Doctrine of Unconstitutional Conditions in the USA

Keywords

Abood, agree, benefit, benefits, cases, condition, conditions, conditional, consent, constitution, constitutional, constitutionally, court, doctrine, Elrod, employee, employees, employment, exercise, federal, freedom, government, liberty, McAuliffe, Perry, policeman, privilege, public, Randall, right, rights, Sindermann, speech, Speiser, state, surrender, unconstitutional, U.S., U.S.A., waive, waiver, waiving

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1. Introduction

In my work on constitutional law in the USA, one issue has repeatedly arisen:

> Can the federal government, or a state government, in the USA require someone to surrender a constitutional right, as a condition of receiving some benefit (e.g., employment, contract, grant of money, right, privilege, lesser penalty, etc.) from the government?

The general answer is "no", according to the doctrine of unconstitutional conditions. This essay quotes extensively from U.S. Supreme Court cases that consider this issue.

I first encountered this issue in the context of a professor at a state college whose employment was terminated because the professor criticized either the government or college administration (i.e., an apparently violation of the professor's First Amendment right to freedom of speech). See my essay at http://www.rbs2.com/afree2.htm .

I considered this issue again in 1999, when I wrote an essay, *Heckler's Veto* at http://www.rbs2.com/heckler.htm about attempts by government to charge unpopular speakers with the cost of law enforcement to maintain order (i.e., to prevent a riot) at their speech.

My essay, *US Government Restrictions on Scientific Publications,* http://www.rbs2.com/OFAC.pdf considers restrictions on freedom of speech of scientists and engineers who work on either military weapons or nuclear physics, including prior restraint of publication of government secrets.

The issue arose again for me in December 2004, when I wrote an essay on the law of searches of airline passengers in the USA, specifically considering whether the government could make some benefit (e.g., permitting travel on an airline) conditional on surrender of a constitutional right (e.g., agreeing to a to a search that arguably violated the Fourth Amendment to the U.S. Constitution). See my essay at http://www.rbs2.com/travel.pdf .

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

2. Recognition of The Doctrine

The doctrine of unconstitutional conditions can be traced back to *Home Ins. Co. of New York v. Morse,* 87 U.S. 445, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights."). The first mention of the phrase "unconstitutional conditions" by the U.S. Supreme Court occurred in *Doyle v. Continental Ins. Co.,* 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.").

Frost v. Railroad Commission

In 1925, the U.S. Supreme Court considered whether the state of California could deny the use of public highways to a private company that had a contract for the transportation of citrus fruit, unless the private company was licensed as a common carrier. The Court held that California could not impose such conditions on the private company.

> There is involved in the inquiry not a single power, but two distinct powers. One of these, the power to prohibit the use of the public highways in proper cases, the state possesses; and the other, the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool — an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.
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> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Frost v. Railroad Commission, 271 U.S. 583, 593-594 (1925).

Almost five years after *Frost,* the U.S. Supreme Court repeated the doctrine:

> There are many decisions to this effect; but we need cite only *Frost & Frost Trucking Co. v. R. R. Comm.,* 271 U. S. 583, 593-599, 46 S. Ct. 605, 70 L. Ed. 1101, 47 A. L. R. 457, and *Hanover Ins. Co. v. Harding,* 272 U. S. 494, 507, 508, 47 S. Ct. 179, 71 L. Ed. 372, 49 A. L. R. 713 where the cases are collected and reviewed. The decisions rest upon a principle, which 'is broader than the applications thus far made of it,' *Frost Trucking Co. v. R. R. Com.,* supra, at page 598 of 271 U. S., 46 S. Ct. 605, 609. Broadly stated, the rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution. *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, 47, 48, 30 S. Ct. 190, 54 L. Ed. 355; *Western Union Tel. Co. v. Foster,* 247 U. S. 105, 114, 38 S. Ct. 438, 62 L. Ed. 1006, 1 A. L. R. 1278.

U.S. v. Chicago, M., St. P. & P. Railway Co., 282 U.S. 311, 328-329 (1931).

Speiser v. Randall

A 1958 case at the U.S. Supreme Court was the beginning of the modern era of the doctrine of unconstitutional conditions. This case involved an exemption from property tax in California for veterans of World War II. In 1954, California modified the annual exemption form to require veterans to declare under oath that:

> I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities.

Speiser, an honorably discharged veteran of World War II, sued the state of California, arguing that the oath violated his First Amendment rights. The U.S. Supreme Court agreed with Speiser, and further recognized that California was requiring a waiver of a constitutional right as a condition of receiving a benefit (i.e., the property tax exemption). California also argued that overthrowing a government by force or violence is a crime. However, the U.S. Supreme Court rejected that argument, because the state alone has the burden of proving guilt of a crime, while in this case California required its citizens to swear that they were not engaging in prohibited speech.

> The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis v. United States,* supra, [341 U.S. 494] provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of

escape from constitutional restrictions." *Bailey v. State of Alabama,* 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191.

Speiser v. Randall, 357 U.S. 513, 526 (1958).

The most famous part of this paragraph is the Court's remark that the unconstitutional condition allowed the state of California to "produce a result which the State could not command directly."

Sherbert v. Verner

In a 1963 case about the availability of unemployment benefits, the U.S. Supreme Court held that the state could not deny benefits to a person who refused to work on Saturday. the Sabbath day of her religion, because of the First Amendment protection for her religious beliefs:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.
>
> Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. [FN6] *American Communications Ass'n v. Douds,* 339 U.S. 382, 390, 70 S.Ct. 674, 679, 94 L.Ed. 925; *Wieman v. Updegraff,* 344 U.S. 183, 191-192, 73 S.Ct. 215, 218-219, 97 L.Ed. 216; *Hannegan v. Esquire, Inc.,* 327 U.S. 146, 155-156, 66 S.Ct. 456, 461, 90 L.Ed. 586. For example, in *Flemming v. Nestor,* 363 U.S. 603, 611, 80 S.Ct. 1367, 1373, 4 L.Ed.2d 1435, the Court recognized with respect to Federal Social Security benefits that '(t)he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause.' In *Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly.' 357 U.S., at 526, 78 S.Ct., at 1342. 'To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.' *Id.,* 357 U.S., at 518, 78 S.Ct., at 1338. Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.
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> FN6. See for examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity, *Steinberg v. United States,* 163 F.Supp. 590, 143 Ct.Cl. 1; *Syrek v. California Unemployment Ins. Board,* 54 Cal.2d 519, 7 Cal.Rptr. 97, 354 P.2d 625; *Fino v. Maryland Employment Security Board,* 218 Md. 504, 147 A.2d 738; *Chicago Housing Authority v. Blackman,* 4 Ill.2d 319, 122 N.E.2d 522; *Housing Authority of Los Angeles v. Cordova,* 130 Cal.App.2d Supp. 883, 279 P.2d 215; *Lawson v.*

> *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N.W.2d 605; *Danskin v. San Diego Unified School District,* 28 Cal.2d 536, 171 P.2d 885; *American Civil Liberties Union v. Board of Education,* 55 Cal.2d 167, 10 Cal.Rptr. 647, 359 P.2d 45; cf. *City of Baltimore v. A. S. Abell Co.,* 218 Md. 273, 145 A.2d 111. See also Willcox, Invasions of the First Amendment Through Conditioned Public Spending, 41 Cornell L.Q. 12 (1955); Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 942-943 (1963); 36 N.Y.U.L.Rev. 1052 (1961); 9 Kan.L.Rev. 346 (1961); Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595, 1599-1602 (1960).

Sherbert v. Verner, 374 U.S. 398, 404-406 (1963).

Sherbert v. Verner is particularly significant because there the Court first rejected the argument that the characterization of benefits as a privilege vs. a right was appropriate for an inquiry into unconstitutional conditions. *Ibid.* at 404-405. See *Graham v. Richardson,* 403 U.S. 365, 374 (1971); *Elrod v. Burns,* 427 U.S. 347, 361, n. 15 (1976).

Shapiro v. Thompson

In 1969, the U.S. Supreme Court invalidated state statutes that required welfare recipients to have been a resident of the state for at least one year before applying for welfare benefits. The Court held that such a condition violated the recipient's right to travel.

> Thus, the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has 'no other purpose ... than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it (is) patently unconstitutional.' *United States v. Jackson,* 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).

Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

> The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees [i.e., plaintiffs] were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.

Shapiro v. Thompson, 394 U.S. at 634.

Perry v. Sindermann

In 1972, the U.S. Supreme Court considered a professor at a state college in Texas whose employment contract was not renewed, in retaliation for the professor's criticism of the Regents of the college. In the terse opinion, the Court held that the professor had been denied due process. The opinion is remarkable for the following statement of law:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command

directly." *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 [1958]. Such interference with constitutional rights is impermissible.

We have applied this general principle to denials of tax exemptions, *Speiser v. Randall,* supra, unemployment benefits, *Sherbert v. Verner,* 374 U.S. 398, 404-405, 83 S.Ct. 1790, 1794-1795, 10 L.Ed.2d 965, and welfare payments, *Shapiro v. Thompson,* 394 U.S. 618, 627, n. 6, 89 S.Ct. 1322, 1327 n. 6, 22 L.Ed.2d 600; *Graham v. Richardson,* 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534. But, most often, we have applied the principle to denials of public employment. *United Public Workers v. Mitchell,* 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754; *Wieman v. Updegraff,* 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216; *Shelton v. Tucker,* 364 U.S. 479, 485-486, 81 S.Ct. 247, 250-251, 5 L.Ed.2d 231; *Torcaso v. Watkins,* 367 U.S. 488, 495-496, 81 S.Ct. 1680, 1683-1684, 6 L.Ed.2d 982; *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230; *Cramp v. Board of Public Instruction,* 368 U.S. 278, 288, 82 S.Ct. 275, 281, 7 L.Ed.2d 285; *Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *Elfbrandt v. Russell,* 384 U.S. 11, 17, 86 S.Ct. 1238, 1241, 16 L.Ed.2d 321; *Keyishian v. Board of Regents,* 385 U.S. 589, 605-606, 87 S.Ct. 675, 684-685, 17 L.Ed.2d 629; *Whitehill v. Elkins,* 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228; *United States v. Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508; *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811. We have applied the principle regardless of the public employee's contractual or other claim to a job. Compare *Pickering v. Board of Education,* supra, with *Shelton v. Tucker,* supra.

Thus, the respondent's lack of a contractual or tenure 'right' to re-employment for the 1969-1970 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton v. Tucker,* supra; *Keyishian v. Board of Regents,* supra. We reaffirm those holdings here.

Perry v. Sindermann, 408 U.S. 593, 597-598 (1972).

Elrod v. Burns

In 1976, the U.S. Supreme Court held that the new sheriff of Cook County, Illinois could *not* terminate the employment of noncivil service people in his department, solely because they were members of the opposite political party.

The Court recognized in *United Public Workers v. Mitchell,* 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754 (1947), that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office . . . .' " This principle was reaffirmed in *Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in *Cafeteria Workers v. McElroy,* 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230 (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party. [FN11]

FN11. Protection of First Amendment interests has not been limited to invalidation of conditions on government employment requiring allegiance to a particular political party. This Court's decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights.

In *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), decided the same day as *Cafeteria Workers,* the Court squarely held that a citizen could not be refused a public office for failure to declare his belief in God. More broadly, the Court has held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds. *Pickering v. Board of Education,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). And in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), unemployment compensation, rather than public employment, was the government benefit which could not be withheld on the condition that a person accept Saturday employment where such employment was contrary to religious faith. Similarly, the First Amendment prohibits limiting the grant of a tax exemption to only those who affirm their loyalty to the State granting the exemption. *Speiser v. Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

Particularly pertinent to the constitutionality of the practice of patronage dismissals are *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), and *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). In *Keyishian,* the Court invalidated New York statutes barring employment merely on the basis of membership in "subversive" organizations. *Keyishian* squarely held that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment. [FN12] In *Perry*, the Court broadly rejected the validity of limitations on First Amendment rights as a condition to the receipt of a governmental benefit, stating that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Such interference with constitutional rights is impermissible." 408 U.S., at 597, 92 S.Ct. at 2697.

FN12. Thereafter, *United States v. Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967), similarly held that mere membership in the Communist Party could not bar a person from employment in private defense establishments important to national security.

Patronage practice falls squarely within the prohibitions of *Keyishian* and *Perry.* Under that practice, public employees hold their jobs on the condition that they provide, in some acceptable manner, support for the favored political party. The threat of dismissal for failure to provide that support unquestionably inhibits protected belief and association, and dismissal for failure to provide support only penalizes its exercise. The belief and association which government may not ordain directly are achieved by indirection. [FN13] And regardless of how evenhandedly these restraints may operate in the long run, after political office has changed hands several times, protected interests are still infringed and thus the violation remains.

FN13. The increasingly pervasive nature of public employment provides officials with substantial power through conditioning jobs on partisan support, particularly in this time of high unemployment. Since the government however, may not seek to achieve an unlawful end either directly or indirectly, the inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason. Petitioners contend that even though the government may not provide that public employees may retain their jobs only if they become affiliated with or provide support for the in-party, respondents here have waived any objection to such requirements. The difficulty with this argument is that it completely swallows the rule. Since the qualification may not be constitutionally imposed absent an appropriate justification, to accept the waiver argument is to say that the government may

> do what it may not do. A finding of waiver in this case, therefore, would be contrary to our view that a partisan job qualification abridges the First Amendment.
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> Although the practice of patronage dismissals clearly infringes First Amendment interests, our inquiry is not at an end, for the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted for appropriate reasons. *Keyishian* and *Perry,* however, not only serve to establish a presumptive prohibition on infringement, but also serve to dispose of one suggested by petitioners' reference to this Court's affirmance by an equally divided court in *Bailey v. Richardson,* 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352 (1951), *aff'g* 86 U.S.App.D.C. 248, 182 F.2d 46 (1950). [footnote omitted] That is the notion that because there is no right to a government benefit, such as public employment, the benefit may be denied for any reason. *Perry,* however, emphasized that "[f]or at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." 408 U.S., at 597, 92 S.Ct., at 2697. *Perry* and *Keyishian* properly recognize such impermissible reason: The denial of a public benefit may not be used by the government for the purpose of creating an incentive enabling it to achieve what it may not command directly. " '[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' " *Keyishian v. Board of Regents,* 385 U.S., at 605-606, 87 S.Ct., at 685. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963). " '[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege" ' " *Sugarman v. Dougall,* 413 U.S. 634, 644, 93 S.Ct. 2842, 2848, 37 L.Ed.2d 853 (1973) (quoting *Graham v. Richardson,* 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed.2d 534 (1971)). [footnote citing nine cases omitted]

Elrod v. Burns, 427 U.S. 347, 357-361 (1976).

The U.S. Supreme Court specifically rejected the notion that political affiliation was related to job performance:

> More fundamentally, however, the argument does not succeed because it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used as a basis for imputing such behavior. The Court has consistently recognized that mere political association is an inadequate basis for imputing disposition to ill-willed conduct. See *Keyishian v. Board of Regents,* 385 U.S., at 606-608, 87 S.Ct., at 685-686; *Elfbrandt v. Russell,* 384 U.S. 11, 19, 86 S.Ct. 1238, 1242, 16 L.Ed.2d 321 (1966); *Wieman v. Updegraff,* 344 U.S., at 190-191, 73 S.Ct., at 218. [footnote omitted] Though those cases involved affiliation with the Communist Party, we do not "consider these (respondents') interest in freely associating with members of the (Republican) Party less worthy of protection than (other) employees' interest in associating with Communists or former Communists." *Illinois State Employees Union v. Lewis,* 473 F.2d, at 570. At all events, less drastic means for insuring government effectiveness and employee efficiency are available to the State. Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.

Elrod v. Burns, 427 U.S. 347, 365-366 (1976).

Abood

In 1977, the U.S. Supreme Court considered a case from Michigan in which all teachers in Detroit public schools were required to belong to a labor union, and one teacher had objected to paying fees to the union for support ideological causes with which that teacher did not agree. In this case, Michigan was conditioning a benefit (i.e., employment as a school teacher) on surrender of some of the teacher's First Amendment rights. The Court held that it was proper for the union to require payment of fees for the purposes of collective bargaining, contract administration, and deciding grievances. However, the Court held that it was unconstitutional for the union to demand that all teachers contribute to the political activities of the union.

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. E.g., *Elrod v. Burns,* 427 U.S. 347, 355-357, 96 S.Ct. 2673, 2680-82, 49 L.Ed.2d 547 (plurality opinion); *Cousins v. Wigoda,* 419 U.S. 477, 487, 95 S.Ct. 541, 547, 42 L.Ed.2d 595; *Kusper v. Pontikes,* 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260; *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-461, 78 S.Ct. 1163, 1170-71, 2 L.Ed.2d 1488. Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. E.g., *Elrod v. Burns,* supra, 427 U.S. at 357-360, 96 S.Ct. at 2681-2683 and cases cited; *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570; *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629. The appellants [i.e., the teachers as Plaintiffs] argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.

Abood v. Detroit Board of Education, 431 U.S. 209, 233-234 (1977).

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. [FN31] For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See *Elrod v. Burns,* supra, 427 U.S. at 356-357, 95 S.Ct. at 2681-82; *Stanley v. Georgia,* 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542; *Cantwell v. Connecticut,* 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections:
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> > If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.
>
> *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628.
>
> FN31. This view has long been held. James Madison, the First Amendment's author, wrote in defense of religious liberty: "Who does not see . . . (t)hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" 2 The Writings of James

> Madison 186 (Hunt ed. 1901). Thomas Jefferson agreed that " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " I. Brant, James Madison: The Nationalist 354 (1948).

> These principles prohibit a State from compelling any individual to affirm his belief in God, *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982, or to associate with a political party, *Elrod v. Burns,* supra ; see 427 U.S., at 363-364, n. 17, 95 S.Ct., at 2685, as a condition of retaining public employment. They are no less applicable to the case at bar, and they thus prohibit the appellees from requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher.
>
> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. [footnote omitted] Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

Abood v. Detroit Board of Education, 431 U.S. 209, 234-236 (1977).

Westlaw notes that *Abood* was "criticized" in a subsequent decision, *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees,* 466 U.S. 435 (1984). But see *Keller v. State Bar of California,* 496 U.S. 1, 10 (1990) ("... in the later case of *Ellis* ..., the Court made it clear that the principles of *Abood* apply equally to employees in the private sector."). Furthermore, the Court twice quoted with approval the sentence in *Abood* that declares:

> ... a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.

Abood, 431 U.S. at 234.

- *Minnesota State Bd. for Community Colleges v. Knight,* 465 U.S. 271, n. 29 (1984).

- *Rust v. Sullivan,* 500 U.S. 173, 212 (1991) ("It is beyond question 'that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment.'").

Lefkowitz v. Cunningham

In 1977, the U.S. Supreme Court held that New York state could not remove a person from office in a political party, because that person had elected to use his Fifth Amendment right against self-incrimination in a grand jury proceeding.

> Thus, when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution. In *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967), for example, police officers under investigation were told that if they declined to answer potentially incriminating questions they would be removed from office, but that any answers they did give could be used against them in a criminal prosecution. We held that statements given

> under such circumstances were made involuntarily and could not be used to convict the officers of crime.
>
> Similarly, our cases have established that a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself. In *Gardner v. Broderick,* 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968), a police officer appearing before a grand jury investigating official corruption was subject to discharge if he did not waive his Fifth Amendment privilege and answer, without immunity, all questions asked of him. When he refused, and his employment was terminated, this Court held that the officer could not be discharged solely for his refusal to forfeit the rights guaranteed him by the Fifth Amendment; the privilege against compelled self-incrimination could not abide any "attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Id.,* at 279, 88 S.Ct. at 1916. Accord, *Uniformed Sanitation Men Ass'n. v. Commissioner of Sanitation,* 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968). At the same time, the Court provided for effectuation of the important public interest in securing from public employees an accounting of their public trust. Public employees may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties if they have not been required to surrender their constitutional immunity. *Gardner,* supra, 392 U.S. at 278-279, 88 S.Ct. at 1916.
>
> We affirmed the teaching of *Gardner* more recently in *Lefkowitz v. Turley,* [414 U.S. 70 (1973)], where two architects who did occasional work for the State of New York refused to waive their Fifth Amendment privilege before a grand jury investigating corruption in public contracting practices. State law provided that if a contractor refused to surrender his constitutional privilege before a grand jury, his existing state contracts would be canceled, and he would be barred from future contracts with the State for five years. The Court saw no constitutional distinction between discharging a public employee and depriving an independent contractor of the opportunity to secure public contracts; in both cases the State had sought to compel testimony by imposing a sanction as the price of invoking the Fifth Amendment right.
>
> These cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized. It is true, as appellant points out, that our earlier cases were concerned with penalties having a substantial economic impact. But the touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.

Lefkowitz v. Cunningham, 431 U.S. 801, 805-806 (1977).

Branti v. Finkel

In 1980, the U.S. Supreme Court declared that assistant public defenders could not have their employment terminated solely because the new public defender of a county in New York state was a member of the opposite political party.

> If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes. [FN10] Under this line of analysis, unless the government can demonstrate “an overriding interest,” [*Elrod v. Burns,*] 427 U.S., at 368, 96 S.Ct., at 2687, “of vital importance,” *id*., at 362, 96 S.Ct., at 2684, requiring that a person's private beliefs conform to those of the hiring authority, his beliefs cannot be the sole basis for depriving him of continued public employment.

> FN10. "The Court recognized in *United Public Workers v. Mitchell*, 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754 (1947), that 'Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office. . . ." ' This principle was reaffirmed in *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), which held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. And in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898, 81 S.Ct. 1743, 1750, 6 L.Ed.2d 1230 (1961), the Court recognized again that the government could not deny employment because of previous membership in a particular party." *Id.*, at 357-358, 96 S.Ct., at 2682.

Branti v. Finkel, 445 U.S. 507, 515-516 (1980).

FCC v. League of Women Voters

In 1984, the U.S. Supreme Court invalidated a federal statute that provided funding to public television stations only if those stations did *not* engage in "editorializing". The editorials were protected speech under the First Amendment and the U.S. Government could not require public television stations to relinquish their First Amendment rights as a condition for financial support. *F.C.C. v. League of Women Voters of California,* 468 U.S. 364 (1984).

Nollan

In 1987, the U.S. Supreme Court held that California could not require a property owner to grant an easement to the public for access to the beach adjacent to the owner's property as a condition for approving the owner's application for a building permit to demolish the existing house and then build a larger house on the land. The Court held that such an easement was a "taking" and California would need to compensate the property owner. This case stands for the proposition that there must be some kind of "essential nexus" between the condition and the benefit. *Nollan v. California Coastal Com'n,* 483 U.S. 825, 837 (1987). Although I agree with the holding, I find Justice Scalia's opinion for the majority to be difficult to read. A clear summary of *Nolan* is in a dissenting opinion:

> The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

Nollan v. California Coastal Com'n, 483 U.S. 825, 842 (1987) (Brennan, J., dissenting).

Rutan

In 1990, the U.S. Supreme Court extended the holdings of *Elrod v. Burns* and *Branti v. Finkel* to cases involving promotion, transfer, recall after layoff, and hiring decisions of low-level government employees.

> The same First Amendment concerns that underlay our decisions in *Elrod, supra,* and *Branti, supra,* are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are

> imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. See *Elrod, supra,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti, supra,* 445 U.S., at 515-516, 100 S.Ct., at 1293.

Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990).

> A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.
>
> Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude. [footnote omitted] Decades of decisions by this Court belie such a claim. We premised *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the required oath "unconstitutionally invades the appellant's freedom of belief and religion." *Id.,* at 496, 81 S.Ct., at 1684. In *Keyishian v. Board of Regents of Univ. of New York,* 385 U.S. 589, 609-610, 87 S.Ct. 675, 687, 17 L.Ed.2d 629 (1967), we held a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association. In *Elfbrandt v. Russell,* 384 U.S. 11, 19, 86 S.Ct. 1238, 1242, 16 L.Ed.2d 321 (1966), we struck down a loyalty oath which was a prerequisite for public employment.
>
> Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican ... shall be appointed to federal office." *Public Workers v. Mitchell,* 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754 (1947). What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. See *Perry,* 408 U.S., at 597, 92 S.Ct., at 2697 (citing *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)); see *supra,* at 2735. Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See *Elrod,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti,* 445 U.S., at 515-516, 100 S.Ct., at 1293; see also *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (unemployment benefits); *Speiser v. Randall, supra* (tax exemption). We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls.

Rutan, 497 U.S. at 77-78.

Dolan

In 1994, the U.S. Supreme Court held that the state of Oregon could not require a retail hardware store to create a bicycle pathway easement, and to create a greeway, as conditions for approving the owner's application for a building permit to enlarge her store, because there was no "rough proportionality" between the condition and the benefit. The Court did find an "essential nexus" between the condition and benefit, which was the other part of the test.

> In *Nollan, supra,* [483 U.S. 825] we held that governmental authority to exact such a condition was circumscribed by the Fifth and Fourteenth Amendments. Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right — here the right to receive just compensation when property is taken for a public use — in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. See *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).
>
> Petitioner contends that the city has forced her to choose between the building permit and her right under the Fifth Amendment to just compensation for the public easements. Petitioner does not quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenges the showing made by the city to justify these exactions. She argues that the city has identified "no special benefits" conferred on her, and has not identified any "special quantifiable burdens" created by her new store that would justify the particular dedications required from her which are not required from the public at large.
>
> In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. *Nollan,* 483 U.S., at 837, 107 S.Ct., at 3148. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan,* because we concluded that the connection did not meet even the loosest standard. *Id.,* at 838, 107 S.Ct., at 3149. Here, however, we must decide this question.

Dolan v. City of Tigard, 512 U.S. 374, 385-386 (1994).

44 Liquormart, Inc. v. Rhode Island

In 1996, the U.S. Supreme Court considered whether the state of Rhode Island could prohibit the advertising of liquor prices. If the stores had used their First Amendment right of freedom of speech to advertise prices, in violation of the prohibition, the state would presumedly rescind the license to sell liquor, thus putting the stores out of business. Viewed in another way, the state conferred the benefits of a license to sell liquor only if the stores surrendered their First Amendment right. The U.S. Supreme Court held the prohibition on advertising prices was *un*constitutional.

> That the State has chosen to license its liquor retailers does not change the analysis. Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of

> a constitutional right. See, *e.g., Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.,* 271 U.S. 583, 594, 46 S.Ct. 605, 607, 70 L.Ed. 1101 (1926). In *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), relying on a host of cases applying that principle during the preceding quarter century, the Court explained that government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially his interest in freedom of speech." *Id.,* at 597, 92 S.Ct., at 2697. That teaching clearly applies to state attempts to regulate commercial speech, as our cases striking down bans on truthful, nonmisleading speech by licensed professionals attest. See, *e.g., Bates v. State Bar of Ariz.,* 433 U.S., at 355, 97 S.Ct., at 2694; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).
>
> Thus, just as it is perfectly clear that Rhode Island could not ban all obscene liquor ads except those that advocated temperance, we think it equally clear that its power to ban the sale of liquor entirely does not include a power to censor all advertisements that contain accurate and nonmisleading information about the price of the product. As the entire Court apparently now agrees, the statements in the *Posadas* opinion on which Rhode Island relies are no longer persuasive.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513 (1996).

U.S. Courts of Appeal

Sometimes the U.S. Courts of Appeal give a clearer statement of the law than the U.S. Supreme Court. In the area of the doctrine of unconstitutional conditions, the following decisions by the U.S. Courts of Appeals are noteworthy:

- *Patton v. State of N. C.,* 381 F.2d 636, 640 (4th Cir. 1967) ("Enjoyment of a benefit or protection provided by law cannot be conditioned upon the 'waiver' of a constitutional right."), *cert. den.,* 390 U.S. 905 (1968).

- *Parks v. Watson,* 716 F.2d 646, 652 (9th Cir. 1983) ("Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred.").

- *Blackburn v. Snow,* 771 F.2d 556, 568 (1st Cir. 1985) ("... it has long been settled that government may not condition access to even a gratuitous benefit or privilege it bestows upon the sacrifice of a constitutional right.").

- *U.S. v. Melancon,* 972 F.2d 566, 577, n. 16 (5th Cir. 1992) (One of a very few cases to consider unconstitutional conditions in the context of a waiver of a right by a criminal in his guilty plea.)

- *National Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 747 (1st Cir. 1995) ("The doctrine of unconstitutional conditions bars government from arbitrarily conditioning the grant of a benefit on the surrender of a constitutional right, regardless of the fact that the government appropriately might have refused to grant the benefit at all."), *cert. den.,* 515 U.S. 1103 (1995).

Sometimes a case is postured as involving the doctrine of unconstitutional conditions, but the case is really only about a contractual bargain. One example occurred when 425 teachers in one county in Florida submitted their resignations simultaneously. Later, the school board offered to rehire them, and again give them their previously earned tenure and seniority, provided that each teacher paid a $ 100 fee. The teachers characterized the fee as a fine or punishment, and sued in court, arguing that the government had conditioned their employment on relinquishing their constitutional right to a trial. The government characterized the fee as "liquidated damages" for the work stoppage by the teachers.[1]

> Concededly it is now established to a point beyond all dispute that "public employment, including academic employment, may [not] be conditioned upon the surrender of constitutional rights which could not be abridged by direct governmental action." *Keyishian v. Board of Regents,* 1967, 385 U.S. 589, 605, 87 S.Ct. 675, 685, 17 L.Ed.2d 629, 642. [FN8] Denial of a government job solely because an individual refuses to abjure the protection afforded by the United States Constitution amounts to nothing more than an attempt to accomplish indirectly an otherwise impermissible objective — penalization of conduct which is constitutionally insulated against punishment. *Speiser v. Randall,* 1958, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460, 1473. Consequently, this Court has encountered no difficulty in holding that a Federal claim based upon the allegation that a State has denied public employment solely because of the exercise of a constitutional right will, if proven, entitle the plaintiff to appropriate relief. *Sindermann v. Perry,* 5 Cir., 1970, 430 F.2d 939, *affirmed,* 1972, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570; *Ferguson v. Thomas,* 5 Cir., 1970, 430 F.2d 852; *Pred v. Board of Public Instruction,* 5 Cir., 1969, 415 F.2d 851.
>
> FN8. See also *Pickering v. Board of Education,* 1968, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811; *Cramp v. Board of Public Instruction,* 1961, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285; *Baggett v. Bullitt,* 1964, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; *Wieman v. Updegraff,* 1952, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; *Truax v. Raich,* 1915, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131.
>
> However, none of these cases have any application here unless the teachers were in fact compelled to forego the exercise of a Federal constitutional right in return for reemployment. The critical flaw in their argument is the uncritical (and, on this record, insupportable) assumption that the $100 payments constituted a *deprivation* of property without due process of law within the prohibition of the Fourteenth Amendment. The agreement clearly provided that the teachers would receive a benefit to which concededly they were not otherwise entitled — reemployment with full tenure rights and other accompanying privileges which they had enjoyed before their resignations-in return for a payment of $100. In substance, they were offered an opportunity to surrender one "property right" in order to acquire another "property right" that was plainly of greater value to them. [footnote omitted] Such a mutually advantageous exchange cannot be characterized as a *deprivation* of property, regardless of whether the teachers' payments are pejoratively denominated as "fines" and regardless of whether the subjective intention of the Board members who voted for it was to "punish" alleged past misconduct.

National Educational Ass'n, Inc. v. Lee County Bd. of Public Instruction, 467 F.2d 447, 450-451 (5thCir. 1972).

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[1] *National Educ. Ass'n v. Lee County Bd. of Public Instruction,* 260 So.2d 206, 209 (Fla. 1972) (answering question certified by U.S. Court of Appeals).

A particularly clear exposition of the reasons underlying the doctrine of unconstitutional conditions was given by Chief Judge Posner, of the U.S. Court of Appeals in Chicago:

> When we say that the defendants appeal to it, we really mean they appeal to its predecessor, the doctrine memorably stated by Justice Holmes that it is not a constitutional violation to condition a benefit on the waiver of a constitutional right. *McAuliffe v. Mayor, etc., of City of New Bedford,* 155 Mass. 216, 29 N.E. 517 (1892).[2] On this view, a rule denying free speech to police officers is valid because it does not really deny free speech; it merely asks the would-be officer to decide whether he would rather speak freely or be a police officer. Note, "Unconstitutional Conditions," 73 *Harv. L. Rev.* 1595 (1960). Later cases rejected the Holmesian doctrine and held that conditions, as well as outright prohibitions, can be unconstitutional. E.g., *Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 674-75, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). The clearest case is where the condition is discriminatory. No one has a right to visit an aircraft carrier, but if the Navy allowed everyone except Jews to visit its aircraft carriers it would be denying the equal protection of the laws. But that is *too* clear a case, because the equal protection clause is not about rights, but about equal treatment. Where rights are involved, it is easy to imagine cases in which conditioning is a lesser infringement than prohibiting. People who work for the CIA accept that they will have less freedom of speech than if they worked for McDonald's, but since the condition is a reasonable one the restriction on their freedom of speech is not considered unconstitutional. See, e.g., *Snepp v. United States,* 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam).
>
> What the law of "unconstitutional conditions" boils down to, so far as it might be thought to help governments seeking to curtail the usual freedoms — in which application it ought to be called something like the doctrine of "constitutional conditioning" — is simply that conditions can lawfully be imposed on the receipt of a benefit — conditions that may include the surrender of a constitutional right, such as the right to be free from unreasonable searches and seizures — provided the conditions are reasonable. This was the approach that the district judge took in this case, and the fact that he didn't mention the doctrine of unconstitutional conditions in evaluating the state's arguments can hardly matter, especially since the doctrine is invariably viewed as a basis for invalidating, not defending, challenged governmental action.

Burgess v. Lowery, 201 F.3d 942, 946-947 (7th Cir. 2000), *rehearing en banc denied, cert. den.,* 531 U.S. 817 (2000).

law review articles

There are several important law review articles on unconstitutional conditions.

- Maurice H. Merrill, "Unconstitutional Conditions," 77 Univ. Pennsylvania Law Rev. 879 (May 1929).
- Robert L. Hale, "Unconstitutional Conditions and Constitutional Rights," 35 Columbia Law Rev. 321 (March 1935).
- Anonymous, Note, "Unconstitutional Conditions," 73 Harvard Law Rev. 1595 (June 1960).

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[2] *McAuliffe* is quoted and discussed below, beginning at page 19.

- Richard A. Epstein, "Unconstitutional Conditions, State Power, and the Limits of Consent," 102 Harvard Law Rev. 4 (Nov 1988).

- Kathleen M. Sullivan, "Unconstitutional Conditions," 102 Harvard Law Rev. 1413, 1415 (May 1989) ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.").

- Jason Mazzone, "The Waiver Paradox," 97 Northwestern University Law Review 801 (Winter 2003) (Includes plea bargains by criminals in the scope of the doctrine.).

In my opinion, the article by Prof. Sullivan is the best of these articles. Her article and the Note in the 1960 Harvard Law Review are both frequently cited by judges in their opinions. The article by Prof. Mazzone is too new to have attracted the attention that it deserves.

3. No Right To Be a Policeman?

The issue of surrendering a constitutional right (e.g., First Amendment right to freedom of speech) often occurs in the context of employment by a state government. These are additional examples of the doctrine of unconstitutional conditions.

McAuliffe (now repudiated)

The title for this section, "no right to be a policeman", comes from a witty (and now recognized as *wrong*) remark by Judge Oliver Wendell Holmes, when he was sitting on the Massachusetts Supreme Court in 1892. That case involved McAuliffe, a policeman in New Bedford, Massachusetts, who was a member of a "political committee" and who solicited money for that committee, in violation of a regulation of the police department. The policeman's employment was terminated. The ex-policeman petitioned the court for restoration of his employment, and the court denied his petition. On appeal, Justice Holmes declared:

> ... there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here.

McAuliffe v. Mayor of City of New Bedford, 29 N.E. 517, 517-518 (1892).

The view in *McAuliffe* was the law in the USA for many years, but, beginning in the 1950s, has been thoroughly repudiated by the U.S. Supreme Court for the situation involving a government employee. Part of the error in *McAuliff* is that Holmes saw employment by government as a privilege, not a right. The following cases show this repudiation. The following cases are also additional examples of the recognition by the U.S. Supreme Court of the doctrine of unconstitutional conditions, although only *Umbehr* and *O'Hare Truck Service* use that label.

Garrity

In 1967, the U.S. Supreme Court considered the case of several police officers in New Jersey state government who had been forced to give testimony incriminating themselves, after being threatened with the loss of their employment and pension if they refused to testify. The Court held that the incriminating testimony was *not* admissible as evidence in criminal prosecutions, because the testimony had been obtained in violation of the defendants' constitutional rights. Justice Douglas, writing for the majority of the Court, concluded:

> Mr. Justice Holmes in *McAuliffe v. New Bedford,* 155 Mass. 216, 29 N.E. 517, stated a dictum on which New Jersey heavily relies:
>
> > The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control.
>
> *Id.,* at 220, 29 N.E., at 517--518.
>
> The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee.
>
> We held in *Slochower v. Board of Education,* 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692, that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee:
>
> > The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. * * * The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.
>
> *Id.,* at 557-558, 76 S.Ct. at 641.
>
> We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
>
> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union Tel. Co. v. State of Kansas,* 216 U.S. 1, 30 S.Ct. 190, 54 L.Ed. 355. Resort to the federal courts in diversity of citizenship cases is another. *Terral v. Burke Constr. Co.,* 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352. Assertion of a First Amendment right is still another. *Lovell v. City of Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; *Murdock v. Com. of Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430;

> *Lamont v. Postmaster General,* 381 U.S. 301, 305--306, 85 S.Ct. 1493, 1495--1496, 14 L.Ed.2d 398. The imposition of a burden on the exercise of a Twenty-fourth Amendment right is also banned. *Harman v. Forssenius,* 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50. We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.

Garrity v. New Jersey, 385 U.S. 493, 499-500 (1967).

Connick v. Myers

In 1983, the U.S. Supreme Court considered the case of a prosecutor whose employment was terminated because she criticized her supervisor. I discuss this case at length in my essay at http://www.rbs2.com/afree2.htm , here I quote two paragraphs that reject the holding in *McAuliffe.*

> For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment — including those which restricted the exercise of constitutional rights. The classic formulation of this position was Justice Holmes', who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). For many years, Holmes' epigram expressed this Court's law. *Adler v. Board of Education,* 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952); *Garner v. Board of Public Works,* 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); *United Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947); *United States v. Wurzbach,* 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930); *Ex parte Curtis,* 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882).
>
> The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950s and early 1960s to require public employees, particularly teachers, to swear oaths of loyalty to the state and reveal the groups with which they associated. In *Wiemann v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past affiliation with Communists. In *Cafeteria Workers v. McElroy,* 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961), the Court recognized that the government could not deny employment because of previous membership in a particular party. See also *Shelton v. Tucker,* 364 U.S. 479, 490, 81 S.Ct. 247, 253, 5 L.Ed.2d 231 (1960); *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); *Cramp v. Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961). By the time *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), was decided, it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Id.,* at 404, 83 S.Ct., at 1794. It was therefore no surprise when in *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected. *Id.,* at 605-606, 87 S.Ct., at 684-685.

Connick v. Myers, 461 U.S. 138, 143-144 (1983).

Umbehr

In June 1996, the U.S. Supreme Court considered a case in which a county in Kansas had refused to renew a trash hauling contract, because the contractor had criticized the county government.

> Those precedents have long since rejected Justice Holmes' famous dictum, that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892). Recognizing that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," *Laird v. Tatum,* 408 U.S. 1, 11, 92 S.Ct. 2318, 2324, 33 L.Ed.2d 154 (1972), our modern "unconstitutional conditions" doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech" even if he has no entitlement to that benefit, *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972). We have held that government workers are constitutionally protected from dismissal for refusing to take an oath regarding their political affiliation, see, *e.g., Wieman v. Updegraff,* 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); *Keyishian v. Board of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), for publicly or privately criticizing their employer's policies, see *Perry, supra; Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), for expressing hostility to prominent political figures, see *Rankin v. McPherson,* 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), or, except where political affiliation may reasonably be considered an appropriate job qualification, for supporting or affiliating with a particular political party, see, *e.g., Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). See also *United States v. Treasury Employees,* 513 U.S. 454, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (Government employees are protected from undue burdens on their expressive activities created by a prohibition against accepting honoraria); *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977) (government employment cannot be conditioned on making or not making financial contributions to particular political causes).

Board of Cty. Commissioners v. Umbehr, 518 U.S. 668, 674-675 (1996).

O'Hare Truck Service

On the same day that the U.S. Supreme Court decided *Umbehr,* supra, the Court also decided a similar case, this one involving a towing company who was excluded from the city's list of towing vendors in retaliation for the owner's of the towing company refusal to contribute to the mayor's reelection campaign, and in retaliation for the owner openly supporting the mayor's opponent.

> The Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment rights, a doctrine once captured in Justice Holmes' aphorism that although a policeman "may have a constitutional right to talk politics ... he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford,* 155 Mass. 216, 220, 29 N.E. 517 (1892). A State may not condition public employment on an employee's exercise of his or her First Amendment

> rights. See, *e. g., Keyishian v. Board of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). See also *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S., at 674-675, 116 S.Ct., at 2347 (collecting cases). As we have said: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Perry v. Sindermann, supra,* at 597, 92 S.Ct., at 2697, quoting *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958). Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression.
>
> In *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), we considered whether to apply the principles of the unconstitutional conditions cases to public employees dismissed on account of their political association. ....

O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712, 716-717 (1996).

4. Exceptions to The Doctrine

The above quotations shows that the U.S. Supreme Court often treats the doctrine of unconstitutional conditions as an absolute rule, with little explanation except a list of citations to earlier cases. A moment's thought shows that there are many instances in which a benefit conferred by government *can* properly be conditioned on a waiver of constitutional right(s). For example:

- Laborers can be required to join a union as a condition of being employed. *Railway Emp. Dept. v. Hanson,* 351 U.S. 225 (1956); *Machinists v. Street,* 367 U.S. 740 (1961). Similarly, an attorney can be required to join a state bar association as a condition of being granted a license to practice law in that state. *Lathrop v. Donohue,* 367 U.S. 820 (1961); but see *Keller v. State Bar of California,* 496 U.S. 1 (1990) (State bar association can not require payment of dues to support lobbying unrelated to practice of law.).

- Scientists and engineers who design weapons of mass destruction can be required to forever maintain confidentiality of government secrets, as a condition of employment in weapons laboratories. See my separate essay at http://www.rbs2.com/OFAC.pdf .

- Federal Rule of Criminal Procedure 23(a) allows a defendant to waive his constitutional right to a trial by jury, with the approval of the judge and prosecution. *Singer v. U.S.,* 380 U.S. 24 (1965).

- A criminal suspect may agree to a plea bargain. In exchange for waiving the constitutional right to a trial (and to confront witnesses against him) and waiving the constitutional right to avoid self-incrimination, the suspect admits his guilt in exchange for either dismissal of some charges or a shorter imprisonment. *Boykin v. Alabama,* 395 U.S. 238, (1969) (plea bargain must be made knowingly, voluntarily, and intelligently); *Brady v. U.S.,* 397 U.S. 742 (1970); *Bordenkircher v. Hayes,* 434 U.S. 357 (1978).

Interestingly, opinions at the U.S. Supreme Court that discuss these exceptions to the doctrine of unconstitutional conditions simply omit mention of the doctrine, instead of explaining why the doctrine does not apply to these exceptions. Below, beginning at page 31, I suggest three different situations in which the doctrine might apply.

balancing tests

The U.S. Supreme Court has not been clear about what test to use in deciding whether a government has an acceptable reason to require waiver of a constitutional right. In 1996, the Court held that the balancing test in *Pickering,* 391 U.S. 563, was to be used. *Board of County Com'rs, Wabaunsee County, Kan. v. Umbehr,* 518 U.S. 668, 678-680 (1996). Earlier, the U.S. Supreme Court used the phrase "vital government interest" in *Rutan v. Republican Party of Illinois,* 497 U.S. 62, (1990) and "overriding interest ... of vital importance" in *Branti v. Finkel,* 445 U.S. 507 (1980). Earlier still, the Court appears to pretend that the doctrine is absolute, so no test is necessary. *Speiser v. Randall,* 357 U.S. 513 (1958).

The accepted test for the acceptability of a denial of some constitutional right is that the government must have a compelling governmental interest and the courts will require the government to use the "least restrictive means" to achieve that governmental interest.[3] However, in the context of the doctrine of unconstitutional conditions, it *may* be acceptable to have a slightly more permissive standard, because the government is giving a benefit in exchange for the right, as compared with giving nothing in the case of censorship.

There must also be a test for the relationship between, and values of, the condition and benefit. The U.S. Supreme Court held in *Nollan* and *Dolan* that an "essential nexus" was required. If a nexus exists, then there must be a "rough proportionality"[4] between the values of the condition (i.e., surrender of property right) and benefit. The Court remarked in *Dolan*:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some

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[3] See, e.g., *Sable Communications of California, Inc. v. F.C.C.,* 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").

[4] The Court mangled the mathematical nomenclature here. The Court should have said "approxomate [or rough] equality", *not* "rough proportionality". Two quantities are proportional if there is a linear relationship between them.

> sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

dissenting opinions at the U.S. Supreme Court

I have found the following two opinions of the U.S. Supreme Court where the doctrine *might* have been used to invalidate a statute, but the majority of justices chose not to apply the doctrine, and the dissenting justices mentioned the doctrine.

Rust v. Sullivan

A notable discussion of an apparent violation of the doctrine of unconstitutional conditions occurred in 1991, in the context of judicial review of a federal statute that prohibited physicians who worked at a clinic funded by federal money from counseling or advocating abortion to their patients, or from referring their patients to abortion providers. A majority of only five justices of the U.S. Supreme Court held that the U.S. Congress could put such conditions on recipients of government grants, because the clinics are free to decline such grants. The majority opinion rejected the Plaintiffs' application of the doctrine of unconstitutional conditions in this case.

> Petitioners [i.e., Plaintiffs: Rust, et al.] also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding [28 U.S.C. § 300a-6 and 42 C.F.R.§ 59.8(a) (1989)], on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. Relying on *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972), and *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984), petitioners argue that "even though the government may deny [a] ... benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech." *Perry, supra,* 408 U.S., at 597, 92 S.Ct., at 2697.
>
> Petitioners' reliance on these cases is unavailing, however, because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project.* The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. Brief for Petitioners in No. 89-1391, pp. 3, n. 5, 13. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. 42 U.S.C. 300(a). The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds. 42 CFR 59.9 (1989).

In contrast, our "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. In *FCC v. League of Women Voters of Cal.,* we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not "engage in editorializing." Under that law, a recipient of federal funds was "barred absolutely from all editorializing" because it "is not able to segregate its activities according to the source of its funding" and thus "has no way of limiting the use of its federal funds to all noneditorializing activities." The effect of the law was that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing" and "barred from using even wholly private funds to finance its editorial activity." 468 U.S., at 400, 104 S.Ct., at 3128. We expressly recognized, however, that were Congress to permit the recipient stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Ibid.* Such a scheme would permit the station "to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Ibid.*

Similarly, in *Regan* we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, we explained that such organizations remained free "to receive deductible contributions to support ... nonlobbying activit[ies]." 461 U.S., at 545, 103 S.Ct., at 2001. Thus, a charitable organization could create, under § 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C. § 501(c)(3), an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and at the same time establish, under § 501(c)(4), a separate affiliate to pursue its lobbying efforts without such contributions. 461 U.S., at 544, 103 S.Ct., at 2000. Given that alternative, the Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity[; it] has simply chosen not to pay for [appellee's] lobbying." *Id.,* at 546, 103 S.Ct., at 2001. We also noted that appellee "would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." *Id.,* at 544, 103 S.Ct., at 2000. The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights. "Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures." See *id.,* at 548, 103 S.Ct., at 2002.

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan,* not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of

> expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority. [footnote omitted]

Rust v. Sullivan, 500 U.S. 173, 196-199 (1991) (majority opinion).

Justice Blackmun, joined by Justice O'Connor, wrote in his dissent:

> This facile response to the intractable problem the Court addresses today is disingenuous at best. Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to these cases not because "it was likely that [the regulations] ... would be challenged on constitutional grounds," *ante,* [111 S.Ct.] at 1771, but because the question squarely presented by the regulations — the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit — implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily. See, *e.g.,* Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv.L.Rev. 4, 6 (1988) (describing this problem as "the basic structural issue that for over a hundred years has bedeviled courts and commentators alike..."); Sullivan, Unconstitutional Conditions, 102 Harv.L.Rev. 1413, 1415-1416 (1989) (observing that this Court's unconstitutional conditions cases "seem a minefield to be traversed gingerly").
>
> As is discussed in Parts II and III, *infra,* the regulations impose viewpoint-based restrictions upon protected speech and are aimed at a woman's decision whether to continue or terminate her pregnancy. In both respects, they implicate core constitutional values. This verity is evidenced by the fact that two of the three Courts of Appeals that have entertained challenges to the regulations have invalidated them on constitutional grounds. [citations omitted]

Rust v. Sullivan, 500 U.S. 173, 205 (1991) (Blackmun, J., dissenting).

In the parts II B and II C of his dissent, Justice Blackmun, now joined by Justices Marshall and Stevens, wrote:

> The Court concludes that the challenged regulations do not violate the First Amendment rights of Title X staff members because any limitation of the employees' freedom of expression is simply a consequence of their decision to accept employment at a federally funded project. *Ante,* at 1775. But it has never been sufficient to justify an otherwise unconstitutional condition upon public employment that the employee may escape the condition by relinquishing his or her job. It is beyond question "that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood v. Detroit Bd. of Ed.,* 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977), citing *Elrod v. Burns,* 427 U.S. 347, 357-360, 96 S.Ct. 2673, 2681-2683, 49 L.Ed.2d 547 (1976), and cases cited therein; *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Keyishian v. Board of Regents, State Univ. of N.Y.,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Nearly two decades ago, it was said:
>
> > For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be

> penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'

Perry v. Sindermann, 408 U.S., at 597, 92 S.Ct., at 2697, quoting *Speiser v. Randall,* 357 U.S., at 526, 78 S.Ct., at 1342.

The majority attempts to circumvent this principle by emphasizing that Title X physicians and counselors "remain free ... to pursue abortion-related activities when they are not acting under the auspices of the Title X project." *Ante,* at 1775. "The regulations," the majority explains, "do not in any way restrict the activities of those persons acting as private individuals." *Ibid.* Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.

In *Abood,* it was no answer to the petitioners' claim of compelled speech as a condition upon public employment that their speech outside the workplace remained unregulated by the State. Nor was the public employee's First Amendment claim in *Rankin v. McPherson,* 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), derogated because the communication that her employer sought to punish occurred during business hours. At the least, such conditions require courts to balance the speaker's interest in the message against those of government in preventing its dissemination. *Id.,* at 384, 107 S.Ct., at 2896; *Pickering v. Board of Ed. of Township High School Dist.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

In the cases at bar, the speaker's interest in the communication is both clear and vital. In addressing the family-planning needs of their clients, the physicians and counselors who staff Title X projects seek to provide them with the full range of information and options regarding their health and reproductive freedom. Indeed, the legitimate expectations of the patient and the ethical responsibilities of the medical profession demand no less. "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice.... The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." Current Opinions, Council on Ethical and Judicial Affairs of American Medical Association 8.08 (1989). See also President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 70 (1982); American College of Obstetricians & Gynecologists, Standards for Obstetric-Gynecologic Services 62 (7th ed. 1989). When a client becomes pregnant, the full range of therapeutic alternatives includes the abortion option, and Title X counselors' interest in providing this information is compelling.

The Government's articulated interest in distorting the doctor-patient dialogue — ensuring that federal funds are not spent for a purpose outside the scope of the program — falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct. [FN4] Moreover, the offending regulation is not narrowly tailored to serve this interest. For example, the governmental interest at stake could be served by imposing rigorous bookkeeping standards to ensure financial separation or adopting content-neutral rules for the balanced dissemination of family-planning and health information. See *Massachusetts v. Secretary of Health and Human Services,* 899 F.2d 53, 74 (CA1 1990), cert. pending, No. 89-1929. By failing to balance or even to consider the free speech interests claimed by Title X physicians against the Government's asserted interest in suppressing the speech, the Court falters in its duty to implement the protection that the First Amendment clearly provides for this important message.

> Finally, it is of no small significance that the speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate governmental interest that might be served by suppressing such information. Concededly, the abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years. "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943).

Rust v. Sullivan, 500 U.S. 173, 212-215 (1991) (Blackmun, J., dissenting).

Incidentally, in my personal opinion, the decision in *Rust v. Sullivan* is wrong because it allows restrictions on the professional autonomy of physicians: affected physicians are forbidden to suggest options that are not only legal, but also might be an acceptable choice for a specific patients. Whether clinics are free to accept or decline such grants, or whether there exist alternative clinics for indigent women, is a distraction from the core issue that the statute, in my opinion, clearly offends the First Amendment.

Dolan

One notable exception occurred in 1994, when Justice Stevens, joined by Justices Blackmun and Ginsberg, wrote a dissenting opinion that said:

> Although it has a long history, see *Home Ins. Co. v. Morse,* 20 Wall. 445, 451, 22 L.Ed. 365 (1874), the "unconstitutional conditions" doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question. See, *e.g.,* Sunstein, Why the Unconstitutional Conditions Doctrine is an Anachronism, 70 B.U.L.Rev. 593, 620 (1990) (doctrine is "too crude and too general to provide help in contested cases"); Sullivan, Unconstitutional Conditions, 102 Harv.L.Rev. 1415, 1416 (1989) (doctrine is "riven with inconsistencies"); Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum.L.Rev. 321, 322 (1935) ("The Supreme Court has sustained many such exertions of power even after announcing the broad doctrine that would invalidate them"). As the majority's case citations suggest, *ante,* [114 S.Ct.] at 2316, modern decisions invoking the doctrine have most frequently involved First Amendment liberties, see also, *e.g., Connick v. Myers,* 461 U.S. 138, 143-144, 103 S.Ct. 1684, 1688, 75 L.Ed.2d 708 (1983); *Elrod v. Burns,* 427 U.S. 347, 361-363, 96 S.Ct. 2673, 2684, 49 L.Ed.2d 547 (1976) (plurality opinion); *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 1794, 10 L.Ed.2d 965 (1963); *Speiser v. Randall,* 357 U.S. 513, 518-519, 78 S.Ct. 1332, 1338, 2 L.Ed.2d 1460 (1958). But see *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.,* 478 U.S. 328, 345-346, 106 S.Ct. 2968, 2979, 92 L.Ed.2d 266 (1986) ("[T]he greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling"). The necessary and traditional breadth of municipalities' power to regulate property development, together with the absence here of fragile and easily "chilled" constitutional rights such as that of free speech, make it quite clear that the Court is really writing on a clean slate rather than merely applying "well-settled" doctrine. *Ante,* at 2316.

Dolan v. City of Tigard, 512 U.S. 374, 407, n. 12 (1994) (Stevens, J., dissenting).

In unconstitutional conditions cases involving a divided court, the liberal justices usually vote for individual rights against the government. This is especially true in cases involving freedom of speech. But in both *Nollan* and *Dolan,* the liberal justices (e.g., Stevens, Blackmun, Brennan, Marshall, Ginsburg) voted against rights of individual property owners. This reminds us that constitutional law is partly politics and a justice's political philosophy definitely influences his/her opinion about the limits of government power.

other cases

Justice Douglas called both *Flemming v. Nestor,* 363 U.S. 603 (1960), and *Wyman v. James* anomalies in the application of the doctrine of unconstitutional conditions. *Wyman v. James,* 400 U.S. 309, 329, n. 8 (1971) (Douglas, J., dissenting).

Harris v. McRae, 448 U.S. 297 (1980), upholding the federal government's refusal to pay for medically necessary abortions, thus forcing indigent women to forgo their constitutional right to an abortion, is an awful decision by a 5 to 4 majority.

making sense out of the doctrine

As remarked above, the U.S. Supreme Court has not given a clear explanation for this doctrine of unconstitutional conditions, and the Court ignores the doctrine in many cases involving waivers of constitutional rights. However, many law review articles have suggested justifications for this doctrine. Back in 1960, an anonymous group of law students at Harvard Law School wrote that the doctrine of unconstitutional conditions is justified by the due process clauses in the Fifth and Fourteenth Amendments:

> ... it is at least arguable that state spending power cannot be exercised to "buy up" rights guaranteed by the Constitution.

Note, "Unconstitutional Conditions," 73 Harvard Law Rev. 1595, 1599 (June 1960).[5]

In her classic 1989 article on unconstitutional conditions, Prof. Sullivan gave several justifications for the doctrine. I agree with her view that the doctrine of unconstitutional conditions is best justified to prevent overreaching by a powerful government.

> Reich's landmark article [73 Yale Law J. 733 (1964)] located the principal danger of government overreaching not in its overregulation of the world, but in its ability to create dependency through its wealth. The danger on this view is that Leviathan, swollen with tax dollars, will buy up people's liberty.

Kathleen M. Sullivan, "Unconstitutional Conditions," 102 Harvard Law Rev. 1413, 1494 (May 1989). She concludes:

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[5] This sentence was cited with approval by Justice Douglas in his dissenting opinion in *Wyman v. James,* 400 U.S. 309, 328 (1971) (Douglas, J., dissenting).

> ... the doctrine guards against a characteristic form of government overreaching and thus serves a state-checking function. Furthermore, it bars redistribution of constitutional rights as to which government has obligations of evenhandedness. Finally, it prevents inappropriate hierarchy ["a system of constitutional caste"] among rightholders.

Sullivan, 102 Harvard Law Rev. at 1506.

Her remarks fit neatly with the holding by the U.S. Supreme Court that the government can not do indirectly what the government is forbidden from doing directly. *Speiser v. Randall,* 357 U.S. 513, 526 (1958).

I suggest the doctrine of unconstitutional conditions is composed of several different situations, with different outcomes.

1. The government can *never* require surrender of one constitutional right as a condition to receive another constitutional right. This is an absolute rule that protects the integrity of civil liberties.

2. The government can *not* additionally require surrender of a constitutional right as condition of *continuing* to receive a benefit (e.g., employment, welfare check, renewal of contract, etc.) when the person continues to meet *all* of the conditions in statutes and regulations for that benefit. In other words, once the benefit has begun, the benefit can not be discontinued because the person used (or wants to use) their constitutional right. This rule prevents retaliation by the government against people who use their civil liberties.

3. The government *can* require surrender of a constitutional right as an openly published (i.e., in a statute or regulation) condition for receiving a benefit (e.g., employment), when *both* of the following are satisfied:
   (a) there must be an "essential nexus" between the right being surrendered and the benefit, *and*
   (b) the values of the surrendered right and the benefit must be approximately equal.[6] Values are easy to determine for property rights, but a value is difficult to put on the right to freedom of speech and other intangible constitutional rights. In cases where value of the surrendered right can not be determined, there should be a compelling reason why the surrender is required for the proper functioning of government or public policy.

For example, scientists working on design of military weapons can be required not to disclose information about the weapons. As another example, government employees with a security clearance can be required not to disclose state secrets related to foreign policy, military policy, surveillance of foreign nations, etc. Note in these examples that there is not complete surrender of First Amendment right to "freedom of speech", but only surrender of that right for narrowly limited topics.

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[6] See above, at page 24, for a discussion of the inconsistent tests used by the U.S. Supreme Court.

In the few circumstances where the government can require surrender of a constitutional right as a condition for receiving a benefit, I suggest that the waiver of the right must be both knowing, voluntary, and intelligent. These are the three traditional conditions for suspect or defendant in criminal proceedings to waive his/her constitutional rights.[7] *Knowing* means that the person is aware that he/she is waiving rights, and is *not* some accidental waiver. *Voluntary* means that there is neither coercion nor deceit by the government. *Intelligent* means that the person has the mental capacity to understand the significance of his/her waiver.

In the context of employment, note that the government does *not* guarantee employment to every person. The fact that a potential employee maybe be impoverished and desperate for a paying job does *not* make the government's conditions for the job coercive, unless the government specifically created the person's unemployment.

It is also helpful to recognize that constitutional rights are rarely absolute. An alleged violation of a constitutional right by government can be justified if there is a "compelling state interest".

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[7] A criminal suspect may waive either his Sixth Amendment right to have an attorney represent him or his Fifth Amendment right against self-incrimination, provided that the waiver is both knowing, voluntary, and intelligent. *Miranda v. Arizona,* 384 U.S. 436, 444, 475 (1966); *Brewer v. Williams,* 430 U.S. 387, 404 (1977); *Edwards v. Arizona,* 451 U.S. 477, 482-484 (1981); .... *Iowa v. Tovar,* 124 S.Ct. 1379, 1387, 1389-1390 (2004).

5. Conclusion

The doctrine of unconstitutional conditions has occasionally been used by judges to prohibit the government from requiring people to waive their constitutional rights. The doctrine has never been carefully explained by the U.S. Supreme Court. Furthermore, when making an exception to the doctrine, the U.S. Supreme Court usually simply ignores the doctrine. Above, beginning at page 31, I suggest three different situations in which the doctrine might apply. The U.S. Supreme Court permits waivers of constitutional rights in one group of situations.

By focusing on a broad proposition like this doctrine, we can make a general decision of the limits that we wish to place on our government. For that reason, the doctrine is more important than any of the cases that invoke it.

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