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Constitutional Theory and Constitutionally Optional Benefits and Burdens.

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CONSTITUTIONAL THEORY AND CONSTITUTIONALLY OPTIONAL BENEFITS AND BURDENS

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INTRODUCTION

A bedrock assumption of almost all judicial and academic interpreters of the Constitution is that the Constitution is in large part permissive. That is, most laws or governmental actions are neither forbidden nor required by the Constitution but are merely permitted.[1] I will call this presumably rather large set of governmental actions "constitutionally optional."

The purpose of this essay is to show that this assumption—that there are (many) constitutionally optional laws and governmental actions—gives rise to some immense and perhaps intractable difficulties in justifying large areas of constitutional doctrine. At stake is the entire domain of the Equal Protection Clause (and the equal protection component of Fifth Amendment due process), as well as the "equal protection" component of other constitutional rights, which is sometimes dealt with as a matter of equal protection, and sometimes as a matter of unconstitutional conditions on the rights in question.[2] At the most general level, the theoretical difficulties I elaborate are all bound up

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1. An approach contrary to this assumption is that outlined by Richard Epstein, who argues that a correct interpretation of the Constitution produces a blueprint of a single constitutionally valid set of laws. According to Epstein's Constitution, the common law prevails (with the distribution of wealth it produces), subject to some modification through the exercise of the police power and the eminent domain power. Epstein's constitutional scheme leaves no theoretical room for government choice, hence, leaving no room for politics in the normal sense. See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harv. U. Press, 1985); Richard A. Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 San Diego L. Rev. 189, 202-07 (1989); Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 14-28 (1988); Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 San Diego L. Rev. 175, 178-80 (1989).

2. Compare *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980) (content-based speech restrictions invalidated under the equal protection clause) with, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) and *Leathers v. Medlock*, 499 U.S. 439 (1991) (content-based discriminations among media invalidated on first amendment grounds). See also *Church of the*

in the question of why the greater power to choose the option or to forgo it does not include the lesser powers to place conditions on it or to distribute it unequally. How is it that one can have a constitutional complaint over conditions attached to or inequalities in the distribution of a benefit that one has no constitutional right to in the first place? Unless that question can be given an answer, much of constitutional law will lack a solid theoretical foundation.

I. THE NATURE OF CONSTITUTIONAL OPTIONS: OF LAWS, ACTIONS, AND OMISSIONS, BENEFITS AND BURDENS, INDIVIDUAL LAWS AND SETS OF LAWS, AND SWITCHES OVER TIMES

The notion of constitutional optionality applies to any type of governmental action that can be subject to constraint by constitutional norms. Thus, a law or an administrative rule can be constitutionally optional, but so too can an administrative or judicial decision in an individual case not covered by a pre-existing rule. Thus, a decision by a governmental official about whom to hire for a particular job might be a matter of optionality within a range of possibilities. So, too, might a decision by a judge about how severely to sentence offenders.

An important corollary to the constitutional optionality of laws and governmental actions is that their omission—the failure to enact those laws or undertake those actions—is likewise constitutionally optional. If, for example, public welfare or public education is a constitutionally optional benefit, then not only is provision of such benefits constitutionally permissible, but so too is the repeal of those benefits or the failure to provide those benefits initially.

That omissions are constitutionally optional if their corresponding actions are optional might seem trivial because it is analytically true. Nonetheless, it becomes important if optionality forces a consideration of governmental motives: motives behind failures to act are frequently much more opaque than motives behind actions.

Frequently, the notion of constitutional optionality is associated with benefits, particularly the benefits of the modern welfare state. Thus, the Supreme Court has stated or implied that welfare payments, public schools, public libraries, and public

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Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (regulation discriminating against religious practice invalidated under Free Exercise Clause).

health care are constitutionally optional.[3] The domain of constitutional optionality, however, is much broader than those public welfare benefits. It includes any other benefits that government is constitutionally at liberty to provide or not to provide. And it includes as well all burdens with respect to which the government has a similar liberty.

Thus, if the government has the constitutional liberty to impose five years of imprisonment for robbery or ten years, then ten years of imprisonment is a constitutionally optional burden on those serving such a sentence. Likewise, if government has the constitutional liberty to regulate taxi service in particular ways or to leave it unregulated, the regulation of taxi service in those ways is a constitutionally optional burden on those regulated.

In one sense, the point here is merely semantic. What I have called constitutionally optional burdens—for example, ten years imprisonment or regulation of taxi service—can be turned around so that constitutionally optional "benefits" are at stake: five years of imprisonment or freedom from regulation. And constitutionally optional benefits, such as welfare, can be viewed as burdens if one adopts the standpoint of the taxpayer. The important point, however, is not a semantic one. It is that the domain of constitutionally optional governmental action is quite broad. Indeed, it apparently includes almost all possible governmental actions.

Although it is common to speak of specific laws or governmental actions as constitutionally optional or nonoptional, constitutionality—and, derivatively, constitutional optionality and nonoptionality—is actually an attribute of entire sets of laws. Thus, public education might be regarded as a constitutionally optional benefit in the context of most sets of laws, but not if the remaining laws include a law conditioning the right to vote upon literacy or education. Likewise, a literacy or education requirement for voting may be a constitutionally optional burden but only if there is universal public education. And freedom of speech might demand either the set of laws a, b, and c or the set of laws x, y, and z but forbid the set of laws a, b, and z. If so, it will be true but misleading to speak of the optionality of any particular law a-z. Only if a particular law is optional—or nonoptional (forbidden or required)—in all possible sets of laws will it

3. See generally *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 546-47 (1972); *Dandridge v. Williams*, 397 U.S. 471, 484 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

be accurate to speak of that particular law as optional (or nonoptional). Generally, when we speak of individual laws or actions as optional or nonoptional, we are referring to the entire set of laws to which that particular law belongs.

Finally, true constitutional optionality requires that the government always be permitted to reconsider the current status of a benefit or burden. If government possessed the option whether to have, say, welfare or public education only at the onset of its existence as a government, but was required as a constitutional matter to stick forever with whatever choice it made at that time, nothing would now be constitutionally optional. Constitutional optionality *now* means constitutional optionality tomorrow and the day after. Although the Takings Clause, the Contracts Clause, the Due Process Clauses, and the Ex Post Facto Laws Clauses place some constitutional limits on government's ability to change otherwise optional laws—to protect against unfair upsets of expectations—government in general may constantly change its mind regarding optional benefits and burdens. As we shall see, this point about optionality has important implications for constitutional theory.

II. THE DOCTRINAL DOMAINS OF CONSTITUTIONALLY OPTIONAL BENEFITS AND BURDENS

As noted earlier, optionality questions are implicated most strongly in issues arising under the Equal Protection Clause and the equal protection components of other clauses—most notably, the Speech and Religion Clauses of the First Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. A true equal protection case always assumes that what is at stake is a constitutionally optional benefit or burden. The complainant is objecting, not to receiving, say, a certain level of welfare, education, or some other benefit or burden, but to receiving less of that benefit (or more of that burden) than a comparison group is receiving. If there is an equal protection problem with the way the optional benefit or burden is allocated among groups or individuals, it can be remedied either by government's allocating more of the benefit (or less of the burden) to the complainant or by government's allocating less of the benefit (or more of the burden) to the comparison group. Thus, if the government is denying equal protection by giving whites more welfare than blacks, or by giving embezzlers less punishment than larcenists, it can remedy the violation either by giving

blacks and embezzlers more or by giving whites and larcenists less.[4]

Similarly, although freedom of speech is typically thought of as a noncomparative right—a denial of freedom of speech is objectionable even if government is denying it to everyone—there is a comparative (or equal protection or optional benefit and burden) side to freedom of speech. For in many cases freedom of speech is nothing more than a ban on government's discriminating on the basis of subject matter discussed or viewpoint expressed.[5]

Thus, in the area of time, place, and manner regulations, government has great latitude in deciding whether or not to permit expressive behavior. For example, it may deny demonstrators the right to demonstrate in a prison yard, to conduct a sleep-in in a public park, or to burn their draft cards.[6] On the other hand, it would also be constitutional for government to allow demonstrations in prison yards, sleep-ins in public parks, or draft card destruction. Thus, all of these activities represent constitutionally optional benefits that government may withhold or grant at its option. What government may not do, however, is grant these optional benefits only to demonstrators expressing certain ideas or viewpoints, unless the government has a sufficient justification for its discrimination in granting the optional benefits. In other words, there is an "equal protection" doctrine that applies to subject matter or viewpoint discrimination in regulating the time, place, and manner of speech.[7]

Similarly, when government is spending its own resources to speak, the courts have imposed an equal protection limitation, albeit quite erratically. Government funding of speech—its own or another's—is a paradigmatic optional benefit. Government need not give money to family planning clinics, to the endowments for the arts or humanities, or to public broadcasting, nor need government run municipal theaters or even public schools. When it chooses the option of funding these enterprises, how-

4. This is why cases like *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that restriction of access to contraceptives to married persons violates Equal Protection Clause), are not true equal protection cases: the benefit, access to birth control, can only be ratcheted up because it is constitutionally mandated by the Due Process Clause. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

5. See note 2 supra.

6. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (public park sleep-in); *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card burning); *Adderley v. Florida*, 385 U.S. 39 (1966) (prison yard demonstration).

7. See *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

ever, it faces some constitutional restrictions on its ability to favor certain ideas or subjects.[8]

Much of Establishment and Free Exercise Clause doctrine likewise invokes a nondiscrimination principle in the granting of optional benefits and burdens. The Free Exercise Clause has recently been narrowed by the Supreme Court to the point that it appears to cover very little other than discrimination. Thus, government may now be able to ban all uses of alcohol or drugs and all slaughtering of animals—none of which, of course, it is constitutionally compelled to do—no matter how serious the effects of such bans on religious practices might be. What it may not do, at least without a compelling reason, is limit its bans to religious uses of alcohol and drugs or to religious slaughter of animals.[9]

While the Free Exercise Clause deals with religious discrimination in the imposition of optional burdens, the establishment clause limits religious discrimination in the granting of optional benefits. Because every possible allocation of optional benefits and burdens will affect the relative prospects of various religions (and nonreligion) differently, the major difficulty under both the Establishment and the Free Exercise Clauses is to determine the constitutional baseline from which to measure discriminatory effects.

As with the Speech and Religion Clauses, the Due Process Clauses have an equal protection component, though the courts have been much more willing to allow government discrimination in this area. Thus, while government constitutionally may finance the live births of indigent women without financing their abortions—that is, may condition the optional benefit of publicly-financed medical procedures on how the constitutional right to choose between live birth and abortion is exercised—the Supreme Court has hinted that government may not condition the optional benefit of ordinary welfare or even publicly financed general medical care on forgoing the right to an abortion.[10]

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8. See *Rust v. Sullivan*, 500 U.S. 173, 201-03 (1991); *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364 (1984); *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

9. See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217 (1993); *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

10. See *Maher v. Roe*, 432 U.S. 464, 474-75 n.8 (1977).

III. APPLYING THE CONSTITUTION TO OPTIONAL BENEFITS AND BURDENS: THE THEORY-DEPENDENCE OF JUSTIFICATIONS AND THE IMPERIALISM OF THEORY

A

If there are constitutional constraints on the allocation of optional benefits and burdens, what explains them? How can it be that the Constitution prohibits giving more of good G to X than to Y—unless there is a sufficient justification for doing so—but does not prohibit giving even less G to Y as long as X gets the same amount of G as Y?

The texts of the Equal Protection and Due Process Clauses and the First Amendment's Speech and Religion Clauses surely do not contain clear rules dictating the results the courts have reached. And although some who make the Framers' original intentions authoritative find clear rules embedded in these intentions, those rules tend to be much narrower constraints on optional benefits and burdens than is found in current judicial doctrine. Thus, some read the intent behind the Equal Protection Clause to be a rule requiring that there be no racial discrimination in specific domains of benefits and burdens, a much narrower conception of equal protection than is currently enforced.[11]

In today's jurisprudence, perhaps with the exception of facial religious discrimination, there are no *per se* rules in any of these domains, and surely none that can be said to be textual or a direct reading of the Framers' intentions. Instead, we have varying standards of judicial review, all of which refer to how government must justify its allocations of optional benefits and burdens. The judicial doctrines in play refer to "compelling," "important," "substantial," and "legitimate" governmental interests. They also refer to degrees of "fit" between the governmental means in question and the ends those means are supposed to further. And they debate the level of generality at which the ends are to be characterized for purposes of determining means/ends fit, and how to deal with the fact that government usually pursues multiple ends in a single act, or at least a primary end constrained by multiple secondary ones.

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11. See, e.g., Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* 123-24 (U. of Okla. Press, 1989); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 191-92 (Harv. U. Press, 1977).

How do we know what governmental interests are legitimate, or how important they are, at what level of generality they should be characterized, and how the government's acts must "fit" with these various interests? The answer is that we cannot know these things without some normative theory about the proper ends of government. If we are Benthamite or Millian utilitarians, for example, then we will be able to assess allocations of optional benefits by whether they maximize social utility. Indeed, maximizing social utility is the only legitimate governmental end. It is therefore always compelling. And it is at the level of generality expressed by "maximizing social utility" that government's plurality of more specific ends must be characterized in order to determine whether its means "fit." Moreover, only 100% "fit" at that level of generality is acceptable. For a utilitarian, no over or under-inclusiveness in the relation of means to ends is ever permissible where the end in question is "maximize social utility."

A utilitarian normative theory would thus answer the questions about justifying governmental allocations of optional benefits and burdens. So too would some contractarian normative theory such as that of John Rawls, a theory which several constitutional theorists would read into the Constitution.[12] Thus, for those theorists, an allocation of optional benefits or burdens would properly "fit" with "legitimate" and "compelling" ends described at the correct level of generality if those allocations maximized the positions of the least advantaged. Likewise, those who would read the Constitution as embodying an essentially libertarian normative theory of government would assess means and ends through the prism of their chosen brand of libertarianism.[13]

Thus, the justifications at issue in assessing allocations of optional benefits and burdens unsurprisingly require a justificatory theory such as utilitarianism, contractarianism, or libertarianism might provide. And here is the kicker: *The justificatory theories that would provide the framework for assessing the allocations of optional benefits and burdens will tend themselves to undermine the optionality of those benefits and burdens.* In other words, jus-

12. See, e.g., David A.J. Richards, *A Theory of Reasons for Action* (Clarendon Press, 1971); David A.J. Richards, *Toleration and the Constitution* (Oxford U. Press, 1986); David A.J. Richards, *Foundations of American Constitutionalism* (Oxford U. Press, 1989); David A.J. Richards, *Conscience and the Constitution: History, Theory, and Law of the Reconstruction Amendments* (Princeton U. Press, 1993); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

13. See, e.g., Epstein, *Takings: Private Property and the Power of Eminent Domain* (cited in note 1).

tifying allocations of optional benefits and burdens requires a comprehensive theory, but a comprehensive theory is a normative blueprint that leaves no options but rather either mandates or forbids every possible set of laws and governmental actions.

When I say that any comprehensive theory that would justify (or invalidate) allocations of optional benefits will be a blueprint for government action that undermines optionality, I do not mean that any normative theory must render a moral verdict of forbidden or required on all possible actions. Although accounting for a domain of moral freedom is a theoretically difficult enterprise, especially for consequentialist moral theories, I assume that such a domain is theoretically justifiable when we are dealing with individual moral agents.

A domain of moral freedom is much more problematic, however, if we are dealing with the government. Although there may be some areas where the moral options of the governed (say, to prefer opera over dance) appear to translate directly into options for the government (to prefer a municipal opera over a municipal ballet), even then it is more accurate to say that government has no other option than to reflect the preferences of the governed. And when we move to optional benefits like welfare or public education, it is difficult to imagine that any comprehensible normative theory would regard them as within the realm of individual moral freedom, much less a matter of governmental moral freedom.

Therefore, applying constitutional constraints to allocations of optional benefits is theoretically problematic. We cannot decide whether the government's interests in support of its allocations are legitimate or sufficiently weighty without a comprehensive normative theory. A comprehensive normative theory, however, will undermine the optionality of the benefits in question and demand a single pattern of allocation.

B

Perhaps the most attractive solution to the predicament posed in the preceding section is to assume that more than one comprehensive normative theory can justify governmental acts. Thus, to simplify matters, let us assume that government acts in a constitutionally justified manner if its entire set of laws are consistent with either the set of laws a thoroughgoing contractarian like Rawls would enact or the set of laws a libertarian like Nozick or Epstein would enact. In other words, the Constitution is con-

sistent with either Left liberalism or Right liberalism but with nothing else.[14]

On such an assumption we can explain both nonoptional constitutional rights and optional benefits and burdens. The former represent the area of overlap between Left and Right liberal theories, what both Rawls and Nozick would forbid or require. The latter represent the area in which the theories dictate different results. Thus, while both theories would support a common core of freedom of speech, freedom of religion, and privacy, Left liberalism would demand and Right liberalism would forbid many of the redistributive programs of the welfare state, such as welfare and public education. Those welfare state programs, required by one theory and forbidden by the other, would be constitutionally optional.

Optional normative theories may explain the existence of constitutionally optional benefits and burdens. However, we have not yet fully explained constitutional constraints on the allocations of those optional benefits and burdens. Thus far, we have only explained one option, the option to choose that set of laws demanded by Left liberal theory or that set of laws demanded by Right liberal theory. We have not explained the existence of options that represent neither the pure Left liberal nor the pure Right liberal position.

Put differently, we have shown how there can be a constitutionally legitimate thoroughgoing welfare state and a constitutionally legitimate thoroughgoing libertarian state. We have not shown how there can be a constitutionally legitimate modest welfare state. And because orthodox constitutional doctrine assumes many more optional benefits and burdens than the two stark, polar options of Left and Right liberalism—basically, the vast number of sets of laws that represent positions in between those poles—positing optional normative theories is not sufficient fully to explain orthodox constitutional assumptions.

What is necessary to explain the full panoply of options is this: We must assume that the Constitution permits the government to choose not only between Left liberalism and Right liberalism but also among various positions that lie "between" those two poles (viewing the poles somewhat spatially). Thus, if Left liberalism demands $15,000 of welfare per year to the average poor person, and Right liberalism forbids welfare altogether, government has the constitutional option to choose *any* level of

14. See, e.g., Larry A. Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 Ohio St. L.J. 3, 24-39 (1981).

welfare between $15,000 and zero. I shall call these intermediate positions compromise positions because they represent a compromise between pure Left liberalism and pure Right liberal.

With the assumption in place that compromise positions as well as pure theories are constitutionally permitted, we can now account for the existence of constitutional options as well as for constraints on their allocation. The latter represent the fact that the Constitution permits *only* the sets of laws endorsed by Left or Right liberal theories or that represent compromises between those theories. It does not permit, say, welfare without qualification. It permits welfare only up to what Left liberalism requires or down to what Right liberalism requires. Beyond those poles welfare is no longer optional.

We have not yet gotten to where we need to go, however, for we have still not fully explained the constraints on allocations of optional benefits and burdens that orthodox constitutional law assumes. Consider the following example. Suppose Left liberalism requires $15,000 of welfare and Right liberalism requires that there be no welfare. And suppose the government enacts a welfare law granting poor whites $10,000 of welfare and poor blacks $5,000 of welfare. In the absence of some surprising reason for this racial classification within the welfare law, we assume the welfare law violates the equal protection clause. But why, given that both $10,000 and $5,000 of welfare lie "between" the $15,000 and zero polar amounts of Left and Right liberalism? We need a theoretical explanation of constitutional constraints on allocations "between" the optional poles.

Coming up with such an explanation has been a formidable problem in constitutional theory. If the government has the "greater" power to give poor blacks no welfare (because it has the power to eliminate welfare altogether), why does it not have the "lesser" power to give them some welfare, but less than it gives to whites? Analogously, if government has the "greater" power to make provocation immaterial to the crime of murder, why does it not have the "lesser" power to make it an element of the crime, but one not subject to the requirement of proof beyond a reasonable doubt?[15] Or, moving beyond constitutional law, why does not the "greater" power of publishing scandalous information about X include the "lesser" power of selling silence to X?

15. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Cf. *Patterson v. New York*, 432 U.S. 197 (1977) (upholding shifting the burden of proof to the defendant for affirmative defenses).

One answer to the puzzle of constraints on intermediate positions is to argue that the particular position that is prohibited is not really an intermediate compromise. Thus, one could argue that although government may subsidize political campaigns at any level up to a certain amount—say, one million dollars—or not subsidize them at all, it may not subsidize Republican campaigns at a higher level than Democratic ones because to do so would make Democrats worse off than had there been no subsidy at all, which is the pole marking one boundary of optionality. What appears to be a position "between" the poles of no subsidy and a one million dollar subsidy is really one in which the Democrats are worse off than they are if both parties are at either pole.

This kind of solution is sometimes offered for solving the puzzle of blackmail. Thus, it is argued that the victim of blackmail—or at least the class of potential victims—or society at large is actually better off if blackmail is criminalized and the blackmailer is left to choose between disclosure and being unpaid for silence.[16] And this solution works for some kinds of optional benefits, those the value of which is dependent on what others are getting. But it is doubtful that it works for all optional benefits. For example, are murder defendants really worse off if the prosecution must prove the absence of provocation by a preponderance of the evidence than if provocation is completely immaterial to the crime or its degree? And are poor blacks really worse off getting $5,000 of welfare when whites get $10,000 than if no one got any welfare at all?

One might try instead to explain constitutional constraints on intermediate positions on the basis of this principle: When government reaches a compromise between the polar justificatory theories, the compromise must reflect only considerations that are material under those theories and may not reflect considerations that are extraneous to those theories.

Thus, if Left liberals consider only the welfare of the least advantaged, and Right liberals only the integrity of one's person and property, and neither group considers race to be material, then government may not structure its welfare program in a way that assumes the theoretical materiality of race. That is not to say that racial distinctions are absolutely forbidden, for they might serve some further end that is material under one or both of the constraining theories. What government cannot do in between the Left and Right liberal poles is to act for ends that neither pole endorses.

16. See *Symposium: Blackmail*, 141 U. Pa. L. Rev. 1565 (1993).

I shall characterize this constraint on allocations of optional benefits and burdens as the constraint of symmetry. To be constitutionally permissible, an allocation lying "between" the polar justificatory theories must reflect nothing more than the relative political force of those theories and represent the point at which the force exerted by each theory in the political arena is exactly balanced by the force exerted by the opposite theory. If an allocation reflects considerations extraneous to any justificatory theory, then it will not represent a symmetrical compromise whose shape reflects only the political balance between the polar opposite theories. Asymmetrical compromises will be unconstitutional, which means that the requirement of symmetry is our missing constitutional constraint.

Still, while the requirement of symmetry may describe the constitutional constraints on allocations falling between the theoretical poles, I leave it as an open question whether it adequately justifies those constraints. If blacks in my example are not worse off receiving less welfare than whites than they would be were they receiving no welfare, why should we view their relative treatment as a constitutional wrong? Some might answer that the treatment is "unfair." But what one regards as fair is a function of one's normative theory. Therefore, all one can be claiming in describing the treatment as "unfair" is that the treatment is not what it should be under one or the other of the normative theories in play. In other words, it is not treatment endorsed by either Rawls or Nozick. But that is true of *all* compromise allocations, not just those that treat blacks and whites differently.

The position I am examining, then, can be restated as the following view: If we permit government to choose among two or more normative theories, then we have as many conceptions of fairness as we have permissible theories; but no allocation can be fair if it reflects values not endorsed by any of the permissible theories. More welfare for whites than for blacks is unfair to blacks because it must represent values extraneous to either Left or Right liberalism.[17]

17. It remains an open question, however, whether this position is really a solution to the problem of constitutional constraints on allocations of optional benefits and burdens or whether it is merely a redescription of the problem. I leave it to others to answer this question.

IV. CONSTITUTIONAL OPTIONS, GOVERNMENTAL MOTIVES, AND EFFECTS

A

Let us assume that positing optional normative theories in the Constitution, which theories establish polar positions between which a government may act so long as it considers only the relative political forces exerted by the theories, explains how there can be constitutionally optional benefits and burdens whose allocations are nonetheless subject to constitutional constraints. The following sections examine some of the more troublesome implications of such a view. I begin with the question of motive, then turn to effects, and finally examine remedies and standing.

If there are going to be constitutional constraints on the allocation of optional benefits and burdens, then government's motivation must be a material element in the constitutional analysis. Why that is so can be illustrated by the following example, in which I assume that public swimming pools are constitutionally optional benefits, permitted but not required by the Constitution. Consider five states' policies regarding public pools:

> STATE ONE has had public swimming pools for many years.
> STATE TWO has never had public swimming pools.
> STATE THREE has alternated between having and not having public swimming pools, depending upon whether Left or Right liberals controlled the legislature. The decisions the legislature has taken have reflected only the conflict between Left and Right liberalism. Nonetheless, though quite coincidentally, the pools have been open when whites have been the principal beneficiaries of the pools and have been closed when blacks would have been the principal beneficiaries.
> STATE FOUR has also alternated between having and not having public swimming pools. As in State Three, the public pools have been open when whites have been the principal beneficiaries and closed when blacks would have been the principal beneficiaries. Unlike State Three's legislature, however, State Four's has been motivated by anti-black attitudes.
> STATE FIVE has had for many years a law authorizing public swimming pools "during periods when whites but not blacks would make up the preponderant share of pool users."

Based on the preceding analysis, we can say that, at least prima facie, State One and State Two have acted constitutionally. Moreover, if they have acted constitutionally, then so too has State Three. As I argued earlier, the Constitution does not con-

tain any principle that "freezes" the option first chosen by the government and entrenches it against repeal, assuming no takings, contractual impairment, or retroactivity problems.

State Five has violated the Constitution, however. If race is not a factor picked out by our constraining Left and Right liberal normative theories, then State Five's policy is not a symmetrical compromise between optional poles.

That leaves State Four. On the one hand, State Four's policies have had exactly the same external appearance and exactly the same effects in the world as State Three's constitutionally permissible policies. On the other hand, there is no functional difference between State Four's policies and the unconstitutional law in State Five. State Five's law is not invalid because of its effects during any narrow time slice. In any narrow time slice, its pools will either be open or closed, neither of which represents an unconstitutional state of affairs. (State laws unconstitutionally segregating public beaches were unconstitutional during all moments of their existence; but at some of those moments at least, no one actually wanted to swim or to swim at the forbidden beach.)[18] Nor is State Five's law invalid because its pools will shift from open to closed or vice versa during certain time slices. State Five's law is invalid because it picks out race, an immaterial element under the justificatory theories, as a determining factor for the status of public pools and mandates that race shall affect that status for the indefinite future.

There is no material difference between State Five's mandate to consider race, a mandate that has no temporal limitation, and State Four's less formal consideration of race, which will be no more but surely no less determinative of what happens for the indefinite future. If State Five's law is unconstitutional, as we have assumed, then State Four's racially motivated actions are unconstitutional. Moreover, those actions are unconstitutional whether they are administrative actions opening and closing the pools or whether they are in the form of laws—"public pools," "no public pools"—so long as the underlying legislative or administrative motives are the same.[19]

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18. See Lawrence A. Alexander, *Introduction: Motivation and Constitutionality*, 15 San Diego L. Rev. 925, 928-29 (esp. 929 n.20) (1978).

19. See id. at 928-29; Alexander, 42 Ohio State L.J. at 21-23 (cited in note 14).

The statement in text shows why the Supreme Court's decision in *Palmer v. Thompson*, 403 U.S. 217 (1971), holding that racially motivated closing of public pools did not violate the Equal Protection Clause, is inconsistent with its decisions in cases such as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down under the Equal Protection Clause an administrative action denying permission to operate a laundry because the applicant was Chinese). *Palmer* is no longer good law. See *Washington v. Davis*, 426 U.S. 229 (1976);

What makes State Four's actions functionally equivalent to State Five's is what also distinguishes its actions from State Three's. Because the legislature in State Three lacks a racial motive, it cannot be predicted to shift from public pools to no public pools or vice versa in ways that always relatively disadvantage Blacks, even though in the past those shifts have done so.

What makes State Four's actions different from the constitutionally permissible ones of State Three and similar to the unconstitutional law in State Five is motive. Without motive as a material element in the constitutional analysis, we cannot make the distinctions we must make among the actions of States One through Five. Yet the necessity of a motive inquiry exacts an extremely high price as a matter of constitutional theory.

Laws are unconstitutional because of their predicted effects over an indefinite period of time, not because of their effects during any given time slice. After all, State Five's unconstitutional law did not differ in its past effects from the constitutionally permissible actions of State Three, nor would its effects differ during narrow time slices from the effects of State One's or State Two's constitutionally permissible laws. Legislative motivation is what provides the assumption that all law will persist over an indefinite period of time, so that its predicted effects over an indefinite period become relevant. Because government's choice of an allocation of optional benefits is not frozen by the Constitution and can always be changed, there is no basis other than motive for assuming durability over time. And unless durability over time is assumed, constitutional analysis breaks down. For if time is sliced sufficiently narrowly, it will be impossible to say of the allocation of optional benefits and burdens *during that narrow time slice* that they violate the Constitution.

But why assume motivations are durable? Government decisionmakers change over time. And any given government decisionmaker can change his or her attitudes over time.

Take the case of *Yick Wo v. Hopkins*[20] as an example. In that case, about three hundred Chinese applicants had been denied licenses to operate laundries by the San Francisco Board of Supervisors before Yick Wo, too, was denied. This pattern did not itself make Yick Wo's denial unconstitutional. Had the pre-

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). For the same reason, the Court's 1968 rejection of motive inquiry where the First Amendment and optional regulations intersect was untenable and ultimately repudiated. Compare *United States v. O'Brien*, 391 U.S. 367 (1968) with *Wayte v. United States*, 470 U.S. 598 (1985).

20. 118 U.S. 356 (1886).

vious three hundred applicants been denied licenses because they were Chinese, but Yick Wo was denied one because of a valid health, safety, or welfare concern, Yick Wo would not have had the constitutional grievance the previous three hundred applicants had. What the past cases provided was circumstantial evidence to support the hypothesis that an anti-Chinese motive explained a fair number if not all the results, since constitutionally permissible rationales for denials of licenses would be very unlikely to work against three hundred Chinese applicants in a row.

What is significant, then, is that the past cases are relevant to Yick Wo's case but not material. They support his claim that *he* was denied a license unconstitutionally. And if we assume that Yick Wo's receiving a license was constitutionally optional—there were available constitutionally permissible laws or policies regulating who gets a laundry license that San Francisco could have employed and that would have excluded Yick Wo—then what made Yick Wo's denial unconstitutional was its underlying motive. Yick Wo did not have a constitutional right to a license. Rather, he had a constitutional right not to have a license denied for improper reasons *even when proper reasons for a denial were available.*

Now why should we care that Yick Wo was denied a license for the wrong reasons if good reasons were available? Why do we demand that government act for proper motives if what it does is consistent with proper motivation in any given case? The answer, I have argued, is that government's motivations, and the patterns of laws and actions to which they give rise, are presumed to persist for an indefinite period, during which period they will produce effects that cannot be squared with any justificatory theory or proper compromise.

But why assume such permanence? Suppose at the time of Yick Wo's trial the San Francisco Board of Supervisors was entirely different from the Board that had denied Yick Wo his license. Suppose it is now controlled by Chinese members, so that no one will likely be denied a license because he is Chinese during this Board's governance. The assumption of durability of the motive operative in Yick Wo's case has now been rendered false by the facts. Why should we deem Yick Wo to have suffered an unconstitutional denial?

Or, to change the example to make it a State Five example rather than a State Four example, suppose the first three hundred cases of laundry license applications by Chinese, including Yick Wo's, were governed by a law that set forth criteria of eligibility

for such a license, among which was that one not be Chinese. Yick Wo's case is now before the court. The law under which he was denied a license has been repealed, however, and Chinese are now eligible. The law with its racial classification proved not to be indefinitely durable. How do we explain a conclusion that Yick Wo was dealt with unconstitutionally?

The answer cannot be in the pattern of results under the law during the time it was in force. The reason is simple. *That pattern could have been produced constitutionally.* For recall State Three and its opening and closing of public swimming pools. It produced the same pattern as did the unconstitutional actions of States Four and Five. All that can distinguish the states is the underlying motivation, and unless that motivation makes some difference in the effects of government action on individuals, it is hard to see why it matters. Because the motivation did not distinguish States Four and Five from State Three in the past, it must be its potential to do so in the future that makes it important. In the hypothetical under consideration, however, that improper motivation has disappeared. In that hypothetical, *the future of States Four and Five, like their past, will be identical to that of State Three.* Therefore, the materiality of motive is mysterious.

Let us recap the argument here. We assumed that because State One and State Two were acting constitutionally, so too was State Three. To say otherwise would be to deny options at any point except at the beginning of the state's existence. But State Three was indistinguishable from States Four and Five on any basis but motive. And motive seemed material only if it was projected into the indefinite future. Its disappearance in our hypothetical after Yick Wo's case then defeats its materiality. But orthodox constitutional doctrine assumes that if Yick Wo were denied a license based on his ancestry, he was treated unconstitutionally, even if no one was ever treated that way again. We need motive to distinguish State Three from States Four and Five, but the distinction breaks down if motive is not indefinitely durable.

If motive inquiry is necessary in order to deal with constitutional optionality, then there are a number of important implications and problems that attend such an inquiry. Of course, there is the sometimes formidable evidentiary problem of discerning what government's motive is or was. The scope of this evidentiary problem can only be fully appreciated by noting the following implications and conceptual puzzles of motive inquiry.

There are two principal implications of motive inquiry that should be mentioned because these two implications demon-

strate the scope of the evidentiary difficulties. First, motive inquiry must extend to every law and governmental act that lie in the domain of constitutional optionality. To return to our original examples, if motive is material in State Four, the state that opened and closed its public schools depending upon whether whites or blacks were primarily benefited, then the motive behind the laws in State One, Two, and Three are also material. For improper motives are all that distinguish States Four and Five from States One, Two, and Three at any given moment in time.

The second implication is this: Not only must every law or governmental decision allocating optional benefits and burdens be subjected to motive inquiry, but so also must every repeal of a law and failure to enact a law. A set of laws may be constitutionally permissible at one moment and constitutionally impermissible at the next without any change on the books if the motive for not changing that set of laws changes from a constitutionally permissible motive to a constitutionally prohibited one.

There are a number of conceptual problems that attend motive inquiry, some well known, others less so. A well known problem concerns the "motive" of a multimember body. Although many optional benefits and burdens are allocated according to policies attributable to individual government decisionmakers, many are allocated according to policies embodied in laws, regulations, and ordinances enacted by multimember legislative bodies. When we speak of the motives of such bodies, to what facts in the world are we referring? How do we cumulate the motives of real persons to arrive at the motive of a collective? What if no particular motive is sufficient for passage (or for failure to enact, or for repeal) of a law? What if no particular motive is necessary? And what do we do with the motives of chief executives with veto power,[21] or with the motives of those opposing the law (or failure to enact, or repeal)?

A perhaps less well known conceptual problem is that of mixed motivation. Government officials take actions based upon all sorts of motives, many of which operate simultaneously. Some officials' motives are just to please their constituents, who have their own motives for supporting or opposing various acts. Some officials have other kinds of personal motives (this will make me a hero, or a martyr, etc.). And some officials have a mixture of motives reflecting both licit and illicit social concerns.

21. See *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 666-67 nn.6-7 (1981).

Does the presence of *any* motive other than the motive to bring about the state of affairs mandated by one of the justificatory theories render the officials' motives unconstitutional? Or must those other motives be dominant? Sufficient? Necessary?

An even less well known conceptual problem with motive inquiry has to do with the hierarchical relationship among motives. When we act we do so for the sake of some ultimate ends, but we also have intermediate ends that motivate us because they are believed to be means to our ultimate ends. Suppose, however, as is no doubt frequently the case, our intermediate ends do not serve our ultimate ends, and we are mistaken in believing them to do so? Although we view our motivations to be consistent, they are in fact inconsistent. For example, we are motivated as legislators to achieve the ideals of Left liberalism, and we are motivated to support more redistribution of wealth because we believe more redistribution will bring about those ideals. Yet, it turns out that we are mistaken, and that more redistribution will in fact take us farther away from our ideals. If the test of constitutionally proper motivation is whether we are motivated to achieve the ends of one of the optional justificatory theories, are we properly motivated?

In fact, however, this otherwise potentially perplexing problem, unlike the other conceptual and evidentiary problems associated with motive inquiry, turns out to be rather easily resolvable. For intermediate motives that are inconsistent with proper ultimate motives will produce laws and actions whose *effects* fail to match those the normative theories prescribe. And as the next section argues, effects as well as motives matter.

B

Thus far I have been both making the case for motive inquiry in allocations of constitutionally optional benefits and burdens and also raising various theoretical difficulties with that case. Even if motive *is* material, however, so too must be the effects of government's laws and actions. Proper motivation—in our example, the motivation to realize Left or Right liberalism or a symmetrical compromise between them—is necessary for constitutionality, but it cannot be sufficient. If laws or actions produce effects that are inconsistent with such laws' or actions' underlying proper motivations, the laws or actions cannot be constitutional. For ultimately, effects in the world are all that matter, even conceding the materiality of motivation. Or put somewhat differently, no properly motivated government would

be content with laws that in fact do not achieve the ideals of the admissible normative theories or a proper compromise. Thus, proper motivation and proper effects are both necessary for constitutionality, and neither is sufficient by itself.

Although the materiality of effects complicates the constitutional analysis of optional allocations in one sense, it solves the last of the previously mentioned conceptual problems of motive inquiry, namely, the problem of mistaken intermediate motives. If a legislature has a proper ultimate motivation but has an improper lower level motivation (because it misperceives the relation in the world between the two), its law will probably produce effects that are inconsistent with the ultimate motivation and its justificatory normative theory. For example, if a legislature is properly motivated to achieve, say, Left liberalism, but erroneously believes that racial classifications further that end and so is motivated to enact laws containing racial classifications, those laws will probably produce effects that fail to correspond to a proper justificatory theory or compromise. Thus, even if we do not deem laws unconstitutional because of improper intermediate motivations, those laws will almost always be unconstitutional due to their effects.

V. REMEDIES AND STANDING

Even if we can figure out when and why allocations of optional benefits and burdens are unconstitutional, what are we justified in demanding of the lawmakers when we identify an unconstitutional allocation? If, for instance, the allocation is unconstitutional because of its underlying motivation, as was State Four's opening and closing of public pools in our earlier example, or Yick Wo's license denial, what should follow? Must the pools be kept open? Must Yick Wo get his license? Remember that those states of affairs, though constitutional (with proper motivation), are not inherently "more" constitutional than their opposites (with proper motivation). And although we can ask government to go back and make a new allocation with proper motivation, there is no way to ensure that it will do so and good reason to think that bad motives will persist for some period. What do we do, then, if government does not provide a new, properly-motivated allocation?

The problem transcends unconstitutionality due to improper motivation and includes unconstitutionality due to improper effects. Even if State Four or the San Francisco Board of Supervisors were motivated by a legitimate normative theory and were

merely misapplying it, so that the effects did not match the theory's blueprint, the problem of remedy would remain. Nor is the problem circumscribed to a choice between pools or no pools, or between a license or no license. For the range of optional allocations permitted includes every alternative set of laws except the forbidden ones. Thus, State Four might close its pools but replace them with tennis courts, close its pools and put the money into tax refunds, open its pools, but with shorter seasons, and so on. San Francisco might ban laundries in wooden buildings altogether, or require licensees to prove financial solvency, to take courses in laundry operations, or any of a number of possibilities, some of which would result in Yick Wo's getting a license, others of which would not. If government does not enact an option with permissible effects and based on proper motives, what set of laws out of the indefinitely larger number of constitutionally optional sets should be imposed remedially?

There is no way to finesse this problem. Given that the existing set of laws is unconstitutional, some alternative set must be imposed, and optionality assumes that there is more than one such set. There is no way to avoid imposition, for the status quo ante is unconstitutional. And we have said that repeals, failures to enact, or failures to repeal can be unconstitutional (due to underlying motivation), which reinforces the point that some option other than the status quo must be imposed. But which?

The problem of optional remedies leads to the problem of standing. Under each possible constitutionally optional set of laws that might supplant the present unconstitutional set, there will be different winners and losers. Who then has standing to challenge an unconstitutional set of laws? Does anyone who would benefit under a constitutionally permissible set that *might* supplant the existing set have standing to challenge that set?

Consider *Regents v. Bakke*.[22] The Supreme Court held that racial set-asides in the admissions process violated the Equal Protection Clause. Alan Bakke presumably would have been admitted had there been a racially-blind consideration of only grades and test scores. Moreover, such an alternative system of admission to state medical schools would have been constitutional, or so the Court implied and everyone assumed. Presumably, because this latter system would have been constitutional and would have resulted in Bakke's admission, whereas Davis's actual system was unconstitutional and resulted in denying him admission, Bakke was deemed to have standing to challenge the

22. *Regents of the Univ. of Calif. at Davis v. Bakke*, 438 U.S. 265 (1978).

constitutionality of Davis's system.[23] It was unconstitutional *as to him.*

But note that the Court did not deny that state-run medical schools were constitutionally optional. Nor did the Court imply that if the state chooses to have a medical school, it can only be of one type with one kind of admissions process. We must assume that the University of California could close its Davis campus medical school, keep it open but restrict it to certain specialties, keep it open but have open admission, and so on. The more options the Constitution leaves open to the University of California, the more people who might benefit by holding the status quo to be unconstitutional. If Bakke had standing to challenge the system, why would not anyone else who might benefit from some constitutionally optional alternative?

One answer is that the system in *Bakke* was "unfair" to Bakke but not to others. This reply is unsatisfactory, however, because the system is unfair to Bakke only by reference to an alternative under which Bakke benefits. However, there are alternatives under which persons other than Bakke who could not get into medical school for other reasons would benefit, as well, and many under which Bakke would not benefit. For example, applicants who would have gained admission under an open or random admission process but who would not qualify for admission under the system in *Bakke* could also claim to have been treated "unfairly."

VI. OTHER APPROACHES TO CONSTITUTIONALLY OPTIONAL BENEFITS AND BURDENS

I have described a particular way of understanding how the Constitution might constrain the allocation of benefits and burdens that are otherwise constitutionally optional. One might conclude, however, that the way I have described, which depends upon the Constitution's referring to two or more alternative normative theories as ultimate sources for evaluating government action, succeeds at too high a price. For if optional normative theories explain constitutionally constrained but constitutionally optional benefits and burdens, then constitutional analysis will be burdened with messy evidentiary problems regarding motives and effects, conceptual problems regarding motives, and uncertainty regarding remedies and standing.

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23. Id. at 277-81, 320.

Thus, there is reason to look briefly at some possible alternatives to this way of reconciling constitutional optionality with constitutional constraint. In this concluding section, I shall do so.

Suppose that the Constitution does not refer to optional normative theories. Suppose that only one such theory lies behind the constitutional scheme, and that the appearance of optional benefits and burdens is just that, an appearance, and one born of judicial uncertainty about what the one animating normative theory requires. Thus, if the Constitution embodies Rawlsian contractarianism, then where the courts can discern what that theory requires, they stand ready to invalidate laws and actions that are inconsistent with it. Where, however, they are uncertain regarding what Rawlsian contractarianism requires, they defer to the legislature's choice, which creates the sense that the legislature has an option under the Constitution. In reality, of course, it does not, but the courts' epistemic limitations translate into legislative finality regarding the constitutionality of its choices.

On the other hand, even if some allocations of benefits and burdens are treated by the courts as if they are optional because the courts do not know which allocations are required by the one normative theory in play, other allocations of those same benefits and burdens need not be so treated. For example, the courts may not know whether Rawlsian contractarianism requires a high level of wealth redistribution or a much lower level, but they may be quite certain that Rawlsian contractarianism cannot justify, say, high welfare for whites and low welfare for blacks.

Thus, we have an alternative account of how there can be constitutionally optional benefits and burdens that are nonetheless somewhat constitutionally constrained, an account that posits only one justifying normative theory rather than multiple ones.[24] Nonetheless, although this account may affect the legislature and administrators differently from the earlier one—it directs them to try to realize the ideals of a single normative theory rather than giving them a choice among more than one—it affects the courts qua reviewing agencies no differently from the earlier one. From the courts' perspective, at least, there will be constitutional options. And if there are constitutional options, then from the courts' perspective, it will be as if there actually were constitutionally optional normative theories. All of the problems of motive inquiry, remedies, and standing that arose under our original account will arise for the courts under this ac-

24. See Alexander, 42 Ohio St. L.J. at 20 (cited in note 14).

count, and in exactly the same way. Options as a consequence of epistemic uncertainty will for the courts feel no different from options as a consequence of normative relativity.

An alternative account of optional benefits/burdens and their constraints can be found in process theories of constitutional law, such as John Ely's.[25] Essentially, these theories view the Constitution as a set of very narrow constraints designed to ensure well-functioning democratic institutions. So long as those institutions do not attempt to free themselves from the constraints that ensure the purity of the process and are not otherwise infected with process-undermining conditions (such as "prejudice"), their decisions are constitutional whatever those decisions may be.

There is a familiar and I believe fatal objection to process accounts of constitutional law such as Ely's. Commentators as diverse as Paul Brest, Samuel Freeman, Laurence Tribe, and Michael Perry have pointed out that process theories ultimately must rest on substantive theories (in Ely's case, some version of utilitarianism).[26] Without a substantive theory, no particular process nor set of constraints can be justified. With a substantive theory, however, the existence of options becomes problematic. A similar criticism applies to more philosophically ambitious "process" theories, such as the "dialogic" theories of Bruce Ackerman and Jürgen Habermas:[27] the substantive constraints necessary to secure an "ideal speech situation" for reaching moral agreement may include everything morally significant, leaving no options open for dialogic resolution.[28]

Another way to preserve constitutional options that are nonetheless constrained is to interpret constraints such as equal protection and freedom of speech as very specific, rule-like prohibitions and not as broad moral principles. For example, if equal protection just means the state may not discriminate on the

25. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harv. U. Press, 1980).

26. See Paul Brest, *The Substance of Process*, 42 Ohio St. L.J. 131 (1981); Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 Law & Phil. 327 (1990-91); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L.J. 1063, 1071 (1980); Michael J. Perry, *The Constitution, The Courts, and Human Rights: An Inquiry into the Letigimacy of Constitutional Policymaking by the Judiciary* 77-90 (Yale U. Press, 1982).

27. See Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale U. Press, 1980); Jürgen Habermas, *Legitimation Crisis* (Beacon Press, Thomas McCarthy, trans., 1975).

28. See Walzer, *Moral Minimalism*, in W.R. Shea & A. Spadafora, eds., *From the Twilight of Probability: Ethics and Politics* 3, 11 (Science History Publications, 1992); Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 San Diego L. Rev. 763, 784-85 n.48 (1993).

basis of race and ethnicity in the allocation of benefits and burdens, then all allocations that do not rest on racial or ethnic distinctions will be optional insofar as the Equal Protection Clause is concerned.[29] Similarly, if freedom of speech is just a rule against viewpoint discrimination, then government has a considerable range of options as far as freedom of speech is concerned.

The problem with viewing constitutional constraints in this rule-like manner is that rules cannot be judicially extended or modified to adapt to everchanging situations. For example, an Equal Protection Clause that is a "rule" against racial or ethnic discrimination simply does not apply to gender discrimination, discrimination against illegitimates, and so forth, even if these latter forms of discrimination are morally analogous to the forms proscribed. Extension of a rule by analogy requires treating the rule as merely an application of a more general principle, which principle covers the new case and renders it analogous to those covered by the original rule. In short, extensions of a rule require treating it not as a rule but as a principle.

Now there are advantages to treating constitutional provisions as rules, not principles. Justice Scalia has written in favor of doing so wholesale;[30] Fred Schauer has endorsed doing so retail.[31] And treating constitutional provisions as rules preserves the optionality of most benefits and burdens while at the same time explaining how they can be constrained. On the other hand, rules are posited, canonical norms, and arguments over their interpretation are highly constrained by these characteristics. If the 1868 Framers failed to consider how gender discrimination was morally similar to racial discrimination in fashioning their equal protection "rule," gender discrimination is forever after exempt from equal protection invalidation, even if the moral principle that lies behind equal protection also applies to gender discrimination. That some practice is morally like another is a conclusive moral reason for treating them the same way, but it is frequently a very weak reason for assuming that the framers of a rule that deals with one also meant the rule to deal with the other. Rules are the products of particular individuals at particular times laboring under limitations of knowledge, imagination, empathy, and logic.

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29. See note 11 supra.

30. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

31. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991).

Some might argue that constitutional constraints are not fixed, limited rules but rather reflect some single but powerful moral principle, such as the principle of equality of respect or the principle against subordination.[32] Government's options regarding benefits and burdens can be quite broad; so long as government's allocations do not reflect inequality of respect or do not subordinate, they are constitutionally permissible. For example, both welfare and its absence could be constitutionally permissible, whereas welfare for whites but not blacks *would* violate the equality of respect and/or anti-subordination principle. Thus, we end up with constitutional options and constitutional constraints.

The problem with these theories lies in their assumption that equality of respect or anti-subordination principles can be fleshed out without a full-blown normative theory that would in turn undermine optionality. For example, Dworkin, who introduced equality of respect as his candidate for the equal protection norm, has now fleshed out that principle to entail a complete moral philosophy.[33] And there is no reason to assume that an anti-subordination principle would not lead to the same result. For example, it is a very short step from "welfare for whites but not blacks subordinates blacks" to "no welfare for anyone subordinates blacks (who are disproportionately likely to be poor)." Indeed, it is a step many have already taken.[34] And the implicit theory behind such a step would leave little room for options.

One final theory for reconciling constitutional options with constitutional constraints is to view the latter as directed toward forbidding government from (unjustly) stigmatizing persons. For example, all sorts of allocations might be permissible, but those that would stigmatize, such as more welfare for whites than for blacks, would be unconstitutional.

This theory would, of course, need a theory about when persons are justified in feeling stigmatized, so that the mere claim that one feels stigmatized is not sufficient to make out a constitutional violation. Presumably the theory would link the justifiability of feeling stigmatized to actually being stigmatized. It would thus have to provide an account of when people *are* stigmatized, or more specifically, are stigmatized unjustifiably.

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32. See Ronald Dworkin, *Taking Rights Seriously* 180-83, 272-78 (Harv. U. Press, 1977) (equality of respect); Laurence H. Tribe, *American Constitutional Law* §§ 16-21 (Foundation Press, 2d ed. 1988) (antisubjugation).

33. See Ronald Dworkin, *Foundations of Liberal Equality*, in Grethe B. Peterson, ed., XI *The Tanner Lectures on Human Values* 1 (1990).

34. See Tribe, *American Constitutional Law* at 1518-21 (cited in note 32).

It should be apparent, however, that a theory of unjustifiable stigmatization, like theories of equality of respect or subordination, must inevitably turn into a full-blown normative theory. People will be unjustifiably stigmatized to the extent—and only to the extent—they do not receive their moral due. Even if the focus is restricted to government officials' states of mind—did they regard the constitutional claimants in an unjustifiably stigmatic manner?—the states of mind can only be characterized as stigmatizing by reference to a full-blown normative theory. Moreover, if the gravamen of the complaint is that the officials' states of mind are stigmatizing, no remedy exists to cure such a constitutional defect: we can impose sets of laws on governmental officials, but we cannot—or surely courts with their ordinary remedies cannot—change officials' views of others. If unconstitutional stigma lies in the officials' attitudes, stigma is beyond the power of courts to remedy.

CONCLUSION

I have argued that reconciling constitutionally optional benefits and burdens with constitutional constraints on their allocations is theoretically problematic. Constraints seem to require a normative theory, but a single normative theory undermines the existence of options. Linking constitutional options to optional normative theories, however, saves options at the cost of introducing the difficult practical and conceptual problems of motive inquiry, remedy, and standing. Finally, other approaches (pure process, equality of respect, anti-subordination, anti-stigmatic) either require a background normative theory, which again will undermine options, or rest on conceiving constitutional constraints to be limited, fixed rules, opaque to background moral principles and incapable of extension or modification. It is thus not surprising that the intersection of constitutionally optional benefits and burdens with constitutional constraints has produced a doctrinal mess and a theoretical nightmare.[35]

35. See *Unconstitutional Conditions Symposium*, 26 San Diego L. Rev. 175 (1989).