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Reflections on Context and the Constitution

Louis Michael Seidman*

Written constitutions attempt to capture within the confines of a single document the rules that will mold the future of a political community. The most persistent and vexing problem for constitutional law concerns the possibility and legitimacy of this endeavor. This Essay describes two obstacles to such a project—the coercive offer problem and the neutral viewpoint problem. The Essay then explores how these two obstacles are interrelated and discusses some of the implications these obstacles have for constitutional analysis.

The coercive offer problem raises doubts about the possibility of constitutionalism. The problem occurs when the government makes an offer that it has no constitutional obligation to extend, but conditions the offer in a fashion that presents constitutional problems.

The coercive offer problem has been the subject of seemingly endless debate among the Supreme Court Justices. Consider the variety of contexts in which the problem arose during the 1986 Term:

1. Congress enacts a statute directing the Secretary of Transportation to withhold a portion of federal highway funds from states that do not prohibit the purchase of alcohol by people under the age of twenty-one. (The Court upheld the statute in South Dakota v. Dole.1)

2. Arkansas enacts a statute that exempts newspapers and religious, professional, trade, and sports journals from a state sales tax imposed on general interest magazines. In effect, the statute grants a tax subsidy to publishers who forgo their constitutional right to publish periodicals that do not fall within

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the favored categories. (The Court invalidated the statute in *Arkansas Writers' Project, Inc. v. Ragland.*

3. An amendment to the Aid to Families with Dependent Children (AFDC) program requires recipient families to assign to the government child support payments received from a non-custodial parent for a child living in the covered household. (The Court upheld the amendment in *Bowen v. Gilliard.*

4. The California Coastal Commission conditions the grant of a permit to rebuild a beachfront house on the homeowner’s transfer to the public of an easement across his property. (The Court held that the Commission imposed the condition unconstitutionally in *Nollan v. California Coastal Commission.*

5. A Wisconsin law puts probationers in the custody of a state agency subject to conditions set by the agency. An agency regulation permits probation officers to search a probationer’s home without a warrant and on less than probable cause. (The Court upheld the regulation in *Griffin v. Wisconsin.*

Similar difficulties plague virtually every area of constitutional law. For example, the public forum problem in first amendment law concerns the extent to which the use of government property should be treated as a “mere subsidy” that the government can condition as it chooses. The “market participant” exception to the dormant commerce clause seems to stem from the intuition that constitutional constraints should be loosened when the government extends a benefit rather than imposes a burden. Arguments about the reach of procedural due process concern the extent to which the government can condition discretionary benefits on a willingness to forgo procedural protections. Even the state action controversy can

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6. *Compare* Adderley v. Florida, 385 U.S. 39, 47 (1966) (“The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.”) *with* Grayned v. City of Rockford, 408 U.S. 104, 115 (1972) (“The right to use a public place for expressive activity may be restricted only for weighty reasons.”).
7. *See* L. Tribe, *Constitutional Choices* 145 (1985) (“The broader theme that underlies [market participant cases] seems to be creation of commerce: whatever the state’s ultimate goal, the state is approaching that goal by channelling its resources into commerce rather than by placing restrictions on commerce already in existence.”).
be recharacterized as a dispute about the distinction between governmentally imposed burdens, which are treated as raising constitutional issues, and government failures to subsidize, which are treated as immune from constitutional attack.\(^9\)

Given the frequency with which the coercive offer problem arises, one might suppose that the Court would have reached a consistent position concerning it. In fact, these cases display wildly inconsistent results. In some cases the Justices focus on the offer and uphold the government action, while in other cases, they focus on the condition and strike down the government action.

Consider, for example, the inconsistent positions that Justice Scalia has taken. In *Ragland*, Scalia dissented from the Court's holding that the state had violated the first amendment when it conditioned the grant of a tax exemption on the content of a publication: "The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect."\(^10\) Yet Justice Scalia had no analogous difficulty detecting coercion in *Nollan*, when he wrote for a majority that found an unconstitutional taking when the state conditioned the right to rebuild a beachfront home on the grant of a public easement across the property: "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"\(^11\)

The rationale behind the decisions is no clearer when viewed from the other side of the ideological divide. Dissenting in *Nollan*, Justice Brennan found that there had been no taking, in part because "appellants were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring [the easement]."\(^12\) Yet prior notice failed to satisfy Justice Brennan in *Gilliard*, when the government conditioned the grant of AFDC benefits to a

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12. Id. at 3159.
covered family on the child's relinquishment of support pay-
ments from a noncustodial parent:

In a society in which most persons receive some form of Government 
benefit, Government has considerable leverage in shaping individual 
behavior... On certain occasions... Government intrusion into pri-
ivate life is so direct and substantial that we must deem it intolerable 
if we are to be true to our belief that there is a boundary between the 
public citizen and the private person.\textsuperscript{13}

It is no accident that the coercive offer problem produces 
this sort of confusion. The problem seems difficult because it 

Justice Brennan argued that Gilliard could be distinguished from other 
coercive offer cases on the ground that the child in Gilliard did not accept the 
offer, yet was adversely affected when another household member accepted 
AFDC benefits.

We are willing to accept the validity of many conditions on participa-
tion in Government programs because this Court has never held that 
anyone has an absolute right to receive public assistance....

In this case, however, the burden placed on the child is not the 
result of his or her voluntary application for AFDC benefits.... 
Rather, the child must choose between the father and mother solely 
because other household members are indigent and desire public 
assistance.

\textit{Id.} at 3029-30.

Nevertheless, there are two reasons why these observations fail to distin-
guish Nollan. First, it is hard to believe that Justice Brennan would have 
changed his position in Nollan if the suit had been brought by a child living in 
the Nollan household who objected to the easement on the ground that it was 
er her parents who had applied for the permit to rebuild the beachhouse. Justice 
Brennan must therefore explain why parental decisions should be imputed to 
the child in one case but not the other.

Second, even if one focuses solely on the child's decision in Gilliard, the 
structure of the problem in the two cases remains identical. In both cases, the 
plaintiff has undertaken a voluntary action (rebuilding the beachhouse in Noll-
an, living with an AFDC recipient in Gilliard) that results in the loss of a 
preexisting property right (exclusive use of the property in Nollan, child sup-
port in Gilliard).

Of course, anyone would concede that living with a parent and rebuilding 
a beachhouse are not the same. The important point, however, is that it is not 
possible to learn how the two situations differ by consulting the constitutional 
text. \textit{See infra} text accompanying notes 14-23.

\textsuperscript{14.} \textit{See}, \textit{e.g.}, South Dakota v. Dole, 107 S. Ct. 2793, 2796 (1987) ("[O]ur
Court has attempted to make distinctions concerning the extent to which the constitutionally problematic condition has a coercive impact on its target.\textsuperscript{15}

Both of these tests have meaning only if supplemented by some nonconstitutional right or conception. Thus, a test that focuses on the underlying purpose of the benefit program requires a specification of the purpose of the program. In \textit{Dole}, for example, the Court thought that validation of the drinking age condition turned on whether the condition reasonably related to the purpose of federal highway legislation. Either this requirement can always be satisfied (and is therefore meaningless), or the requirement must be coupled with some extraconstitutional limitation on the range of permissible purposes for such a program.

Suppose, for example, Congress stated that money for building highways would be withheld from states whose highways could be used by women who had secured an abortion. If one assumes that the purpose of highway programs is to promote the safe and efficient movement of goods and people, then the restriction appears constitutionally vulnerable. But the restriction itself demonstrates that this is not the congressional purpose—or, at least, not Congress's sole purpose. Rather, the evident purposes of the program are to promote the safe and efficient movement of goods and people \textit{and} to encourage live childbirth.

\textit{Dole} and \textit{The Abortion Funding Cases}\textsuperscript{16} tell us that each of these purposes is legitimate.\textsuperscript{17} Consequently, if there is a constitutional problem with the limitation, it must derive from

\begin{quote}
\textit{cases have suggested... that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'”} (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).
\end{quote}

\textsuperscript{15.} \textit{See}, e.g., \textit{id.} at 2798 (“Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'” (quoting Stew-\textit{art Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)})).

\textsuperscript{16.} \textit{Harris v. McRae, 448 U.S. 297, 315 (1980)} (finding that unequal subsidization of abortion services encourages alternative activity deemed in public interest); \textit{Maher v. Roe, 432 U.S. 464, 474 (1977)} (finding that right to terminate pregnancy does not limit state's authority to make value judgment favoring childbirth over abortion).

\textsuperscript{17.} \textit{See Dole, 107 S. Ct. at 2797 (“[T]he condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel.”); Maher v. Roe, 432 U.S. at 478 (“The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth' . . . .”} (quoting Beal v. Doe, 432 U.S. 468, 446 (1977))).
some quasi-platonic conception of the appropriate function for highways. Elsewhere, the Court has eschewed reliance on limiting conceptions of this sort, most notably in Garcia v. San Antonio Metropolitan Transit Authority. Writing for the majority in Garcia, Justice Blackmun forcefully rejected nonconstitutional limits on "the historical functions of States" precisely because "within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal." A purpose-based approach, however, cannot be given content without some nonconstitutional conception of the appropriate purposes for state activities.

A court actually confronted with an abortion limitation on highway funding might attempt to resolve the problem through resort to the second technique by examining the coercive impact of the limitation on the exercise of the constitutional right to secure an abortion. This technique also requires extraconstitutional supplementation. The fund limitation coerces women wanting abortions only if the limitation adds to the cost of securing an abortion. In order to determine whether the limitation adds to the cost, it is necessary to specify a preexisting baseline against which the cost can be measured.

Such a baseline might be either normative or positive. A court might generate a positive baseline by asking whether Congress would want the limitation to be severable from the underlying program. If Congress would abandon the entire program rather than extend it, then the limitation constitutes no more than a failure to grant a benefit that makes the individual no worse off than she would have been if no limitation had existed. Conversely, if Congress would extend the program rather than abandon it, then the limitation imposes a burden that otherwise would not exist and that therefore leaves the individual in a worse condition.

The difficulty with reliance on a positive baseline, however, is that there is no necessary nexus between the description of such a baseline and the existence of coercion. Imagine, for example, a police officer who tells a suspect that he will do nothing to stop an angry lynch mob unless the suspect confesses. The officer may be entirely credible in his assertion that in a

19. Id. at 546.
counterfactual world, where he was precluded from making this offer, he would gladly allow the lynching to occur. There is therefore a sense in which the offer leaves the suspect in no worse a condition. But it hardly follows from this observation that the defendant's confession will be "free" or "voluntary." In the real world, the defendant knows that he can save his life only by confessing. Consequently, it seems more natural to say that the officer has used the presence of a lynch mob to extort the confession from the defendant.21

A court might overcome these difficulties by specifying a normative baseline. Such a specification requires a determination of the decision-making environment that people have a right to expect.22 For example, if people have a right to expect protection from lynch mobs, then the officer's threat to withdraw such protection imposes a cost on the suspect and is coercive. If people have no right to expect protection, then the officer has simply failed to convey a benefit that no one could legitimately expect in any event, and therefore has not engaged in coercion.

The difficulty with this analysis is that the constitutional text, at least as conventionally understood, does not specify a normative baseline with regard to all conditional offers. Even if the Constitution specifies a baseline with regard to lynch mobs,23 it certainly does not specify one regarding highways. One might say that an individual has a right to expect a particular outcome only when the constitutional text guarantees that right and that because there is no constitutional right to highways, the abortion limitation should be allowed to stand. But this formulation leaves the coercive offer doctrine with no work to do, for if the Constitution directly guarantees a particular outcome, such as protection from lynch mobs, failure to pro-

23. See, e.g., Logan v. United States, 144 U.S. 263, 284-88 (1892) (upholding congressional power to punish conspiracies to harm persons in custody of United States Marshal as enforcement of fourteenth amendment). But see Davidson v. Cannon, 474 U.S. 344, 348 (1986) (finding no due process violation when state prison officials negligently failed to protect prisoner from attack by other inmates).
duce that outcome would itself be unconstitutional even if the failure were not linked to the exercise of some independent constitutional right. Thus, if the Court is to invalidate limitations such as the highway restriction because of their coercive impact on the exercise of constitutional rights, rather than because they are independently unconstitutional, the Court must first specify a norm derived from nonconstitutional sources indicating what the person has a right to expect.

This problem can be generalized in a way that shows the difficulty of ever capturing a set of rights in a constitutional document. No matter how comprehensive the specification of rights, there always will be some things that people want but that the constitution does not specify. The government will therefore always be able to coerce people into abandoning specified rights by withholding unspecified benefits. One might, of course, escape this difficulty by definitional fiat. One might define "rights" in a way that eliminates the inconsistency between the existence of a right and this sort of coercion. Alternatively, one might define "coercion" in a way that excludes this sort of pressure. As long as these definitional escapes seem normatively unattractive, however, the effort to build a wholly self-contained constitutional system will be frustrated.

There is a sense in which these conclusions are trivial. Even the most extreme textualist would not maintain that constitutions can be interpreted in a vacuum. Obviously, the text has a common meaning only for those sharing a language and a culture—not specified by the text—that give the text meaning. Nonetheless, the kind of nonconstitutional supplementation described above is especially problematical because it seems to contradict the fundamental premise of constitutionalism.

To see why this is so, one must examine the second problem for constitutionalism—the problem of neutral viewpoint. Unlike the coercive offer problem, which raises doubts about the possibility of constitutionalism, the neutral viewpoint problem raises doubts concerning the legitimacy of constitutionalism. The problem arises because the choice of a context within which to resolve political disputes must, itself, be made within some context that is inevitably non-neutral with regard to those disputes.

Consider, for example, the Court's decision in Federal Elec...
tion Commission v. Massachusetts Citizens for Life, Inc., in invalidating provisions of the Federal Election Campaign Act regulating corporate political expenditures as applied to a non-profit political corporation. The statute represented a judgment by Congress, an institution that is conventionally regarded as responsive to majority will, that majorities cannot be trusted to act wisely in a context that includes the outlawed corporate practices. This judgment is paradoxical, however, because the Congress that enacted the limitation itself acted in the disfavored context.

Moreover, the Court's decision to invalidate the statute introduces a second paradox. The Court's decision represents a judgment that a prior majority may not attempt to bind some future majority by manipulating the context in which the future majority acts. The decision is paradoxical because it purports to enforce the terms of the Constitution, itself an attempt to establish a binding decision-making context for future majorities.

These twin paradoxes illustrate a contradiction that lies at the core of constitutional law. All constitutional theories rest on the assumption that political preference is influenced by context. Constitutions, as well as quasi-constitutional provisions such as the Federal Election Campaign Act of 1971, are efforts to establish a particular context for future generations. This effort is legitimate only to the extent that one considers privileged the context in which the framers themselves worked.

It is hard to see how an argument for this metapreference could proceed. For example, suppose one could show that the framers of the first amendment thought abstractly about the virtues of free speech, while the Congress that enacted the Federal Election Campaign Act was heavily influenced by the public outcry surrounding a particular example of corporate abuse. A metapreference for one context or the other would itself have to be expressed in either an abstract or a concrete context and therefore would be infected by the very context sought to be transcended. People thinking abstractly will have a preference for abstract thought, while people caught up in the events

25. Id. at 263.
26. See generally Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 AM. B. FOUND. RES. J. 379, 382 (discussing "temporal nature of the legislature's mandate from the citizenry").
of the moment will prefer a response grounded in present reality.

The only possible way to resolve this dispute would be by allowing people somehow to escape from their own desires, perceptions, and limitations. People would have to see the world from some “neutral” vantage point, from which their perceptions would be neither abstract nor concrete. Even if this is a coherent ideal—and it is far from clear that it is—the Constitution does not promote it. The text’s binding power supposedly derives from its abstraction from current preferences. That very abstraction deprives the text of the neutral status that would be necessary to judge fairly between the competing virtues of abstraction and concreteness.

It is now possible to see the connection between the coercive offer problem and the neutral viewpoint problem. Both problems arise out of the interrelationship between choice and context. Just as people will want different things depending upon whether they are thinking abstractly or concretely (the problem of neutral viewpoint), so too they will make different choices depending upon how they conceptualize the choices and depending upon what background rights they consider guaranteed (the problem of coercive offers).

This interrelationship between choice and context is what makes constitutions necessary. Only because context makes a difference must people specify in advance the kind of political system they want to have and the kind of rights people should enjoy within that system. Yet the same interrelationship makes constitutionalism impossible because no constitutional document can capture all decision-making contexts or privilege the context in which the document itself is written. The very instability of preference that causes people to write constitutions also undermines the legitimacy of the preferences expressed in constitutions.

What follows from all of this for courts charged with interpreting the Constitution? There is no simple way to make the contradictions of constitutionalism go away. But the instability of preferences, upon which constitutionalism rests, may argue for a conception of constitutional law that involves perpetual context shifting. Lawyers and judges, using constitutional rhetoric, have at least the potential to improve political dialogue because of their ability to imagine other contexts and to remind people of the different outcomes they might favor if they were
to make their decisions in different circumstances or against
the background of a different set of expectations.

This Essay makes no claim that lawyers and judges are spe-
cially skilled in context shifting. In an ideal world, there might
be other people, with different sorts of training, who could per-
form this function more effectively. But in this world, poets
and mystics are unlikely to get many future Supreme Court
seats, and legal training and method have aspects that, if em-
phasized, can serve to make the best use of present institutions.

Thus, the standard mode of legal analysis—the provisional
extension of a legal principle to a range of hypothetical cases—
can be seen as an effort to test intuitions in a world where the
facts are different in some respect. The process of adjudication,
whereby courts announce legal rules in a specific and real fac-
tual context but must justify them with reference to other, hy-
pothetical contexts, also requires the judge to acknowledge that
things might appear different in a different world. Moreover,
the ambiguous status of judges as public officials who are par-
tially shielded from political accountability allows them to
straddle public and private contexts.28

Context shifting does not justify a preference for one con-
text over another. For reasons set out above, such an effort is
bound to be unsuccessful. That a person might prefer a differ-
ent outcome in a counterfactual world does not dictate rejection
of his initial preference for a particular outcome in this world.

Although context shifting does not dictate outcomes, it
may influence them by confronting people with the possibility
that their preferences are not immutable. A metapreference
for any particular decision context may be impossible to justify,
but broadening horizons by imagining a range of different con-
texts in which people might find themselves remains useful.
Context shifting can never be completely successful, for people
can never completely escape the world in which they currently
live or completely deny their own identity. Nevertheless, to the
extent that people can imagine what things would be like in a
different world, their understanding of their own goals and
desires will be deepened.

Although legal training and the institutional setting in
which judges work offer some hope that judges will be able to
engage in context shifting, their ultimate ability to do so must

28. See Seidman, Public Principle and Private Choice: The Uneasy Case
for a Boundary Maintenance Theory of Constitutional Law, 96 YALE L.J. 1006,
be continually tested empirically. Judges may have the training and intelligence to imagine different contexts, but they also have their own narrow interests and perspectives. Constitutional rhetoric can broaden horizons, but it also can legitimate current arrangements and make what is seem as if it must be.

The real question about constitutional law, then, is which role judges will play. Will they help people to see the extent to which current preferences grow out of background assumptions that are not immutable, or will they reinforce those assumptions by treating them as "natural" and beyond challenge?

Conventional theory treats judicial explication of the constitutional text as central, while judicial effort to define nontextual norms is problematic. The coercive offer problem and the neutral viewpoint problem suggest that purely textual approaches to constitutionalism are doomed to failure. Ironically, the best justification for judicially enforced constitutional norms necessarily involves courts in the testing of current preferences against a variety of contexts and background rights that are not specified in the Constitution. Whether or not judges perform that task and thus justify constitutionalism depends upon their ability to free themselves from the way things are and to imagine the different world that we might create.