

## ARTICLES

### UNCONSTITUTIONAL CONDITIONS: THE IRRELEVANCE OF CONSENT

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**T**HE problem of unconstitutional conditions is the Gordian Knot of constitutional law. The standard solution is to slice through the knot with consent—to conclude that consent excuses otherwise unconstitutional restrictions. This leaves open the danger, however, that the government can rely on consent to evade most of its constitutional limitations, and therefore, even in the conventional consent analysis, it is recognized that consent cannot be effective in all instances, lest it itself become a threat. Consent, in other words, creates many loose ends without really cutting through the problem. Indeed, the consent analysis of unconstitutional conditions is widely acknowledged to be incoherent and inconsistent.

*It therefore is necessary to reconsider consent. Rather than a solution, consent is the source of confusion.*

*This Article unravels the different roles of consent to understand what it can do and what it cannot. On this basis, the Article concludes that consent is irrelevant for conditions that go beyond the government's power. Under the Constitution's grant of powers, consent often enables the government to impose restrictions it could not impose directly. But this does not mean that consent can justify the government in going beyond its legal limits. The Constitution's limits on the government are legal limits imposed with the consent of the people. Therefore, neither private nor state consent can alter these limits or otherwise enlarge the federal government's constitutional power.*

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*The implications are particularly clear for the Constitution's rights and structural limits. Unlike the enumerated powers, the rights and structural limits generally do not define governmental authority in terms of consent, but instead simply cut back on the powers. For such purposes, the question is not whether the Constitution empowers the government to impose by consent restrictions what it could not impose directly, but rather whether private or state consent can relieve the federal government of its constitutional limitations. It thus becomes apparent, at least as to rights and structural limits, that consent is irrelevant.*

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Unconstitutional conditions are a conundrum. On the one hand, if government can spend, why can't it place whatever conditions it wants on its spending? On the other hand, if it can place any conditions it wishes on spending, won't it be able to impose conditions that violate the Constitution, including most constitutional rights? This enigma is notoriously complex, but not as complex as may be supposed, for a large part of the difficulty can be resolved by asking a series of questions about the significance of consent.

The scholarly literature tends to treat unconstitutional conditions as an intractable Gordian Knot, without sufficiently considering the possibility that its strands can be teased apart. In fact, the problem is composed of at least three lines of inquiry: consent in general, delegation, and force. In each strand of the problem, confusion can be avoided simply by differentiating what consent can accomplish and what it cannot. This Article therefore disentangles the role of consent—first generally, second as to delegation, and third as to force. It thereby shows that, although consent has a lawful and essential place within the scope of the government's constitutional power, it cannot justify conditions that go beyond such power. In this sense, consent is irrelevant.

*The Focus of the Debate.* —Notwithstanding the confusion about unconstitutional conditions, there is agreement about some basic matters. In particular, there is hardly any dispute about two underlying points.

First, it is widely acknowledged that the powers granted to the government by the Constitution give it broad authority to spend and to place conditions on its expenditures.<sup>1</sup> Second, on the other

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<sup>1</sup> For such assumptions, see the literature cited *infra* note 2.

side of the equation, it also is widely accepted that all of the powers of the federal government, including the powers of Congress, are limited by constitutional rights and by constitutional structures, such as the separation of powers and the principles of federalism.

Thus, notwithstanding the breadth of the government's authority to spend, it remains subject to limits. The disagreement comes mainly at the next step, when it must be decided whether government restrictions that otherwise violate constitutional rights or structures can be cured by the consent of the restricted persons.<sup>2</sup>

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<sup>2</sup>The literature conventionally distinguishes between what are variously called threats and purchases, or regulatory and contractual conditions—the assumption being that consent is a cure for an unconstitutional restriction, but not when the consent is obtained by a threat or regulatory condition. Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293, 1301 (1984) (distinguishing threats and offers); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 14 (1988) (rejecting government bargains that are “induced by force and fraud” or that “contemplate the use or threat of coercion or fraud against third parties”); Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 Cornell L. Rev. 1185, 1217 (1990) (distinguishing regulatory and contractual conditions); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911, 1916 (1995) (distinguishing reimbursement versus regulatory spending); Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 Sup. Ct. Rev. 271, 319–22 [hereinafter *Hamburger, New Censorship*] (distinguishing regulatory and contractual conditions); Philip Hamburger, *Getting Permission*, 101 Nw. U. L. Rev. 405, 444–45 (2007) [hereinafter *Hamburger, Getting Permission*] (distinguishing regulatory and contractual conditions); Renee Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 Nw. U. L. Rev. 775, 788–89 (2007) (showing the need for a tighter fit between purpose and conditions when distinguishing regulatory conditions and purchases).

Rejecting these conventional distinctions, some scholarship would have the Constitution protect only selected substantive rights values from government purchases. See, e.g., Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1506 (1989) (arguing that “all conditions on benefits that pressure certain preferred liberties” should be subject “to the same strict scrutiny that such rights receive when burdened directly,” thus securing both equality and “private ordering”); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. Rev. 885 (1981) (explaining the availability of administrative due process for denial of government benefits in terms of dignitary interests); W. Stephen Westermann, *Completing the Cathedral Taxonomy of Salient Legal Entitlement Forms: With Application of the New Entitlement Forms to Describe Constitutional Rights, Rationalize the Unconstitutional Conditions Doctrine and Better Understand Legal Personhood* 14–15 (Nov. 12, 2009) [hereinafter *Westermann, Completing the Cathedral*] (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1505049](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1505049)

It will be seen that the inquiry about the effect of consent breaks down into three problems. In each, it is necessary to separate out consent's role within the government's constitutional power and its role beyond such power.

*First Inquiry: Consent.* —The primary problem that needs to be teased out of the supposed Gordian Knot is the general question of the effect of consent. Can consent justify the government in exceeding its constitutional power?

The key is to distinguish between the role of consent within and beyond the government's constitutional authority. As already suggested, the government's total power or authority consists of the powers minus the rights and structural limits. The powers granted by the Constitution leave the government much authority to impose conditions on benefits where it gets the consent of the recipi-

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(arguing that government cannot discriminate against persons for refusing to waive their fundamental rights or "strong property entitlements").

Some scholarship, moreover, takes a functionalist approach, based in law and economics, to sort out when the government can purchase rights and when it cannot. See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309, 349 (arguing that "the doctrine serves to control cases of externalities and monopoly"); Westermann, *Completing the Cathedral*, at 15–16 (arguing that the doctrine should apply not only where government exercises its police power monopoly but also where it has situational monopoly power); Richard A. Epstein, *Bargaining with the State* 174 (1993) (arguing that the doctrine addresses the problem of government monopoly); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U. L. Rev.* 859, 869–72 (1995) [hereinafter Merrill, *Dolan*] (arguing that private consent to waive a constitutional right should be considered effective where it is apt to protect the public interest, but not otherwise); Thomas W. Merrill, *The Constitution and the Cathedral: Prohibiting, Purchasing, and Possibly Condemning Tobacco Advertising*, 93 *Nw. U. L. Rev.* 1143, 1144–45 (1999) [hereinafter Merrill, *The Constitution and the Cathedral*] (using the distinction between property and liability rules to discern the enforceability of government bargains).

In all of these approaches (as noted by Merrill) consent is not always determinative, but nonetheless sometimes is. The difference among the approaches thus focuses on when consent relieves the government of its constitutional limits. The literature suggests that consent excuses otherwise unconstitutional restrictions (a) where they are regulatory or otherwise come with coercion, (b) where they stay clear of selected substantive concerns, or (c) where private consent is aligned with the public interest, as determined by law and economics. Although, as evident above, I previously have assumed the merits of (a), I now am arguing for another approach, (d), that private and state consent cannot relieve the federal government of the limits on its authority and that, in this sense, consent is irrelevant.

ents. In this sense, consent is part of the Constitution's measure of the government's powers. These powers, however, are limited. Even more concretely, they are subject to limits in the Constitution's rights and structures—limits that generally are not defined in terms of consent. It therefore is necessary to avoid any confusion between the two uses of consent. Undoubtedly the government can use consent within its authority, as defined by its various powers; but if these powers are limited and are subject to limits, the question here is whether the government can rely on consent to justify it in going beyond these limits and thus beyond its authority.

The conventional analysis suggests that consent can relieve the government of its constitutional limits. Rather than assume that consent is merely a measure of the government's constitutional authority under its powers, the standard analysis assumes that consent also can justify the government in going beyond its authority—perhaps by exceeding its powers and more clearly by breaking through the constitutional limits on such powers.

The question of whether private or state consent can justify this almost answers itself. The answer can be found in the simple recognition that the Constitution is a law. Being a law and, indeed, a law made by the people, its limits are not alterable by private or state consent, but only by the consent of the people. Even theories of unwritten, informal constitutional change tend to assume the consent of the people to an evolving law. Accordingly, the government cannot escape its constitutional bounds by getting, let alone purchasing, the consent of any lesser body, whether individuals, private institutions, or states. For such purposes, their consent is irrelevant.

Such a conclusion is particularly unexpected on the question of rights. The disputes about unconstitutional conditions tend to focus on rights, and the scholarship tends to assume that because rights belong to private persons, rights can be relinquished and thus can be bought and sold.

The vision of tradable rights, however, fails to recognize that constitutional rights are also structurally the people's legal limits on the government's powers. Thus, although they are personal in the sense that they belong to persons, they protect persons by limiting government. Indeed, it is characteristic of the rights secured

by the U.S. Constitution that, whatever their personal foundation and character, they are framed as limits on government.

This leads to a second point missed by the tradable rights perspective—the distinction between merely leaving a constitutional right unexercised and empowering government. Either intentionally by waiver or merely by forfeiture, individuals can leave a constitutional right unexercised.<sup>3</sup> But they cannot thereby give power to government, for a constitutional right is a legal limit on government imposed by the people. Thus, even when individuals relinquish the exercise of their freedom, they do not thereby grant government a power denied to it by the Constitution. Private or state consent cannot enlarge the government's constitutional power.<sup>4</sup>

Constitutional rights therefore are different from private rights. The latter—such as property or contract rights—are merely personal and therefore can be waived or forfeited, whether by individuals, institutions, or states. In contrast, constitutional rights are communally imposed legal limits, and the federal government therefore cannot free itself from these limits by making side deals with private or state actors. The consent of such persons matters for their use of their rights, but it cannot give the federal government any power that the Constitution denies to it.

*Second Inquiry: Delegation.* —A second problem of consent is whether consensual delegation can cure unconstitutional conditions. This delegation has received little attention in the scholarly literature, but it matters, for the federal government increasingly relies on consent to get others to do what it cannot. In particular, it sometimes uses conditions on its benefits to persuade states and

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<sup>3</sup> For the sake of convenience, this Article merely distinguishes waiver and forfeiture, thus subsuming sales and assignments within waivers, and estoppels within forfeitures.

<sup>4</sup> In light of its argument, this Article avoids the conventional locution that an individual *gives up* a constitutional right. This evidently is shorthand—a dangerously misleading shorthand—for saying that she *gives up her exercise* of the right. To the extent a right is a legally imposed limit on government, individuals cannot give up the right, but can give up only their exercise of it.

private institutions to impose restrictions that violate federal rights and structures.<sup>5</sup>

The delegation, however, cannot cure the federal government's violation of its constitutional duties.<sup>6</sup> To the extent the delegation problem is noticed, it is viewed as a matter of consent, and undoubtedly there is a valuable and lawful role for consent as a mechanism for delegation. But the use of consent to accomplish a lawful delegation should not be confused with the use of consent to justify an unlawful delegation, and the latter is particularly clear when the government delegates restrictions that violate rights and structural limits. For example, when the federal government persuades states or private institutions to suppress speech on its behalf, it cannot be taken for granted that the federal government can rely on consent to justify its delegation. On the contrary, in such circumstances, the federal government violates its constitutional limits as much as if it had done so entirely by itself.

Evidently, neither consent nor delegation can excuse the government in acting outside its authority; most clearly, neither can justify the government in imposing restrictions that violate the limits on federal powers, whether the limits arise from rights or structures. But this is not the end of the matter, for sometimes—most clearly when a condition violates a constitutional right—there remains the question of whether the condition is imposed by force.

*Third Inquiry: Force.* —Like the other problems here, that of government force is bound up with misplaced assumptions about consent. Government force is a necessary element of some constitutional violations, and because consent seems to be the opposite of force, it often is assumed that conditions lack government force.<sup>7</sup>

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<sup>5</sup> Delegation has received attention in the literature on privatization. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1367 (2003) (observing that “current state action doctrine is fundamentally inadequate to address the constitutional challenge presented by privatization.”)

<sup>6</sup> A government's constitutional duties are understood here as its legal duties under a constitution, not more broadly as its moral or political duties in a constitutional system.

<sup>7</sup> Force is not always an element of a violation of a right, for the government can establish a church merely by funding it. Indeed, an establishment of religion tradition-



The existence of consent, however, does not preclude the existence of force. Already at the time of consent, there is always a question of whether the consent was induced by force. Afterward, moreover, the government often relies on force—indeed, the force of law—to implement its conditions.

Thus, the central and lawful role of consent in conditions should not lead one to conclude that there is no force in inducing or implementing them.<sup>8</sup> Of course, it can be difficult to figure out whether a condition comes with constitutionally significant government force. It will be seen, however, that such force is discernable in some instances—in particular, when the government seeks regulatory conditions, and when it seeks conditions that run into the future.

*A Diminished Problem.* —Ultimately, the three inquiries here suggest that for some central constitutional protections, there is no need for an independent doctrine of unconstitutional conditions. Such a doctrine may be necessary for determining whether Congress has the authority within its enumerated powers to offer a condition, but not for resolving whether the restriction in the condition violates the constitutional limits—rights or structures—that confine the enumerated powers. In such instances, if consent and delegation cannot cure the unconstitutionality of the restriction, then much of the distinctiveness of unconstitutional conditions disappears. For such purposes, indeed, it becomes apparent that there is no need to speak about unconstitutional “conditions,” it being sufficient to speak simply of unconstitutional “restrictions.”

In other words, as with directly imposed restrictions, so with those imposed by consent, the question is merely whether the government has gone beyond its constitutional authority. This may re-

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ally was understood to be a matter of government privileges rather than government constraints.

<sup>8</sup>Of course, conditions often are candidly framed as elements of consensual arrangements, and it therefore could be enough to recognize that they are contrary to public policy. Even in contracts merely between private parties, conditions contrary to either law or public policy are void, notwithstanding the lack of state action. Accordingly, the point here about the presence of government force may be considered unnecessary. See *infra* notes 70, 77. The conundrum of unconstitutional conditions, however, is said to rest on the absence of any government force, and this Article therefore shows that force frequently is present.

quire a complicated doctrine of unconstitutional conditions where the inquiry concerns the enumerated powers. But the question is relatively simple and familiar where it concerns the rights or structures that cut back on such powers.

*Foundations in the Case Law.* —The argument here has uneven but substantial foundations in the case law. The cases on unconstitutional conditions are so poorly conceptualized that they cannot provide more than rough support for any theory of such conditions, but even this limited foundation is valuable.

Most basically, the case law tends to recognize that rights and structural limits confine even the broadest of constitutional powers. This may seem a simple point, but it is fundamental, and this Article builds on it.

More elaborate judicial foundations for the argument here can be observed in Thomas Merrill's study of how courts resolve unconstitutional conditions cases. He argues that "some constitutional rights are not just private entitlements but also have aspects of public goods," and that "when constitutional rights are perceived by courts as having a large public goods dimension," courts hesitate to enforce the conditions in which individuals waive such rights.<sup>9</sup> Put succinctly, private consent explains the case law only when the private consent seems aligned with the public interest. Although this insight is inchoate in the cases, and although it therefore is more attributable to Merrill than the judges, it suggests the depth of support that can be discerned in the cases. In this instance, the cases hint that private consent cannot relieve the government of public limits.

Inevitably, however, this Article will in places depart from the case law. It is notorious that the cases on unconstitutional conditions are poorly conceptualized and consequently are hesitant, inconsistent, and confusing.<sup>10</sup> The decisions of the courts therefore

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<sup>9</sup> Merrill, *Dolan*, supra note 2, at 862. For further discussion of this point, and how this Article departs from it, see infra notes 46–47, 81 and accompanying text.

<sup>10</sup> Many commentators, including Richard Epstein, Thomas Merrill, and Justice Stevens, have observed that, as put by the latter, the doctrine has "long suffered from notoriously inconsistent application." *Dolan v. City of Tigard*, 512 U.S. 374, 407 n.12 (1994) (Stevens, J., dissenting). For the other commentators, see citations supra note 2. The doctrine itself, however, has also been problematic.

have the character of old maps of the New World, which blindly sketch out *terra incognita* with better intentions than accuracy. It thus is to be expected that a more systematic conceptualizing of the problem will reveal some past decisions to be outliers.

Indeed, the confusion in the existing case law suggests that the existing decisions cannot be considered very deeply entrenched. Of all areas of constitutional law, unconstitutional conditions is the one most likely to benefit from a candid recognition that the Court has been engaged in exploratory guesswork rather than accurate mapping of the territory. Precisely because the Court has had to reach decisions before it has fully appreciated the contours of the problem, its cases should not be understood to preclude a more accurate approach—one that benefits from the early, tentative efforts at topography, but that more carefully follows the lay of the land.

*Adjacent Problems.* —In focusing on unconstitutional conditions, this Article also touches upon some other, neighboring problems. Each of these other problems has the potential to be important on its own account, but they are included here because they locate the problem of unconstitutional conditions in its context. Indeed, these adjacent problems reveal the problem of unconstitutional conditions to be a key element in a dangerous cluster of developments.

For example, although the main point here is that consent cannot cure unconstitutional conditions, there is also the related point that consent is no cure for conditions that, although not unconstitutional, are otherwise unlawful. To be sure, statutes (let alone regulations) are not imposed by the people. They are, however, imposed by Congress, and until they are repealed, their restrictions on government are legal limits, which cannot be removed by the consent of individuals, private institutions, or states. Thus, although this Article focuses on unconstitutional conditions, its analysis more generally applies to all unlawful conditions.

Another neighboring problem concerns state and private violations of law at the request of the federal government. The conventional unconstitutional conditions problem concentrates on the federal government's violation of its own legal duties. When, however, the government asks state and private institutions to do what

it cannot, there is the additional problem that the states and institutions will end up directly violating their legal duties. This is a much simpler problem, for a federal request or contract is no excuse for a direct violation of law. For example, if the federal government funds states on the condition that they license speech, then quite apart from the complexities of unconstitutional conditions, the complying states will have squarely violated their own constitutions, the Fourteenth Amendment, and a range of federal and state statutes.

Yet another adjacent problem concerns freedom of speech. Conditions allow the federal government to evade the Bill of Rights, and not surprisingly, it therefore uses conditions to control talking and publishing in ways it could not do directly. The law on the First Amendment, however, has largely ignored this danger, and this leads to the question of whether such law has remained mired in the past. For example, the study of the First Amendment still largely focuses on prosecutions, injunctions, and libel actions, all of which are relatively small-scale retail proceedings against individuals. This focus was at least plausible up through the 1960s, when government was more limited and its retail threats seemed so salient. The current realities, however, include a massive administrative state, its imposition of wholesale controls on talking and publishing, and its use of conditions to impose these controls at all levels of society, including private conversations with family members, with doctors, and even with God.<sup>11</sup> Fortunately, as argued here, there are constitutional barriers to unconstitutional conditions. But the reality that conditions present a new and expanding threat to freedom of speech needs to be recognized in the study of the First Amendment.

The most serious adjacent danger is government by contract. Government once ordinarily exercised power by adopting laws that restrained freedom. In these circumstances, constitutional law consisted mostly of limits on such restraints—the primary exception being the Establishment Clause. Nowadays, however, the federal

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<sup>11</sup> See, respectively, the regulations enforced by Institutional Review Boards (“IRBs”), discussed in text accompanying *infra* note 31, which apply even to students who interview their family members; *Rust v. Sullivan* discussed in text accompanying *infra* note 101; and § 501(c)(3) discussed in *infra* note 26 and accompanying text.

government governs not merely by force of law, but increasingly by contract.<sup>12</sup> This has many dangers, including not only an evasion of constitutional limits but also an erosion of the distinction between public and private life. The dangers are especially harsh for the poor and otherwise financially vulnerable. More than the wealthy, they are apt to feel they have no choice but to sell their rights for government benefits. As a result, government by contract tends to create an unofficial caste system, which offers the formalities of equal freedom, but which actually deprives the financially weak of their liberty, thus reenforcing financial vulnerabilities with legal inequalities.

*Overview.* —The primary question here is about consent: Does the consent of restricted persons relieve the government of its constitutional limits? A secondary concern is delegation: Does consensual delegation to an agent allow the government to accomplish what it could not do by itself? Finally, there is the question of force: Even though conditions are obtained by consent, do many of them nonetheless come with government force?

The argument proceeds as follows: First, unconstitutional conditions pose a more serious problem than usually is recognized, for they allow the government to evade the Bill of Rights and other constitutional limits. Second, consent has been a source of much confusion about unconstitutional conditions, and therefore, to understand such conditions, the different roles of consent in different problems need to be distinguished. Third, and most centrally, consent is no cure. Fourth, consensual delegation is no cure. Fifth, although conditions have consent, many conditions, most clearly those that are regulatory or that bind into the future, are backed with constitutionally significant government force. Sixth, these points about consent, delegation, and force explain a wide range of conditions without unraveling the conditions needed by government.

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<sup>12</sup> See Metzger, *supra* note 5, at 1367.

## I. EVASION

Before turning to the conceptual problem, this Article must consider the threat from unconstitutional conditions. Although they have long been treated as merely a peripheral danger, they have become of central importance, for they have become a means of evading much of the Constitution, including the Bill of Rights. Only by recognizing this can one begin to understand the peril of casually assuming that the government can purchase its way out of constitutional rights and other limits.

### *A. Evasion*

The evasion of constitutional limits arises from the distinction between government restraints on liberty and the benefits received from government. Although this distinction has been disputed, it remains profoundly important for understanding conditions on government benefits.<sup>13</sup>

Much of the Constitution protects liberty by limiting the federal government in its imposition of constraints. For example, the First Amendment forbids the government from prohibiting the free exercise of religion.<sup>14</sup> Only rarely does the Constitution so concretely limit the government in its distribution of benefits—the best example being when the First Amendment prohibits Congress from making any law respecting an establishment of religion, thus most centrally barring some types of government subsidies and other privileges.<sup>15</sup>

Because the Constitution typically protects liberty by limiting government constraints, not government benefits, the government seems largely unlimited when it places conditions on its benefits. Accordingly, if the federal government merely attaches conditions

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<sup>13</sup> Scholarly questions about the distinction arise, in part, from concerns about an equality in benefits. See, e.g., William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968). The distinction, however, is ingrained in the Constitution and in the nature of American society, let alone deeper considerations. The point here is merely that the distinction underlies most discussions of unconstitutional conditions.

<sup>14</sup> U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”).

<sup>15</sup> *Id.*

to its spending or other benefits, it apparently can escape most constitutional protections for liberty. The Supreme Court occasionally has attempted to stave off the danger from such conditions, but not with much clarity or breadth, for if the government's conditions merely are aspects of its benefits, they do not ordinarily seem limited by the Constitution.<sup>16</sup>

As a result, conditions on benefits offer a path of evasion. By casting restrictions on liberty in terms of conditions rather than direct constraints, the government can escape not only its limited powers but the most of the limits on such powers, including most of the Bill of Rights.

The danger is especially serious because the government spends ever larger amounts, thus allowing it increasingly to use its financial muscle to accomplish what the Constitution forbids. In almost every sector of the economy, what once were private companies and institutions, working with private capital, are now recipients of government largess. And with this federal money comes a growing range of opportunities for the government to exercise power without complying with the limitations imposed by the Constitution.

### *B. Illustrations*

The most sobering examples of the evasion are speech conditions. All governments are tempted to restrict speech, and when conditions on benefits are understood to escape constitutional limits, this practically invites the government to sidestep the First Amendment.

Although the speech examples recited below generically illustrate the risk of evasion, they also more specifically show the danger for individuals, vulnerable groups, and the people as a whole. Individuals lose their freedom of speech; minorities or other finan-

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<sup>16</sup> The leading case is *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that even if Congress lacks the power directly to impose a national minimum drinking age, its spending power allows it to allocate highway funds on the condition that states impose a minimum drinking age of twenty-one years). This stands in contrast to *United States v. Butler*, 297 U.S. 1 (1936) (holding that Congress cannot rely on its spending power to give tax relief to farmers who comply with conditions restricting their production).

cially vulnerable groups relinquish their voice in the society; and the people are deprived of essential constraints on government.

*Suppression of Political Speech of Section 501(c)(3) Organizations.* —An initial example concerns the political speech of Section 501(c)(3) organizations, whether charitable, educational, or religious. Under the tax code, these organizations are exempt from federal income taxes, and their donors receive tax deductions, but all of this is on the condition that the organizations refrain from two particularly salient forms of political speech: They may not campaign for or against any political candidate, and they may not do more than a minimal amount of lobbying to influence legislation.<sup>17</sup>

It is difficult to think of more central types of speech or petitioning or a more blatant suppression of them. If Congress had acted directly, it clearly would have acted unconstitutionally. But because Congress acted through conditions on tax benefits, it seems to be able to evade the First Amendment.<sup>18</sup>

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<sup>17</sup> They may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” I.R.C. § 501(c)(3) (2006). And such an organization may engage in lobbying only as long as such activities do not constitute a “substantial part” of its activities. *Id.*

<sup>18</sup> It is by no means clear, however, that the exemption and deductibility granted by § 501(c)(3) are really government benefits—either in the sense of the distribution of government property or even in the more general sense of government privileges. To start with, § 501(c)(3) merely offers relief from a general tax. It therefore clearly is not a benefit in the sense of a grant of government property. Instead, if it is a government benefit or privilege, it amounts to this because it grants an exemption from a more general constraint. Obviously, however, what is framed as an exemption or privilege can sometimes really be an unequal constraint.

Conventionally, the exemption is said to be a government benefit for § 501(c)(3) organizations, but this description is incomplete, for the tax relief is conditional on a type of political silence. It therefore is more accurate to say the exemption is a privilege or benefit for § 501(c)(3) organizations that are willing to submit to censorship.

Even this, however, is not sufficiently accurate, for although the tax code frames § 501(c)(3) in terms of exemptions, it actually subjects § 501(c)(3) organizations to government restraints or penalties. Considered on its own, § 501(c)(3) is an exemption and thus a privilege or benefit from government. When one examines it, however, in the context of the tax code, § 501(c)(3) is a mechanism that subjects different § 501(c)(3) organizations to different tax burdens: a very low burden for those that submit to censorship of their petitioning and political speech and a higher burden for those that do not submit. The government tells charitable, educational, and religious organizations that they must pay high taxes and have no donor deductibility if they



Of course, Congress may have good reason to exempt or subsidize institutions without paying for campaigning or lobbying. A circle of money, moving back and forth between Congress and tax exempt organizations, would be very worrisome. But when Congress subsidizes business corporations, it frequently leaves ample room for expansive circles of money—as evident in industries as diverse as healthcare, banking, and defense. It therefore remains an open question as to why Congress is so worried about a circle of money involving charitable, educational, and religious organizations. Is the circle of money more dangerous as to educational institutions than as to defense contractors?

At the very least, Congress can avoid a circle of money from Section 501(c)(3) organizations in much less restrictive ways than by denying them basic political speech. For example, Congress could subsidize particular church or charitable projects, dedicated to particular ends or messages. It even could do this through dedicated subsidiary organizations.<sup>19</sup> Congress, however, instead takes

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petition and speak freely, but that they can avoid taxes and get donor deductibility if they do not lobby too much and do not campaign. Thus, although it is sufficient here to accept Congress's assumption that it is giving tax benefits to § 501(c)(3) organizations, the reality is that the tax code imposes constraints or penalties on the speech and petitioning of such groups.

This conclusion, moreover, has rather strong foundations in precedent. Although the Supreme Court has upheld the lobbying restrictions, it did not do so on the ground that the tax code merely offered a benefit or privilege. On the contrary, the Court recognized that the tax code imposes what ordinarily would be an unconstitutional restriction on speech, but the Court excused the restriction on the ground that the restricted organizations enjoy freedom of speech through associated entities. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983) (upholding denial of federal tax exemption under I.R.C. § 501(c)(3) for nonprofit organizations that engage in substantial lobbying, because the organizations could use a parallel organization for lobbying). This sort of justification has been called into question in *Citizens United v. FEC*, 130 S. Ct. 876, 882 (2010) (holding that the ability of corporations to engage in electioneering speech through political action committees does not excuse a ban on corporate electioneering expenditures). Nonetheless, the decision in *Regan* remains an acknowledgment (unaffected by *Citizens United*) that the tax code imposes a restriction on the political speech of § 501(c)(3) organizations. All that changed in *Citizens United* was the recognition that the unconstitutionality of this sort of restriction cannot be justified by the availability of speech through a parallel organization.

<sup>19</sup> In other words, rather than suppress the political speech of an entire church or other § 501(c)(3) organization, Congress could simply grant money to satellite organizations. Instead, however, Congress forces churches and other § 501(c)(3) organiza-

the most restrictive approach. It views tax exemptions as grants to Section 501(c)(3) organizations and then uses this as a justification for suppressing the political speech of the entire organizations and their personnel.<sup>20</sup>

Similarly, Congress might reasonably worry that donors could use Section 501(c)(3) organizations as avenues for what, in effect, would be tax-deductible political contributions, but if this were Congress's real concern, it again could adopt a much less restrictive approach. Rather than sweepingly bar Section 501(c)(3) organizations from engaging in electoral politics, it could simply deny deductibility for donations made for electoral purposes. This would limit the tax benefit to the donors without limiting the political speech of the churches or the donors. Again, however, Congress has not adopted narrow solutions for narrow problems, but instead has used the narrow problems to justify broad suppression of entire organizations.

Congress's focus on charitable, educational, and religious organizations is especially troubling because these are the groups that are apt to shape American life independently of politics. These institutions offer a cultural alternative to the more politically centered life that prevails in the federal government, and this is one reason why, as Alexis de Tocqueville observed, they are so important for maintaining liberty in America.<sup>21</sup> It therefore, perhaps, is no coincidence that Congress has sought to limit their participation in politics. They are a source of energy and power that is relatively independent from political control, and this can seem irksome to politicians who do not want to be held accountable to such forces. For such politicians, it seems only natural that these organizations should be confined to cultural matters, understood as distinct from politics. Yet this denies the breadth of both cultural and political experience in America. Of particular significance here, it cuts off

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tions to engage in lobbying through satellites, namely § 501(c)(4) organizations, and broadly bars the political speech of the central organization.

<sup>20</sup> Although the word "personnel" ordinarily means only employees, it is loosely used here, for lack of a better term, to mean an institution's employees, students, members, and any other individuals associated with it.

<sup>21</sup> This is often discussed in terms of "civil society," but because this modern use of the phrase differs from traditional Lockean usage, it tends to be a source of confusion and is therefore avoided here.

politics from the cultural life that simultaneously sustains and competes with political life.

At a more personal level, the censorship is worrisome because Section 501(c)(3) organizations often are the means by which many of their employees and members give expression to their highest social, religious, and political aspirations. Business organizations do not have members, but only partners or shareholders, and they generally are not organized for expressive purposes. Charitable, educational, and religious organizations, however, have personnel not only in the sense of employees but also in the sense of members or students, who often are the very life of these organizations. Accordingly, it is important to keep in mind that the censorship of these organizations reaches far beyond the formal organizational bodies and their leaders and employees; it also reaches their personnel in the broadest sense, including the members of charities and churches who pressure Congress and campaign on behalf of their organizations.

The evasion of the First Amendment is most astonishing as to churches and their ministers. For centuries, the clergy have participated in American elections from the pulpit. From this vantage point, they preached in favor of the Revolution, in favor of the Constitution, and for and against presidents, Senators, and Congressmen. Without such preaching, and associated petitioning, especially in connection with elections and legislation, the anti-slavery movement and the Civil Rights Movement would have been utterly enfeebled. To understand this, one need only recall the realities. The anti-slavery movement was sustained by thousands of New England clergymen, who systematically preached and petitioned against servitude.<sup>22</sup> Similarly, the Civil Rights Movement

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<sup>22</sup> For example, in the space of only six weeks in 1854, over 3,200 sermons were preached against the Nebraska Bill in New England and New York. The bill allowed the residents of what became Nebraska and Kansas to choose whether slavery would be legal within their territories, and it thereby undermined the Missouri Compromise's bar against slavery in these areas. More than 3,000 New England clergymen petitioned Congress against the bill. Victor B. Howard, *Conscience and Slavery: The Evangelistic Calvinist Domestic Missions, 1837–1861*, 132–34 (Kent State Univ. Press, 1990). The memorial declared:

The undersigned, clergymen of different religious denominations in New England, hereby, in the name of Almighty God, and in his presence, do sol-

was led not by a politician, but by a clergyman, the Rev. Martin Luther King, who preached equal rights and marched to Washington to share this gospel with Congress.<sup>23</sup>

Nonetheless, the Supreme Court has upheld the Section 501(c)(3) restrictions on lobbying on the ground that a church or other Section 501(c)(3) organization can set up a parallel Section 501(c)(4) organization to engage in the prohibited lobbying.<sup>24</sup> But this misses the point. The church itself has a right to speak, and speech through a related organization is not the same. The Supreme Court recently recognized this point in *Citizens United v. FEC*. Although an act of Congress barred corporations from engaging in electioneering speech, the statute permitted such corporate speech through Political Action Committees (“PACs”). The Court, however, held this unconstitutional, explaining that “[a] PAC is a separate association from the corporation. So the PAC

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emly protest against the passage of what is known as the Nebraska Bill, or any repeal or modification of the existing legal prohibitions of slavery in that part of our national domain which it is proposed to organize into the territories of Nebraska and Kansas. We protest against it as a great moral wrong, as a breach of faith eminently unjust to the moral principles of the community, and subversive of all confidence in national engagements; as a measure full of danger to the peace and even the existence of our beloved Union, and exposing us to the righteous judgments of the Almighty: and your protestants, as in duty bound, will ever pray.

Protest of 3,050 New England Clergymen (March 1, 1854), in David Christy, *Pulpit Politics: or, Ecclesiastical Legislation on Slavery 598–99* (Faran & McLean, 1862). More generally, see Philip Hamburger, *Separation of Church and State 244–45* (2002).

<sup>23</sup> The depth of the clerical and religious role is nicely captured by a list of some of the speakers at the 1963 March on Washington: The Very Rev. Patrick O’Boyle, Archbishop of Washington; Dr. Eugene Carson Blake, Stated Clerk of the United Presbyterian Church of the U.S.A.; Rabbi Uri Miller, President of the Synagogue Council of America; Mathew Ahmann, Executive Director of the National Catholic Conference for Interracial Justice; Rabbi Joachim Prinz, President of the American Jewish Congress; and of course the Rev. Dr. Martin Luther King, Jr. See *March on Washington For Jobs and Freedom August 28, 1963: Lincoln Memorial Program*, in Bayard Rustin Papers, John F. Kennedy Library, National Archives and Records Administration, available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=96>.

<sup>24</sup> *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 546 (1983) (upholding denial of federal tax exemption under I.R.C. § 501(c)(3) for nonprofit organizations that engage in substantial lobbying, because the organizations could use a parallel organization for lobbying).

exemption from [the] expenditure ban . . . does not allow corporations to speak.”<sup>25</sup>

Similarly, a church, as a church, has a right to speak out and petition. This matters because, when the church itself speaks and petitions, it makes a theological commitment. It thereby exerts a persuasive force that cannot be matched by the speaking and petitioning of a different body that is not the church. The suppression imposed by Section 501(c)(3) is doubly serious because it reaches down from the institutional to the individual level. Most obviously, it prevents a clergyman from speaking or even praying aloud in his church on the election of politicians, thus depriving a minister of his speech and prayer in his own pulpit on questions that long have been of profound theological concern to the American clergy.<sup>26</sup> Equally, it prevents his congregants from speaking out on questions where they, rather than their minister, speak for their church—for example, in jointly praying, singing, witnessing, or subscribing to a creed. It therefore is irrelevant that the church can set up a parallel Section 501(c)(4) organization to speak or lobby, for this does not preserve the speech or petitioning of the church itself, and it does nothing for the rights of the clergyman who has been silenced in his pulpit, let alone his congregants who have been silenced in their work on behalf of their church.<sup>27</sup>

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<sup>25</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 897 (2010)

<sup>26</sup> It is particularly astonishing that the restrictions bar not only the lobbying or petitioning of Congress but also, at least as to electioneering, the lobbying or petitioning of God. The clergy may be misdirecting their energies when they petition God about who will be among the elect in Congress, but this is no excuse for Congress to interpose itself between God and those who lobby and petition him.

<sup>27</sup> Perhaps not surprisingly, Congress’s suppressive intent was particularly overt as to religious and other § 501(c)(3) speech in election campaigns. Suppressive intent is not ordinarily a measure of whether a law abridges the freedom of speech—the notable exception being *United States v. O’Brien*, 391 U.S. 367 (1968)—but it is clarifying to observe such intent, for it suggests the harsh reality of what Congress did. Prior to 1954, a religious or other charitable organization was exempt from federal income tax if “no substantial part” of its activities consisted of “carrying on propaganda, or otherwise attempting, to influence legislation.” I.R.C. § 101(6) (1952). It has been shown, however, that Senator Lyndon Johnson came to believe that such organizations also should be barred from elections. James D. Davidson, *Why Churches Cannot Endorse or Oppose Political Candidates*, 40 *Rev. of Religious Research* 16, 16 (1998); Patrick L. O’Daniel, *More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches*, 42 *B.C. L. Rev.* 733 (2001).

It ordinarily would be recognized that such restrictions on speech and petitioning are unconstitutional. They limit the political speech of individuals and other persons, they target particular groups, and in both ways they deprive the people as a whole of a sort of speech that has long served as perhaps the most profound structural limit on government. Yet because the restrictions come in the form of conditions on benefits, and because the affected organizations consent, it is thought that there is no constitutional violation. It is but the first illustration of how, by means of conditions, the government openly evades the Bill of Rights.

*Licensing of Human Subjects Research.* —A second example can be found in the regulations on human-subjects research. These regulations are imposed by seventeen federal departments or agencies—most prominently, the Department of Health and Human Services (“HHS”). The regulations require universities and other institutions that receive any federal support for human-

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Johnson ran in the 1954 Texas democratic primary against a local Catholic, Dudley Dougherty, who “was one of the first Catholics to run for state-wide office in the State of Texas.” O’Daniel, *supra*, at 769. Johnson’s allies and probably Johnson himself therefore worried about religious opposition, and certainly his religious supporters circulated ugly warnings against Catholic opposition, primarily from “the Roman Catholic Mexican vote,” which “has been organized against him.” *Id.* at 748. Even more seriously, Johnson faced severe criticism from conservative anti-communist groups, which enjoyed tax-free status as educational organizations. *Id.* at 753, 762; Davidson, *supra*, at 22–26. During the campaign, therefore, in June 1954, Johnson arranged for Rep. John McCormack—the Senate Democratic Whip—to ask the Commissioner of the IRS to reconsider the tax status of one of the groups. *Id.* at 28; O’Daniel, *supra*, at 763–64. It turned out, however, that it had not violated the bar on lobbying. *Id.* at 764–65.

Johnson responded in July 1954 by ensuring that § 501(c)(3) organizations would never again interfere in an election. The tax code was then being redrafted, and Johnson offered and obtained an amendment stating that such organizations could not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” I.R.C. § 501(c)(3). (For Johnson’s contribution, see O’Daniel, *supra*, at 765–66; Davidson, *supra*, at 17–18.) Section § 501(c)(3) organizations already could not engage in lobbying, and they now could not participate in elections.

Slightly more than a century and a half earlier, Thomas Jefferson and his political allies had introduced the idea of separation of church and state into American political life in order to browbeat his clerical opponents into silence. Hamburger, *supra* note 22, at 109–90. Now Johnson completed the realization of this sort of ugly objective by making political silence a condition of tax benefits for § 501(c)(3) organizations.

subjects research to establish Institutional Review Boards (“IRBs”).<sup>28</sup> These boards review and censor both the academic speech employed within research on human subjects and the publication arising from such research.

The professed purpose of the regulations is to prevent harm from research on human subjects, but the harm is largely informational. Human subjects are defined as persons from whom, or about whom, one gets information.<sup>29</sup> Moreover, “research” is defined as a systematic attempt to develop “generalizable knowledge”—in other words, academic inquiry to develop a publishable hypothesis—and most IRBs bluntly recognize that they therefore must review inquiry that is “publishable” or is done with an intent to “publish.”<sup>30</sup> Indeed, most of what IRBs do is to adjust and otherwise censor what academics and students can say to other per-

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<sup>28</sup> According to regulations, “this policy applies to all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency which takes appropriate administrative action to make the policy applicable to such research.” 45 CFR § 46.101(a) (2010). This refers to human-subjects research “supported” by the government so as to include even research that gets only the most minimal support, such as the mere loan of a book.

<sup>29</sup> The regulations state: “*Human subject* means a living individual about whom an investigator (whether professional or student) conducting research obtains (1) Data through intervention or interaction with the individual, or (2) Identifiable private information . . . Interaction includes communication or interpersonal contact between investigator and subject. *Private information* includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record).” 45 CFR § 46.102(f) (2010).

Although the regulations refer to “private” information, this is understood very broadly to include much that is clearly public and constitutionally protected. For example, it is understood to include much information in printed and manuscript materials that is publically available in public libraries. Astonishingly, it also is understood to include much information in public records, including census data and court records. See Hamburger, *Getting Permission*, supra note 2, at 423, 432, 435.

These regulations apply regardless of whether the research is in the hard sciences, the social sciences, or the arts, and regardless of whether the information is acquired by injecting foreign substances into people or, most commonly, merely by talking, writing, and reading. It thus covers inquiry that includes epidemiological surveys, political science surveys, polling, interviews of politicians, literary research in manuscripts, and legal inquiry that involves talking to lawyers or even (as suggested above) reading the public records of recent cases. See Hamburger, *New Censorship*, supra note 2, at 293, 344.

<sup>30</sup> See Hamburger, *Getting Permission*, supra note 2, at 431–32.

sons, whether in acquiring information during their research or later in publishing their results.<sup>31</sup> This may sound astonishing, but HHS views information from or about human beings as a health risk, and on this account licenses it.

This prior review or licensing of speech and publication is very similar to the licensing that the Inquisition and the Star Chamber imposed in the seventeenth century.<sup>32</sup> The similarities even reach down to the focus on universities and academics. The Star Cham-

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<sup>31</sup> Of course, after-the-fact regulations of speech are not absolutely barred, and this is especially true when the regulated speech is mixed with conduct in “expressive conduct.” Accordingly, it may be thought that the licensing of “research” is not clearly unconstitutional. But licensing is different from other regulations of speech. This prior review of words is a forbidden method of control, which cannot be excused by the doctrines that are used to permit some after-the-fact regulation of speech. (Note that licensing thus is distinguishable from injunctions, which need to be understood more like after-the-fact regulation. See *id.* at 413–14, 418, 427–30.) For example, the content-discrimination doctrine serves to permit some after-the-fact regulation of speech, if the regulation does not discriminate on the basis of content, but this is irrelevant to licensing, which is dangerous and strictly forbidden, regardless of whether the licensing law discriminates on the basis of content. *Id.* at 427–30. (As it happens, the IRB laws discriminate on the basis of content, *id.* at 433–34, but this need not be pursued here.)

Similarly, although the doctrine on expressive conduct serves to permit some after-the-fact regulation of speech where it is mixed with conduct, it makes no difference for licensing aimed at words, which is strictly prohibited regardless of whether the words are mixed with conduct. *Id.* at 427–30. For example, in *Freedman v. Maryland*, the Supreme Court left room for some licensing of motion pictures, but it did not acknowledge that the government could have licensed the words. 380 U.S. 51, 58–59 (1965). See *infra* text at note 40. That licensing directed at words is barred, regardless of any mixture with conduct, is also evident from the history of licensing. The English licensing laws established licensing not only of words but also of printers, printing presses, the production of printing type, and the importation of books—all of which licensing involved conduct, but all of which clearly would today be unconstitutional. Note also that the harms occurring in research and other admixtures of speech and conduct are of a sort that usually can easily be regulated after-the-fact.

<sup>32</sup> Hamburger, *Getting Permission*, *supra* note 2, at 429, 448–49 (noting similarities between IRB licensing and Star Chamber licensing), 481, 495 (noting parallels with the licensing imposed by the Inquisition), 426 n.60 (noting parallels with inquisitorial process). The connection between the licensing by the Inquisition and that by the Star Chamber is no coincidence, for the licensing in England under the king’s prerogative, and later under acts of Parliament, was drawn from the licensing developed by the Church. See Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 *Stan. L. Rev.* 661, 671–72 (1985) (tracing the development of the licensing of the press). See also Fredrick Seaton Seibert, *Freedom of the Press in England, 1476–1776*, 42 (1952).



ber, for example, required the leading officers of the English universities to license academic publications; by the same token HHS requires assurances from such officers that they will establish IRBs at their institutions to license academic inquiry and publication concerning human subjects.<sup>33</sup> The primary change has been in the goal of the licensing. Whereas the highest end of the Inquisition and Star Chamber in imposing licensing was to protect the dignity of God, the ultimate goal of HHS and its IRBs is to protect the dignity of human beings.<sup>34</sup>

Of course, government has an interest in preventing harm, but this does not mean it needs to use the licensing of speech or the press for this end. Nor can it justify such licensing by categorizing academic speech and publication as a health risk—as if the minority devoted to empirical research and publication are particularly dangerous.<sup>35</sup> On the contrary, licensing of words has long been recognized as the most dangerous method of controlling what is said or published—a method that is prohibited regardless of content or speaker.<sup>36</sup> It is what John Milton and John Locke protested against, and what the First Amendment's speech and press guarantee most clearly prohibited.<sup>37</sup> The licensing conducted by IRBs therefore is so obviously unconstitutional that the federal government ordinarily would not attempt it.

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<sup>33</sup> A Decree of Starre-Chamber Concerning Printing, sig. B3[1v] (London Robert Barker 1637).

<sup>34</sup> Hamburger, *Getting Permission*, supra note 2, at 481–82.

<sup>35</sup> *Id.* at 412–15, 463–73. States use licensing systems to regulate the use of public property, such as sidewalks and parks, in ways that may block the mobility of others, but they cannot do so on account of what is said at such events. *Cox v. New Hampshire*, 312 U.S. 569 (1941) (upholding convictions of religious protesters for holding a march on sidewalk without a license in violation of non-discriminatory municipal ordinance); *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (upholding non-discriminatory municipal ordinance requiring permit for large events in parks).

<sup>36</sup> Hamburger, *Getting Permission*, supra note 2, at 415–20.

<sup>37</sup> John Milton, *Areopagitica; A Speech For The Liberty Of Unlicensed Printing To The Parliament Of England* 6–7 (1644); Commons' Resolutions on the Licensing Bill, in *Sources of English Constitutional History* 619–21 (Carl Stephenson & Frederick George Marcham, eds., trans., 1937). The Commons' resolutions are said to have been drafted by Locke, and they at least were based on his reasoning in a related memorandum. Fredrick Seaton Siebert, *Freedom of the Press in England 1476–1776*, at 261 (Univ. of Ill. Press, 1952). For the point about the First Amendment, see Leonard W. Levy, *Emergence of a Free Press* 220, 281 (1985).

The government, however, imposes the licensing through conditions on government benefits, and it therefore assumes it need not worry about the First Amendment. The government thereby silences many individuals who fail to get permission or who censor themselves to get permission; it burdens the class of persons devoted to inquiry and scholarship; and it leaves Americans without the benefit of many empirical academic critiques of government policy. Once again, conditions seem to offer a way around the First Amendment, with the full range of predictable dangers.

*Licensing of Airwaves.* —A third and final illustration of the evasion is the licensing of the airwaves. The Federal Communications Commission (“FCC”) allocates airwaves to broadcasting companies on the condition that they meet a range of conditions, including the conditions that they not air “obscene” programming at any time and that they not air “indecent” programming or “profane” language during specified hours.<sup>38</sup> Accordingly, if a television or radio station violates this condition, the FCC can revoke its license or impose lesser consequences, such as a monetary forfeiture or a warning that can affect the renewal of a license.

As with the licensing of human-subjects research, the licensing of the airwaves directly focuses on licensing of speech and the press, which is a distinctly forbidden method of control. This is not to say that government cannot sometimes impose after-the-fact regulation against harms—here, obscenity, indecency, or profanity. Indeed, the Supreme Court allows some injunctions against words, and even some licensing against expressive conduct—such as the

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<sup>38</sup> A federal statute specifies criminal penalties for such language. 18 U.S.C. § 1464 (2006) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned . . . or both.”) More realistically, however, federal regulations enforce this section by means of conditions. In particular, 47 CFR § 73.3999 (2010) enforces 18 U.S.C. § 1464 by providing: “(a) No licensee of a radio or television broadcast station shall broadcast any material which is obscene. (b) No licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which is indecent.” To this, 47 U.S.C. § 312(a)(6) (2006) adds “Administrative Sanctions”—namely, that “The Commission may revoke any station license or construction permit . . . for violation of section 1304, 1343, or 1464 of title 18.” Moreover, “Any person who is determined by the Commission. . .to have. . .violated any provision of section 1304, 1343, or 1464 of title 18; shall be liable to the United States for a forfeiture penalty.” 47 U.S.C. §503(b)(1)(D) (2006).

images and performances employed in sexually-oriented businesses. But the Court has never held licensing of words to be constitutional; not even when the words are sexual; nor even when they are combined with images or more generally with conduct.<sup>39</sup> For example, when dealing with the licensing of pornographic moving pictures, which combine words and pictures, the Supreme Court recognizes a heavy presumption of unconstitutionality, and of course what is really at stake is the licensing of the pictures, not of the words.<sup>40</sup> Regardless of the government's power to impose penalties in after-the-fact proceedings, nothing is more emphatically forbidden than prior review or licensing of words.

The FCC licensing of obscenity, indecency, and profanity therefore would ordinarily be unconstitutional. At least to the extent the FCC licenses words (and the persons and equipment that broadcast words), it revives the licensing imposed by the Inquisition and Star Chamber.<sup>41</sup> The government thereby suppresses a mode of communication with strong political and class affiliations; it silences individuals radio hosts; and it confines a powerful avenue of criticism. Nonetheless, because the government imposes the licensing as a condition of what supposedly is a government benefit, it apparently escapes the First Amendment.<sup>42</sup> Conditions, again, are a mode of evasion.

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<sup>39</sup> This even is true of *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine as applied in after-the-fact proceedings against a broadcaster).

<sup>40</sup> *Freedman v. Maryland*, 380 U.S. 51 (1965) (holding licensing by movie ratings board unconstitutional because without adequate procedural safeguards). For recent decisions that apply modified versions of *Freedman's* procedural requirements to the licensing of sexually oriented or adult businesses, see *City of Littleton v. Z.J. Gifts D-4*, 541 U.S. 774 (2004); see also *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). In a recent FCC case, the Court expressly left the First Amendment questions aside. *FCC v. Fox Television Stations*, 129 S. Ct. 1800 (2009) (upholding FCC's liability order for fleeting expletives on television).

<sup>41</sup> The modern licensing of broadcasters is closer to the Star Chamber licensing than may be realized, for the Star Chamber required licensing not only of what was printed but also of printers and their means of printing. See *supra* note 33.

<sup>42</sup> As with the restrictions on § 501(c)(3) organizations, there is reason to doubt whether the underlying government "benefit" is really a benefit—although here for different reasons. Unlike federal spending or other aid, the airwaves in America have never been government or public property. Instead, they are common property, which belongs in common to all Americans. Thus, when allowing access to the airwaves, the government is not so much distributing benefits, in the sense of government property,

The evasion is exacerbated by the government's delegation of its restrictions. In all of the three examples recited here, the government does not bring retail proceedings (such as prosecutions, injunctions, or libel actions) for individual failures to adhere to its censorship. Instead, it uses conditions on institutions. It thereby dispenses with the difficulties of retail proceedings against individuals for talking and publishing and, instead, by means of delegation, secures wholesale institutional enforcement of its restrictions. In particular, by shifting away from retail court proceedings against individuals, and by using institutions to impose prior licensing, the government reaches not only the institutions but also their employees and even mere associated persons, and it does so without having to take enforcement measures against the individuals, let alone with the due process of law. In this efficient wholesale manner, the government's censorship covers not only churches and their ministers but also their congregants; not only universities and their teachers but also their students; not only medical organizations and their doctors but also their patients; not only charities and their employees but also their members and volunteers. At least while such persons are within their institutions, or merely within the aegis of these institutions, they all are subject to the unconstitutional restrictions. This is censorship of unprecedented breadth and depth.

In the end, it is difficult to avoid the conclusion that the federal government uses conditions on its benefits to restrict speech and the press in ways that otherwise would violate the First Amendment—indeed, that have profound consequences for individuals, vulnerable groups, and the role of speech as a structural limit on government. These conditions therefore offer a stark reminder of what is at stake: Whether the federal government can evade most

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as allocating access to a scarce shared resource. By analogy, consider the difference between federal land and the air (in the sense of the nitrogen and oxygen) above the United States. The land is public, federal property, which the government can grant to persons as it wishes; but the air is common property, in which the government has no rights to give away. Along the same lines, although the federal government can allocate or otherwise regulate use of the airwaves, it does not thereby give or grant the airwaves, for they never belonged to the government in the first place.

of the Bill of Rights and the other constitutional limits that protect liberty.

## II. CONFUSION

Although consent is central to the debate about unconstitutional conditions, there is much ambiguity or confusion about why consent matters. The literature on such conditions tends to wrestle with consent as a generic question. It arises, however, in at least three overlapping problems. It therefore is necessary to begin the analysis here by untangling the three problems and the role of consent in each of them. In each area of difficulty, consent has a valuable role within the law, but this must be distinguished from the use of consent to legitimize what the government does outside the law.

### *A. Consent*

The confusion about the constitutionality of conditions arises most generally from the conflation of two different roles of consent. Within its constitutional authority, the government can use consent to impose conditions on its benefits, and in this sense, consent is a part of the definition of the government's constitutional authority. At the same time, consent can be understood as a waiver or justification of what the government does beyond its constitutional authority. Thus, as already suggested, consent has at least two roles in relation to conditions: sometimes as a measure of what the government can do within its constitutional authority, and sometimes as a waiver or cure for what it does outside such authority.

When considered as a measure of the government's authority, consent surely encounters no constitutional difficulties. The Third Amendment expressly makes consent a measure of the right it guarantees: "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner."<sup>43</sup> More generally, under its powers, the government can impose conditions on its benefits if it gets consent. The government clearly has authority to spend un-

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<sup>43</sup> U.S. Const. amend. III.

der many of its powers, and as part of its spending, it can offer funding on the condition that recipients consent to its conditions. For example, although the government cannot directly require a particular graduate student to study physics, it can require him to study physics as a condition of its funding for his education. In this role, consent is a mechanism entirely within the scope of the government's constitutional powers and, indeed, it defines much of what the government can do.

In contrast to this role of consent within constitutional authority, however, is a second use of consent, concerning what the government does outside its authority—as when it is suggested that consent can waive or cure an unconstitutional condition. It is one thing for the government, within its powers, to use consent to impose conditions, but quite another for it to impose a condition that exceeds such powers or the limits on them. For example, even when the government has constitutional authority under its powers to impose consensual speech restrictions on its distribution of funds, this does not mean that the consent can justify it in imposing speech restrictions in violation of the First Amendment. Consent thus has two roles—first as a means of exercising power within the government's constitutional authority, second as a means of waiving or curing an unconstitutional restriction.

It is essential to distinguish these two roles of consent, lest the first obscure and unjustifiably legitimize the second. The consent that serves as a mechanism within constitutional authority is not in doubt. The claim, however, that consent can relieve the government of its constitutional limits requires more caution. It therefore is crucial that the role of consent as a mechanism within the government's constitutional authority should not obscure the problem of whether consent can cure what the government does outside its constitutional authority.

### *B. Consent and Delegation*

A secondary point of confusion about consent concerns delegation. When the federal government uses conditions on benefits to get states and private institutions to impose restrictions on its behalf, it may be thought that the consensual delegation settles any constitutional questions. Under such arrangements, the federal

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government itself does not impose the unconstitutional restrictions. Moreover, at least when the federal government acts through private institutions, not only the institutions but also their employees can be assumed to have consented.

The consensual delegation, however, cannot put to rest the question of whether the federal government has violated its duties. A principal cannot avoid a violation of its legal duties by delegating the violation to an agent, and this remains true regardless of whether the delegation is consensual. Accordingly, when the federal government delegates the imposition of unconstitutional restrictions—most concretely when it delegates restrictions that violate the limits that cut back on federal powers—the consent to the delegation cannot be assumed to settle the question of whether the federal government has violated its legal duties. The federal government certainly needs consent to delegate the imposition of the restrictions through states and private institutions, but if the restrictions conflict with rights or structural limits, it remains necessary to consider the possibility that the federal government has violated its constitutional duties. Once again, the role of consent within the law does not necessarily cure what the government does outside the law.

*C. Consent and Force*

Another point of confusion concerns the relationship of consent to government force. Some constitutional violations involve government force, and confusion arises because it is widely assumed that where there is consent, there cannot be force—as if consent and force were two sides of the same coin. Put another way, consent and force often are assumed to be mirror images, thus making each the measure of the other. This seems to make sense in the abstract, for if a party actually consents to a condition, he has not been forced, and if he is forced, he has not really consented.

In fact, however, consent does not preclude force. Once one examines how unconstitutional conditions actually work, it becomes apparent that the question of consent to a condition is different from the question of whether the government has applied force. For example, although the government may obtain consent to a condition, there remains the possibility that the government in-

duced consent through an exercise of force. Moreover, even if the government does not use force to induce consent, it remains to be considered whether, at a later stage, the government relies on its force to implement the condition.

Thus, when consent and force are presented as an abstract pair, there is a danger that the emphasis on consent will obscure inquiry about any concurrent or later force. To be sure, consent is formally the mechanism by which the government imposes conditions on its benefits. But the question of force is another matter, which needs to be evaluated separately.

By avoiding these three points of confusion about consent, this Article now can sort out unconstitutional conditions. For any restriction that goes beyond the government's authority—most concretely for a restriction that conflicts with the Constitution's rights or structural limits—it will be seen that consent is no cure. Such conditions therefore will be analyzed in much the same way as other government restrictions.

### III. CONSENT

The Constitution is a law containing legal limits on government enacted by the people. Even in most theories of unwritten constitutional change, the adjustments made by judges are said to be constitutionally binding because they have the informal consent of the people. On such foundations, it becomes apparent that what the people as a body legislate as limits on government cannot be altered by the consent of any lesser body, whether individuals, private institutions, or states. Put another way, their consent cannot enlarge the government's constitutional power. Thus, if the government goes beyond its constitutional authority in adopting a condition, consent is no excuse.

Of course, as has been seen, consent can matter within the sphere of government power. For example, under its powers, the government can use consent to place conditions on its benefits. Consent thus defines part of the government's constitutional authority. Yet even though consent is a mechanism within the government's constitutional authority, this is not to say that consent can excuse what the government does outside its constitutional authority. In this sense, consent is no cure.



Although this point applies to all limits on the government, the emphasis here will be on the enumerated rights. Rights often are thought to be merely private spheres of freedom, which can be simply bargained away, and it therefore is important for this Part to pay special attention to them.<sup>44</sup>

*A. Rights as Legal Limits on Government Legislated by the People*

Although it is widely assumed that individuals can give up what is theirs, including their constitutional rights, this misunderstands the nature of these rights. Such rights are not simply spheres of freedom but, more specifically, are spheres of freedom legislated by the people as legal limits on government.

*Limits.* —Constitutional rights are not only spheres of personal freedom but also are limits on power. The character of rights as limits on government often gets forgotten, but it is essential for understanding constitutional rights and their significance.

Thomas Merrill's work on unconstitutional conditions takes a step toward recognizing this point, for it begins with the observation that some constitutional rights are not merely individual in character.<sup>45</sup> In particular, his work argues that some rights protect the public interest, and on this basis, he concludes that they can be waived where private consent would protect the public interest.<sup>46</sup> This functionalist justification for the waiver of constitutional rights does not recognize that all such rights have a public aspect,

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<sup>44</sup> See *supra* note 4. Although the focus here is on constitutional limits, particularly constitutional rights, a similar argument could be made about statutory limits on government. Having been imposed by Congress, statutory limits cannot be removed by personal, institutional, or state consent.

Note that the argument here does not concern inalienability. Rather than rest on the inalienable character of any particular rights, it rests more generally on the legal character of the Constitution's limits on government. Inalienable rights are those that *ought not* be sacrificed in a constitution, and they raise interesting philosophic questions about a narrow range of the constitutional rights affected by unconstitutional conditions. In contrast, constitutional rights are those that *are not* sacrificed in a constitution, and they raise potent legal questions about all rights affected by unconstitutional conditions.

<sup>45</sup> Merrill, *Dolan*, *supra* note 2, at 869–71.

<sup>46</sup> *Id.* at 871–72.

let alone that they all limit government. But it at least moves away from a purely individualistic vision of rights.

In fact, all rights combine personal freedom and governmental limits. Constitutional rights are areas of personal authority or freedom. Whether for individuals or others, they are fields of independence, in which persons can make their own choices.

More specifically, however, they are areas of freedom from government, which the Constitution guarantees as limits on the government. This is particularly explicit in the First Amendment, which begins “Congress shall make no law . . .”<sup>47</sup> Politically, no right is more closely associated with personal freedom than the freedom of speech and the press; philosophically, no right is more individualistic than the free exercise of religion. The First Amendment, however, does not speak of individuals or other persons, but rather declares that “Congress shall make no law . . .”<sup>48</sup> Its freedoms thus are expressly limits on Congress.<sup>49</sup>

Most other rights enumerated in the Constitution are stated in the passive voice, but it is clear that they, too, are framed as limits on government. For example, the Constitution recites that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended” and that “[n]o Bill of Attainder or ex post facto Law shall be passed.”<sup>50</sup> In the Bill of Rights, the Constitution adds guarantees such as: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and sei-

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<sup>47</sup> U.S. Const. amend. I.

<sup>48</sup> *Id.* Incidentally, this is also why the government cannot restrict the freedom of speech to individuals—as when it places limits on the speech of corporations. Being a limit on government rather than merely a right restricted to individuals, the freedom of speech cannot be abridged by the government, regardless of the speaker. Cf. *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (holding corporate funding of independent political broadcasts to be protected by the First Amendment).

<sup>49</sup> Of course, especially under an administrative state, the First Amendment is understood to apply more generally to a wide range of executive actions.

<sup>50</sup> U.S. Const. art. I, § 9. Incidentally, note that the Suspension Clause could have appeared within the enumeration of powers, but instead was included in the enumeration rights as part of the definition of the right of habeas. Had the Suspension Clause been in the enumeration of powers, it would have suggested that, in at least one instance, a power could trump a right—thus opening up a justification for a sort of absolute power. The Constitution, however, kept suspension within the definition of the right of habeas. Thus, even in an apparently small matter, the Constitution consistently kept powers subject to rights.

zures, shall not be violated,” and “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”<sup>51</sup> Although these are spheres of freedom, they are more precisely spheres of freedom from government.

Not only in its phrasing but even more basically in its structure, the Constitution guarantees rights as limits on, or exceptions to, the grants of power. The Constitution, in Article I, section 8, grants Congress only limited legislative powers. It then further confines the government’s powers by carving out rights—first in Article I, section 9, by enumerating rights, and then in the Bill of Rights. As James Madison explained when he introduced the initial draft of the Bill of Rights, it would “enumerat[e] particular exceptions to the grant of power.”<sup>52</sup>

Constitutional rights are thus limits on government powers. The Constitution initially sketches out the extent and limits of federal power with the broad brush strokes of powers, and it then pencils in more detailed limits with rights.

*Enacted by the People.* —The Constitution’s limits on government, including constitutional rights, are not contractual terms, but rather are legal constraints legislated by the people. They therefore are legally binding on the government, regardless of any contrary private or state consent.

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<sup>51</sup> U.S. Const. amend. IV, V.

<sup>52</sup> James Madison, *The Congressional Register* (June 8, 1789), reprinted in *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 83 (Helen E. Veit et al. eds. 1991). Similarly, Alexander Hamilton wrote that, “By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like.” *The Federalist* No. 78, at 524 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Of course, notwithstanding Hamilton’s emphasis on exceptions to legislative power, the U.S. Bill of Rights, like state bills of rights, also included exceptions to executive and judicial power. This is probably why the first ten amendments to the U.S. Constitution were not ultimately placed within the body of the Constitution, but instead were added at the end.

In at least some states, when the people made their early constitutions, they were understood to be forming social compacts.<sup>53</sup> Simultaneously, though, they also were understood to be enacting their early constitutions as laws, which established and limited their governments. The Massachusetts Constitution of 1780 was particularly explicit about this combination of contract and enactment. It explained in its Preamble that the people were “entering into an original, explicit, and solemn compact with each other” and were “forming a new constitution of civil government, for ourselves and posterity . . . .” Accordingly, the people “agree[d] upon” it as a compact and “ordain[ed] and establish[ed]” it as a law.<sup>54</sup> The constitution thus was simultaneously contract and law.

In 1787, however, it seemed that the society or “union” of the United States had already been formed by compact—at least at the state level in state constitutions and at the federal level in the Articles of Confederation. As explained by the Philadelphia Convention’s Committee of Detail, “we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and interwoven with what we call the rights of states.”<sup>55</sup> The Constitution therefore said nothing about agreement, which had been the language of the Articles of Confederation, but instead merely used the language of enactment: “We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America.”<sup>56</sup> The phrase “ordain and establish” was a standard formula for the passage of legislation, thus making clear that the people were not entering a contract, let alone a contract among the states, but were enacting a law establishing and limiting the federal government.<sup>57</sup>

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<sup>53</sup> Philip Hamburger, *Law and Judicial Duty* 294–95 (2008) (citing the Georgia, Massachusetts, New York, Pennsylvania, Vermont, and Virginia constitutions as examples).

<sup>54</sup> Mass. Const. pmbl.

<sup>55</sup> Edmund Randolph, *Draft Sketch of Constitution*, in *The Records of the Federal Convention of 1787*, Supplementary Volume, 183 (James H. Hutson ed., 1987).

<sup>56</sup> U.S. Const. pmbl. In contrast, the Articles of Confederation did not include such language. *Articles of Confederation of 1781*.

<sup>57</sup> Hamburger, *supra* note 53, at 294.

This character of the Constitution—as an enacted law rather than a contract—is profoundly important, not least because it confirms that constitutional rights are legally binding limits on government. In defense of slavery, nineteenth-century Southerners insisted that the U.S. Constitution was merely a compact—indeed, merely a compact among the states—thus laying the foundation for the Southern argument that the states, as parties to the Constitution, could in some circumstances abandon it.

These days, with even less coherent logic, it is suggested that individuals, institutions, and states, by their consent, can relieve the federal government of the limits imposed on it by the Constitution. Constitutional rights, however, are not private rights, which the rights-holders can barter away or otherwise relinquish as they please. On the contrary, they are legal limits legislated by the people, and this has implications for the significance of consent.

#### *B. State and Private Consent Irrelevant*

Being laws—indeed, laws enacted by the people—the constitutional limits on the federal government, including constitutional rights, cannot be changed or relaxed by state or private consent. Put concretely, consent cannot enlarge federal power. In this respect, consent does not matter.

The people as a body adopted the Constitution as a law limiting government, and therefore although the people can enact changes in the Constitution, individuals, states, and other bodies less than the people cannot relieve the government of its limits or duties under the Constitution. For example, even when an individual chooses not to exercise her right to speak or seek habeas, the government remains confined by the Constitution's prohibitions against abridging speech or denying habeas. The individual's relinquishment of her rights does not create a corresponding power in government.<sup>58</sup>

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<sup>58</sup> There is an analogy in the constitutional doctrine on sovereign power that developed around the *Dartmouth College Case*. *Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518 (1819). Put simply, the doctrine clarified that, even when the government enters contracts, it retains its sovereign power. As explained by the Supreme Court, “[t]he government purely as contractor, in the absence of special laws, may stand like a private person; but, by making a contract, it does not give up its power to

Of course, private rights can be sacrificed by private consent. But constitutional limits, including constitutional rights, do not belong to persons in the same way as private rights. Instead, constitutional rights are legal limits on government imposed by the people, and therefore no amount of consent by individuals, institutions, or states can relieve the federal government of these limits. In personal terms, although an individual may choose not to exercise a constitutional right, she cannot by means of her consent authorize the government to exercise any power denied to it by the people's enumeration of the right.<sup>59</sup>

Thus, if the government violates a right or any other constitutional limitation, it cannot escape these constitutional limits by getting consent. It may be able to get the consent of churches and radio stations to restrictions on their political speech, and the consent of universities to restrictions on their academic speech, but if the restrictions are otherwise unconstitutional, they remain unconstitutional even when the government gets consent.

The argument can be put in other ways. For example, in terms of authority, the obligation of the Constitution, including its enumeration of rights, is based on the authority of the people, and because mere states and private bodies do not have the authority to change

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make a law," including a law which renders criminal a breach of contract. *Ellis v. United States*, 206 U.S. 246, 256 (1907) (upholding statutory eight hour limits for laborers and mechanics employed by the United States or its contractors).

Another analogy concerns the notion that the acquiescence of one branch of government in an exercise of power by another can really shift constitutional authority. Although this sort of conclusion tends to be understood in terms of separation of powers rather than unconstitutional conditions, it points to a similar problem of consent. In this instance, how can the consent of one part of government enlarge the power of another part? Although there remain questions about the power of the branches to decide constitutional questions for themselves, the mere consent of a branch cannot alter the constitutionally demarcated lines of power any more than can the consent of individuals or states.

<sup>59</sup>The word "consent" is used here broadly to cover not only the sort of consent involved in contracts but also in other consensual arrangements, and this is consistent with the policy of the federal government, which is sometimes careful to emphasize that its conditions do not arise out of contracts. For example, under the regulations on human subjects, a research institution does not enter a contract with the government about its use of IRBs, but rather gives the government an "assurance." Such distinctions, however, are not significant for the analysis here, which deals with the full range of consensual arrangements resting on unconstitutional conditions.

this law, its limits remain binding regardless of any amount of state or private authorization. In political terms, private consent cannot defeat public law; or, from the other direction, the government cannot make a separate peace with some Americans to escape the limits imposed by and for all Americans. In terms of corruption, the government cannot free itself from the constitutional duties it owes to the people as a whole by bribing states or private parties into acquiescence. In terms of equality, the Constitution is a law uniformly binding on government with respect to all the people, regardless of the government's power to purchase the subordination of groups within the people. In terms of public-choice theory, the non-tradable character of constitutional rights stands as an obstacle to the tragedy of the commons, for it bars attempts at a division of constitutional spoils in which the shared character of constitutional rights is lost because some Americans are willing to sell their freedom.

It may be assumed that one should distinguish between the waiver of a right and the waiver of an exercise of the right, and certainly this is an interesting problem. It soon, indeed, becomes metaphysical.<sup>60</sup> But the question here is not so difficult, for rather than concerning the waiver or forfeiture of a private right, it concerns the limits that the people impose on the federal government through their law. Once the question is understood in this way, it becomes clear that no amount of consent to a condition can defeat the enactment of the Constitution. Thus, although individuals, institutions, and states can decline to exercise their liberty, the law enacted by the people remains binding on the federal government, and no amount of individual, institutional, or state consent can relax its obligation to obey that law.

This is why, incidentally, it does not matter whether the consent comes through a conscious waiver or a less conscious forfeiture. Regardless of consent or other intent, a person's failure to exercise

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<sup>60</sup> At common law, such questions were addressed with greater clarity in the distinction between particular rights and common or general rights. See, e.g., *Norris v. Staps*, (1616) 14 Jac. Rot. 907 (C.P.) Hob. Rep. 210, 211 (distinguishing "particular privileges" from the "general liberties of the people"). The point here is that the latter cannot be waived.

her right cannot give government a power that the law denies to government.

This irrelevance of consent even extends to takings of land and other things that ordinarily could be relinquished by consent. Consider, for example, the following scenario. The Connecticut legislature passes an act taking land belonging to S and giving it to W. When S sues W for the land, W protests that S acquiesced in the legislative act. S responds, however, that notwithstanding its acquiescence, the legislature lacked the constitutional power to take its property. Far from being merely a hypothetical illustration, this is roughly *The Symsbury Case*—a 1785 decision detailed in Appendix A. What matters here is that, although the town of Symsbury could consent to give up its land, its consent could not give the legislature the power to take the land. It therefore is no surprise that the Connecticut Superior Court upheld the rights of Symsbury against claims derived from the town of Windsor. As in *Nollan* and *Dolan*, which will be discussed in Part VII, consent is no cure.<sup>61</sup>

The irrelevance of consent may seem surprising. Certainly, it does not fit with the common assumption that consent is the key to understanding unconstitutional conditions. The Constitution, however, is a law which comes from the people, and therefore no consent from individuals, institutions, or states can relieve the federal government of the Constitution's limits. For such purposes, consent is irrelevant.

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<sup>61</sup> Other historical examples of the irrelevance of consent can be observed in the judicial decisions holding that the consent of parties cannot justify judges in stepping outside their office or jurisdiction. For example, judges traditionally could not enter a consent decree or other judgment “which they know would be against the Law, altho’ the Plaintiff and Defendant do agree to have such a Judgment given.” John Lilly, 2 *The Practical Register* 98 (1719) (citing a King’s Bench case of 1671). Similarly, “the admittance of a party cannot give jurisdiction to a court where it has none, and the proceeding is *coram non judice*.” Nathan Dane, 3 *A General Abridgment and Digest of American Law* 65 (1824). Indeed, “if the court of Admiralty have no jurisdiction originally, its sentence is void, and the party may avail himself of it at any time.” *Id.* Put another way, there was a difference between nullities and irregularities, the former being void even where there was consent. H. McNamara, *A Practical Treatise on Nullities and Irregularities in Law, Their Character, Distinctions, and Consequences* 20 (1855).



## IV. DELEGATION

Just as consent is no cure, so too delegation is no cure. The federal government sometimes asks states and private institutions that receive federal benefits to restrict persons subject to their control—indeed, sometimes to restrict them in ways that confine their constitutional rights. This delegation of the task of imposing unconstitutional restrictions may be thought to help the federal government avoid its constitutional limits. In fact, however, as is familiar from the law of agency, the delegation cannot relieve the federal government of its legal duties. Like other principals that delegate acts to agents, the federal government cannot escape its legal limitations by asking others to act on its behalf.

*A. Dangers of Delegation*

Before showing that the federal government cannot avoid its constitutional duties by delegating unconstitutional acts to agents, this Part must draw attention to the dangers of delegation. To some observers, the use of a condition to delegate enforcement of an unconstitutional restriction may seem just another sort of unconstitutional condition. It is, however, a particularly dangerous use of conditions, for it shortcuts consent and exaggerates enforcement. Although neither point is a necessary foundation for the constitutional argument here, these dangers suggest why the use of conditions to delegate unconstitutional restrictions deserves particular attention.

*Delegation Shortcuts Consent.* —The use of conditions to delegate private institutions and the states to carry out unconstitutional restrictions has the effect of cutting short consent. This in itself is not a constitutional problem, for as has been seen, consent is no cure. But the truncation of consent suggests the brazen character of the government's delegation, and it should be particularly worrisome to those persons who still adhere to the conventional view, that unconstitutional conditions are justified by consent.

The familiar problem with the use of conditions to delegate unconstitutional restrictions is that the restricted persons are merely presumed to give their consent. In a simple unconstitutional condition, the federal government obtains the consent of the restricted

persons. But where the government delegates restrictions through conditions on states and private institutions, the government merely gets the consent of the bodies that impose the restrictions. On the conventional assumption that consent is a cure, it commonly is said that the consent of the individuals within an institution can be implied from their willingness to remain employed by, or otherwise attached to, the institution. In other words, if they do not like the regulations imposed in response to the condition, they can leave their institution. Certainly, some individual consent can be implied from institutional consent. Nonetheless, the presumption of consent makes the notion of consent rather attenuated, and this is an initial ground for concern.

More seriously, the presumption of consent entirely collapses when the federal government asks not merely private institutions, but states to impose unconstitutional restrictions. Even if the consent of individuals were a cure, it is implausible to suggest that persons within a state have consented to relinquish their constitutional rights merely by remaining within the state. It is one thing to say that employees have no right to their jobs and that therefore, if they remain in their jobs, they impliedly consent to any sacrifice of their freedom required by the federal government in exchange for its financing of their employer. But it does not follow that individuals in a state impliedly consent to an unconstitutional federal condition merely because they do not exercise their right of exit.

Persons who are lawfully in a state have a right to remain there without thereby being presumed to have consented to a sacrifice of their constitutional rights. Thus, even if consent were a cure, the consent theory fails on its own terms when the federal government delegates states to impose unconstitutional restrictions on persons within their jurisdictions.

Of course, this is not a necessary foundation for the argument here, which is that the consent of a state cannot relieve the federal government of its constitutional limits. It is a reminder, however, that the use of conditions to delegate unconstitutional restrictions tends to undermine the consent that is said to justify these conditions.

*Delegation Exaggerates Enforcement.* —Delegation also has troubling consequences for the enforcement of conditions; in par-

ticular, it exaggerates the enforcement of unconstitutional restrictions. Again, this is not a necessary basis for the argument here, but it suggests why the conditions that delegate states and private institutions to impose unconstitutional restrictions require special attention.

The first and most general enforcement danger from the delegation of unconstitutional restrictions is that it allows the federal government to leverage its power. By getting states and institutions to control individuals, the government can extend the reach of its unconstitutional conditions, relying on the consent of a relatively small number of intermediaries to impose unconstitutional restrictions on vast numbers of individuals.

Second, when the federal government acts through states and institutions, it subjects individuals to the coordinated effect of multiple layers of power—federal, state, and corporate. Whereas these entities ordinarily would act independently, the federal government uses its purchasing power to ensure that they collaborate in pursuit of conduct barred to the federal government by the Constitution. The layered character of the American political and social system traditionally allowed individuals to find some refuge, for themselves and their liberty, in the different stances taken by different governments and different institutions. Through its use of conditions on benefits, however, the federal government increasingly aligns the police power of the states and the economic power of private institutions to create a uniform phalanx of public and private power in pursuit of unconstitutional restrictions—a phalanx that discourages individuals from resisting. This consolidated enforcement is bad enough from the perspective of federalism because it reduces states and private institutions to federal agents or administrative agencies. Its implications for individual liberty, however, are even more worrisome.

Third, almost all delegated unconstitutional restrictions are enforced without the due process that the government would have to offer if it were imposing the restrictions directly. The loss of due process already is serious under regular conditions, for these often are enforced merely in administrative proceedings. The loss of process, however, is far worse when the federal government delegates states and private institutions to impose unconstitutional re-

strictions. In such instances, there often is no due process at all; indeed, the very opposite of due process.

Consider, for example, how the government nowadays controls speech—not in its own retail court proceedings, but wholesale through delegation. The government once had to proceed against persons individually in court by seeking an injunction or bringing a prosecution, with a jury and all of the other due process of law. Now, however, the government uses its conditions to delegate the dirty work to its agents, thus allowing it to control speech on a massive scale for which due process would be impracticable. As a result of the conditions, radio and television stations respond to FCC warnings about their licenses by instructing their hosts to tone down what they say; churches respond to IRS threats about their tax exemptions by telling their ministers not to speak from the pulpit about election politics; university IRBs comply with HHS regulations by reviewing and censoring what scholars and students say and publish—all of which is done without due process. Although the IRBs impose their licensing more or less continuously, even they offer no due process; on the contrary, IRBs act in secret meetings, without a jury, without a hearing, without lawyers, or even any appeal to a court of law.<sup>62</sup> Thus, in a wide range of circum-

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<sup>62</sup> See Hamburger, *Getting Permission*, *supra* note 2, at 426. It therefore is not surprising that faculty and students are afraid even to complain, except with anonymity, for they fear that their IRB will respond by arbitrarily denying them further permission to inquire and publish. *Id.* at 426 n.58; Cary Nelson, *Can E.T. Phone Home? The Brave New World of University Surveillance*, *Academe*, Sept.–Oct. 2003, at 30, 35.

The lack of due process goes so far as to include requirements that researchers confess their violations. For example, the conditions on research institutions under the human-subjects research regulations ordinarily include self-reporting requirements: “Written procedures for ensuring prompt reporting to the IRB, appropriate institutional officials, and the department or agency head of (1) any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB . . .” 45 C.F.R. § 46.103(b)(5). With such conditions, the government creates an atmosphere in which self-denunciation is expected and a failure promptly to volunteer one’s violations can lead to IRB or government sanctions.

The pressure for self-denunciation usually is felt in rather informal ways. IRBs frequently adjust the severity of their licensing depending on whether the individuals are sufficiently “cooperative” and “submissive” toward the IRB. The justification is that uncooperative persons are apt to pose a greater risk, and IRBs therefore feel free on such grounds to deny permission to inquire or publish. See generally Robert J. Levine, *Ethics and Regulation of Clinical Research* 27 (2d ed. 1986); Hamburger, *Get-*

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stances, when the government delegates unconstitutional restrictions, it can shift from retail to wholesale suppression, thereby evading not only the freedom of speech but also due process.<sup>63</sup>

It thus should be apparent that, both in undermining consent and in exaggerating enforcement, the conditions that delegate enforcement of unconstitutional restrictions are unusually dangerous. Although the mere dangers of such conditions do not make them unconstitutional, the dangers suggest why it is important to focus on the delegation and to understand that it is no cure.

*B. Delegation to an Agent No Cure for the Principal*

When the federal government uses conditions to delegate unconstitutional restrictions, does it successfully wiggle out from un-

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ting Permission, *supra* note 2, at 426. Accordingly, when individuals fail to comply with any IRB limitation, they feel obliged, and sometimes are candidly instructed, to be “cooperative” and “submissive.”

<sup>63</sup> Making matters worse, the federal government uses its delegation at many institutions not only to exercise an exaggerated enforcement power but also to enforce exaggerated unconstitutional restrictions. Under highly restrictive and cross-collateralized conditions, there will always be someone at an institution who is out of compliance, and this gives the government the power to declare, at any time, at almost any federally funded institution, that the institution has forfeited all benefits received or receivable under current grants. For example, under human-subjects research regulations, the government can, more or less at its discretion, shut down entire institutions, stopping the work, including the inquiry and publication, of all persons associated with the institution. This is a formidable power, and after exercising it in a small number of institutions, thereby intimidating the others, the government now typically need only hint that it might shut down an institution. It uses this quiet bullying not only to enforce its conditions but also to impose a wide range of additional restrictions that are not required by law, that do not comply with the Administrative Procedure Act, and that, in some instances, are clearly unconstitutional. For example, the government pressures universities to require students and faculty to undergo “education” or indoctrination before they may begin their inquiries or publish on the basis of them.

Indeed, the government’s enforcement power is so overwhelming that it sometimes creates a cascade of exaggerated restrictions. Fearful of losing funding on account of a minor slip-up by a single person, institutions often enforce restrictive conditions with such vigilance as to demand more from their personnel than the federal government requires. And their administrators protect themselves by imposing yet more restrictive measures—all in the name of enforcing federal conditions. As a result, persons associated with funded institutions often are under institutional and bureaucratic pressure, without due process, to conform to restrictions that exceed what is stated in the government’s conditions.

der its legal limits? To take the most clear-cut example, can the federal government evade the limits on its powers—i.e., the Constitution’s rights and structural limits—merely by persuading someone else to do the prohibited acts? The answer is evident from a basic point of the law of agency.

*Principal and Agent.* —A foundational maxim of agency law recites, *qui facit per alium facit per se*—meaning that “what a man does by another, he does by himself.”<sup>64</sup> As restated in another maxim, *nam qui facit per alium, facit per se*, “he who acts through another does the act himself.”<sup>65</sup> In other words, when a person is barred by law from doing an act, she cannot avoid her legal duty by asking someone else to do the prohibited act for her.

The logic of *qui facit* is based on causation. A person who uses a mechanical instrument to do a legally significant act cannot claim that the act is not hers. By the same token, when she uses another person to do the act, she cannot disown it. Thus, she cannot ordinarily escape a legal obstacle by asking another to act in her stead; on the contrary, she is usually understood to have acted unlawfully.

This point should not be confused with the more familiar rule, which works in reverse, holding the principal vicariously liable for her agent’s violation of his legal duties. That reverse liability, which is standard fare in tort and criminal law, does not apply in constitutional law, for reasons discussed in Appendix B. Here, it should be enough to recognize that, for purposes of constitutional law, a principal cannot avoid her violation of her duties by acting through an agent.

In soliciting the action of an agent, it obviously is irrelevant whether the principal induces cooperation by means of a threat of penalty or a promise of benefits. For example, although a principal can threaten an agent to get cooperation, she can also simply offer a commission. Indeed, consensual dealing rather than threat is the normal way of getting things done, and it provides no excuse for a person who uses someone else to do what she is legally barred from doing. Delegation is no cure, however it is accomplished.

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<sup>64</sup> For this maxim, see Thomas Branch, *Principia Legis et Æquitatis: Being an Alphabetical Collection of Maxims, Principles or Rules, Definitions, and Memorable Sayings, in Law and Equity* 122 (William Waller Hening ed., 1824).

<sup>65</sup> For this maxim, see 1 William Blackstone, *Commentaries* \*462.

Of course, some legal limits narrowly confine only the principal, not agents, and under such a limit, the principal can ask an agent to act for her without violating her legal duty. For example, even if state law bars pregnant women from drinking more than one bottle of beer a day, a pregnant woman can lawfully encourage her husband to drink an extra glass on her behalf. This sort of limitation merely protects the limited person (or, in the pregnant woman example, the potential person within her), and thus even if her husband were considered her agent, she would not have violated the law.

Many legal limitations, however, including constitutional limitations, bar conduct that endangers others. For example, the United States Constitution limits the government so as to protect the people. As a result, it makes no difference for purposes of constitutional law whether the government violates its constitutional limits directly or whether it does so through states or private institutions.

It thus becomes apparent that the federal government cannot escape its legal duties by asking others to do what it cannot. For example, if the federal government takes a person's property, it does not matter whether a government official seizes it with his own hands or whether he hires an agent or an independent contractor to carry out the taking.<sup>66</sup> Regardless, the federal government has committed an unlawful taking. Similarly, if the federal government imposes licensing of speech and the press, it makes no difference whether it does this by itself or by delegating the task to others, whether states or private institutions.<sup>67</sup> For purposes of the delegated conduct, the federal government is a principal, and the state or private institution is an agent. It therefore is difficult to avoid the conclusion that the federal government is violating the Constitution.

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<sup>66</sup> The distinction between an agent and an independent contractor is apt to matter for the reverse attribution of liability in tort law—for example, if A hires B—a forklift truck operator—to take C's property, and the operator negligently kills a bystander, D. But neither the question of liability, nor the distinction between an agent and an independent contractor, is relevant to the question here, which is whether A has departed from her own legal duties. For the reverse attribution of liability, see Appendix B.

<sup>67</sup> The historical foundation for this point is discussed at *infra* note 92.

*The Underlying Problem of Evasion.* —Far from being merely a matter of doctrine, the principle drawn from agency law matters as a structural response to evasion. Consider the risks: Can persons evade their legal duties by asking others to act for them? Or, for that matter, can the others evade their legal duties by being asked to act? If so, neither principal nor agent is subject to law.

Once this threat of evasion is understood, it becomes clear that the *qui facit* principle is essential for preventing the evasion of legal duties. In particular, the principle is essential for preventing governments from brushing aside their constitutional duties. Although the federal government often will ask a state to do what the federal government cannot do under the federal constitution, does this consensual delegation relieve both governments of their constitutional limits—thus leaving neither responsible and everyone else vulnerable? Merely to ask the question goes a long way toward answering it.

The danger of allowing government to escape its constitutional limits by means of delegation has been all too familiar in America. When local sheriffs in the old West, or the early-twentieth century South, wanted to act unlawfully but without responsibility, they delegated their beatings and other unlawful acts to local thugs. This vigilante justice was sometimes known as “regulation”—it being said, for example, that the Ku Klux Klan would “regulate” fellow citizens.<sup>68</sup> Although this sort of regulation is bad enough when done

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<sup>68</sup> “Regulation” thus has been defined as “[t]he mode or practice of policing or governing a society through regulators”—as when it was said in 1837 that “[t]he outrages of the borderers—the frontier law of ‘regulation’ or ‘lynching’ which is common to new counties all over the world, are ascribed to slavery.” A Dictionary of Americanisms on Historical Principles 1381 (Mitford M. Mathews ed., 1956).

An illustration of this usage within the Klan comes from Hugo Black. He was the third in command of the most influential Klavern in the United States, the Robert E. Lee Klan No. 1, and in 1926, he was the Klan’s candidate in the Alabama Senate primary. After his victory, which virtually assured him a seat in the Senate, the Robert E. Lee Klan No. 1 held a “Klorero” to celebrate his victory, and at this event the future Senator and Associate Justice told his fellow Klansmen: “The great thing I like about this organization is not the burning of crosses, it is not attempting to regulate anybody—I don’t know, some may do that—but my friends, I see a bigger vision, I see a vision of America honored by the nations of the world.” Ray Sprigle, *Black’s Loyalty to Klan Shown in Fervid Pledge*, Pitts. Post-Gazette, Sept. 15, 1937, at 2.



entirely on private initiative, it is especially dangerous when carried out on behalf of the government or its officers.

To take another example, the federal government can be compared to a community-minded individual—call him “Carmine”—who owns a restaurant.<sup>69</sup> Carmine regularly uses the profits of this lawful business to support another well-meaning individual, “Joe,” and asks little in return other than an occasional public service, in which Carmine expects Joe to “regulate” persons who get out of line—for example, persons who cheat Carmine or fail to show adequate respect. Does this arrangement absolve Carmine, let alone Joe, of his legal duties?

And how is it different when Congress or an executive official requires either a state or a private institution, as condition of a grant, to do what is forbidden by the Constitution’s rights or structures—not to mention what is forbidden to the state by its state bill of rights, the incorporated Bill of Rights, and a range of civil rights laws? Is the federal government or anyone else really relieved of its legal limits by the delegation?

Although the evasion of constitutional limits is clear, so is the solution in the *qui facit* principle. When the federal government gets states or private institutions to implement what the federal government itself cannot lawfully do, the federal government does not thereby avoid its legal duties; on the contrary, it violates them.

*Extent of Delegation.* —That delegation to an agent is not a cure becomes particularly evident when one realizes that almost all government action is delegated. The government regularly delegates its actions, both within the government and outside, thus revealing a continuum of delegation in which the government does not escape its constitutional duties.

Most acts by government officers are not formally acts of the United States. Acts of Congress and some acts of the President are acts of the United States. The rest of federal action, however, is done by officers of the United States, usually inferior officers, who

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<sup>69</sup> Cf. Carmine Galante, a.k.a. “The Cigar,” head of the Bonanno crime family from the mid-1970s until his assassination in 1979. Carl Sifakis, *The Mafia Encyclopedia* 176–77 (3d ed. 2005).

act as agents of the United States. Thus, even within the government, most action is delegated.

Inferior officers, moreover, often hire outsiders to do work for the United States. Such arrangements ordinarily require the outsiders merely to do what the government itself also can lawfully do—such as cleaning government buildings, distributing government census forms, running research laboratories, or manufacturing weapons. There thus are layers of delegation, reaching down to inferior officers and then to persons outside the government.

Both the officers and outsiders, moreover, can be agents of the United States. Not only when an officer of the United States is acting for the United States, but also when an outsider is acting by request of the United States, he is an agent for purposes of the *qui facit* principle.

These layers are revealing, for they are a reminder that most of the acts by which the United States can violate the law are not formally acts of the United States. On the contrary, the government acts that violate the law are mostly done by delegation—sometimes within the government, and sometimes outside. For example, the government can order its own officers to carry out an uncompensated taking, or it can hire a private company to do it; but either way, the government will have delegated the taking, and in neither case does this mean that the government did not violate the Fifth Amendment.

Whether the government relies on its own officers or on outside entities, it delegates most of its unconstitutional conduct, and the difference is merely in the reach of the delegation. It thus becomes clear that delegation is irrelevant.

*Delegation No Cure for Direct Violations of Law by States and Private Institutions.* —Before concluding this analysis of delegation, Part IV must note a critical adjacent point. Although the question here is whether delegation can cure the federal government's violation of its own constitutional duties, this usually is accompanied by the question of whether the delegation can be an excuse for states and private institutions that, when carrying out the requested acts, end up directly violating their own legal limits. Although this is not an unconstitutional conditions question, it is apt to be of profound importance in litigation over unconstitutional conditions, and it

therefore is discussed in Appendix C. Suffice it to say here, just as delegation cannot excuse the principal's violation of its duties, so too it cannot excuse an agent's violation of its duties.

The main question here, however, is the more complex problem of the federal government's violations of its own duties. As by now should be evident, the federal government violates its own constitutional limits when it delegates the enforcement of restrictions that it lacks the authority to impose. Most concretely, the government cannot rely on delegation to excuse its imposition of restrictions that otherwise would violate the Constitution's rights or structural limits.

#### V. FORCE

When the excuses of consent and delegation are stripped away, all that is left is the question of force. Although force is not an element of all constitutional violations, it is an element of some, including violations of most constitutional rights. It therefore is essential to recognize that, even with consent, many of the unconstitutional conditions that restrict rights come with constitutionally significant government force.

The question of consent tends to be confused with the question of force, but in fact they are quite different. If consent is no cure for an unconstitutional government act, then the question—at least in rights cases—is not whether there is consent to a restriction, but rather whether the restriction comes with government force.

This is not as difficult a question as may be supposed, for although consent can be intertwined with force at the inducement stage, it presents no difficulties at the implementation stage. It therefore is essential in this Part to distinguish between conditions that amount to an immediate sacrifice of liberty and those that bind into the future. When the government obtains an immediate sacrifice of liberty, the question is whether the government relied on mere force to induce consent, and this can be a complicated inquiry. When the government, however, secures conditions with commitments into the future, it relies on the force of law to imple-

ment the conditions, thus making the question of force much easier to resolve.<sup>70</sup>

*A. Immediate Sacrifices of Liberty: Induced by Mere Force?*

Some government conditions require an immediate sacrifice of liberty—that is, they require a current relinquishment of rights, not any commitment into the future. In such instances, the government has no need to rely on the force of law to implement its conditions, and the question therefore comes to rest on the pressure or mere force used by the government to induce consent. Obviously, it can be difficult to determine whether this pressure is so strong as to be constitutionally significant.

*Regulatory Conditions.*—One solution is to differentiate conditions that are regulatory from those that simply define grants or purchases. The distinction between regulatory and spending conditions has been widely embraced in the literature on unconstitutional conditions, but without a recognition that its primary value is for evaluating the conditions that require an immediate sacrifice of liberty.<sup>71</sup> As to these, there is no later government force and thus no force of law, but only the mere force or pressure used to induce

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<sup>70</sup> Incidentally, conditions violating constitutional rights can be void even without government force. The government emphasizes that its conditions are not requirements of law, but simply are consensual conditions on grants. In the law on consensual arrangements between private parties, however, conditions are void if contrary to law; indeed, they are void if contrary merely to public policy. Thus, even without government force, a government condition imposing censorship or otherwise violating a constitutional right surely should be considered void and unenforceable. See also notes 8, 77.

In this connection, note that here, too, consent is of no avail. Speaking of unlawful contracts, the Supreme Court has summarized:

In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced . . . . Whenever the illegality appears . . . the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.

Coppell v. Hall, 74 U.S. (7 Wall.) 542, 558–59 (1868).

<sup>71</sup> See supra note 2.

consent. In this context, the best way to evaluate whether there has been constitutionally significant coercion is to consider whether the condition is regulatory.

Of course, this sort of analysis assumes a connection between regulation and a coercive inducement. Just because a condition is regulatory does it really follow that the pressure used to induce consent was coercive? In theory, one might assume not. But as a practical matter the regulatory function of a condition is at least a *prima facie* indicator that the government has induced acceptance of the condition with what amounts to regulatory or coercive pressure.

Although the distinction between a regulatory and a non-regulatory condition can be elusive, the facts often eliminate the difficulties. The government sometimes bluntly says that it is using its conditions as a mode of regulation. Less directly, but no less clearly, it sometimes imposes conditions that are disproportionate, non-germane, or otherwise “off.” For example, it sometimes gives its conditions a regulatory effect by spreading out its funding among many recipients, by imposing overbroad restrictions, by restricting activities not closely related to the spending, or by leveraging funding of one project, subject matter, or person to impose conditions on others. In such circumstances, the conditions evidently are regulatory.

The regulatory nature of a condition suggests that the inducement went beyond what was necessary for an ordinary and lawful purchase. For example, where the government requires a public teacher, as a condition of her employment, to give up not only her irrelevant speech in the classroom but also her general political speech outside the school, the restriction clearly is non-germane, or at least disproportionate, and thus regulatory. The government is unlikely to have obtained such a restriction without offering an inducement beyond what would have been necessary for obtaining a non-regulatory restriction, and at least in this sense, the government appears to have relied on regulatory pressures. The existence of a regulatory condition thereby suggests that the inducement amounted to the sort of pressure necessary to impose regulation, and this is at least a *prima facie* sign of constitutionally significant coercion.

*Non-Regulatory Conditions.* —Of course, even where conditions are not regulatory, the force used for inducement can be constitutionally significant. For example, where the government uses duress to obtain consent to a restriction on speech, it surely is violating the First Amendment, regardless of whether the restriction is not regulatory. Government duress, however, rarely is overt. Therefore, in the absence of regulatory conditions, it often is difficult to sort out whether the force inducing non-regulatory conditions is constitutionally significant.

*B. Conditions Binding Into the Future: Implemented by the Force of Law*

In contrast to the conditions that merely require a current sacrifice of liberty are the conditions that bind into the future. The government in these conditions secures legally binding commitments into the future. Thus, regardless of any question about force in the inducement, these conditions always come with the force of law at the later, implementation stage.

Of course, the force of law underlying these forward-looking conditions is more collateral than direct, for the conditions themselves are not legally obligatory. Nonetheless, breaches of the conditions are subject to legally binding duties, thus allowing the government to take legal action against defaulters. Consequently, although the conditions are not legally binding, they are supported by the force of law.

Suppose, for example, the federal government were to make grants to impecunious professors at private colleges, on the condition that the professors not publish academic articles criticizing fellow citizens without first getting their written permission. On account of both the content discrimination and the requirement of prior licensing, this restriction on liberty is unconstitutional, but it is unconstitutional only if the government imposes it by force. Although the conditions themselves are not obligatory or enforceable, they are tied by consent to the government's grant of benefits. As a result, if the recipients of the benefits breach the conditions, they have a legally obligatory and enforceable duty to return the benefits. It thus does not matter whether the conditions themselves

are legally binding; they are backed by the force of law and thus are unconstitutional.

A recognition of context is all that is necessary to understand this collateral force of law. Standing alone, a condition that binds into the future will not seem legally obligatory or enforceable. But one cannot rest with this conclusion, unless one takes an artificially narrow vision, which ignores the rest of the transaction. In both form and reality, the transaction includes not only a restriction on the recipient of government funding, but also a legally binding and enforceable claim against him if he fails to conform. Thus, when the condition is considered in the context of the entire transaction, there is no doubt that it is supported by the force of law.<sup>72</sup>

### *C. The Chain of Force in Delegated Restrictions*

When the government asks states or private institutions to impose unconstitutional restrictions, the question of federal force becomes more complicated. The problem is that even when the force of federal law applies to the delegated body, this does not necessarily amount to force against the persons under that body's control.

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<sup>72</sup> To avoid the force of law that underlies conditions running into the future, the government could try to protect its unconstitutional conditions by shifting to conditions that merely involve an immediate sacrifice of liberty. This evasion, however, would not be entirely successful.

The evasion itself is simple. If courts come to recognize that unconstitutional conditions binding into the future are backed by the force of law, the government probably will replace these forward-looking conditions with a policy of rewarding existing sacrifices of constitutional liberty. For example, when imposing unconstitutional restrictions, the government could adopt a policy of repeatedly giving small or partial grants and giving them only to recipients who already have complied with the government's restrictions—thus avoiding the clear-cut effect of the force of law. In fact, at least some experimentation with this sort of evasion has begun, as is evident from the legislation underlying *United States v. American Library Ass'n*, 539 U.S. 194, 210 (2003)—legislation that barred any recovery of funds for non-compliance and instead authorized the government to deny future funds. 20 U.S.C. § 9134(f)(5)(A)–(B) (2000).

This tactical move, however, would simply shift the focus of analysis from the force of law to mere force. Although the government would avoid the conclusion that it was relying on the force of law, there would still remain the question of whether the government induced consent by means of constitutionally significant mere force. In considering this question, moreover, the government's policy of requiring the conditions will be evidence that the conditions are regulatory. In the end, therefore, the government can complicate the discernment of constitutionally significant force, but it cannot avoid it.

Of course, one solution would be simply to recognize that the condition is contrary to public policy and thus void.<sup>73</sup> As it happens, though, there is a more direct explanation—that the federal government’s conduct generates a chain of force, which reaches beyond the delegated entity to the persons it restricts.

*The Chain.* —A chain of force attributable to the federal government can be observed wherever the government uses conditions to delegate unconstitutional restrictions, and the delegated states and institutions, in turn, impose these restrictions on behalf of the federal government in ways that are backed by the force of law.

To begin with a simple example, suppose a Southern state in the 1960s contracts with a park management company to operate a state park, and suppose that the contract includes a condition that the company is to carry out the state’s admission requirements, including the exclusion of blacks.<sup>74</sup> The condition itself would not be legally obligatory, and therefore, in a narrowly literal sense, the company is legally free to admit or exclude blacks as it pleases. Nonetheless, it will be seen that the state would be using force to impose a discriminatory constraint in violation of the Fourteenth Amendment.

The difficult question about the chain of force arises when one asks about the application of the force to the restricted persons. Although the government is relying on the collateral force of law against the park management company, what force is used against the blacks who seek entry? To be sure, one need not always reach this question, for when the government uses a state or institution to restrict individuals, the government often also restricts the state or institution itself, thus making any unconstitutional condition already unlawful as to that body. In general, however, in instances of delegated restrictions, the government force must reach not only the cooperating state or institution but also the persons that are subject to these institutions.

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<sup>73</sup> For further details on this argument, see notes **Error! Bookmark not defined.**, 70, 77.

<sup>74</sup> Note that the state action in this case is much more direct than in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (finding state action in the conduct of a private restaurant, located in a state parking lot, that excluded black customers).



An easy answer, perhaps too easy, could be found in a familiar presumption. It has been seen that institutional *consent* is taken to imply individual consent. Similarly, perhaps federal *constraint* of an institution should be taken to imply federal constraint of the individuals controlled by the institution. Put another way, if the individuals are merged into their institution for purposes of consent, why not also for constraint? Even were this logic persuasive, however, it would be of no avail in the park example, for the excluded blacks are not employees or members of the park management company.

A deeper answer involves a chain of constraint: First, the collateral force of law against the cooperating states and institutions; second, the force used by these entities against persons within their jurisdiction or control. For example, in the park example, the state employs the force of law collaterally to enforce the unconstitutional restrictions on the park management company, and the company then uses such force against blacks. Although the company's coercion on behalf of the state ordinarily is mere force, it is backed by the force of law. For instance, if the law justifies the company in physically preventing blacks from entering the park, let alone if the police or the courts back up the company in such exclusion, then the company's conduct on behalf of the federal government collaterally has the force of law.

Similarly, when the federal government asks private universities to carry out its unconstitutional licensing of speech and the press, there is a chain of force: First, the government imposes conditions backed by the force of law; second, on behalf of the government, the universities and their IRBs impose the licensing on faculty and students—initially by threatening them with barriers to further verbal inquiry and publication, and ultimately by threatening to fire the employees and expel the students, all of which is backed by the force of law. In such ways, the government's coercion reaches the censored individuals.

Churches, charities, and educational organizations also illustrate the point, for after the federal government imposes its conditions on these Section 501(c)(3) organizations, they impose the conditions on their employees and members. It thus does not matter that the Internal Revenue Service has rarely denied charitable status to

a church on account of its political speech. Such a measure is so severe that the government need only warn a Section 501(c)(3) organization in order to obtain its compliance. The government's conditions come with the force of law, and churches and other Section 501(c)(3) organizations therefore tone down their ministers and members. It may be only a church, not a government, that carries out the restrictions on the minister and congregants, but the church acts at the behest of the government, and when it takes punitive action against its minister or members—for example, by silencing or dismissing them—it is backed by the force of law. In such ways, the force of law reaches down from the government, to the bodies it delegates, and finally to their personnel.<sup>75</sup>

*A Shelley v. Kraemer Problem?*—The chain of force ultimately comes to rest on contracts or other consensual arrangements between private parties, and it therefore is necessary to consider whether such a chain runs into a *Shelley v. Kraemer* problem. Put another way, how can there be state action in a private arrangement?

*Shelley* held that, under the Fourteenth Amendment, state courts could not enforce racially exclusionary covenants running with the land.<sup>76</sup> It is widely understood, however, that judicial enforcement of contracts, at least as to breaches of contracts between private parties, does not ordinarily amount to state action. The original *Shelley* problem thus was the difficulty of discerning why the covenants in that case gave rise to unconstitutional state action but other discriminatory private contracts did not. Fortunately, this *Shelley* problem need not be solved here. Instead, the *Shelley* problem that matters here is more specific: Why do consensual restrictions imposed by private institutions on their personnel have the force of law, at least collaterally, when the institutions act at the request of the federal government, but not when the institutions act independently of the federal government? As it turns out, there is a clear answer—not necessarily to the original *Shelley* question, but at least to the more specific *Shelley* issue here.<sup>77</sup>

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<sup>75</sup> For the meaning of the word “personnel” here, see *supra* note 20.

<sup>76</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>77</sup> One explanation of *Shelley* has been largely ignored because the explanation does not involve state action. In contracts between private parties, as already observed in

One of the things that may distinguish *Shelley* from other contracts between private parties, and that certainly distinguishes the instances here, is the role of the federal government in predetermining the unconstitutional terms of the contracts. In *Shelley*, although the government did not dictate the particular terms of the land contracts, the common law doctrine on covenants running with the land left little choice to the owners of the land that was subject to racial covenants. If they were to sell their land, they had to perpetuate the discrimination or face legal consequences. The law itself thus predetermined the terms on which land could be sold, and the law aligned its force behind such terms. When developers of subdivisions initially sold lots subject to racial covenants, the law did not predetermine the terms. From that moment onward, however, the owners of the lots were subject to the force of the law if they breached the covenants.<sup>78</sup> Thus, although the state was not a party, and although the covenants themselves did not have the force of law, the state participated in predetermining the unlawful terms and collaterally gave them the force of law.

Of course, the law's role in shaping the unconstitutional terms of the covenants in *Shelley* was sufficiently accidental that it is unclear whether this alone can explain the case. Nonetheless, the government's role in predetermining the content of the covenants after the initial sale by the developers appears to be at least an element of what distinguishes *Shelley* from other contracts cases. Although contract law as applied to most private contracts does not give rise to state action, contract law plus racial covenants shaped by the state gave the government a dual role, in which it not only provided the force of contract law but also contributed to the adoption of the unconstitutional covenants.

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supra notes 8, 70, a condition contrary to law, or even merely public policy, is void. Thus, even if there were no state action in *Shelley*, the racially restrictive covenants would have been void. Cf. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (holding that IRS can deny § 501(c)(3) tax status to racially discriminatory educational organizations, as such discrimination is contrary to public policy and thus not compatible with the charitable tax status).

<sup>78</sup> States also interjected themselves by establishing recording offices and by imposing legal costs on parties who did not promptly record their deeds. In this way, not only the common law but also state legislatures created impediments for black purchasers.

This dual role is clearer and more clearly unconstitutional here. The government uses its conditions to set the terms of the arrangements between the institutions and their personnel, and it then backs up these terms with the force of law. For example, under Section 501(c)(3), it is not merely contract law and private contracts that impose unconstitutional conditions on employees (such as ministers, teachers, and charity workers) and associated members of the public (such as congregants, students, and charity volunteers). On the contrary, such persons are subject to unconstitutional restrictions as a result of an unholy combination of contract law and the conditions that the government imposes on key cultural institutions. Thus, even more emphatically than in *Shelley*, the question is not simply about the application of contract law to the private choices made by private parties. Instead, the problem is that contract law is being applied where the government has intervened to ensure that private contracts will impose unconstitutional restrictions.

Whereas the government's role in *Shelley* remains resistant to simple analysis, the government's dual role in delegated unconstitutional conditions is obvious. The government not only supplies the force of contract law between private institutions and their personnel but also engages the private institutions as agents to impose the government's unconstitutional restrictions. Far more than in *Shelley*, therefore, the government both offers enforcement and requires the unconstitutional terms.

The use of conditions to delegate unconstitutional restrictions thus creates a chain of force, in which the force of law runs not only from the government to other institutions, but also from the institutions to their personnel. The bottom level of this chain initially may seem complicated because it often involves only private institutions and their personnel. Once it is understood, however, that the government both predetermines the unconstitutional terms and backs them, collaterally, with the force of law, it becomes apparent that the force of law reaches all the way from the top of the chain to the bottom.<sup>79</sup>

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<sup>79</sup> The institutions understand that they are bringing federal law to bear on the individuals within their control, for they often warn their personnel that the federal re-

In sum, notwithstanding that conditions come with consent, they often also come with constitutionally significant government force. The conditions that require immediate sacrifices of liberty frequently are induced by force, which is most clearly evident when the conditions are regulatory. Moreover, the conditions that bind into the future are always backed by the force of law at the implementation stage. Consent thus does not preclude the existence of force.

## VI. PUBLIC INTEREST

Although by now it should be evident that consent cannot cure restrictions that violate the rights and structures that limit government powers, there may remain doubts on the ground that constitutional rights belong to individuals. If such rights really concern only those to whom they belong, such persons should be able to alienate them in the same way as private rights.

There is, however, a public interest in personal rights. To be precise, the Constitution protects rights not merely for individuals, but for the sake of the people as a whole. Personal consent therefore cannot be taken to enlarge the power of the government in these spheres of freedom. Indeed, the irrelevance of consent preserves the interests of the people as a body in the liberty of individuals.

### *A. Individualistic and Functionalist Claims About Merely Individual Interests in Rights*

From some individualistic and functionalist perspectives, rights (or at least some of them) merely protect individual interests. The shared assumption is that a constitutional right is alienable in the same way as other personal property and that therefore an individual often can give up his rights—meaning not merely that he can

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strictions must be obeyed because they are required by federal law. For example, the University of Chicago answers the question, “Why is my research subject to review?” by explaining that it has negotiated an assurance with the Federal Office for Human Research Protections and that, “[i]n addition, federal laws require this protection.” University of Chicago, Social & Behavioral Sciences IRB & Investigator Manual 6 (2009), available at [http://sbsirb.uchicago.edu/sites/sbsirb.uchicago.edu/files/uploads/sbsirb\\_manual.pdf](http://sbsirb.uchicago.edu/sites/sbsirb.uchicago.edu/files/uploads/sbsirb_manual.pdf).

refrain from exercising them, but that he can convey power over these little realms of freedom.

From a narrowly individualistic angle, a constitutional right is the possession of individuals, who therefore can give it up. Especially when rights are considered in the version of libertarian thought that values autonomy and alienability, it is difficult to resist the conclusion that even constitutional rights are tradable objects.

This was not, however, the conception of rights adopted in American constitutions. For one thing, the Constitution does not secure most rights merely for individuals, but for all persons within the protection of the law, including the groups and organizations formed by individuals.<sup>80</sup> In addition, as has been seen, the rights protected by American constitutions were understood as limits on government imposed by the people—indeed, as caveats to the grant of powers—which means that, even though individuals can decline to exercise their constitutional rights, they cannot, merely through their individual consent, relieve the government of the limits imposed by these rights.

From another, more functionalist perspective—taken by Frank Easterbrook, Richard Epstein, and Thomas Merrill—it is assumed that some but not all rights are merely of individual concern. The underlying point is that government is limited not merely by the Constitution's formal limits but also by a wide range of functional limitations, including economic constraints. On this assumption, although courts sometimes need to enforce constitutional rights, they need not do so where an individual relinquishes his rights and there are functional substitutes for them, which render them unnecessary as legal limitations on government. In other words, where there are functional substitutes for constitutional rights, there is no public interest in protecting the rights themselves.

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<sup>80</sup> The individualistic approach thus is mistaken on its face in assuming that constitutional rights distinguish between individuals and other persons. Indeed, some of the most individual of rights are valuable, both individually and politically, because they can be exercised by private groups or institutions, through which individuals can exercise a power unavailable to them merely as individuals. It thus is no accident that, for example, the freedom of speech and the freedom of religion belong not only to individuals but also to groups or institutions, whether secular or religious.

For example, where the government acts in the private sphere and thus has private rivals, it is possible that the market will function as an adequate substitute for constitutional rights. Similarly, where the government does not exert monopoly power, and thus leaves individuals free to make arrangements with other actors, perhaps the government does not need to be constrained by due process and other constitutional rights. The functional alternatives to these constitutional limits appear to drain them of their public significance, and therefore, if individuals consent, the government should not be constrained by the limits.<sup>81</sup>

These individualist and functionalist arguments, however, run into difficulties. Most centrally, they are mistaken in their assumption that constitutional rights are sometimes of merely personal interest.<sup>82</sup>

### *B. The Public Interest in Personal Liberty*

Personal rights are matters in which there is a profound public interest. Indeed, they are matters in which the people have declared their interest. They therefore cannot be left to private individuals or institutions.

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<sup>81</sup> Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 Sup. Ct. Rev. 309, 349 (1981). See also Epstein, *Bargaining with the State*, supra note 2, at 174. For another, somewhat functionalist approach, which assumes that there is an overriding public interest in some constitutional rights, see Merrill, *Dolan*, supra note 2, at 869–71. Interestingly, the functionalist arguments are more common in conversation than in the literature.

Accompanying this functionalist analysis of limits on government is a similarly functionalist approach to understanding whether the government has acted with coercive force. From this perspective, if the government offers benefits for which there are adequate substitutes in the market, it evidently has not acted coercively. In contrast, if it offers benefits for which there are no private substitutes, there is more likely to be coercion.

<sup>82</sup> Of course, there are other problems. For example, both arguments invite judges to pick and choose which rights they should enforce—on the basis of a judge's almost metaphysical understanding of individual freedom at one extreme, or on a judge's economic conception of functional substitutes for law at the other extreme. Those who argue for either individualistic or functionalist departures from the formal requirements of law surely have the burden of showing that judges have both the authority and the competence to make such open-ended decisions. At least thus far, however, the arguments for such departures have not evolved to the point of showing that judges have adequate authority and competence.

This sort of observation already is familiar from the literature on property rights and how they differ from contract rights. Property rights seem quintessentially individualistic. But the law on property rights sharply limits what individuals can contract for, and, as shown by Thomas Merrill and Henry Smith, this formal limitation on private consent protects the interests of the public.<sup>83</sup> Similarly, by limiting the effect of private consent, constitutional law protects the public interest in constitutional liberty.

The very nature of constitutional law is to place constitutional limits beyond any political bargain, including any bargain between Congress and individuals. Constitutional law comes from the people, who thereby reserve to themselves the matters that they decide cannot safely be left to legislative political deals. By making a constitution in which they reserve such issues to themselves, the people declare their predominant interest in such matters, and they do this in their constitution because this is the law in which they, not Congress, are the lawmakers. It therefore makes no difference whether Congress thinks it has an interest in such questions, or whether it gets the consent of states or private parties, for the whole point of constitutional law is to preserve the public's interests by establishing limits outside the reach of legislative interests and deals.

More generally, the people have an interest in maintaining their constitution as a law under which the government is accountable. If the government can make a side deal to purchase its way out from under constitutional limitations, the Constitution cannot consistently limit government in its relation to the people, and they cannot consistently rely on the law and the courts to hold the government accountable to them. In other words, if the government can use the consent of an individual to acquire greater power over her speech and religion than the government enjoys under the Constitution, then the society as a whole will lose not only the public advantages of her verbal and religious freedom but also, even more seriously, the advantages of having rights as limits on government power.

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<sup>83</sup> Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle, 110 Yale L.J. 1, 7–8 (2000).



Quite apart from these structural considerations, the people have an interest in the equal liberty of all persons in relation to government. As already hinted, when government can buy its way out of the constitutional rights of some classes of institutions or individuals, it leaves them with lesser rights than other persons. It is apt to have greatest success in purchasing constitutional rights, moreover, when dealing with institutions and individuals who have become dependent on government or who otherwise are sensitive to financial pressures. Unconstitutional conditions thus tend to magnify the inequality of the financially sensitive—giving the law the effect of reinforcing vulnerability.

Put another way, if one views the Constitution as a sort of relational contract, which is renegotiated over time, there is a danger that the poor not only will remain poor but also will lose their freedom. Relational contracts can have much value among relatively equal or independent parties, but among unequal parties who are bound together, they soon can exaggerate existing inequalities. This matters here because the government usually has greater power than any individual or class of individuals. In these circumstances, the assumption that constitutional rights are subject to continual renegotiation between the government and individuals does not bode well for the latter, especially if they are poor or otherwise financially vulnerable. At least when the Constitution is viewed as a relational contract between the government and the people, there is at least the possibility of some parity between the parties (although even among these parties, the people need formal constitutional protections precisely to avoid having their rights whittled away). In contrast, if the Constitution is understood as a relational contract between government and individuals, the disparity of power allows the government repeatedly to renegotiate the relationship, always increasing its power, and diminishing individual liberty, particularly for those who are dependent on the government. The vision of the Constitution as a relational contract thus will tend to reduce the poor to a sort of servitude, in which the poor and others who are financially vulnerable not only remain economically dependent but also become legally subordinated—reduced to a caste that is deprived of the equal protection of the law.

Of course, the financially vulnerable include not only the poor but also institutions and their personnel who press against the boundaries of political power in new or unpopular ways, such as universities and their academics and students, or churches and their clergy and members.<sup>84</sup> Although some such institutions are very wealthy, and tend to be very strong in their own little ponds, they are utterly vulnerable in the larger world, especially as most operate at the margins of financial sustainability. For example, even though a bio-chemistry laboratory relies on extensive funding, the struggle of scientists to explore new and often politically challenging knowledge almost always leaves them anxious for further money and vulnerable to any loss of funding. And the vulnerability of these institutions is felt even more acutely by the individuals who work within them. As a result, large classes of Americans, including academics, clergy, and other institutionally dependent intellectuals, are subject to almost irresistible pressures to acquiesce in sacrifices of their constitutional rights.<sup>85</sup>

The questions of inequality and vulnerable classes bring the question back to the structural concerns, for if the government can make a separate peace with part of the society, it can diminish the power of people to defend their liberty. Consider, for example, the free speech rights of an individual. If she is willing to trade her speech and religion rights for cash, why shouldn't she? These rights are hers, and she is free to refrain from exercising them. But as other scholars have observed, the public also has an interest in her rights.<sup>86</sup> This public interest in her rights is often understood as an interest in her knowledge and opinion, which contributes to the

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<sup>84</sup> For lack of a better term, the word "personnel" is used here to mean not merely employees, but all persons associated with an institution—not only teachers but also students, not only clergy but also congregants, etc.

<sup>85</sup> This vulnerability also is felt by states, especially those following policies that deviate from national trends. Not entirely unlike intellectuals in academic institutions, states experiment with ideas and policies, being in effect laboratories of change. Like universities, moreover, states often strain their resources, and they and especially their nonconformist experiments therefore are vulnerable to demands that they give up their constitutional freedom in exchange for federal funds.

<sup>86</sup> Merrill, *Dolan*, supra note 2, at 870 (citing Daniel A. Farber, Free Speech without Romance: Public Choice and the First Amendment, 105 Harv. L. Rev. 554, 558–60 (1991)).

knowledge and opinions of the rest of the society.<sup>87</sup> More basically, even if she is not apt to say or believe much, the society as a whole has a stake in her continuing to enjoy a freedom of speech and religion, for rights enjoy the greatest security when they are shared by the broadest number of persons. Rights that are the property of all can have the psychological and political commitment of all, thus giving even the most personal rights an essential societal resilience. In contrast, unconstitutional conditions chip away at the shared interest of Americans in their rights, leaving an ever smaller number willing to stand up for their constitutional freedoms.

Thus, in many ways, there is a public interest in preserving the rights of all persons as legal limits on government. More will be said in the Conclusion about the interests of the entire society in barring the government from using consent to evade rights and create inequalities. Already here, however, it should be evident that the nation as a whole has an interest in consistently and equally protecting the constitutional liberty of all Americans, regardless of their consent.

## VII. IMPLICATIONS

The final task of this Article is to examine the practical implications of the observation here that consent cannot relieve the government of the constitutional limits on its power. The implications will be examined as to three types of conditions: those concerning speech, property, and procedure.

These sorts of conditions tend to pose problems for the current approach to unconstitutional conditions. In asking whether a condition is really just a purchase, the current analysis has left courts adrift, unable to explain their different treatment of different conditions, notably those on speech property, and procedure. As a result, leading commentators complain that the consent analysis cannot be applied consistently.<sup>88</sup>

In contrast, the range of conditions reveals the robustness of this Article's theory. On the assumption that consent cannot enlarge the government's constitutional authority, this Article sorts out

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<sup>87</sup> Merrill, *Dolan*, supra note 2, at 870; Farber, supra note 86, at 558–59.

<sup>88</sup> See supra note 10 and infra note 117.

speech, property, and procedure conditions simply by asking about the lawfulness of the restrictions. To be precise, it follows what by now should be a familiar double-barreled inquiry. The initial general question is whether a restriction violates the Constitution—in particular, whether it violates either the limited powers or the rights and structures that limit these powers. Of course, where the restriction violates a constitutional right, force is an element of the violation, and it therefore is necessary to follow up with a second, more specific inquiry as to whether there is constitutionally significant government force. In this manner, it becomes possible to provide a textured and consistent explanation of divergent conditions.

#### *A. Speech Conditions*

The implications for speech conditions have already been suggested in Part I, where it was seen how the government uses such conditions in a way that evades the First Amendment. All governments occasionally are tempted to abridge the freedom of speech, and the government of the United States has used conditions to restrict the political speech of clergy, the inquiry and publications of academics, and the use of the airwaves. These and the government's other unconstitutional speech restrictions cannot be saved by consent or delegation, and where they are imposed with constitutionally significant force—indeed, usually the force of law—they are unlawful.

*Tax Restrictions on Churches, Charities, and Educational Institutions.* —It will be recalled that the government's Section 501(c)(3) restrictions on the First Amendment rights of churches, charities, and educational institutions are justified as conditions on a benefit. These organizations, it is said, get the benefit of tax-free income and of contributions that are deductible to the donors. In exchange, the organizations give up their freedom to engage in certain types of political speech and petitioning—in particular, they, their employees, and their members give up much of their freedom to campaign for political candidates and to lobby government.

Even if the favorable tax treatment really is a government benefit, are the concomitant speech conditions constitutional?<sup>89</sup>

To conclude that the consent of the tax-exempt institutions cures the unconstitutionality would be to assume that the consent of some churches, charities, and educational institutions can relieve the federal government of the limits imposed on it by the people. This is not plausible, and the government therefore remains subject to the limitations of the First Amendment, regardless of the consent.

The remaining questions are those of delegation and force. Although the federal government delegates much of the censorship to the Section 501(c)(3) organizations, the government cannot avoid the unconstitutionality of its restrictions on speech and petitioning by asking private institutions to impose the restrictions on its behalf. The restrictions in the conditions, moreover, are backed by the force of law—at the very least because breaching Section 501(c)(3) organizations are subject to government demands for back taxes (within the statute of limitations).<sup>90</sup> In short, the speech restrictions are grossly unconstitutional, and the conditions and delegation cannot avoid the constitutional violation.

None of this is to say that the federal government must subsidize the electoral and lobbying speech of churches, charities, or educational institutions.<sup>91</sup> But just because the government supports organizations does not mean it can exceed its constitutional power.

*IRB Licensing of Human-Subjects Research.* —To impose licensing of speech and the press on human-subjects research, the government makes the licensing a condition of its research grants. As

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<sup>89</sup> As discussed in *supra* note 18 there is an important underlying question as to whether the favorable tax treatment is really a government benefit or just an unequal constraint. If the latter, it is a dramatic penalty on political speech, without regard to any question of unconstitutional conditions.

<sup>90</sup> Although the IRS apparently has almost never gone to such lengths, this does not undermine the argument here, which is based on the government's legal power. Indeed, the hesitation of the IRS to exercise its power suggests that it is at least vaguely aware that it is standing on thin constitutional ice.

<sup>91</sup> The question of how the government can encourage such organizations without subsidizing their campaigning and lobbying is complicated, and the answer may be particularly difficult as to religious organizations. Suffice it to say, however, that it is a different question from whether the speech restrictions on such groups are constitutional.

has been seen, universities and research institutions always comply, thus requiring their faculty, students, and other personnel to get IRB permission before beginning inquiry designed to produce “generalizable” or publishable knowledge. The result is IRB licensing of what individuals can say and learn in their inquiries and of what they publish about the results.

Once again, however, consent and delegation cannot cure the violation of the First Amendment.<sup>92</sup> As a result, the licensing requirements imposed through the conditions must be evaluated on their merits as restrictions on liberty. As it happens, they bind the research institutions into the future and thus are backed by the force of law. Indeed, they are severely enforceable through cross-collateralized conditions. They therefore violate the First Amendment.<sup>93</sup>

It may be feared that this means the federal government cannot regulate harm done in research. The conclusion, however, is much narrower. Although the government can address research harms, it cannot do so by licensing speech or the press, as this is flagrantly unconstitutional.<sup>94</sup>

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<sup>92</sup> The Constitution’s bar against delegation of unconstitutional restrictions is particularly clear as to the licensing of speech and the press. The seventeenth-century English licensing system was the model of what the First Amendment’s press clause rejected, and already in that English system, the licensing of the press as to academics and students was delegated to the universities. It thus becomes evident that delegated licensing was part of what the First Amendment prohibited.

<sup>93</sup> Along similar lines, when the federal government required researchers to get federal permission before sharing their results, a federal district court held this condition unconstitutional. *Bd. of Tr. of Leland Stanford Jr. Univ. v. Sullivan*, 773 F. Supp. 472, 473, 478–79 (D.D.C. 1991). The National Institutes of Health had awarded a grant to researchers at Stanford University on the condition that they “obtain government approval before publishing or otherwise publicly discussing preliminary research results.” *Id.* at 473. When the university challenged this condition, the court held the condition unconstitutional under the First Amendment, explaining that otherwise, “the result would be an invitation to government censorship wherever public funds flow, and . . . thus . . . an enormous threat to the First Amendment rights of American citizens and to a free society.” *Id.* at 478.

<sup>94</sup> A private university could still impose the licensing on its own initiative, but if it did so in response to conditions, or even merely in response to a government policy of awarding more grants to compliant institutions, the government would still be in violation of the First Amendment. See *supra* Parts IV and V, including note 72.

It is important to observe that there is no scientifically serious empirical evidence of the alleged harms. To be precise, there is no such evidence that, overall, human-

*Licensing of Airwaves.* —The licensing of what is said on the airwaves is similarly explained as a condition on a government benefit. But even if the airwaves are a benefit received from government, can the government make unconstitutional restrictions on speech the condition of a broadcasting license?<sup>95</sup> Again, consent and delegation are no cure, and because the conditions run into the future, they are backed by the force of law. Accordingly, the government cannot use these conditions to impose restrictions that violate the First Amendment. To conclude otherwise is to conclude that the consent of a broadcasting company can give the government a power that the people prohibited it from exercising.

Of course, the FCC can still license the use of the airwaves. And at least the state governments can still prosecute radio stations for unlawful speech—to the extent such prosecutions are constitution-

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subjects research is particularly dangerous. Of course, some research projects do cause injuries. Yet there is no scientifically serious evidence that, overall, anything is more harmful when done in research or even human-subjects research than when done in other circumstances.

There were a series of notorious studies done in the mid-twentieth century, the most famous being the Tuskegee syphilis study, the Willowbrook hepatitis research, and the Army radiation experiments. These governmental studies, however, are not evidence of the harm from human-subjects research in general. On the contrary, they show the harmfulness of government medical research on wards of government or on persons dependent on government. In fact, the standard article that is cited to show harm from human-subjects research is actually based on data that consist largely of experiments on wards of government done by government doctors or government-funded doctors. The article's author, Henry Beecher, suppressed information that would have shown the dangerous role of government, and his study therefore has been accepted as proof of the danger of all human-subjects research. When the underlying evidence is examined, however, it shows that the danger was primarily from research on wards of government by government doctors or government-funded doctors. Hamburger, *Getting Permission*, supra note 2, at 455–56 (showing suppression of data in Beecher's 1966 study and revealing implications of the suppressed data).

There also have been some deaths in recent medical experiments, and these fatalities regularly are relied upon to justify the regulation of human-subjects research. These deaths, however, have occurred almost entirely in the new drug and device trials conducted under FDA regulations, and they therefore are not evidence about the danger of research conducted under the human-subjects research regulations. Fatalities under one regulatory regime, concerning a particularly dangerous sort of research, cannot justify the imposition of licensing on other research under another regulatory regime.

<sup>95</sup> In fact, the licensing of the airwaves is really an allocation of scarce commonly-held space rather than an allocation of government property. See supra note 42.

ally permitted. But the FCC cannot license access to the airwaves on the basis of what is said on the airwaves, for this is licensing of speech.<sup>96</sup>

*Consent Decrees Limiting Speech.* —Other speech conditions that are at risk under the analysis presented here are those appearing in consent decrees. Whether in the settlement of the government's legal claims, or in the settlement of entirely private disputes, consent decrees sometimes include provisions limiting what private parties can say afterward.<sup>97</sup>

All consent decrees that silence private parties beyond what is required by their legal duties must be considered problematic even before one gets to the question of conditions on speech. The duty and, indeed, the very office of a judge traditionally was to exercise judgment in accord with the law of the land.<sup>98</sup> Accordingly, it long was understood that a judge could not enter a consent decree where he knew it did not follow the law.<sup>99</sup> In other words, regardless of the private contracts a judge could enforce, he could not enter a decree, even with the parties' consent, where he knowingly was imposing a restriction not required by law—let alone, an unlawful restriction.

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<sup>96</sup> *Contra* FCC v. Fox Television Stations, 129 S. Ct. 1800 (2009) (upholding FCC's liability order for fleeting expletives on television); FCC v. Pacifica Found., 438 U.S. 726 (1978) (upholding FCC's order for systematic repetition of offensive, indecent words).

<sup>97</sup> For a defense of many but not all such decrees within an analysis of unconstitutional conditions, see Merrill, *The Constitution and the Cathedral*, *supra* note 2, at 1197–99 (justifying bargained restrictions on commercial speech, but not political speech).

<sup>98</sup> Hamburger, *supra* note 53, at 103–47.

<sup>99</sup> As explained in an English case:

The court will not give a Judgment which they know would be against the Law, altho' the Plaintiff and Defendant do agree to have such a Judgment given. . . .

For the Judges are to do equal Justice according to their best Skill, and not to err wilfully, and against their Knowledge, to please the Parties.

2 John Lilly, *The Practical Register* 136–37 (London, E. Nutt et al. 1735) (citing a King's Bench case of 1671).

The general point about judicial duty calls into doubt all consent decrees in which judges depart from what is required by law. Although the departure from judicial duty is sufficient reason to hold such decrees void, this conclusion also is supported by a range of other considerations, including the risk of inequality, the risk of using courts to give effect to extortionate conduct, limited judicial competence, and the separation of powers.



The problem that more centrally matters in this Article, however, is not the lawfulness of the judge's action, but rather the lawfulness of the conditions sought by the federal government where it is a party to the consent decree. Conditions in consent decrees clearly are backed by the force of law, and therefore if the government obtains an unconstitutional restriction on speech in a consent decree, the decree is unlawful—regardless of whether it carries into the future or involves merely an immediate sacrifice of liberty. Although it may be thought that such a consent decree could be saved by the judicial role in entering it as an order, this judicial participation actually clarifies the constitutional difficulty, for it leaves no doubt that the unconstitutional restriction has the force of law.

*Government Contractors.*—Further speech conditions are those on government contractors. For example, the government has used its funding to place conditions on the speech of artists and family planning organizations.<sup>100</sup>

Such cases usually are said to involve purchases of speech—as if the consent of private persons could enlarge government power beyond the First Amendment's limitations. Certainly Congress, under its powers, has the authority to use conditions to define what it is purchasing. But if Congress imposes restrictions on contractors that violate the First Amendment, and if the restrictions are binding into the future or otherwise come with constitutionally significant government force, it is not evident how the contractors' consent can relieve the government of its constitutional limits. Although the contractors can consensually decline to exercise their First Amendment rights, they cannot thereby give the government any power to impose restrictions that violate the Amendment.

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<sup>100</sup> In *National Endowment for the Arts v. Finley*, the Supreme Court rejected a facial challenge to a statutory requirement that, when the NEA establishes procedures for awarding grants, it must "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public." 524 U.S. 569, 572–73 (1998). Although not itself a conditions case, it is suggestive of the sort of conditions that have at various times been placed on funding of the arts. In *Rust v. Sullivan*, the Court rejected a challenge by doctors to a condition imposed by groups receiving federal funding for family planning services—a condition that required the groups not to counsel or otherwise encourage abortion as a method of family planning. 500 U.S. 173, 177–78 (1991).

Such restrictions on government contractors therefore cannot be explained in terms of purchases or other types of consent.

A partial explanation, however, can be found in the Supreme Court's inquiry as to whether conditions are germane and proportionate. Although the Court examines these considerations on the assumption that consent can cure an unconstitutional restriction, their real significance lies elsewhere. As already noted, where a restriction does not bind into the future, and where it is germane and proportionate, it is not regulatory and therefore usually does not amount to constitutionally significant force. Such a restriction on a contractor therefore does not violate a contractor's freedom of speech and the press.

Another explanation also rests on the inquiry as to whether a restriction is germane and proportionate—not as a measure of government force, but more broadly as a measure of whether the restriction abridges the freedom of speech. Not every restriction on speech is an abridgement of the freedom of speech, and the difference between a restriction on speech and an abridgment of the freedom of speech often depends on context—in particular, on the relevance and proportionality of the restriction to the danger it addresses. Although the Supreme Court usually discusses such problems in terms of compelling government interests, overbreadth, and narrow tailoring, the larger point is that speech restrictions need to be relevant and proportional to more or less tangible dangers, lest the government abridge the freedom of speech. Accordingly, when the Supreme Court analyzes unconstitutional conditions in terms of germaneness and proportionality, it sometimes is really examining the constitutionality of the speech restriction rather than, as claimed, whether consent can justify an unconstitutional restriction. By now it should be clear that consent cannot do this, but the germaneness and proportionality of a speech restriction can help to sort out whether it is constitutional.

Consider, for example, a statute directly barring persons from publishing materials containing racial slurs or other insensitive language. If the statute (directly or by condition) restricts all persons, it clearly is neither germane nor proportionate—or, if you prefer, overbroad and unsupported by a compelling government interest—and it therefore abridges the freedom of speech and the press. If

the statute applies (either directly or by condition) to all persons receiving any government benefits, including merely health benefits, it similarly abridges this freedom. But what if the statute applies only to persons who receive government funding for charter schools, and only to what they say in these schools? Or what if it applies only to advertisers hired by the government to present its sex education funding, and only in their presentations on behalf of the government? Such restrictions are germane and proportionate, which is to say that, regardless of whether imposed directly or by condition, they are based on compelling government interests, are narrowly tailored, and are not overbroad.

It thus becomes apparent that many government restrictions on its contractors are of a sort that the government could impose directly, and it therefore also can impose them by condition. Consider, for example, a government limit on what census workers or sex education workers can say in the scope of their duties. Where the government hires them as federal employees, it clearly can pass a statute directly limiting what they say while working with members of the public—for example, barring them from discussing their personal views, requiring them to be courteous, and requiring them to give advice that strictly follows government policy. The next step is to consider what the government can do when it hires them as contractors. Presumably, it can adopt a statute imposing similar direct limits on them without violating the First Amendment, even though they are contractors rather than employees. This is revealing because, to the extent the First Amendment allows the government directly to restrict the speech of contractors, it also allows the government to restrict them by condition. Either way, such restrictions do not abridge the freedom of speech and the press.

Notwithstanding this conclusion about the lawfulness of many restrictions on contractors, it must be qualified by another point, about the employees of government contractors. Where the contractor's employees are simply agents of the contractor, and where the government's restriction on the speech of the contractor is lawful, it would appear that an extension of the restriction to the contractor's employees is also lawful. In some instances, however, employees are agents for some purposes but independent actors for other purposes. For example, professors are agents in the sense

that they have to teach and publish their research, but they ordinarily are independent actors in presenting their scholarly views in their courses and in pursuing their own topics, ideas, and attitudes in their research. In such ways, their teaching and research is theirs rather than their employer's, and to this extent they ordinarily enjoy a presumption of freedom. Thus, even when the First Amendment allows the government to restrict the speech of a contractor, this does not always mean that the government thereby can restrict the speech of the contractor's employees. At least in some instances, the restriction on the employees will be overbroad, not narrowly tailored, and unsupported by a compelling government interest.

The government's restriction on the doctors in *Rust v. Sullivan* therefore raises a different question than its restrictions on government-funded artists.<sup>101</sup> Whereas the artists are government contractors, the doctors in *Rust* were employees of government contractors, and the central question in *Rust* therefore was not simply whether the government could constitutionally impose its restriction on the contractors, but whether it could thereby impose the restriction on the doctors. At least to some degree, they were independent actors, who enjoyed a freedom to decide for themselves what constituted good medical advice. Indeed, they were subject to state law in giving advice—a sort of law that could be trumped by federal law, but not a mere federal contract. The Supreme Court, however, evidently concluded that the doctors were close enough to being mere agents that the restriction on their speech was constitutional. At the same time, the Court acknowledged that the problem would be more severe in academia, saying that “the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”<sup>102</sup> . . .

In short, a restriction that satisfies the First Amendment can be imposed directly or by condition, and the speech restrictions that

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<sup>101</sup> *Rust*, 500 U.S. 169.

<sup>102</sup> *Id.* at 200.

meet the Supreme Court's "germane" and "proportional" test are apt to satisfy some key First Amendment doctrines. What is constitutional as applied to government contractors, however, is not always constitutional as applied to their employees, and this is particularly clear as to faculty and students in academic institutions.<sup>103</sup>

*Government Employees.* —Another set of speech cases occurs when governments fire their employees for speaking out on controversial questions, whether matters of policy, politics, or religion. These cases tend to involve state restrictions barring state teachers, police officers, transit workers, or other employees from expressing their political or religious views on their own time.

Such cases often are explained in terms of consent—as if they were merely purchases of speech—but if private consent cannot enlarge government power, another explanation is necessary. In fact, these cases can be better understood in terms of whether the restrictions on speech abridge the freedom of speech and the press.

Largely through the influence of Law and Economics, all arrangements nowadays, including the duties imposed by government on its employees, tend to be viewed as contractual. At the outset, however, it should be recognized that most public employees traditionally were not understood to have contractual arrangements with government. Instead, it was said that they were public officers and that, on account of this status, the law imposed duties on them and provided compensation.<sup>104</sup> Although this traditional conception of public office is not necessary for the argument here about the irrelevance of consent, it is a useful reminder that there is nothing inherent or predetermined about the contractual analysis. Even in government employee cases, in which such analysis may seem especially apt, it may be equally reasonable to focus on another approach—on the lawfulness of the restrictions imposed on persons on the basis of their traits or status, including their status as public employees.

The poverty of consent as an explanation of conditions on government employees can be observed from the famous statement of

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<sup>103</sup> *Id.*

<sup>104</sup> See Frank J. Goodnow, *Selected Cases on the Law of Officers including Extraordinary Legal Remedies* 304 (1906); Bruce Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* 159–66 (1903).

Justice Holmes: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>105</sup> This *bon mot* is at least overstated, for there clearly are many conditions that a municipality cannot impose on policemen. In fact, as might be expected under traditional law, the municipal regulation in the case was a direct restriction, and it provided merely that “[n]o member of the department shall be allowed to solicit money . . . for any political purpose whatever.”<sup>106</sup> This restriction carried out an essential government interest, and it did not obviously go beyond a narrowly tailored response. Indeed, the Supreme Court has distinguished between political speech and mere gifts to political campaigns, and along such lines, it is not unreasonable to conclude that a bar on police solicitations does not abridge the freedom of speech. The case therefore does not show that consent justifies otherwise unconstitutional restrictions on government employees; on the contrary, it merely suggests that a bar on police solicitation does not abridge the freedom of speech.

Thus, once again, the talk about purchasing is a distraction. What really matters is whether a restriction on speech goes so far as to abridge the freedom of speech.

Along these lines, when the Court analyzes speech conditions in terms of whether they are germane and proportionate, it often is merely tracking its conventional analysis of direct restrictions on speech. The Court allows the government to pass a law directly limiting the speech of its employees where the restriction is supported by a compelling government interest and is narrowly tailored to this interest; and the Court similarly allows speech conditions where they are germane and proportionate. In these conditions cases, although the Court speaks of germane and proportionate conditions, it does not really depart from its analysis of direct speech restrictions in terms of government interests and narrow tailoring. Thus, regardless of whether the government acts directly or through conditions, it can bar teachers from discussing irrelevant matters in class. But it clearly cannot bar them from discussing politics on their own time, because this would not be

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<sup>105</sup> *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

<sup>106</sup> *Id.*

germane or proportionate—because (in terms of speech doctrine) this would not be supported by the government’s lawful interests and would not be narrowly tailored to such interests.

Of course, where the prohibition appears in a condition, there remains the question of whether it comes with constitutionally significant force. When the government imposes an overreaching speech condition that runs into the future—such as a requirement that teachers not discuss school board elections on their own time—the abridgement of the freedom of speech comes with the force of law.<sup>107</sup> Otherwise, the question of force is apt to rest on whether the condition is regulatory, which again is a contextual inquiry resting on germaneness and proportionality. If regulatory, such conditions have the relevant degree of force and therefore are unconstitutional.

*Snepp*. —A good example of a government employee case can be found in *Snepp v. United States*.<sup>108</sup> Snepp was a former CIA agent who published a book about his work with the government. He thereby violated a condition of his contract requiring him to get prior permission before publishing any such material, and the government therefore sued Snepp to recover his profits on his book. The Supreme Court upheld the verdict against him, and this has seemed puzzling. The explanation, however, is simple: The restriction on speech was constitutional and could have been imposed directly by law.

As already observed, many direct restrictions on speech are not abridgments of the freedom of speech, and this includes restrictions on a fiduciary’s disclosure of confidential information. As it happens, it is not conventional to explain government restrictions on information in terms of fiduciary duties. Such a theory, however, clearly underlies some of the relevant federal statutes, and it offers a very realistic and textured account of when the government can require information to be kept confidential.

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<sup>107</sup> See, e.g., *Perry v. Sinderman*, 408 U.S. 593 (1972) (holding that a college had to offer a hearing to an untenured professor fired for his opinions about the future of the college); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (holding that a school board could not fire a high school teacher for writing a letter critical of the board).

<sup>108</sup> 444 U.S. 507 (1980).

The classification of information serves to give notice of what information the government considers confidential. As a result, when anyone, while serving in a fiduciary capacity, as was true of Snepp, acquires access to what evidently is classified information, he assumes fiduciary duties to avoid disclosing such information. Moreover, where the law recognizes these duties, he can be subject to legal penalties for disclosure.<sup>109</sup> Accordingly, when such a person wishes to publish confidential information without being subject to legal sanctions, he needs to make a First Amendment argument that overrides his fiduciary duty, or he needs to get the government's authorization to publish. Snepp did neither.

Because the law can enforce the fiduciary duties of CIA officers without violating the First Amendment, the government can penalize breaches of such duties either by condition or directly by law. Thus, although the government sought to recover Snepp's profits on his book as a matter of contract, it also could have taken more severe measures against him under its statutes that directly bar the disclosure of confidential information by fiduciaries. This non-contractual option is particularly important because, although

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<sup>109</sup> For example, the federal statute on “[g]athering, transmitting or losing defense information” provides:

Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of its trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 793(f) (2006).

Even when focusing on executive officers, federal law draws on the concept of fiduciary duties. For example, the law restricts executive officers as to the information they acquire in the course of their duties:

Whoever, being an officer or employee of the United States . . . publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties . . . shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. §1905 (2006).



Snepp and other CIA officers typically become fiduciaries voluntarily by contract, drafted military officers become fiduciaries involuntarily by law.

Consent thus is utterly unnecessary to explain *Snepp* or the other cases involving speech conditions. Indeed, discussion of consent merely confuses the analysis and mistakenly suggests that the government can impose restrictions that the Constitution clearly forbids.

### *B. Property Conditions*

The best-known property conditions are those restricting land. In such cases, the question is whether the restrictions amount to unconstitutional takings of property.

A pair of cases has defined most discussion of the question. In *Nollan v. California Coastal Commission*, the Commission permitted the Nollans to replace a bungalow on their beachfront lot with a larger house, but only on the condition that they allow a public easement across their beach, thus connecting two public beaches that lay on either side of theirs.<sup>110</sup> In *Dolan v. City of Tigard*, the city approved Dolan's application to expand her store and pave her parking lot, but on the condition that she dedicate portions of her land for a public greenway and a pedestrian/bicycle path.<sup>111</sup>

Notwithstanding the hand-wringing over these cases, they need not be complex. Indeed, they are simpler than most cases discussed in this Article, for in both instances the landowners refused to consent and instead appealed the decisions of their local governments. The cases thus arose not as unconstitutional conditions, but simply as government demands for acquiescence in unconstitutional conditions.

In each case, the local government sought to take property for public use under threat of a denial of zoning. The question of force therefore rested on the decision of a government body backed by the force of law. For example, if Dolan or the Nollans had proceeded to build without allowing, respectively, the dedication or easement, they would have been subject to legal action. The gov-

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<sup>110</sup> 483 U.S. 825 (1987).

<sup>111</sup> 512 U.S. 374 (1994).

ernments in each case therefore clearly acted with the force of law, and the only remaining question was whether the demanded use of the property was of the sort or degree that constitutes a taking.

The question of whether the use in each case constituted a taking was complex, but it was no different from if the local government had simply seized the property. If the local government had imposed its easement on Dolan or the Nollans, even if it had done this as authorized by zoning regulations, there would be little doubt that it would be physically seizing part of a particular property and that this would constitute a taking. Accordingly, the takings questions should not have been distinctively difficult.

If Dolan or the Nollans had consented and then protested, the cases would be closer to the others considered here, but with no difference in outcome, for after consent, the conditions would have bound the landowners into the future, thus imposing legally enforceable duties on them not to bar the public from their property. The takings thus would have had just as much force of law as in the actual cases. With or without consent, these were takings.

In short, if the government lacks the power to take property, private consent is irrelevant. This conclusion already has been noted in an eighteenth-century takings decision—the *Symsbury Case*, discussed in Appendix A. The court there evidently held that consent could not cure the taking because the taking was beyond the government’s constitutional power. The same logic applies in the contemporary cases.

### C. Procedural Conditions

Procedural conditions that restrict constitutional rights are notoriously difficult to explain in terms of current unconstitutional conditions doctrine. Especially in criminal cases, such conditions seem to require an abandonment of the doctrine.<sup>112</sup> Under the analysis here, however, they are not so difficult to understand.

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<sup>112</sup> See, e.g., Epstein, *supra* note 2, at 10–11 (“It roams about constitutional law like Banquo’s ghost, invoked in some cases, but not in others”); Merrill, *Dolan*, *supra* note 2, at 860; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2118 (1998) (explaining plea bargaining by analogizing it to administrative proceedings).

These conditions often clearly restrict constitutionally protected rights, and the critical question therefore tends to be whether there is constitutionally significant government force. Where procedural conditions bind defendants into the future, they clearly are backed by the force of law. For example, consider a deal between the government and a defendant that limits his testimony not only in the current criminal proceeding but also in future criminal proceedings. If such a restriction deprives the defendant of his due process of law, and if the condition is legally binding and thus is backed by the force of law, it is unconstitutional. In contrast, if such a condition applies only in current legal proceedings, the government is not relying on the force of law to implement it, and the question therefore turns on the mere force by which the government induces consent.<sup>113</sup>

In this conceptual framework, it should be no surprise that plea bargains do not really commit defendants until they come into court. On account of the fact that these arrangements are negotiated prior to trial, they tend to be called “bargains” or “agreements,” but they become binding on the defendant only when he comes before the court to recite a formal waiver. The condition therefore is not so much a commitment into the future as an immediate sacrifice of liberty.<sup>114</sup>

Even after a court accepts a defendant’s waiver of rights—for example, his guilty plea—it still can deny the other side of the bargain, as when it imposes twenty years on a defendant who pled guilty in exchange for a prosecutorial recommendation of ten years. This confirms that the plea bargain or other arrangement is not a condition that binds into the future. Rather than bargain and

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<sup>113</sup> The conditions discussed here thus are different from that in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), in which the Supreme Court overturned a condition on the government’s funding of the Legal Services Corporation. The government funded the corporation on the condition that it not engage in representation involving an effort to amend or otherwise challenge the validity of existing welfare law. This was unconstitutional because, among other things, it “threatens severe impairment of the judicial function.” *Id.* at 546. It was, moreover, a condition running into the future, and it thus collaterally had the force of law.

<sup>114</sup> This is even more emphatically true of waivers or forfeitures of rights on the streets, before the defendant comes into court.

submit to a commitment before he gets to court, the defendant gives up his rights only when he gets to court.<sup>115</sup>

Of course, even when conditions do not bind into the future and thus lack the force of law at the implementation stage, and even when they are not regulatory, there always is the possibility that in one case or another they will have been induced by undue pressure or mere force. It therefore makes sense that courts accept waivers of procedural rights only where the waivers appear to be intelligent and voluntary—that is, without constitutionally significant force.<sup>116</sup> By understanding procedural conditions in this way, the courts already, in effect, are applying the analysis suggested here.<sup>117</sup>

In other words, plea bargains and other procedural conditions tend to be constitutional not because consent can cure an unconstitutional act, but rather because most procedural conditions do not carry into the future and are not regulatory. In these circumstances, there is no easily recognized indicia of constitutionally significant force. Such force, however, still may become apparent on closer examination, and a court therefore must make a factual inquiry about it by questioning the defendant.

Overall, the implications for conditions on speech, property, and procedure reveal a textured and consistent analysis. One could

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<sup>115</sup> This tends to be acknowledged in the agreements themselves, which usually recognize that prosecutors cannot promise any particular result, but rather can at best promise a particular recommendation to the judge. See Daniel C. Richman, *Cooperating Clients*, 56 *Ohio St. L.J.* 69, 72–73, 92, 94 (1995) (examining different types of agreements between prosecutors and defendants).

Court proceedings take place over time, and there consequently is a degree of fiction in describing plea bargains and other procedural conditions as immediate sacrifices of liberty. Instead, one might more accurately say that they are sacrifices of liberty at the commencement of the legal proceedings to which they apply. Once, however, one takes into account the extended chronology of legal proceedings, it becomes apparent that courts treat plea bargains and other procedural conditions as much like immediate sacrifices of liberty as practicable.

<sup>116</sup> *Boykin v. Alabama*, 395 U.S. 238 (1969) (requiring guilty pleas to be intelligent and voluntary).

<sup>117</sup> According to Merrill, “When we examine the full run of decided cases, we discover a fairly robust version of the doctrine in connection with First Amendment rights and certain separation of powers controversies; a much weaker version prevails with respect to . . . criminal procedural rights.” Merrill, *Dolan*, *supra* note 2, at 860. Indeed, the waiver and forfeiture of procedural rights by criminal defendants tends to be discussed without even reference to the doctrine of unconstitutional conditions.

trace the implications for other sorts of conditions.<sup>118</sup> The conditions examined thus far, however, should suffice to suggest how the analysis sorts out the cases. Whatever the subject matter of the condition, the government cannot rely on consent to evade its constitutional limits—most concretely, the rights and structures that confine the government’s powers. At the same time, the government remains free to impose restrictions that do not violate its limits. One way or the other, the analysis of unconstitutional conditions comes to rest not on consent, but on whether the restrictions are unconstitutional, including whether they come with constitutionally significant force.

#### CONCLUSION

The prevailing confusion about unconstitutional conditions arises from confusion about the role of consent. Such confusion, however, is unnecessary. Although the government, under its constitutional powers, can use consent to obtain conditions, the consent cannot save restrictions that go beyond the government’s power. Private or state consent cannot enlarge federal power.

*Consent, Delegation, & Force.* —The risk of confusion arises generally as to consent and in more specific ways as to delegation and force. In each strand of the problem, confusion can be avoided simply by distinguishing between what consent can accomplish and what it cannot.

Most broadly, consent is no cure. To be sure, consent can be a mechanism of lawful government power, but when conditions go beyond such power, can consent justify the unconstitutionality? Although the government often has authority under its powers to seek consent to conditions, the consent cannot relieve the government of the boundaries of such powers. Nor can it relieve the government of the limits that cut back on such powers, whether the limits arise from rights (such as the freedom of speech and the

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<sup>118</sup> Consider, for example, government searches. If consent is no cure for a government violation of a constitutional right, then it cannot explain the constitutionality of government searches of persons entering or traveling on trains, planes, and other common carriers. Instead, the explanation is that reasonable searches of such persons are lawful regardless of their consent.

press) or from structures (such as the separation of powers and the principles of federalism). It often is assumed that at least individual rights can be sacrificed by individual consent, but rights and other limits on the enumerated powers are legal limits on the government enacted by the people of the United States. Accordingly, when the government violates such limits, the consent cannot avoid the unconstitutionality.

Similarly, delegation is no cure. The federal government frequently uses conditions to get states and private institutions to impose restrictions that violate constitutional rights and structures. Because this delegation is done by consent, it is widely assumed that the federal government thereby escapes its constitutional duties. Delegation, however, does not allow a principal to avoid its duties; nor does it excuse an agent that violates its own duties. Evidently, therefore, neither the federal government nor any state or private institution can rely on the delegation to escape its constitutional or other legal limits.

Last but not least, although conditions are not, by themselves, legally obligatory or enforceable, they often come with government force. It may seem odd to suggest that conditions obtained by consent are subject to force, but it has been seen that the consent and the force are different questions. The government always seeks consent for its conditions, but the consent often is induced by means of pressures that amount to constitutionally significant force. At the implementation stage, moreover, the conditions often are backed by the force of law.

It thus should be apparent that unconstitutional conditions are not as formidable a problem as is assumed. In fact, for the conditions that violate the Constitution's limits on government powers—that violate the Constitution's rights or its structural limits on the powers—there is not really a distinct problem of unconstitutional conditions. Instead, there merely is the familiar problem of unconstitutional government action, including the question of force.

Ultimately, the defense of unconstitutional conditions leads to a disturbing question about government power: Is it valuable for the government to have a power to go beyond its constitutional limits? It would be audacious enough to conclude that the government occasionally must go beyond its bounds during severe emergencies.

But the claim for unconstitutional conditions goes further. It suggests that violations of the Constitution—especially violations of the rights and structural limits on government powers—are so continuously and predictably valuable that the Supreme Court must authorize the government regularly to evade these constraints. This obviously is not credible. If the Constitution is not merely to empower government, but also to limit it, consent cannot be understood to authorize government to do what the Constitution forbids.

*More Generally Unlawful Conditions.* —Although this Article has focused on the conventional unconstitutional conditions problem—that is, on the federal government’s violation of its constitutional duties—the analysis here also has implications for some adjacent problems, one of which concerns the conditions that, although not unconstitutional, are nonetheless unlawful in a more mundane way. It has been argued here that private or state consent cannot relieve the federal government of the constitutional limits imposed by the people. Similarly, such consent cannot relieve the government of other, non-constitutional legal limits, such as those in statutes.

Statutory limits are limits of law. Therefore, even if individuals, institutions, or states relinquish their rights under these laws, they cannot thereby give the federal government any power that is barred to it by such laws. For example, if a statute allows executive officials to restrict recipients of grants only in accord with procedures dictated by the statute or a regulation, then the consent of the recipients cannot give the officials a power to impose restrictions in another manner. Regardless of the type of law, contract does not trump law.

*States & Private Institutions in Violation of Their Own Legal Duties.* —Alongside the question of conditions is the much simpler problem that arises when states and private institutions directly violate their own legal duties at the request of the federal government. The classic unconstitutional conditions problem looks from the top down, to discern whether the federal government has violated its duties under federal law. Another problem can be observed, however, when one looks from the bottom up, to see if delegated states and private institutions have directly violated their own duties—under either state or federal law.

This vantage point is particularly fruitful when federal conditions ask states to act unlawfully, for states are subject to a wide array of legal limitations. These range from the Fourteenth Amendment (including the incorporated Bill of Rights) to 42 U.S.C. §1983 and various state constitutions and statutes.

Obviously, when states violate their own legal duties, there are none of the complications traditionally, even if mistakenly, associated with unconstitutional conditions. On the contrary, there is merely the straightforward problem of state violations of law, for which a federal request is no excuse.

Put another way, if federal conditions do not satisfy the Supremacy Clause, they cannot trump state law. The result is a constitutional double bind. For example, if a federal condition requiring state licensing of speech is a federal law for purposes of the Supremacy Clause, then the federal government is directly violating the First Amendment; and if the condition is not a federal law for purposes of the Supremacy Clause, then a state that complies is directly violating its own bill of rights, the Fourteenth Amendment, and Section 1983.

Last but not least, this sort of problem extends beyond federal conditions, to include federal statutes and regulations that directly require states to violate their duties under the federal constitution. For example, when the federal government, in the HIPAA Privacy Rule, requires institutions, including state institutions, to license the transfer or other publication of information, it is requiring the states to license speech and the press in violation of the incorporated Bill of Rights. Undoubtedly, a federal statute trumps state law, but it cannot relieve the states of their duties under the federal constitution.<sup>119</sup>

*Free Speech.* —Another of the adjacent problems is the obsolescence of most contemporary scholarship and teaching about freedom of speech. Contemporary scholarship and teaching focuses on the dangers familiar from early and mid-twentieth century—notably, the retail dangers of prosecutions, injunctions, and libel actions. By now, however, in the early twenty-first century, the

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<sup>119</sup> The danger that delegated institutions and states will end up directly violating their own legal duties is elaborated in Appendix C.



leading threats to freedom of speech have changed. These days, the most serious dangers come from delegated unconstitutional conditions and other wholesale threats, and free speech doctrine needs to catch up with this reality.

Whereas eighteenth-century law on freedom of speech and press focused on licensing of the press, early twentieth century law recognized that there were new dangers that required a further elaboration of what was unconstitutional. Yet just as the problems of the early twentieth century—the threats of prosecutions, injunctions, and libel actions—seemed to extend beyond the problems of the eighteenth century, so too the problems of the early twenty-first century reach beyond those of the prior century. Times have changed, and as result of the shifting circumstances, it is the “modern” doctrine that now looks obsolete.

Indeed, whereas a narrow attention to licensing as the only measure of speech freedoms once seemed rather rigid, it is now a narrow attachment to the doctrines on prosecutions, injunctions, and libel actions that seems thin and brittle. The battleground over freedom of speech and the press has shifted from the courts to the administrative agencies and the institutions they control through conditions.<sup>120</sup> It therefore is ironic that the doctrine of the twentieth century is celebrated as flexible and up-to-date.<sup>121</sup> Perhaps it once was. But that was then, and now the “modern” doctrine needs to be supplemented with a recognition of current realities. Fortunately, all that is required to address the danger from conditions is to recognize that conditions beyond the government’s authority are unlawful, regardless of consent.

*Government by Contract.* —The most serious adjacent problem is the growth of government by contract. This is most immediately dangerous because it allows the government to evade all sorts of particular constitutional limits, such as the First Amendment. The perils, however, run deeper.

Government by contract departs from the ideal of rule by law. This ideal runs from at least the time of Aristotle, through the

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<sup>120</sup> Another instrument of control has been the “guidance” and other under-the-table pressures made possible by the regulatory and contractual regime.

<sup>121</sup> See, e.g., Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 *Pepp. L. Rev.* 273 (2009).

growth of the common law system, up to today. A key stage in this development was the elaboration of ideals of constitutional law in seventeenth-century England, for by this means the Crown was limited from governing through irregular methods and was largely confined to ruling through the regular lawmaking process.<sup>122</sup> As John Locke famously explained at the end of the century, “The *Legislative*, or Supreme Authority . . . is bound to dispense Justice, and decide the Rights of the Subject by promulgated standing Laws.”<sup>123</sup> On this assumption, the U.S. Constitution similarly placed all legislative powers in Congress and established how it can enact laws.<sup>124</sup> As it happens, the breadth of such powers is sweeping, and the federal government therefore has ample constitutional opportunities to restrict freedom. Nonetheless, the government increasingly restricts freedom not through the regular mechanisms for making law, but by contract. Although this is worrisome enough because it enables evasion of particular constitutional rights, it more generally is troubling because it departs from the ideal of rule by law.

This irregular mode of government is dangerous in many ways that run deeper than constitutional law. As has been seen, it allows government to place extra restrictions, even unconstitutional restrictions, on vulnerable parts of the population. In addition, it allows government to legislate in a hidden manner, known to those affected but not others. As a result of both the unequal and the hidden character of such regulation, those who are oppressed have difficulty identifying the breadth of the threat. They feel they stand alone, and they have difficulty forming the legal and political alliances that might allow them to resist the oppression.

Even more profoundly, government by contract is incompatible with the equality and freedom of modernized society. The United States is the exemplar of such a society, in which individuals come from diverse backgrounds and are highly individuated. In traditional societies, such circumstances are not typical, and where they exist, they stand in the way of cooperation, for different communi-

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<sup>122</sup> Hamburger, *supra* note 53, at 70–100.

<sup>123</sup> John Locke, *Two Treatises of Government* 358 (Peter Laslett ed., Cambridge Univ. Press 1988).

<sup>124</sup> U.S. Const. art. I, §§ 1, 7.

ties tend to seek unequal privileges for themselves rather than a common freedom. In a modernized society such as the United States, however, diversity and individuation are prevalent. Nonetheless, individuals in the society can successfully deal with one another across their communal and psychological divisions by relying on the laws, under which they can have at least some hope for unity in their shared freedom. Rule by law, especially equal law, thus is essential for the unity and freedom of American society, for it allows individuals to cohere around their liberty. In contrast, rule by contract threatens to deprive the nation of the common legal foundation on which all can rely and on which all can place their hopes. Put another way, to rule by contract, and thus to divide and conquer, is to deprive Americans of the sociological benefits of rule by law.

Perhaps most dangerously, the government's use of conditions to control states and private institutions, and all persons associated with them, increasingly blurs the distinction between society and government. The underlying danger is that this blurring of lines diminishes the extent to which Americans can make their own choices. This becomes particularly important when the conditions dictate what Americans can read, write, and publish. The peril is that government increasingly can buy its way into the mental processes of the public. Unconstitutional conditions thus are dangerous not merely on account of their unconstitutionality, but more broadly as threats to the independence of the society—indeed, the people—in exploring ideas and making decisions in a manner not manipulated by government.

Ultimately, conditions are part of an ongoing shift in the organization of society—in particular, a shift in modes of dependence. The populace of medieval Europe consisted largely of serfs, who were tied to the land and thus dependent on it. The populace of modern societies has escaped such dependence by substituting money relationships, particularly employment. Although this reliance on money and employment cuts through the old form of servitude, it also carries its own risks of dependence—not really Marx's "wage slavery," but nonetheless an impoverishing reliance on money and employment. In this context, government benefits lead toward a further shift in social arrangements. They offer a sort of

liberation from the market, but not without another sort of dependence—that which binds variegated states, institutions, and individuals to a single government, systematically undermining their diversity and independence, and subjecting them to all the perils of an increasingly dominant centralized power.

The solutions probably will have to be as complex as the problem and surely cannot consist merely of law. Nonetheless, the law matters, and an essential first step will be to recognize that the government cannot rely on conditions to escape its constitutional limitations. Consent is no cure.

## APPENDICES

*Appendix A: The Symsbury Case*

An early illustration of the argument in Part III, that consent cannot enlarge government's constitutional power, can be found in the *Symsbury Case*—a 1785 decision from Connecticut. The case could be relied upon to show how the question was understood at the time of the founding, but it is more substantively valuable to illuminate the conceptual point, that consent cannot cure the invasion of a constitutional right—that consent is in this sense irrelevant.

The case concerned property rights, and one might think this is the precisely the sort of right that an individual or corporation could bargain away. Property is merely a private right, and a private individual or corporation can give up its particular property rights, even if not its right to property in general. Accordingly, the question would seem to center on consent: Why shouldn't an individual or corporation be able to relinquish its property to government? But if rights are exceptions to government power and thus limits on government, then the focus must be on an entirely different question: Whether consent is relevant to justify the government in going beyond its constitutional authority.

The Connecticut decision arose from a boundary dispute between the towns of Symsbury and Windsor. The disputed land lay within a 1670 grant from the General Assembly to the proprietors of Symsbury. It also, however, was within a 1686 grant from the Assembly to the proprietors of Hartford and Windsor. The Assembly had attempted in 1727 to resolve the boundary conflict between Symsbury and Windsor by commissioning a survey, which left title to the disputed border area in the town of Windsor and those who held from it.<sup>125</sup> The next year, the Assembly even adopted this survey in an enactment—thus giving it the force of

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<sup>125</sup> *Symsbury Case*, 1 Kirby 444, 445–46 (Sup. Ct. 1785).

law.<sup>126</sup> Windsor's legislative victory, however, was precarious, for it had been the second grantee. Indeed, decades later, in 1781, Jonathan Humphrey and the other proprietors of Symsbury initiated litigation against the unfortunate Thomas Bidwell, who held land in the disputed area under the Windsor grant—the effect of the litigation being to challenge that grant and the 1728 statute sustaining it.<sup>127</sup> The case thus concerned the power of the legislature (whether acting judicially or legislatively) to take property from the proprietors of one town and give it to the proprietors of another.

Although the case occurred after Independence, it turned on the English constitution, for this was the constitution that had been applicable at the time of the taking. This constitution supposedly had been enacted by the English in the ancient mists of time, and some of its requirements therefore could seem elusive. It was well-established in English law, however, that neither the Crown nor any local legislative body acting under it could constitutionally take property from one person and give it to another.<sup>128</sup>

The case is interesting not because of the mundane point about an unconstitutional taking, but because it provoked debate about the relevance of consent. In opposition to the defendant's reliance on the survey and the 1728 statute, Symsbury pled that it had "Never . . . Had any Distinct Meeting, Resting and Acquiescing in the Affixing of Said Lines" by the surveyors, which was as much as to say that Symsbury had not formally consented to the redrawing of the boundary.<sup>129</sup> When the defendant answered in bar that "the Proprietors of . . . Symsbury have Ever Acquiesced in the Line"—meaning that there had been informal consent—Symsbury's lawyers shifted their argument, now asserting that the question was

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<sup>126</sup> The act of the Assembly consisted of its approval of a surveyor's report. An Act for Enlarging the County of Fairfield (Oct. 1728), Public Records of the Colony of Connecticut 214–215 (1873).

<sup>127</sup> For the reported case, see 1 Kirby 444. For its commencement in 1781, see copy of pleadings in the Superior Court, in Supreme Court file on defendant's appeal, *Thomas Bidwell v. Jonathan Humphrey, &c.* (Supreme Court of Errors Oct. 1785; decided May 27, 1786), file, cover page, page 2, Connecticut State Archives, Supreme Court of Errors, Files.

<sup>128</sup> Hamburger, *supra* note 53, at 194.

<sup>129</sup> Copy of pleadings, *supra* note 127, at 27.

one of constitutional power, as to which the town's acquiescence or consent was irrelevant.<sup>130</sup> They explained that because of the Assembly's instructions to the surveyors, and because of the consequent survey, Symsbury's "Original Grant By the General Assembly" and "their Deed & patten are Greatly Altered Infringed Reduced & Curtailed[,] Which was Not in the power of the General Assembly Constitutionally to Do," and "thereupon the Pla[i]ntiffs Say that they Ought not to be barred . . . Without that [i.e., notwithstanding that] . . . the Proprietors of . . . Symsbury have Ever Acquiesced in the Line . . . as the Defendant in his plea in Barr has Alledged."<sup>131</sup> On these pleadings, the judges of the Superior Court (including, incidentally, Oliver Ellsworth) held that the Assembly's act "could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury . . . being prior to the grant made to the towns of Hartford and Windsor."<sup>132</sup>

It is a revealing decision. Even when the legislature transferred property rights, consent was irrelevant to the question of its constitutional power. Evidently, already under the English constitution, at least as understood in America, a legislature could not escape its constitutional limits by getting consent from the corporation or individuals deprived of their property.<sup>133</sup>

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<sup>130</sup> Id. at 43.

<sup>131</sup> Id.

<sup>132</sup> 1 Kirby at 447.

<sup>133</sup> In contrast, in his dissenting opinion in a companion case between the same parties, Governor Huntington only conceded, "I think it ought to be admitted in the case before us, that the proprietors of Symsbury could not have their grant taken from them, or curtailed, even by the General Assembly, without their consent." Id. at 452.

*Appendix B: Reverse Liability*

The point in Part IV about delegation, that a principal violates her own legal duties when she delegates forbidden acts to agents, stands in contrast to another rule, which works in reverse, holding a principal vicariously liable for her agent's violation of his legal duties. This reverse liability is so familiar from tort and criminal law that it may be thought to suggest that the federal government does not violate its own legal duties when it delegates unlawful acts to others. In fact, however, the reverse liability is applicable only in some situations, which do not include constitutional law, and it therefore does not call the argument here into question. Indeed, it confirms that when the federal government delegates unconstitutional acts, it violates its own constitutional duties.

When does either the direct or reverse analysis prevail? The choice between the two seems to rest on whether the relevant law more centrally focuses on harmful acts or potentially harmful persons. This distinction could be drawn too sharply, but it is suggestive, especially when one contrasts constitutional law to tort and criminal law.

Tort and criminal law focus on harmful acts rather than potentially harmful persons. These areas of law therefore work from the harmful act or injury: They begin with the person who most immediately did the act, and then move back to the person who sought it. In this retrospective inquiry, looking back in time from the injury, the person who did the harmful act is considered the primary actor, leaving the instigator to be held responsible in a secondary or vicarious way—in criminal law as an accessory, or for solicitation; in tort law as the principal under the doctrine of respondeat superior.<sup>134</sup>

In contrast, constitutional law concerns not so much harmful acts as a potentially harmful actor. When a constitution gives power to government, it creates an entity that is dangerously powerful, and therefore, unlike tort and criminal law, a constitution does not generally limit harmful acts, but rather the entity that might do

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<sup>134</sup> On account of the prominence of this reverse analysis in tort and criminal law, there has been insufficient attention to the more direct analysis.



harm. For example, the U.S. Constitution does not generally forbid inequality, but only some government-imposed inequalities. Similarly, the Constitution does not bar all licensing of speech or the press. On the contrary, the Constitution leaves room for owners of copyrighted material or proprietary information to license its use, and merely bars another sort of licensing, in which the government requires licensing of what does not belong to it.<sup>135</sup> Evidently, rather than generally limit dangerous acts, the Constitution limits only the danger arising from the government's power.

On account of this focus on the government's dangerous power, it is not possible in constitutional law to work in reverse from a dangerous act, as one would when determining liability in tort or criminal law. Instead, one must begin with the government's violation of its own legal limits—most prominently, with its violation of the Constitution's limits on its potentially dangerous power. Then, if one wishes, one can move forward from the government's violation of its own limits to the secondary violations by the entities the government engages to assist it.

The inapplicability of the reverse analysis is especially clear when the federal government delegates acts that are unconstitutional for it to do, but not for the cooperating entities. For example, when a private university, in response to a consensual arrangement with the federal government, imposes licensing of speech and the press, the university cannot be said to have violated the First Amendment. In such a case, it is not possible to work in reverse from a generally prohibited act to the entity that carried it out, and then back to the federal government. Nor should this inapplicability of the reverse analysis be a surprise. Although such analysis makes sense in areas of law that prototypically forbid dangerous acts, it is largely irrelevant for constitutional law and other

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<sup>135</sup> Of course, if proprietary information were understood too broadly, it could become the basis for prohibited government licensing, but that is another question. Along similar lines, the regulation of human-subjects research deliberately uses an expansive notion of "private" information to create a prohibited licensing system. See *supra* note 29.

areas of law that prototypically limit potentially dangerous persons, such as governments.<sup>136</sup>

Thus, notwithstanding the prominence of the reverse analysis in tort and criminal law, it is beside the point in constitutional law. This sort of law limits the dangerous power of government rather than dangerous acts, and therefore when the federal government delegates its dirty work to other persons, the question for the federal government is not whether it has unconstitutionally violated their duties, but whether it has violated its own duties. And this brings the inquiry back to the larger point about *qui facit*, that the federal government cannot evade its constitutional limits by getting someone else to act on its behalf.

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<sup>136</sup> The situation of the federal government under constitutional law can be compared to a corporate insider or government official, Fred, who cannot lawfully trade in the stock of a particular corporation. If he hires Stacey to purchase the stock for him, does this delegation enable him to avoid violating the law? Stacey may be neither a corporate insider nor a restricted government official, and she thus may be under no special legal limitations in purchasing the stock. Moreover, she may have no reason to know of Fred's insider or otherwise confined status. Fred, however, is contracting to have Stacey do what Fred is barred from doing, and his delegation of the prohibited conduct does not save him.

*Appendix C: Delegation No Cure for Violations of Law by States and Private Institutions*

Adjacent to the argument in Part IV, about the effect of delegation on the federal government, is another question about the effect of delegation on states and private institutions. As evident from Part IV, delegation cannot cure the federal government's violation of its own constitutional duties, but can it excuse states and private institutions when it leads them to violate their own legal limits?

This is not an unconstitutional conditions problem, because although the federal government delegates the unconstitutional restrictions by condition, the states and private institutions impose the restrictions directly. Indeed, this is the reverse of an unconstitutional conditions problem, for rather than concern whether a principal avoids its duties by using conditions to act through agents, this problem concerns whether these agents avoid their direct violation of their own duties because they have been delegated by their principal. The answer is obvious: Just as federal violations of law cannot be cured by state and private consent, so too state and private violations cannot be cured by federal consent.

*By Condition.* —Even when the federal government uses conditions to delegate unconstitutional restrictions, there is nothing complicated about the violation of law by cooperating bodies. If they violate their own legal duties, the federal condition or other request cannot save them.

At the very least, this can be a problem for private institutions. If they are barred by civil rights laws from conspiring to violate the constitutional rights of individuals, does it help or hurt them that they are complying with requests from the federal government to implement its violations of the U.S. Constitution?<sup>137</sup> More typically,

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<sup>137</sup> For a potentially relevant federal civil rights statute, see 18 U.S.C. § 241 (2006), Conspiracy Against Rights, which makes it unlawful for “two or more persons to conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the laws of the United States, or because of his having exercised the same.” *Id.* Note also 18 U.S.C. § 242 (2006), Deprivation of Rights Under Color of Law, which makes it a crime for any person acting “under color of any law, statute,

the problem concerns the states. Does a state government rise above its state constitution, above the restrictions on the states in the U.S. Constitution, or above state and federal civil rights statutes, merely because it acts in accord with a request from the federal government? How can a consensual arrangement with the federal government relieve a state, let alone a private institution, of its obligation to adhere to state and federal law?

The consensual delegation of unconstitutional restrictions thus is a double-edged sword. If restrictions in federal conditions have the force of law, they clearly are subject to the Bill of Rights and the rest of the Constitution. On behalf of the restrictions, however, it is emphasized that they are merely consensual. The suggestion is that, because the restrictions in federal conditions are consensual, they lack the force of law and therefore are not barred by the federal constitution. Yet if a restriction in a federal condition lacks the force of law, it cannot trump state constitutions or state or federal civil rights laws, and regardless, it cannot trump the incorporated Bill of Rights. Accordingly, when the federal government persuades state universities to license speech and publication, their consensual arrangement with the federal government is of no avail. These state institutions are directly in violation of the federal constitution, their state constitutions, and various civil rights laws, including 42 U.S.C. §1983. Consequently, even if it were true that consent could cure unconstitutional conditions, the consensual character of federal conditions cuts two ways.

Put another way, if conditions are merely consensual arrangements for purposes of constitutional limits on the federal government, they are also merely consensual arrangements for purposes of the Supremacy Clause. The federal government cannot have its cake and eat it. Or, if you prefer savory dishes, what is sauce for the federal goose is sauce for the state gander.

The results are inescapable. Already when the federal government secures consent to conditions that require states or private institutions to violate their own legal duties, the conditions are void.

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ordinance, regulation, or custom” to “willfully subject[] any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” *Id.*

Later, if the states or private institutions comply with such conditions, they will have acted unconstitutionally.

*By Force of Law.*—The federal government obtains the cooperation of states, however, not only by condition but also often directly by force of federal statutes, and it therefore is important to note that even the direct force of a federal statute cannot excuse a state from its violation of the federal Constitution. Like other instances in which states and private institutions violate their own legal duties, this is not a matter of unconstitutional conditions; rather, it is another illustration of the adjacent problem of federally-induced violations of law by other bodies—the general point being that the other bodies cannot be excused from their own legal limits, except by a federal law of higher obligation.

For example, even if a federal statute were forthrightly to require state and private institutions to license speech and the press, the state institutions would remain bound by the First Amendment as incorporated by the Fourteenth Amendment. As a result, state institutions that complied with the federal statute would be violating the Fourteenth Amendment and would be liable for damages under 42 U.S.C. §1983. In the words of the Supreme Court, “Congress cannot, by authorization or ratification, give the slightest effect to a State law or constitution in conflict with the Constitution of the United States.”<sup>138</sup>

Far from being merely hypothetical, this sort of problem is all too real, as can be illustrated by the HIPAA Privacy Rule.<sup>139</sup> This federal rule requires various medical institutions, including state institutions, to impose licensing on the transfer of all sorts of information, ranging from medical records to research data. Of course, patients have an interest in the privacy of their medical records, but surely the unconstitutional licensing of speech and the press is not only way to address this problem. It therefore is difficult to avoid the conclusion that, when state institutions comply

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<sup>138</sup> *Gunn v. Barry*, 82 U.S. (15 Wall.) 610, 623 (1872) (holding that homestead exemption in Georgia constitution approved by Congress impaired the obligation of contract).

<sup>139</sup> For the “Privacy Rule,” see 45 C.F.R. §§ 160, 164, promulgated under the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 2021–31 (1996).

with the federal rule, they directly violate their own constitutional duties, most notably their duties under the Fourteenth Amendment's incorporation of the Bill of Rights. Even the direct obligation of a federal statute or regulation cannot excuse a state from its federal constitutional duties.

Thus, the most immediate weak point in the current regime of unconstitutional conditions is not at the federal level, but at the state and private level. The federal government's violation of its legal duties is the complex problem that usually gets analyzed in terms of "unconstitutional conditions." But quite apart from that problem, there is the utterly simple and inescapable reality that the cooperating states and private institutions have their own legal duties.

Federal conditions cannot relieve states and private institutions of their legal duties, and even the direct requirements of federal statutes cannot relieve the states of their federal constitutional duties. Accordingly, though it is clear that the federal government remains bound by its legal duties notwithstanding any delegation, it also is clear that states and private institutions remain bound by their legal duties, unless the federal government binds them with a federal act of higher obligation.