factionalism, the legitimacy of the underlying justification is drawn into question. There is, moreover, a conceptual difficulty in distinguishing between the two.

[59] Considerations of the sort suggested in this paragraph explain the basis of my uneasiness with Professor McConnell's approach to this problem. *See* McConnell, *Unconstitutional Conditions: Unrecognized Implications for the Establishment Clause*, 26 SAN DIEGO L. REV. 255, 275 (1989) (arguing that the government's decision not to fund parochial schools constitutes a "flagrant burden" on constitutional rights).

[60] These include depictions of Mayor Harold Washington dressed in a bra and panties, Jesus Christ in urine, the American flag on the floor to be stepped on, art involving AIDS, and sexually explicit art, including depictions of homosexuality.

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which to fund the arts and its allocations are necessarily selective. In this area, generality on the part of government is inconceivable. From this point at least three conclusions seem straightforward.

First, it is surely permissible for government to refuse to fund speech that can be banned through the criminal law. A refusal to fund obscenity, libelous speech, or incitement to crime is therefore unobjectionable.[61]

Second, funding decisions that are based on qualitative or aesthetic grounds should be entirely legitimate, at least presumptively and in most cases. The government might properly decide to fund projects that it considers to be of high caliber. Indeed, such judgments are inescapable for those who allocate limited resources.

Third, decisions to fund projects on the basis of subject matter should generally be uncontroversial. For example, there should be no basis for complaint if the government chooses to fund projects related to American history, Chaucer, World War II, the civil rights movement, Egypt, or the film industry. To say that government may be in the business of funding art is almost by itself to say that government may select subjects or topics that it considers worthy of approval. Here too the existence of limited funds makes any alternative approach implausible.

Taken together, these conclusions should be sufficient to authorize the bulk of current practice with respect to funding of the arts. In all of these cases, government has legitimate reasons for selectivity. If government may properly make decisions by reference to subject matter or to aesthetic quality, existing policies will generally be upheld.

Under what circumstances, then, might serious first amendment objections arise? The most obvious involve straightforward discrimination on the basis of viewpoint. Suppose, for example, that government decides to fund projects by Democrats but not Republicans, or only by those who have voted in favor of the current President. The case is an easy one for invalidation. The prohibition on discrimination based on point of view lies at the heart of the first amendment.[62] In this case, both the purpose and the effects of governmental action are objectionable. Moreover, no distinctive, funding-related justification is available to authorize the government's action. Here the problem lies in the absence not of "coercion," but of legitimate reasons for selectivity.

The only possible justification for viewpoint discrimination in this setting would be the taxpayers' unwillingness to subsidize art by people they find disagreeable. But a decision to admit this justification would allow funding

[61] Of course there must be procedural guarantees to ensure that the speech at issue actually falls in the unprotected class.

[62] *See* Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 192-93 (1983) (a "central first amendment concern" is the free communication of individual points of view). *See also* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

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decisions to skew artistic creation in accordance with prevailing political convictions, especially those of governmental actors. At least in a world in which the government engages in a wide range of funding, that skewing effect could not plausibly be tolerated. Even more fundamentally, the core of the first amendment is offended by governmental efforts to skew expression.

Slightly harder but also reasonably clear are cases in which government decides to fund only projects that contain a particular, approved viewpoint. Imagine, for example, a law stating that the National Endowment for the Arts (NEA) will fund only those projects that deal favorably with the current performance of the American government, or only projects involving the Vietnam War that portray the government in a favorable light. An across-the-board ban on the funding of projects critical of government or embodying governmentally-disapproved views would at least usually be impermissible. Here too the government cannot justify selectivity in constitutionally acceptable terms.[63]

If these claims are broadly correct, it is possible to develop some tentative conclusions. The clearest constitutional violation consists of discrimination on the basis of point of view.[64] Most other decisions will be permissible, for they will involve subject matter or aesthetics. The hardest cases arise when the relevant discrimination seems to involve judgments about subject matter or aesthetics but is in fact an effort to control a particular point of view.

The problem is that the line between these two categories is an elusive one—not only in the uninteresting sense that there will be hard intermediate cases, but in the far more troubling sense that the distinction is difficult to draw even as a conceptual matter. Judgments about aesthetics or quality

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[63] It follows that the action of the Chicago City Council in removing the offensive painting of Harold Washington was unconstitutional because it was based on official disapproval of a private decision to ridicule the former Mayor.

I say "at least usually" because even here there may be counterexamples. Suppose, for example, that government says that funded portrayals of the Civil War cannot say that slavery was a good thing, or that such portrayals will count against funding. Or suppose that funding of a show about the American Revolution is limited to people who do not portray the founders as murderers and thugs. Here even viewpoint discrimination may be acceptable as part of qualitative judgments. *See infra* text accompanying notes 66-67.

[64] There are lurking questions here about the government's own speech. Since government seems to have plenary authority over what it will say, it is by no means clear that government may not have similar authority over people whom it pays. Part of the difference may lie in the fact that when government is speaking, the people know who the speaker is; the same cannot be said when the government is paying a private person to say what it wants. Part of the problem also lies in the fear of government cooptation of the private sphere, a fear that retains authority even in a post-New Deal era—although it introduces some of the difficulties criticized in Part I of this essay. It would in any case be intolerable to say that grant recipients are government employees and thus without constitutional protection against viewpoint discrimination; such a conclusion would lead to unacceptable skewing of artistic decisions.

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always depend, at root, on the standpoint of the decisionmaker.[65] This is most obvious for people who think that art celebrating Nazism, Communism, or white supremacy, at least ordinarily, cannot qualify as good art. But the point extends quite generally. Distinctions between representational and nonrepresentational art, or embroidery and painting, involve issues that are at bottom political. The idea that yellow marks smeared on a page, a sentimental drawing of a cat, or American flags marked with swastikas do not qualify for funding is necessarily rooted in views, broadly speaking political in nature, about the appropriate character and aims of the arts.

The available approaches to these difficulties are few—indeed, there are only three realistic options, and none of them is entirely appealing. The first posits a constitutional principle forbidding even aesthetic or subject-matter judgments on the ground that they too are rooted in moral or political judgments and, in that sense, in point of view. But this principle would be intolerable, for it would forbid selective funding of any sort and so also bar government funding entirely. Such a solution would hardly be desirable in a system in which public funding is an important individual and collective good, especially because public funding removes some of the distortions created by private funding of the artistic process.

The second route would be to permit even the most conspicuously partisan funding decisions on the ground that sensible lines cannot be drawn between impermissibly partisan and permissibly neutral decisions. This approach would also be intolerable, because it would authorize egregious governmental interference with expression for the state's own self-interested or otherwise objectionable purposes.

The third and probably the only sensible solution is to apply the constitutional prohibition only in straightforward cases of viewpoint discrimination,[66] and to permit aesthetic or qualitative judgments as long as they are not conspicuously based on partisan aims. Of course this approach must be accompanied by a recognition that it rests on some conceptually uncertain ground.

Under this framework, there are two final hard cases. The first involves a restriction that does not on its face discriminate on the basis of viewpoint, but that amounts to an attempt to impose conventional morality on artistic processes. The second involves hate literature or art that offends a significant portion of the community because it is degrading.

For an example of the first problem, suppose that government says that it will refuse to fund projects containing profanity or sexually explicit scenes. The concern here is that in such cases, government will distort artistic processes by imposing financial pressures that incline people toward offi-

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[65] And that standpoint is rarely without political content. For an especially good discussion of this issue, see W. BOOTH, THE COMPANY OF FRIENDS (1989).

[66] Whether it is straightforward is, unfortunately, itself in part a function of point of view. *See* Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589 (discussing justifications for anti-pornography legislation).

cially sanctioned views about what is fitting in art. In a system containing some public funding, this problem cannot be altogether avoided. But it can be minimized rather than increased. The appropriate strategy here is probably to view with some suspicion across-the-board measures that deny funding to art that offends conventional morality—a conclusion that will of course produce formidable line-drawing problems. The more narrow and selective the exclusionary term, the more it will be properly characterized as viewpoint-based: a ban on depictions of homosexuality is in this sense even more troublesome than a ban on depictions of sexuality in general.

The argument for constitutionality in these cases is strengthened, however, if the regulation has a limited spatial and temporal reach. Cases involving general regulations—those imposing a nationwide statutory ban on, for example, profanity in funded projects—should, if borderline, be resolved unfavorably to the government. A decision by the NEA to forbid the funding of all art with nudity would be far more objectionable than a decision not to allow nudity in one or two governmentally-funded projects. The latter would have some of the familiar characteristics of time, place, and manner restrictions. Indeed, some viewpoint-based restrictions will be permissible if they are narrow in terms of space and time. A local exhibit on the civil rights movement could surely exclude art celebrating slavery or advocating its reinstatement.

The second category, involving hate literature or art, is also troublesome. What if the government decides, for example, not to fund Nazi art, proslavery art, art of the Ku Klux Klan, art glorifying rape and sexual violence, or Rushdie's *The Satanic Verses*, on the ground that the relevant causes are filled with hatred, are harmful and abhorrent, or are perceived as harmful and abhorrent by a large segment of the community? The basic problem here, noted above, is that conventional morality is not the proper arbiter of governmental funding decisions that bear on expression. A system in which conventional morality played that role would be inconsistent with the core of the first amendment guarantee, which is designed precisely to protect views that do not accord with conventional morality. What is required, in these cases, is a principle of sufficient generality to encompass any legitimate concerns about the use of taxpayer money without at the same time impermissibly dictating a particular point of view.

It is not easy to devise any such principle. Surely government should not be permitted to decline to fund any project to which a significant number of taxpayers have a conscientious objection. Such a proposition would enshrine conventional morality as the basis for funding decisions. Perhaps, however, government should be permitted to decline to fund projects that fuel hatred of disadvantaged social groups, at least if the category of regulated speech can be narrowly defined. To be sure, such an approach would embody a form of viewpoint discrimination. There is, however, at least a plausible argument for such an exception in this context. Speech of the sort at issue is not merely offensive, but also helps produce a distinctive set of harms, including a perpetuation of second-class citizenship for certain groups. Gov-

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ernment might have sufficient reason to refuse to fund such speech even if it may not criminalize it.

It follows from these considerations that government has broad power to allocate funds to artistic projects, even if it does so on a highly selective basis. The only clear prohibition is on allocations based on a straightforwardly partisan basis, as in the case of discrimination against a particular point of view; and even here there are exceptions. A similar prohibition might be triggered when a subject-matter restriction also embodies a form of viewpoint discrimination, as in the exclusion of art containing profanity; and here much will depend on the particular context. Hard cases will of course remain. But such an approach would resolve the vast majority of cases, and at least suggest an orientation for the rest.

C. *Funding Abortions In Cases of Rape or Incest*

The Supreme Court has held that the existence of a right to an abortion does not imply a correlative right to public funding of abortion, even if the government is also funding childbirth.[67] In this respect, the right to have an abortion stands on the same footing as the right to send one's children to public schools. In neither case is neutrality required.

I want to explore here the question whether the government might be obliged to fund abortions in cases of rape or incest, at least when government is funding childbirth in such cases. I do not speak to the question whether these considerations suggest that funding for abortions is required even in cases not involving rape or incest. That broader question raises distinctive and more difficult problems.

Under current law, government is almost certainly[68] under no obligation to pay for abortion in cases of rape or incest. No matter what produced the pregnancy, taxpayers are not required to foot the bill for abortions. In the relevant cases, the Court has not been clear about its rationale. It has insisted that government need not remain neutral as between abortion and childbirth; the legitimate interest in protecting fetal life is the reason that neutrality is not compelled.[69] In this quite particular respect, the abortion right is similar to that in *Pierce v. Society of Sisters*: the government has an interest in nonneutrality that does not have sufficient force to justify criminalization, but that does allow selectivity in funding.

In the setting of private schools, we have seen that this line of argument is correct, largely because of the authority of the establishment clause, which is best taken as a self-conscious protection against the use of taxpayer funds to

[67] Harris v. McRae, 448 U.S. 297, 316-17 (1980) (stating that a woman's right to choose an abortion does not carry with it a constitutional entitlement to the financial resources necessary to exercise that right).

[68] The Supreme Court has not, however, decided the precise issue, which has never been presented to it.

[69] *Harris*, 448 U.S. at 324-26.

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pay for religious schools.[70] But this rationale seems unavailable in the abortion context. There would be no tension with the establishment clause if those having religious or other objections to abortion were forced to pay for that procedure. Indeed, taxpayers are quite generally forced to pay for things—for example, national defense, welfare, certain forms of art—to which they have powerful moral objections. If government is to be relieved of its obligation to be neutral as between abortion and childbirth in cases of rape and incest, the argument must take a somewhat different form.

Perhaps one could generalize from the establishment clause, or from the structure of liberal democracy generally, a principle allowing substantial segments of the public not to pay for practices that it considers to be abhorrent for reasons of conscience.[71] In most democratic countries, governments are permitted and indeed encouraged to take account of conscientious objections. This permission may not be an enforceable entitlement, but it does provide a generally legitimate reason for selective funding. Of course, this permission could not be invoked to allow government to violate obligations of neutrality that seem a straightforward inference from the relevant right—such as the first amendment right to neutrality among points of view, or the equal protection right to neutrality between blacks and whites. But perhaps some rights are best conceived as nonneutrality rights in the sense that they allow selectivity in funding decisions if taxpayers have an objection of conscience. And since many taxpayers consider abortion to be murder of defenseless human beings, perhaps they can refuse to pay for it, even in cases of rape and incest.

At least as a general rule, it seems not merely correct but obvious to say that funding decisions may and often do take into account the desires of the citizenry, including conscientious objections.[72] It is unclear, however, what weight such objections should have in hard constitutional cases. If the relevant constitutional provision requires neutrality, consideration of conscientious objections is probably illegitimate and, in any case, insufficiently weighty to justify selective decisionmaking. A decision to fund Christian but not Jewish art, or paintings favorable to Republicans, would be plainly unconstitutional. In cases in which the right does not call for neutrality, conscientious objections are easily translatable into sufficient governmental justifications to survive review.

To evaluate the arguments for and against neutrality in the abortion fund-

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[70] *See supra* text accompanying notes 54-59.

[71] *See* McConnell, The Selective Funding Problem: Abortions and Religious Schools (unpublished manuscript) [hereinafter McConnell manuscript]; McConnell, *supra* note 59, at 265-71.

[72] Some such desires are of course constitutionally unacceptable. *See, e.g.*, Cleburne v. Cleburne Living Center, 473 U.S. 432, 447-50 (1985) (holding that an ordinance requiring a special use permit for a proposed home for mentally retarded persons lacks a rational basis and deprives respondent of equal protection). But here the question to be decided is whether the objection to abortion is unacceptable in that sense.

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ing context, it is necessary to understand the nature of and basis for the right at issue. If the abortion right is seen as one of "privacy," there are good reasons to say that governmental neutrality is not required, and that government may fund childbirth but not abortion regardless of whether the pregnancy is consensual or coercive.[73] Indeed, if the right is one to privacy, it is plausible to say that the conscientious objections of a significant segment of the population provide a sufficient justification for refusing to fund abortions.[74]

There are, however, notorious difficulties in treating the abortion right as one of privacy, not least because the Constitution does not refer to "privacy" and because the abortion decision does not involve conventional privacy at all.[75] Certainly, in the case of abortions involving rape or incest, the best argument on behalf of the relevant right is based on principles of equal protection rather than on due process.[76] This argument stresses issues of sex discrimination and views a prohibition on abortion as an involuntary cooptation of women's bodies in the service of third parties.[77]

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[73] *See* McConnell manuscript, *supra* note 71.

[74] *Id.*

[75] Perhaps the right is one to liberty or autonomy. Liberty is of course protected by the due process clause, and the notion that that clause has a substantive component, though textually and historically controversial, is well-engrained in American law. But if the argument that follows in the text is correct, that understanding inadequately captures the dynamics of the abortion question.

[76] There appears to be a mounting consensus to this effect with respect to abortion generally. *See* C. MACKINNON, FEMINISM UNMODIFIED 93-102 (1987) (criticizing the doctrinal choice to pursue the abortion right under the law of privacy); L.TRIBE, *supra* note 2, at 1353 (stating that "the failure of both plaintiffs and courts to frame the abortion controversy in terms of sexual equality has profoundly affected the law in this area"); Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375 (1985) (invoking sexual equality and suggesting that *Roe* may have been less vulnerable to attack had the Court limited its ruling to the specific statute at issue); Karst, *Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 43 (1977) ("The equal protection clause has not only taken on substantive content of the type envisioned by its framers, but shows every sign of being able to bear the full meaning of the equal citizenship principle."); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 987-1002 (1984) (noting that the "failure to develop a sex equality doctrine that is more responsive to biological difference has affected the Court's analysis in cases challenging explicit sex-based classifications"); Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 431 n.83 (1985) (stating that if *Roe* had been decided as a sex-discrimination case, "the decision would have become a legitimate interpretation . . . within the textual mandate of the equal protection clause"); Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 990-98 (1989) (examining *Roe* as a sex discrimination/equal protection case).

[77] An argument of this general sort is made in Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979) (suggesting, under equal protection principles, that requiring women to carry a fetus to term compels women to be Good Samaritans); Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 52 (1971) ("The question asked is what a

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The first point here is that restrictions on abortion uniquely burden women. A statute that is addressed at women by plain terms is of course a form of sex discrimination. A statute that involves a biological correlate of being female should be treated in the same way.[78] The fact that what is to many another life—that of the fetus—is involved is of course extremely important. The practice of abortion plausibly involves the death of another human being, one who is especially defenseless; and conscientious objections that invoke fetal protection deserve a response. But that fact goes to the issue of justification, not to the question whether there is discrimination in the first instance.

It is important to recall here that the biological capacity to bear children, frequently taken as the basis for women's "natural" role, in fact has the social consequence of involuntary childbearing only as a result of collective decisions, conspicuous among them the legal prohibition of abortion. The question at hand is whether government has the power through law to turn that capacity, limited to one gender, into a source of social disadvantage. The recognition of the *Roe*[79] right sees the biological capacity as having no necessary social consequences, and treating the role of motherhood for women as chosen rather than given,[80] to be selected by women rather than by the state. At the very least this seems to be the best argument in cases of rape or incest. In those cases, the question is whether the state's interest in protecting the fetus allows the state to compel women to bring the fetus to term.

Is the state's justification sufficient? The argument to the contrary would be that in cases in which women are not responsible for their pregnancies, the state may not conscript women in order to protect another life, whether fetal or not. This is so partly because the notion that women should be coopted in this way is in fact a product of sex discrimination, in the form of

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third party may do, and what a mother may do, if mentioned at all, is reduced to an afterthought . . . ."). Issues of sexual inequality are not, however, sufficiently emphasized in those treatments.

[78] This argument is developed in Brief for National Coalition Against Domestic Violence, Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) (No. 88-605) [hereinafter *Webster* Brief] and I am grateful to my co-author, David Strauss, with whom most of the ideas in this and succeeding paragraphs were developed.

An argument to the contrary might stress that statutes directed at biological correlates of sex are less likely to reflect prejudice and stereotyping. There is, after all, a real difference here, and the legislation might be responding sensibly to it. But it is doubtful whether an approach to sex discrimination should be based on an inquiry into whether there are real differences. *See* C. MACKINNON, *supra* note 76, at 40 ("Gender might not even code as difference . . . were it not for its consequences for social power."). Even if it should be, pregnancy is a particular kind of real difference, one whose exclusive targeting is in fact likely to reflect prejudice or subordination.

[79] Roe v. Wade, 410 U.S. 113 (1973).

[80] *See* Held, *Birth and Death*, in FEMINISM AND POLITICAL THEORY (C. Sunstein ed. 1990).

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impermissible stereotypes about the role of women in society. The history unambiguously supports the claim that restrictions on abortion are closely tied up with traditional and now-impermissible ideas about women's proper role.[81]

Two additional factors support this line of argument. First, outside of the abortion context, the government never imposes similar obligations on its citizens, even when human life is uncontroversially at stake.[82] In the abortion context, the striking inequality of imposing the burden of bodily cooptation on women alone suggests that the interest in protection of human life—if invoked as the basis for selective impositions and when pregnancy is involuntary—is inadequate, or can be found adequate only as a result of impermissible sex role stereotypes.

The second factor is that in the real world, the consequence of a restriction on abortion is not materially to save fetal lives, but instead to lead women to procure dangerous abortions with increased risks to women themselves. The abortion rate has not increased dramatically as a result of the decision in *Roe*.[83] Indeed, some estimates suggest that before *Roe*, 5,000 to 10,000 women died per year as a result of incompetently performed, illegal abortions, and that nearly as many abortions were performed before *Roe* as now.[84] Even if these statistics are overstated, the principal effect of *Roe* was not to increase fetal deaths, but instead to produce a shift from dangerous to safe abortions.[85] If this is so, restrictions on abortion do not materially advance the end of protecting fetal life.

These arguments have the advantage of making it unnecessary to decide on the moral status of the fetus. Even if the fetus has all of the status of human life, involuntarily pregnant women cannot be conscripted in order to protect it. To put it bluntly: the question is not whether women may kill fetuses but instead whether the state may enlist women's bodies in the protection of third parties, however defenseless. In view of the inequality in the imposition of such burdens, the connection between restrictions on abortion and impermissible stereotypes, and the unlikelihood that such burdens will promote their own purposes, the answer seems to be negative.

If arguments of this sort are accepted, might government fund childbirth

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[81] K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 162 (1984) (stating that for those seeking to restrict abortions, "abortion is wrong because by giving women control over their fertility . . . it fosters and supports a world view that deemphasizes . . . the traditional roles of men and women"). The connection is an historical one, rather than a logical or necessary one.

[82] There are no compulsory kidney transplants, for example, even for fathers or mothers. *See* L. TRIBE, *supra* note 2, at 1354-55. Of course, no analogy to pregnancy will be precise.

[83] *See* sources cited *infra* note 85; *See also Webster* Brief, *supra* note 78, at 17-18.

[84] *Webster* Brief, *supra* note 78, at 19.

[85] *See* J. BONAR, H. RODMAN, B. SARVIS, THE ABORTION QUESTION 191 (1987); G. ROSENBERG, THE HOLLOW HOPE (forthcoming 1991).

but not abortion in cases of rape or incest? If *Roe* is treated as a case in which government is not permitted to turn biological capacities into social disadvantages, it is hard to see why the abortion right, at least limited to such cases, should not be a right to governmental neutrality. The reason is that the very deneutralizing that underlies *Roe* itself seems to forbid a distinction between funding and criminalization. A refusal to fund is merely another form of government cooptation. To be sure, the protection of potential life is a legitimate state interest, but if the interest is insufficient to outweigh the right in the criminal context, it is not clear why it suffices in the setting of funding. For cases of rape and incest, a selective funding decision has precisely the consequence of turning women into involuntary incubators. The relevant right is best characterized as akin to the first amendment right to neutrality with respect to point of view.[86] If the right is to equal protection, the conscientious objections of the taxpayers should count no more here than in the first amendment context, or in the setting of race or sex discrimination in allocating funds for social security.

At least this perspective will seem persuasive if funding decisions are not treated as an artificial supplement to a natural or spontaneous social order—the central instinct behind *Harris v. McRae*[87]—and if the ideas that gave rise to the regulatory state are taken seriously. Viewed through the lens of the New Deal period, the failure to fund is not inaction at all. It represents a conscious social choice, one that conscripts women in the cause of incubation, rather than simply letting "nature" take its course.[88] If poverty is seen not as part of nature, but instead as a predictable consequence of a system of collective choices, governmental decisions that turn poverty and biology into a basis for the creation of the status of involuntary incubators seem to run afoul of the equal protection clause.

III. CONCLUSION

The unconstitutional conditions doctrine, nominally designed as an effort to adapt constitutional doctrines to the regulatory state, is rooted in intuitions that are deeply incompatible with the understandings that gave rise to modern government. The doctrine is therefore an anachronism. It is also too crude and too general to provide help in dealing with contested cases. There is no need to ask whether government has subsidized rather than penalized, or threatened rather than offered. We might substitute for those unhelpful and probably unanswerable questions a more direct and constitutionally-grounded inquiry into, first, the nature of the incursion on the rele-

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[86] Indeed, a refusal to fund abortion at all, in cases of rape and incest, might raise serious constitutional questions.

[87] 448 U.S. 297 (1980). *See* L. TRIBE, CONSTITUTIONAL CHOICES (1986) (arguing that "those who would outlaw abortion (or who would refuse to fund it) would rely upon economic and physiological circumstances—the supposed dictates of the natural—to conscript women (at least poor women) as incubators").

[88] *See* T. POGGE, *supra* note 28, at 11; L. TRIBE, *supra* note 2, at 1354.

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vant right, and second, the legitimacy and strength of the government's justifications for any such incursion.[89] On this view, there will not be one unconstitutional conditions problem, but a variable set of results depending on the nature of the particular constitutional prohibition at issue.

This reformulation of the problem raised by licensing, employment, and spending programs departs from a model of coercion in favor of a model of reasons. But the reformulation does not by itself resolve concrete cases. In order to accomplish that task, it will be necessary to rely on views about what sorts of rights the Constitution protects, and about what sorts of justifications are legitimate and sufficiently weighty. But an unconstitutional conditions doctrine could never be helpful on those issues. The doctrine is neither necessary nor sufficient for their resolution.

Moreover, the reformulation suggested here need not imply more or fewer occasions for judicial invalidation of legislation. Whether the reformulation leads to more or less invalidation depends on the substantive understandings that are brought to bear in the cases. It would be odd to take the existence of the regulatory state as a reason to apply rational basis review to all measures that burden what might otherwise be seen as constitutional rights. The regulatory state merely provides new and different occasions for constitutional scrutiny. To say that the unconstitutional conditions doctrine is an anachronism is emphatically not to say that all spending, licensing, employment, and regulatory measures will be subject to deferential or no judicial review.

I have also argued that properly interpreted, the relevant provisions permit government to pay for public but not private schools; allow government to be highly selective in funding art and other expression, subject to a prohibition on viewpoint discrimination; but forbid government from refusing to pay the expenses of abortion in cases of rape and incest, at least if government pays for childbirth in such cases. Whether or not these conclusions are persuasive, the broader point remains. In a mature legal system, one that has adapted to the functions and goals of the modern regulatory state, we will not need, and therefore we will not have, an unconstitutional conditions doctrine.

[89] A characteristic feature of the unconstitutional conditions doctrine—the inquiry into the germaneness of the condition to the program, *see generally* Sullivan, *supra* note 3, at 1458-68—should be understood as a means of flushing out impermissible reasons, and of ensuring that legitimate reasons are in fact at work. This task can readily be performed under the reformation suggested here.

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