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UNCONSTITUTIONAL CONDITIONS QUESTIONS EVERYWHERE: THE IMPLICATIONS OF EXIT AND SORTING FOR CONSTITUTIONAL LAW AND THEORY

Adam B. Cox and Adam M. Samaha¹

ABSTRACT

Unconstitutional conditions questions are supposed to be hard and rare. This article contends that, however hard, nearly every constitutional question can be converted into an unconstitutional conditions question. One reason is that the frames of reference in constitutional disputes are often arbitrary, and expanding the frame can turn a constitutional burden into a package deal with discretionary benefits supplied by the very same government. A related reason is more fundamental and inspirational: constitutional claimants are almost always allowed to exit the relevant institution and enter another. This possibility of sorting across multiple institutions generates unconstitutional conditions questions by making nearly every government imposition at least nominally optional. Moreover, exit and sorting dynamics operate in contexts far beyond people physically migrating to new locations. The full implications of exit and sorting have been neglected by constitutional theorists, who tend to assume a static population within one political community or to focus on crude arguments about “voting with your feet.” This article is an initial effort to check these tendencies, and to move exit and sorting toward the center of constitutional law and theory.

1. INTRODUCTION

Like every field of law, constitutional law can be divided into hard questions and easy questions. Good standing in the field depends on understanding the

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difference. I demonstrate that there is real law in the field of constitutional law by showing you clear answers to a set of easy questions, and I demonstrate acuity within the field by showing you the absence of clear answers to a set of hard questions. If I do not identify hard questions, you might wonder whether I know what I am talking about; if I do not identify easy questions, you might wonder whether that matters. Of course, what counts as easy or hard changes over time and across observers, but both types of questions are supposed to persist.

In this essay, we contend that one of the notoriously hard questions in constitutional law is an aspect of nearly every other question in constitutional law. By this, we do not mean that there is a hard constitutional question that is logically prior to other constitutional questions, such as who has final authority to decide a constitutional question. Instead, we mean that just about all constitutional questions may be converted into versions of this notoriously hard question. The question involves unconstitutional conditions.² It turns out that nearly every constitutional question is a kind of unconstitutional conditions question. If this is correct, then two possibilities arise: (i) every constitutional question is a hard question or (ii) unconstitutional conditions questions are not so hard. We are partial to the second possibility, for now. But something like the first possibility might be the future of constitutional theory.

You can easily question the judgment of anyone who writes a paper, even an essay, with “unconstitutional conditions” in the title. The topic is very 1980s and scholars lost their enthusiasm for it not long after the Go-Go’s broke up. But while our initial focus is on unconstitutional conditions questions, our ultimate target is all of constitutional theory. And while intellectual giants in the field, such as Sunstein (1993, 293, 296) and Seidman and Tushnet (1996, 89) have already warned us that unconstitutional conditions questions might be everywhere, they said so on other grounds and to teach different lessons.³ As we emphasize below, one occluded perspective from which unconstitutional conditions questions become pervasive is also a perspective within which

2 Attestations to the difficulty include Seidman & Tushnet (1996): “None of the justices has figured out a general approach that would permit the cases to be resolved in a consistent fashion, and academic commentators have not done much better” (*id.* 76); and Schauer (1995): “Perhaps some constitutional problems are irredeemably intractable, and are so precisely because they replicate the deepest, hardest, and therefore least solvable problems of constitutional government” (*id.* 990).

3 As for grounds: our framing-oriented expansion of unconstitutional conditions questions differs from their baselines-oriented critique (notes 18, & 29 and accompanying text). As for lessons: Sunstein tried to normalize unconstitutional conditions questions into a relatively orthodox approach to constitutional issues, while Seidman and Tushnet tried to demonstrate that orthodox constitutional analysis is empty. These are not our goals. Although parts of their arguments are powerful and compatible with ours, we use our analysis to launch in a different direction—toward a sorting perspective on constitutional law.

constitutional questions can be analyzed in unorthodox and potentially incisive ways. This perspective involves exit options and attendant sorting dynamics. The phenomena of exit and sorting are almost painfully familiar to other fields of academic inquiry (e.g., Tiebout 1956; Hirschman 1970), and yet they are largely neglected in mainstream constitutional theory.⁴ We hope to change this—partly by moving beyond the image of people literally “voting with their feet” across geographic boundaries, and partly by promoting a sorting perspective that is more nuanced than traditional “love it or leave it” demands.

Taking a step back and summarizing, we will contend that constitutional questions are convertible into questions about unconstitutional conditions in two key ways. First, the frames of reference in constitutional disputes are often arbitrary and, if expanded in the right directions, a traditional constitutional question will become a question concerning potentially unconstitutional conditions. A large frame allows an observer to aggregate discretionary government benefits with otherwise constitutionally significant burdens, making the upside and the downside into a package deal. It is already understood that framing choices can affect the outcomes of constitutional disputes (e.g., Cox 2007, 365–375; Levinson 2002; Kelman 1981). Indeed, an important forerunner to our analysis is Daryl Levinson’s. His analysis included unconstitutional conditions litigation in a collection of examples where crucial framing choices have been obscured or undertheorized (Levinson 2002, 1345–1350). Still, our use of framing to infinitely multiply unconstitutional conditions questions is, we believe, unique. Not only do we move beyond explicit conditions or earmarks on government benefits, but also our framing claim does not depend on the modern welfare state. We can make unconstitutional conditions questions pervasive even in the so-called night-watchman state (Nozick 1974, 26–27).

But we do not live in a world where we face “the” night-watchman state or “the” welfare state. We live in a world with *many* states and institutions, whether local, national, or other. This fact creates a second way of finding unconstitutional conditions questions everywhere: the possibility of exit from one political community and entry into another. Exit generates unconstitutional conditions questions by making every government imposition at least nominally optional.

The connection between exit opportunities and unconstitutional conditions questions has been overlooked. More important, the broader implications of exit and sorting for constitutional theory have not been appreciated. The truth is that an array of institutions offers people alternatives involving every facet of

4 A salient counterexample is the federalism literature (Section 4; see also Samaha 2006; Tushnet 1988, 85), although even this scholarship concentrates on relocation across geographically bounded political jurisdictions. Sorting dynamics happen in many other settings (Section 4.2(a)).

life, and these alternatives must be analyzed together if constitutional theory is going to make any sense. This is true for constitutional law in much of the world now, likely true even for federal constitutional rights in the United States over the long run, and already true for parts of U.S. constitutional law today. In our view, a sorting perspective will be indispensable to sound constitutional theory in the 21st century.

In this essay, we take preliminary steps toward that perspective. To be sure, recognizing exit and sorting phenomena will not answer every significant constitutional question. A sorting perspective can take more and less ambitious forms, it can be made sensitive to various ideological commitments, and it can be bounded by side constraints in the form of universal human rights. In fact, concentrating on the chances of exit and sorting probably will produce as many hard questions as it answers. But a perspective that foregrounds peoples' actual choices will help us—perhaps force us—to think about all of constitutional law in a different way.

Our analysis proceeds in three parts. In Section 2, we discuss the conventional idea of an unconstitutional conditions question. In Section 3, we defend the claim that nearly every constitutional question is an unconstitutional conditions question and demonstrate the central role exit opportunities play in generating unconstitutional conditions questions everywhere. Section 4 begins to explore the implications of exit and sorting for the future of constitutional law and theory, leaving additional progress and detail to future work.

2. UNCONSTITUTIONAL CONDITIONS QUESTIONS

Today, unconstitutional conditions questions are typically confined to a select set of tricky court decisions. The classic version of the question shows up in *Frost & Frost Trucking Company v. Railroad Commission* (271 U.S. 583 (1926)), which involved the early days of state highway construction (Phillips 1903, 189–190, 195). *Frost* held that California could not condition a trucking company's access to state highways on the company's agreement to operate as a common carrier. The Court indicated that California would have violated the Constitution had it flatly required a private carrier to operate as a common carrier (271 U.S. at 592 (citing *Michigan P.U.C. v. Duke*, 266 U.S. 570, 577–578 (1925))), and that conditioning state highway use on this demand was no better. The curious part about the decision—or at least what is supposed to be curious—is that the Court appeared to assume that the state was entitled to banish all private businesses from its highways (*id.* 591–593). Certainly, California did not have a federal constitutional obligation to build or maintain those highways at all. Why should a judge care whether the state conditioned highway access for

businesses on common carrier rules? Ignoring loose talk about greater powers including lesser powers (no one really knows which is which), an intelligent observer could conclude that the state offered the company (and voters) an unobjectionable deal. Deal-making is ordinarily a good thing, even if the situation seems like “a choice between the rock and the whirlpool” (*id.* 593).⁵ People may choose options that make them better off than if the deal had not been offered at all (*e.g.*, Epstein 1993, 7–8; Levinson 2002, 1346).⁶

A contrasting case is *Rust v. Sullivan* (500 U.S. 173 (1991)), in which the Court upheld conditions on the use of dollars instead of highways. This probably does not seem like a rational distinction between the two cases but the opportunities for reconciliation are scarce. The federal government had offered funding for family planning services with the warning that those funds could not be used by grantees for abortion counseling (*id.* 180–181).⁷ As in *Frost*, the benefit was not mandatory: there is no recognized constitutional duty on the part of the government to initiate or sustain family planning funding. And like *Frost*, the condition could not have been imposed directly: the government could not lawfully have directed private organizations to discontinue privately funded abortion counseling, as there is almost certainly a constitutional right on the part of private organizations to counsel people about abortion. Nor is *Rust* different because the federal government was merely earmarking the use of tax dollars without telling the recipients what to do with their nonsubsidized lives; essentially, the same observation can be made about restricted highway use in *Frost*. The trucking company was not told that it could not continue operating as a private carrier, but that it could not do so with the help of state highways. Both dollars and highways can be earmarked to “the purposes for which they were authorized” (*id.* 196). Thus an intelligent observer could conclude that the federal government offered a bargain no less and no more constitutionally objectionable than California’s offer of its highways to common carriers and no other businesses.

Conditions on the receipt of government services and cash grants are the most obvious examples along with government jobs (*e.g.*, *Garcetti v. Ceballos*,

5 Three justices dissented, two of them reputable (*id.* 600–602 (Holmes, J., joined by Brandeis, J., dissenting); *id.* 602–603 (McReynolds, J., dissenting) (bracketing impositions on interstate commerce)).

6 Epstein (1993) characterizes the unconstitutional conditions doctrine as entering the picture only after the challenged deal overcomes common-law grounds for setting aside a contract, such as force, misrepresentation, and incompetence (Epstein 1993, 7–8). To be clear, we understand that there are plausible arguments for outlawing selective highway access of the kind challenged in *Frost*, such as ensuring healthy competition.

7 Such counseling could, however, be provided by an affiliated organization.

547 U.S. 410, 418–419 (2006); *Connick v. Meyer*, 461 U.S. 138, 147 (1983)), but exemptions from the regulation of primary conduct can also prompt people to ask about unconstitutional conditions. Exemptions can look like gifts. If government has authority to prohibit or demand action backed by the threat of some kind of penalty, and if some class of people are not constitutionally entitled to an exemption therefrom, then exempting these people from regulation may count as a gratuitous benefit. Consider land use regulation. Modern federal constitutional law is relatively permissive when it comes to restrictions on the development of real property in the asserted interest of environmental protection, traffic control, and other purposes. In addition, many land use regulation systems include the opportunity for developers to receive exemptions from standard restrictions, and sometimes exactions are demanded in return for the exemption. A landowner might be asked to give up a recognized property right without getting cash compensation in exchange for permission to develop the land. An example is *Dolan v. City of Tigard* (512 U.S. 374 (1994)), which involved a city's offer to grant a building permit in exchange for a dedicated greenway and bike path across 10 percent of the owner's property. Sometimes, but only sometimes, these deals are declared unconstitutional by the judges (*cf.*, *e.g.*, *id.* 379–380, 386–396 (invalidating the deal), *with*, *e.g.*, *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 825 (N.Y. 2003) (upholding a deal that exacted parkland dedications or recreation fees), *and West Linn Corp. Park v. City of West Linn*, 2011 WL 1461372, at *2 (9th Cir. Apr. 11, 2011) (unpublished opinion) (upholding a deal that exacted off-site improvements)).

Whichever outcome is best in these cases, the unconstitutional conditions canon is united by attention to a particular type of bargain. “Unconstitutional conditions problems arise,” Kathleen Sullivan told us a generation ago, “when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference” (Sullivan 1989, 1421–1422; *accord* Epstein 1993, 6; Berman 2001, 2–3). The benefit must be something that government is legally permitted, yet not constitutionally obligated to provide to at least a subset of all people; and this government benefit must be conditioned on action or inaction involving a constitutional right over which the recipient has some kind of control (Sullivan 1989, 1422–1428). Accordingly, unconstitutional conditions questions do *not* arise if government cannot offer the benefit to anyone without breaking the law, or if government must offer the benefit to everyone as a matter of law, or if the condition does not implicate a constitutional right, or, possibly, if the condition turns on immutable attributes of the recipient class, or, of course, if there is no condition at all. Those situations appear to take cases out of the deal-making context and, therefore, outside of the relevant canon.

The constitutionality of a criminal penalty thus seems to be the antithesis of an unconstitutional conditions question (*id.* 1419). Where is the deal?⁸

The foregoing might make unconstitutional conditions complaints seem like rare and well-understood events, however interesting the political dynamics might be.⁹ But an amusing aspect of the unconstitutional conditions doctrine is that there is no doctrine. At least there is no snappy and established test for analyzing unconstitutional conditions questions. Early on, the Supreme Court indicated that the sacrifice of constitutional rights could never be a condition for receiving a government benefit (*e.g.*, *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 595 (1926); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)), but there were equally strident judicial statements pointing in the opposite direction (*e.g.*, *Paul v. Virginia*, 75 U.S. 168, 181 (1868); *Hale 1935*, 321, 331, 550–551; *Van Alstyne 1968*, 1445–1454). We have had enough experience to know that the law will rest at neither of these extreme points.¹⁰ This is not to say that there are no useful proposals for analyzing such questions. Commentators are not at a loss.¹¹ And sometimes judges tell us that they are

8 Conditions on benefits might be characterized as a “lesser” exercise of a “greater” power to withhold the benefit altogether (*e.g.*, *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345–346 (1986)). Greater-includes-the-lesser arguments cover different territory than we are interested in evaluating. The same is true of the notion that government is doing “indirectly” what it cannot do “directly” (*e.g.*, *Spieser v. Randall*, 357 U.S. 513, 526 (1958); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593 (1926); *Schauer 1995*).

9 While unconstitutional conditions complaints tend to arise after a political compromise is fashioned, the prospect of successful complaints will influence some of those compromises *ex ante*; and a successful complaint opens the possibility of more than one political response. Knowing that highways or grants or regulations cannot be spread as selectively as nonjudicial politics would prefer might lead to fewer highways or fewer grants or fewer regulations in the first place. Similarly, suffering judicial rebuke for attempting to impose an unconstitutional condition might lead to either benefits without conditions or no benefits at all. Court decisions of this kind shift the hard choice away from the private party seeking government benefits and onto the government benefactor, “imposing an all-or-nothing regime under which ‘nothing’ could be a State’s easiest response” (*Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 44 (1999) (Ginsburg, J., concurring)). In this way, unconstitutional conditions questions have a structure similar to equality claims, which politicians can respond to either by “leveling up” or “leveling down” (*Palmer v. Thompson*, 403 U.S. 217 (1971); *Karlan 1998*, 2027). A constitutional norm operating in this domain is potentially modest, although much depends on the feasible political options, which in turn depend on a confluence of shifting societal forces.

10 For one unhelpful, moderate statement on the question, see *Grove City College v. Bell* (465 U.S. 555, 575 (1984)): “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.”

11 For coercion-like tests, see Berman (2001, 12); Rosenthal (1987, 1110); Kreimer (1984, 1300–1301, 1352–1378). For a third-party effects test, see Merrill (1995, 862). For a germaneness test, see Baker (1995, 1962–1967). For tests sensitive to resulting distributions, see Cole (1992, 680–681) and Sullivan (1989, 1420–1421). For balancing tests, see Sunstein (1993, 292, 305); Sunstein (1990, 595); Westen (1981, 751 (asserting that unconstitutional conditions issues are conceptually the

interested in whether the government's deal imposes coercive pressure (*NFIB v. Sebelius*, 132 S.Ct. 2566, 2606–2607 (2012) (opinion of Roberts, C.J.)), or whether the government's true purpose is to eliminate the right (*Western Union Telegraph Co. v. Foster*, 247 U.S. 105, 114 (1918)), or whether the government is merely refusing to subsidize the exercise of constitutional rights (*FCC v. League of Women Voters*, 468 U.S. 364, 399 (1984)), or whether the condition has some nexus or is germane to the benefit being sought (*Dolan v. City of Tigard*, 512 U.S. 374, 386–396 (1994); *South Dakota v. Dole*, 483 U.S. 203, 208–209, 211–212 (1987)). There are plenty of ideas. It is just that there are no set doctrines for analyzing the question. Whether there ought to be one unified test for this jumble of contexts, there might not ever be. “Unconstitutional conditions doctrine” actually designates a kind of problem calling for analysis rather than the analysis used to solve a kind of problem.¹² The phrase “unconstitutional conditions questions” is more fitting.

Understanding why many unconstitutional conditions questions generate uncertainty and disagreement is not terribly difficult. These questions involve the proper rules for bargaining with government when constitutional values are on the trading block. The issue draws fuel from normative visions for behavior in private markets, combined with views on how government does and ought to treat private parties. Observers initially attracted by to-the-hilt enforcement of bargains checked only by narrow conceptions of force or fraud might curb their enthusiasm when government enters the trading floor, whereas observers usually committed to vigorous review of every private market deal for unconscionability might drift in the other direction depending on who is facing pressure from the government. Since unconstitutional conditions claims are similar to but not necessarily the same as coercion rebuttals to consent arguments in private law, these claims can bring out those sorts of disagreements along with a few more variables to complicate matters. Determining when driving a hard bargain turns into coercion, whether a market is adequately competitive, when third-party interests are adequately protected, and even whether choice is valuable rather than simply distressing can be a challenge in any setting (Seidman & Tushnet 1996, 83).

same as other constitutional problems)). For a perspective sensitive to political responses, see Epstein (1988). The most recent full-blown treatment in the law literature is Hamburger (2012, 483–484), which suggests that we can somehow better manage unconstitutional conditions questions by treating them as “powers” questions and by recognizing that the Constitution is “a law made by the people.”

12 Perhaps for that reason, scholars dealing with these issues sometimes use the term “unconstitutional conditions doctrine” to mean only those cases in which the condition is invalid (e.g., Chemerinsky 2006, 557; Tribe 1988, 681; Sullivan 1989, 1415).

Whatever the difficulty in resolving them, unconstitutional conditions questions have been considered pressing since at least the New Deal. The modern regulatory and welfare state are thought to generate, or at least increase the frequency of, unconstitutional conditions questions (Epstein 1993 239; Sunstein 1993, 294). The more goods, services, and exemptions that may be offered by the government at the behest of ordinary politics, the greater is the opportunity for government officials to condition those benefits on the sacrifice of constitutional rights. By any fair measure, federal, state, and local governments shoulder much more responsibility than they did a century ago. And on any mainstream view, this sphere of responsibility has far outrun what the Constitution requires. All of this raises the stakes of unconstitutional conditions questions, for classical liberals, welfare state supporters, cultural conservatives, and everyone else—though, as we argue below, even these growing concerns radically underestimate the sweep of unconstitutional conditions questions.

The foregoing addresses constitutional doctrine and why it might be controversial but it will help to remember that, in a less technical sense, unconstitutional conditions questions are about uncomfortable choices among imperfect alternatives. These questions arise when the state effectively offers people a package deal with upsides and downsides involving constitutional entitlements. Sometimes a constitutional system might prohibit the offer of certain deals, but prohibiting all deal-making between the citizens and the state would be imprudent if not impossible. Not every right can be literally inalienable. Even if you are uneasy with the entrenched system of plea bargaining, consider the effects of forbidding people to trade away their trial rights in petty criminal and civil cases: settlements and uncontested traffic tickets would be illegal and no one, aside from any new employees of the court system, would be better off. Having a choice about whether to exercise one's rights is often positively valued in constitutional law, and rightly so. The challenge is sorting between permissible and impermissible offers.

3. UNCONSTITUTIONAL CONDITIONS QUESTIONS EVERYWHERE

Ordinarily, unconstitutional conditions questions are treated as if limited to special contexts. This might make the apparent incoherence of unconstitutional conditions cases seem easy to stomach: not that many cases are thought to be at stake. But this is a mistake. Unconstitutional conditions questions are everywhere. One reason is that almost any constitutional question can be turned into an unconstitutional conditions question by expanding the frame of reference; a large frame will join complained of constitutional burdens with constitutionally

gratuitous benefits—of which there are now shockingly many. This possibility has been intimated by other scholars, but we think that the implications are more fundamental than has been recognized. A second reason is related to the first, but it has been almost entirely overlooked: unconstitutional conditions questions become pervasive once one recognizes the opportunities for exit from political communities and the possibility of inter-jurisdictional sorting. A sorting perspective allows an observer to view certain constitutional burdens within a *single* political community as part of a choice across *many* political communities. Either way, the distance between government directives and government deals can be diminished or eliminated, and the space for unconstitutional conditions questions radically expanded. Exactly how far to go and what to do with these newfound issues are questions that require sustained investigation. Our goal in this essay is not to answer them but to suggest that they are worth asking.

3.1 Enlarging the Frame

3.1.1 Finding Large Frames

The technical understanding of unconstitutional conditions questions depends on a benefit that the government could withhold from the complaining party without violating the Constitution.¹³ As it happens, such a benefit can pretty much always be identified. All it takes is willingness to expand the frame of reference in a given political community, allowing otherwise unconstitutional burdens on rights to be joined with gratuitous government benefits. If these benefits are enjoyed by the complaining party, any constitutional claim asserted by that party becomes an unconstitutional conditions question.

To illustrate the thought, consider a variation on *Frost*. Suppose a California statute imposed a \$100 fine on any trucking company not conducting itself as a common carrier, regardless of which roads they use. Presumably, every justice would have viewed the case as failing to raise an unconstitutional conditions question and a trucking company subject to the fine would have been free to make its substantive due process objection. If there is any sort of constitutional right to operate as a private carrier, one might think, it just must entail immunity from a statute that simply singles out private carriers for a fine. Indeed, a simple criminal law like this would appear to be the paradigmatic contrast to

13 In the analysis that follows, we focus on the familiar situation in which a private party objects to government practices. But the analysis applies, *mutatis mutandis*, to private parties attacking each other with constitutional claims, as when a defamation defendant claims that state defamation law violates free speech guarantees. Moreover, it will often also apply to constitutional claims asserted by one government against another—though these claims do raise some separate problems and cannot necessarily be reframed to be equivalent to the conventional situation in which a private party attacks the government.

deals involving gratuitous government services, grants, and exemptions. Again, the narrow understanding of unconstitutional conditions questions requires government officials to identify a discretionary benefit that is withheld in exchange for the sacrifice of a constitutional right. Where is that benefit?

You can see it if you look for it. Recall that California had a highway system that trucking companies apparently liked using, and that the state had no federal constitutional obligation to maintain those highways. Nothing stops us from conceptualizing the hypothetical statute and the highway system as a package deal: trucking companies are offered highways in exchange for following common carrier rules on whichever roads they operate. The state is doing both things for/to trucking companies at the same time, and its supporters are theoretically free to say, “That’s the deal.” What about an odd ball trucking company that completely avoids using the state highways? If it, too, is subject to a fine for operating as a private carrier, how can there be anything like a package deal with the state? All we have to do is locate a different government benefit that the company does enjoy and that might be deemed constitutionally optional—including the ability to lawfully operate and contract as a trucking company of any kind. As we are about to explain, discretionary government benefits are all over the place in modern constitutional law. And so once again, the trucking beneficiaries might be told, “That’s the deal.”

Of course, these would be laughable arguments for distinguishing the result in *Frost*. The Court there was explicitly worried about the practical value of state highways to the complaining trucking company, claiming that “the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden” (*Frost & Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583, 593 (1926)). But that is partly the point. There is no simple reason to reject the frame that we suggest for the hypothetical that we pose. And if you believe that the common carrier condition is easily rejected as unconstitutional, that is part of our point as well. With a large frame, many unconstitutional conditions questions become intuitively easy to answer.¹⁴

14 Even a simple criminal prohibition offers people a deal in another sense. If we take an ex ante perspective, if enforcement is imperfect, and if people do not have a moral obligation to follow the law in question, then all government can do is offer an uncomfortable choice involving an alleged constitutional right: forego the exercise of this right or run the risk of detection, apprehension, and punishment. People then choose, in a certain literal sense, whether or not to follow the legal norm. Not even much-maligned prior restraints actually “freeze” rather than “chill” speech—not without outrageous prospective penalties, massive enforcement efforts, or some other strong (and unrealistic) assumption (*but see Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976), *citing Bickel 1975*, 61). The ordinary ability to evade government burdens, or to run risks for one course of conduct

We can generalize the observation. The closest step is to other services and grants akin to public highways in that they are government benefits attractive to millions of people and yet not required as a matter of federal constitutional law. Important parts of modern government fall within this category. At the state and local level, it includes public schools, public parks, public libraries, fire departments, sanitation services, health inspectors, traffic signs, road maintenance, and mass transit. At the federal level, we can add Social Security, Medicare, Medicaid, unemployment insurance, food stamps, mortgage interest deductions, child and investment tax credits, the National Weather Service, national parks, the national highway system, and the national currency. Even the Armed Forces are merely authorized under Article I, not clearly required.¹⁵ Moreover, these gratuitous programs themselves require institutions with over twenty million beneficiaries—the government bureaucracies that enable the delivery of these services and grants (Bureau of Labor Statistics, Occupational Employment Statistics (May 17, 2011), <http://www.bls.gov/oes/current/999001.htm#00-0000>). Other commentators have recognized the discretionary nature of many contemporary government services and grants, and they have seen implications for unconstitutional conditions questions. But, in this field, people seem to keep their frames small. They tend to count only conditions or earmarks that are tied to welfare state services or grants in relatively explicit terms. In our view, this formality is dispensable. We would not require the government to call something “a deal” before we analyzed it as such. Even if we were more formalistic, however, it would not take much for government officials to announce that government benefits and burdens are linked.

Of course, some government projects are nonexcludable public goods, at least within some geographic limit. Aesthetic benefits of mountain ranges in national parks and information about the weather cannot easily be selectively doled out. In such situations, it will not be feasible to withhold the benefit from particular constitutional claimants. This does not undercut our conceptual

instead of another, begins to narrow the real-world gap between flat-out penalties and withheld gratuities. But, ultimately, we are interested in something more than the chance of evading burdens. We are interested in situations where different alternatives compete or are treated as comparable, such that a valuable sorting dynamic may arise (text accompanying *infra* note 31).

15 An army and navy are explicitly authorized, that is; an air force is not even listed in the Constitution of the United States (U.S. Const. art. I, § 8, cl. 12–14). An argument could be made that the President’s commander-in-chief power implicitly requires armed forces for him to command, although this imputation might be limited to foreseeable foreign invasion.

point, however. In the first place, the technical notion of unconstitutional conditions questions is indifferent to practical inhibitions on the ability to withhold benefits. It seems to require only that the benefit may be withheld lawfully, not that it likely will be in fact. Government retains authority to eliminate these public goods altogether. True, the political consequences of attempting to auction off the Grand Canyon will make such threats fairly empty and unlikely. Yet, however much a low risk of lost benefits diminishes the need for constitutional or judicial safeguards, it does not diminish the conceptual domain of unconstitutional conditions questions. And even if the technical notion of unconstitutional conditions demanded a realistic chance of the relevant benefit being withheld, there are countless other gratuitous government benefits to join with burdens on constitutional rights. Like it or not, much of the government does not involve the provision of either public goods or politically popular goods.

Our short list of constitutionally optional services and grants is only the beginning. We can go beyond the contemporary welfare state. Less obvious yet equally significant, the foundations of the classical liberal state seem to be quite optional as far as modern federal constitutional law is concerned. If there ever was one, there is no longer any sturdy hook for a federal constitutional demand that government offer contract law, or tort law, or property law, or criminal law, or a police force to enforce such laws, or a judiciary to process such claims. Since the 1930s, remember, the Supreme Court ended up generally resisting not only welfare rights claims (e.g., *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970)), but also property and contract claims (e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *Nebbia v. New York*, 291 U.S. 502 (1934); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934)). The U.S. Constitution was interpreted in a way that tends not to protect private parties from each other (e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *Deshaney v. Winnebago County*, 489 U.S. 189, 195 (1989)). At least as far as the judiciary is concerned, neither Occupy Wall Street nor the Tea Party is constitutionally entitled to their preferred shape for government.

Exactly how much government must exist to comply with the Constitution is an independently interesting question without a short answer. Compliance obviously requires the existence of a Congress, a President, and a Supreme Court, as well as the existence of states (U.S. Const. *passim*; *Texas v. White*, 74 U.S. 700, 725 (1869)). But it is less clear that these institutions must do anything very important, and it seems that all local governments might be eliminated without violating federal constitutional law. Repealing existing contract, property, or tort law could be a taking that would require just

compensation under federal constitutional law.¹⁶ On the other hand, perhaps the concomitant elimination of associated tax burdens and liability risks would count as adequate in-kind compensation. Even if not, perhaps takings objections would protect only preexisting legal claims and would not guarantee any contract, property, or tort law going forward. Whatever takings problem remains might be transitional only. Admittedly, a thicket of legal questions surrounds the transition from big government to small government. Our point is that much of the law and many of the legal institutions in this country are there by the grace of ordinary politics.¹⁷ *Neither* the modern welfare state *nor* the classical liberal state is secure under contemporary federal constitutional law.¹⁸

So it should be easy enough to threaten everyone's interests without implicating federal constitutional obligations. This is probably true if *either* the modern welfare state *or* the classical liberal state are made constitutionally optional. After all, most people who prefer government spending in areas such as health, education, and welfare also derive great benefit from ordinary legal norms of property, contract, and tort. And the politics of welfare state creation suggest that services and grants will be spread to plenty of people with ideological doubts about big government in the abstract. But making both

16 Compare constitutional challenges to workers' compensation laws that were unsuccessful but that prompted courts to note that tort claims were effectively being exchanged for a different kind of claim (e.g., *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 203–204 (1917)).

17 Sometimes state constitutional law requires public services such as schools (Ratner 1985, 814, n. 138; Hershkoff & Loffredo 1997, 3–4). The technical understanding of unconstitutional conditions questions in federal constitutional law has ignored state law requirements. Even if it incorporated those requirements, however, there are plenty of other gratuitous government benefits to use.

18 Cass Sunstein made a related point in *The Partial Constitution*, observing that one might assert that all cases are unconstitutional conditions cases in which government prevails “because common law rights are state created” (Sunstein 1993, 296). Sunstein's position was that the initial version of the unconstitutional conditions doctrine depended on a common-law baseline of legal entitlements and was used to defend that baseline once the state grew bigger (*id.* 299–301). Subsequent normative versions of the doctrine turn out to use the same baseline. But if the common-law baseline is rejected, as Sunstein did in following the post-1937 settlement, then there is no longer an obvious reason for having an unconstitutional conditions doctrine. Instead, he argued, we should revert back to an examination of government justifications and constitutionally protected interests, with the possibility that government spending and licensing present special contexts that affect the strength of the government's defense (*id.* 292, 304–306, 318). Sunstein wanted to undercut the notion that government “action” is the threat to constitutional rights by arguing that those rights depend on the state in the first place. His work emphasized that government “inaction” can be a social problem and that government can make rights meaningful. We agree, but we are making a different point in this essay. We can accept conventional understandings of constitutional rights and what threatens them for the purpose of our analysis, and we then ask when the relinquishment of those rights can be seen as a condition for some other government action or inaction. Our answer is, “Constantly,” and we proceed to explore a sorting perspective from which these ever-present deals might be evaluated sensibly.

components of modern law constitutionally gratuitous allows us to run the table without much doubt. No one's heartfelt preferences will be left out. To be sure, this claim is largely contingent on today's constitutional settlement, and constitutional orders are not stable over long periods of time. But the bulk of this settlement is stable for the time being.¹⁹

The flip side of the idea that government could be scaled back radically is that it also could be scaled up immensely without violating contemporary constitutional law. When the government refrains from regulating where it could and asks for something in return, the resulting deals are sometimes recognized as subject to unconstitutional conditions analysis. But what has not been noticed is that the prevalence of forbearance is enough to make nearly every constitutional claim an unconstitutional conditions question. If our frame of reference is large, we can always or almost always identify private action or inaction that could have been regulated without federal constitutional problem, but was not.

First of all, we have the phenomenon of nonenforcement. Long stretches of government regulation are characterized by strict rules, constant violation, and minimal enforcement. Most traffic laws fit this description, as do some tax laws, some immigration laws, and an untold number of municipal ordinances. Nonenforcement is often the norm, because of limited resources or deliberately overbroad regulation or some other factor, and often there appears to be no constitutional problem with such laxity (e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Landes & Posner 1975*, 38–41). One might count discretionary nonenforcement as a constitutionally gratuitous benefit to the people who end up practically free to do what government officials might have stopped. In making this observation, we hope to avoid taking a position on the hard question whether (or when) a person has a moral or ethical obligation to follow the law. No doubt, on some versions of obligation, abiding by law might be required regardless of the enforcement decisions made by the government officials; and this position could indicate that nonenforcement, at least in some forms, cannot register as a gratuity to which any burden can be connected. For those with less statist views, however, or for those with different understandings of obligation, nonenforcement can remain part of the gratuitous benefit provided by a state with constitutional authority to do more.

19 A constitutional system that guaranteed both classical liberal rights and generous welfare rights might run into serious theoretical and practical tensions. One would not want to take the position that wealth transfers are both constitutionally forbidden and constitutionally required. In this regard, contrast the *Lochner* era opinion in *Coppage v. Kansas* (236 U.S. 1, 17–18 (1915)), which indicated that unequal market outcomes were natural and inevitable, with *West Coast Hotel v. Parrish* (300 U.S. 379, 399 (1937)), which indicated that unadjusted market outcomes were “a subsidy for unconscionable employers.”

Less controversially, government is running well below its constitutionally authorized regulatory capacity in a second sense: by not passing laws. Some people may feel as if everything is regulated but a mammoth amount of private activity might be formally prohibited, yet is not. Consider adult alcohol consumption, texting-while-driving in some states, gambling in others, or even the possibility of marginal tax rates higher than their current levels. This very short list alone is enough to implicate nearly everyone's strong policy preferences. The possibility that the absence of regulation might be treated as a condition for the relinquishment of other interests or rights has, as far as we are aware, gone unnoticed. But the extent of government regulation turns out to be quite a bit more restrained by ordinary politics than by constitutional law in general or judicial review in particular. And this political constraint reinforces our point: the possibility that government lawfully could be either less or more than it currently is—eliminating modern welfare state benefits or classically liberal protections on the one hand, or regulating aspects of life that it currently leaves untouched on the other—provides a basis for believing that unconstitutional conditions questions are pervasive.²⁰

Any of the foregoing benefits (optional services, grants, law, and exemptions) can be joined equally well to a wide variety of constitutional claims. We can link any of them to stinginess on liberty claims, property claims, equality claims, process claims, structure claims, and more.

While we are at it, we might as well observe that all enforceable constitutional law exists by the grace of ordinary politics. Without political support of some kind, constitutional law is a set of words lacking an enforcement mechanism, aside from whatever internalized norms remain.²¹ The broader point is that constitutions themselves are package deals that are in turn packaged with other assorted benefits and burdens within a political community. From this perspective, it becomes difficult or impossible to distinguish constitutional rights from government benefits. They are all gratuities in one sense and components of large bargains in another sense. On this account, the presence of government support for rights claims might itself legitimate conditions on the exercise of those or other rights.

20 Our discussion enlarges the scope of subject matter frame to join many benefits with many rights at a particular moment in time. A larger temporal frame would make our pervasiveness claim even stronger (Levinson 2002, 1326–1328; Cox 2007, 65–75). But that additional point is not necessary to our claim.

21 Our caveat above, regarding certain versions of obligation to follow the law, applies here as well. We are neither claiming nor denying that the absence of political will to enforce constitutional norms necessarily absolves people from moral or ethical obligation to follow those norms.

Cass Sunstein made a similar observation in 1996. He suggested that a radical strand of post-New Deal logic could eliminate the foundation of constitutionalism: “Interference with constitutional rights in the old-fashioned sense—as through the criminal law—is merely interference with rights the government itself created and may therefore eliminate at its pleasure” (Sunstein 1993, 296). If this logic is extended beyond deprivations of property to deprivations of liberty or even life—and it is not obvious that Sunstein meant to go this far—then the breadth of the argument becomes quite controversial. Many people will reject theories that regard their lives and liberty as no more than state creations, even if we can demonstrate that neither has much practical value without state institutions. Our analysis does not require us to take sides on this point, however. Either way, our pervasiveness claim stands. We can match old-fashioned notions of “rights” with conventional understandings of constitutionally optional “benefits.” As long as the analytical frame remains large, moreover, unconstitutional conditions questions remain pervasive whether the state is European-style large or libertarian-style small.

3.1.2 Fighting Large Frames

This brings us to a simple objection to conceptualizing unconstitutional conditions questions in this fashion. What should it mean for a government to offer a discretionary benefit on “condition” that a constitutional entitlement be sacrificed? Can the frame be as inclusive as we say, and still make sense of the term?

We can think of several versions of this concern. As we have indicated, some readers might want to define “condition” narrowly in terms of explicit offers that are explicitly conditioned on rights sacrifices. They might agree that *Frost* involved a condition on transportation company use of state highways because the licensing scheme under review clearly bundled highway access together with regulatory compliance, but they might refuse to bundle together a privilege of trucking (on the highways or anywhere else) with our hypothetical fine on private carriers.²² Other readers might want to reject conditions that seem implausible or hypothetical, even if made explicit. These readers might feel, for instance, that the Court was wrong in the classic case of *Paul v. Virginia* (75 U.S. 168 (1868)) to conclude that a state’s regulation of foreign corporations was acceptable because these corporations theoretically could have been

22 Compare and contrast the clear statement requirement that the Supreme Court has imposed on conditional federal spending sent to the states (e.g., *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)), which effectively *invalidates* purported conditions as not part of an unambiguous prior deal in order to protect states from unwelcome surprises.

entirely excluded from the state (*id.* 181).²³ Perhaps no state actually had any real interest in going that far. Finally, one might suggest that some purported conditions on the exercise of rights are so unrelated to discretionary government benefits that they should not be called conditions at all. Perhaps, these situations should be condemned with labels such as “coercion,” “extortion,” and other epithets indicating distance from wholesome “deals” involving people accepting “conditions.”

The trouble is in defending these positions. As a logical matter, nothing normative flows from our use of large frames to join burdens with benefits. We are grouping together situations that we take to be descriptively or conceptually similar without passing normative judgments. We would not think that the mugger’s implicit threat of “your money or your life” is morally acceptable simply because the statement can be thought about as a deal involving risks.²⁴ Our point is that the question of what conditions are acceptable cannot be resolved by arbitrarily narrowing the scope of what counts as a condition. That buries the tough normative choice in an undefended conceptual distinction. If someone wants to eliminate what we call conditional government benefits that are insufficiently “germane” to the sacrificed right, then arguments should be offered beyond asserting that there just is no “condition” in the picture. Likewise for someone who wants to ignore constitutionally gratuitous benefits that officials are unlikely to eliminate or do not explicitly link to rights burdens.²⁵

Our conceptual inclusiveness should make clear that some unconstitutional conditions cases can be easy. We have no loyalty to the tradition of linking unconstitutional conditions questions to hard questions. This link is an artifact of confining the category in ways that we have rejected. Of course, a narrow focus on difficult unconstitutional conditions questions is not harmful per se;

23 See also *Davis v. Massachusetts* (167 U.S. 43, 48 (1897)), which relied on the state’s “right to absolutely exclude all right to use” Boston Common, and *Hess v. Pawloski* (274 U.S. 352 (1927)), which relied on a state’s right to exclude drivers from the state’s highway to uphold a statute extending jurisdiction over persons outside the state’s territory. We probably should not have to repeat that we are not endorsing or condemning any of these case results.

24 Philosophical discussion of such conditional offers and/or threats is generally framed around the question of what counts as coercion or, in some cases, unjust coercion. But that literature, like our approach here, takes a capacious view of what counts as an offer or a threat (*e.g.*, Nozick 1969; Wertheimer 1987).

25 Even if unconstitutional conditions doctrine required someone to stand up and point out a constitutionally discretionary benefit, government could always make the link between benefits and rights explicit in this way, and presumably would do so whenever that would make an advantageous difference. The fact that legislators and lawyers often decline to make the link explicit might say something about political and legal strategy, but it need not obscure the pervasiveness of unconstitutional conditions questions for the rest of us.

people are free to study the subjects that interest them. It is odd, however. Neither scholars nor decision makers tend to create doctrinal categories composed only of difficult cases. Although law professors are attracted to challenging and contested questions, there is no “schmorts doctrine” made up of hard torts questions. Part of the reason is that legal scholars believe that we can learn from studying large sets of situations sharing a common logic or issue. If the issue is fundamentally the same across the set, then accumulating easy answers might help resolve the harder situations, even if those situations are hard for the same reason. Contemporary unconstitutional conditions scholarship does not follow this approach. Apart from the occasional extreme hypothetical, the scholarship is ordinarily narrowed to the most controversial, confusing, and divisive situations. Even if that scholarly norm is not surprising, confining the so-called doctrine to hard questions is offbeat.²⁶

Once the domain of unconstitutional conditions questions is radically expanded, however, there might be a large number of easy cases. And these cases will be easy in both directions: clearly valid and clearly invalid conditions. At this stage, we are not asking readers to change any of their intuitions about case results. Nothing said so far doubts the strength of constitutional objections to incarceration based on ideology, race, sexual orientation, or anything else. If recharacterizing a constitutional claim as an unconstitutional conditions question were enough to defeat the claim, almost no constitutional right would survive. We reject that outcome.

Our basic message and framing choice is consistent with Daryl Levinson’s, although we are pushing further. He emphasizes that an adjudicator cannot know whether government has caused net loss to a constitutional claimant without selecting a transactional frame for the inquiry (Levinson 2002, 1337–1338). A claimant might want to narrow the frame to capture only a single injurious interaction with government, as if the two litigants were otherwise strangers litigating a tort case. But “[b]ecause citizens are always in a repeat-play—or, more accurately, a continuous-play—relationship with government, opportunities for aggregation over time are ubiquitous” (*id.* 1333); choosing a

26 In this article, we are not interested in accounting for, let alone defending, the status quo in constitutional analysis. First, there is the problem of what to make of silence from judges or other decision makers on potential arguments about conditional government benefits. Second, there is the question whether we should place much faith in common-law reasoning of this kind, especially given the silences. We can find sources of wisdom other than judicial opinions in litigated cases. An institution that systematically ignores a logical question is not a leading candidate for the foundations of sound normative lessons, whatever insight might be gained into how the institution operates in fact. And third, there is the chance to rethink standard constitutional analysis for the future based on the observations we have made. To us, this seems more important than rationalizing an artificially restricted field of adjudication.

larger frame may reach numerous offsetting benefits that flow from the government to the claimants.²⁷ One of Levinson's illustrations is unconstitutional conditions cases. He observes that adjudicators have the choice of isolating the challenged condition or bundling it with the benefit offered in exchange (*id.* 1346, 1349; *accord* Seidman 1988, 75). Although we are interested in deals and Levinson was interested in injuries, we agree with Levinson's observation. We are, however, stressing that any number of discretionary benefits can be bundled with conditions on constitutional rights, once the framing decision is taken seriously.

If we have a disagreement, it is with Levinson's suggestion that within "the structure of unconstitutional conditions doctrine, . . . analytically, a highly salient government benefit is always immediately at hand—the very benefit to which the condition is attached" (Levinson 2002, 1349).²⁸ We do not see things this way. While judges are sometimes drawn to foggy nexus tests as a check on conditional government benefits (*id.* 1346–1349; Hale 1935, 350–359), these tests are ways of distinguishing between permissible and impermissible conditions, not ways of eliminating unconstitutional conditions questions altogether. A general aversion to court losses probably deters officials from pointing to discretionary benefits that would not seem germane to the average judge, but that selection effect on constitutional argument does not tell us to avoid large frames in identifying unconstitutional conditions questions. In one respect, the message is the opposite. Nexus tests for unconstitutional conditions are useful only if conditions and benefits with *no* nexus can be tested for one. Thus, in our view, the benefits side of the frame is potentially enormous even after accepting orthodox limits on unconstitutional conditions doctrine. This seems to be within the spirit if not the letter of Levinson's contribution.²⁹

27 Both Levinson's analysis and ours work best when all of "government" is aggregated into a single institution—at least at the local, state, and federal levels. This large group frame makes it much easier for Levinson to claim that government is in an ongoing relationship with citizens involving a variety of injuries and benefits. And it makes it much easier for us to claim that, functionally, government offers people countless discretionary benefits conditioned on the curtailment of constitutional entitlements.

28 In addition, our leaning is to include third-party harm and equal distribution objections to conditional benefits within the normative component of unconstitutional conditions questions (*but cf. id.*, 1346, n. 106). But little turns on this choice.

29 Seidman and Tushnet delivered a similar message: "No matter how many rights are granted in a constitutional text, some things people very badly want or will need always fall outside the text's guarantees. The government will therefore always be able to undermine textually protected rights by threatening to withhold nontextually protected benefits unless the individual gives up the rights" (1996, 89). And, we add, the question whether a discretionary benefit is conditioned on a sacrifice of rights cannot obviously be avoided by restricting the issue to explicit conditions announced by government officials in advance. Unconstitutional conditions questions arise regardless, we think.

3.2. Exit Opportunities and Sorting Dynamics

The above discussion—like all well-known discussions about unconstitutional conditions—was limited to the relationship between a constitutional complainant and a single government. But this omits a critical fact: there are many political communities, and many governments, in the world. In this section, we explore the significance of exit and sorting for the relationships between all rights holders and all government institutions. Acknowledging exit opportunities and the sorting dynamics that exit may generate points toward a quite different perspective from which the promiscuous matching of benefits and burdens is entirely normal. The perspective suggests the largest possible frame for each political community. Of course, you should want good reasons for adopting a sorting perspective and its remarkably large frame; the multiplication of unconstitutional conditions questions is not itself a particularly good reason. Later in this essay and in later work, we hope to suggest persuasive reasons. Before that, however, we want to lay out clearly the connection between a sorting perspective and large frames.

The first step is to remember that people ordinarily have the opportunity to exit imperfect political communities. To a greater or lesser extent, they may move their persons and their property from one community to another. This is a long-standing fallback alternative when one's voice and other rights within a political community seem inadequate.³⁰ The origin of the United States is partly a story of exit from the Old World (e.g., Samaha 2006, 164–165), and exit has been a legal right within the United States shared by nonincarcerated persons since the end of slavery (e.g., *Slaughter-House Cases*, 83 U.S. 36, 80 (1872); *id.* 112–113 (Bradley, J., dissenting)). But the significance of exit obtains whenever a claimant has the resources to migrate out. Exit is a phenomenon at the interlocal, interstate, and international levels whether that migration is formally lawful or not. Equally important, more than one political community often is willing to allow exiting persons to enter. Any community not completely walled off from outsiders might be an option for outsiders who are not completely walled in.

This opportunity for dynamic interchange makes *exit plus sorting* distinct from more general categories of “choice,” or “alternatives,” or “evasion opportunities.” Your chance of dodging my assault might be thought of as an exit option, broadly speaking, and so might my chance of avoiding detection when violating laws prohibiting assault. For deterrence theorists at least, thinking along these lines reduces the practical distance between prohibitions and

30 Threat of exit by desirable members of a political community tends to generate voice and other rights that make exit less necessary in the first place—plus a strong voice within as political community might generate exit rights. Exit and voice should not be separated in analyzing institutions, but here the separation is useful in defending our pervasiveness claim.

conditions, by turning them both into expected costs for behaving in certain ways. But our point is different. The kind of exit that we have in mind combines the (lawful) evasion of unwanted burdens with entrance into an alternative environment—whether physical or virtual—which might better serve the exiting party’s interests or needs. Given the right conditions, exit is part of a dynamic in which substitutes are compared, selected, and ultimately influenced by people attempting to make the best of an imperfect world. This system involves lawful alternatives that are in some sense competing with each other and in some sense living alongside each other (Section 4, *infra*), and the system can be seen only with a frame wide enough to encompass multiple institutions with comparable functions.³¹

With exit plus sorting as a possibility, it is easy to recast any burden on any right as a condition on membership in a particular political community. Return to our play on *Frost*. A trucking company that would rather not operate as a common carrier can go elsewhere—literally. California is hardly the only transportation market in town. Indeed, other jurisdictions may benefit from California’s decision to inhibit competition among carriers, picking up refugees in the form of mobile capital if not labor. The Supreme Court was understandably concerned that the freedom to operate as a private carrier “may be vital to [the company’s] livelihood” (*Frost & Frost Trucking Co. v. Railroad Comm’n*, 271 U.S. 583, 593 (1926)). But the Court majority showed no interest in actually understanding the complainant’s mobility and the trucking opportunities available elsewhere, to say nothing of the opportunities to invest the same capital in other industries.

More striking yet are the late 19th-century cases recognizing the issue of unconstitutional conditions. They dealt with foreign corporations hoping to do business across state lines, and states attempting to burden access to their home markets in some way. An early example is a state demanding that foreign corporations waive their right to remove diversity cases to the federal courts in exchange for the privilege of doing business in the state (*Doyle v. Continental*

31 This quick description of different people choosing and then living with different alternatives should be enough to distinguish still other kinds of “choice,” such as voting. To be clear, we do not mean to suggest that exit is different than other sorts of choices because other choices are principally individual while exit necessarily entails collective action that produce sorting dynamics. As Hirschman and others have long recognized, the use of exit, voice, and even rights to satisfy individual preferences or influence government all involve both private and collective action. The central (and underappreciated) difference between these instruments is that they necessarily involve different forms of private and collective action. That is why the choice among them is so important and why it is a mistake to think of them as perfect substitutes.

Ins. Co., 94 U.S. 535, 540–542 (1876) (permitting a license revocation), *overruled by Terral v. Burke Constr. Co.*, 257 U.S. 529, 533 (1922)). Complainants do not get much more mobile than these companies, regardless of how socially destructive parochial conditions on such businesses might be. Similar rules for out-of-state persons were upheld by the Court, again by reference to the privilege of entry and the possibility of exit. Perhaps, the most famous example is the 1920s Massachusetts statute demanding that out-of-state drivers consent to jurisdiction in the absence of in-state service, which was upheld by the Court in *Hess v. Palawski* (274 U.S. 352 (1927)).

Rather than endorse love-it-or-leave-it responses to every constitutional complaint, our goal is to normalize exit as a relevant alternative and sorting as a possible dynamic in many different situations. This attentiveness to exit and sorting converts political communities into package deals. Every political community offers a bundle of taxes, services, grants, regulations, rights, and other members, where any burden on an asserted constitutional right can be conceptualized as a condition on the rest of the package. The significance of those conditions cannot be understood in isolation. Conditions exist within a dynamic setting of multiple jurisdictions and populations with different values, preferences, and judgments.

From one academic perspective, this is the standard way of understanding political communities. Charles Tiebout's crude model of interlocal sorting captured the idea in the middle of the last century (Tiebout 1956, 418 and note 12), Albert Hirschman contrasted exit and voice a generation later (Hirschman 1970, 21–30), and scholars from several disciplines have toyed with these notions ever since. Nonetheless, this idea of exit has played an obscure and often overlooked role in constitutional law. Perhaps this is because exit is not strictly necessary to generate a broad swath of unconstitutional conditions questions, and many of us would rather not have a new perspective that adds more of them. But placing exit and sorting at the center of constitutional law, rather than at its periphery, opens new directions for constitutional theory in the United States.³²

32 To be sure, choice of political community is the premise of exit opportunities and, therefore, eliminating these choices would kill this part of the pervasiveness claim. Logically, however, exit is available in any case where more than one political community exists. We take up in Section 4 the question whether a meaningful opportunity for exit is important in the same way that some believe the presence of a meaningful choice is central to understanding the implications of the large-frames argument.

4. SORTING THROUGH THE FUTURE OF CONSTITUTIONAL THEORY

Much contemporary constitutional theory ignores exit and sorting. The scholarly model is something like the early work of John Rawls³³ rather than Robert Nozick,³⁴ which means that most writers begin with the assumption of an essentially static population committed to sharing a single political jurisdiction. The typical theorist then develops ideas about individual rights—privacy rights, speech rights, religion rights, gun rights, voting rights, and so on—which are designed to protect those people within that community. Many scholars do consider how rights claims might affect whole systems of behavior, and which of the several institutions might be involved in developing and enforcing such claims. But these valuable angles on rights claims nevertheless tend to suppose a single government, if not a single intelligent designer. Commentators focused on government structure rather than individual rights that are not different on this score. For them, there is usually one government to be understood or reformed.³⁵

To be sure, scholars working in particular subfields have spent more time thinking about exit and sorting. Scholarship on local government law (e.g., Fennell 2000, 53–54; Frug 1999, 168–173; Been 1991; Epstein 1993, 184–187, 200–207), federalism (e.g., Solmin 2011; Hills 2006; Sterk 2004; McConnell 1987, 1493–1500, 1503),³⁶ immigration (e.g., Cox & Posner 2009; Shachar 2011), and international law (e.g., Bradley & Gulati 2010; Helfer 2005) does not always share the static population, single-state perspective. In those fields, the significance of multiple jurisdictions is difficult to ignore. Not so for more

33 See Rawls 1971. One can view Rawls's later thinking about justice in the international setting as progressing toward multiple, if largely static, political communities (Rawls, 1999).

34 Or at least the later chapters of *Anarchy, State, and Utopia* (Nozick 1974, 310–323).

35 John Hart Ely was nearly a counterexample. Toward the end of *Democracy and Distrust*, he began to consider exit as an escape hatch for complaining minorities (Ely 1980, 178–179). Otherwise, Ely was a leader among voice-based constitutional theorists.

36 For the view that positions on federalism usually are and should be about more important commitments, see Seidman (2012, 122): “What we should be doing... is talking about our disagreements about substantive justice... instead of changing the subject to talk about federalism.” We think that a sorting perspective will be a productive addition to standard constitutional analysis in many areas, but we agree that the history of federalism-based arguments is not a source for optimism. Part of our hope comes from a changing technological and international setting in which problems of governance, disagreement, and uncertainty might hold significant attention from people of many different views. Regardless, a sorting perspective focuses on real-world phenomena, whether or not the perspective will be generally accepted or handled well in application.

general constitutional theory in the United States.³⁷ The state of unconstitutional conditions law and scholarship is one manifestation of this fact. Both ignore almost entirely the existence of multiple political communities containing mobile capital and people.

In this Part, we begin to explore the implications of a sorting perspective for constitutional theory. The implications are small and large, short run and long. To take a relatively minor example, inserting exit and sorting considerations into unconstitutional conditions theorizing makes “nexus” or “germaneness” tests seem irrelevant or always satisfied. If political communities are package deals, then each part of the package is germane to every other.³⁸ Whatever sophisticated story might be told to make germaneness a sensible test, the first-cut advice from a sorting perspective is to look elsewhere for leverage on unconstitutional conditions questions. But as we hope to show below, the consequences strike more broadly and deeply. This perspective implicates not just one idea about unconstitutional conditions, but a whole host of thought about constitutional theory writ large. To be sure, a sorting perspective pushes in several different directions: it weakens some constitutional claims, it strengthens some others, and it makes central a series of questions that are often ignored in mainstream constitutional theory. But the impact on constitutional analysis is significant. The near-term implications may be modest, though quite real. The long-term consequences are potentially radical.

4.1 Sorting Analysis and Its Complications

A sorting perspective can be specified in more than one way, but we can identify its core features as they relate to constitutional analysis. First, this perspective looks for competing options and indications that people are in fact choosing among comparable alternatives. The choice might be about physically locating oneself in one of many geographically bounded political jurisdictions, but the relevant choices do not stop there. We note other examples below. Second, a sorting perspective makes the existence of such choices relevant to evaluating claims of constitutional right. If exit and sorting are happening and deemed healthy, many rights claims asserted against a particular government will become weaker. This is a crude generalization, as we will emphasize. Those

37 Exceptions include globalization-of-rights studies by Law (2008) and Tushnet (2009), and the thoughts on exit in Levinson (2012, 1355–1361).

38 For a judicial decision that begins to recognize this larger point, consider *Board of Regents v. Southworth* (529 U.S. 217, 231–232 (2000)), which rejected a germaneness test for university student activity fees that funded student speech with which the complainants disagreed. The Court had no inclination or idea how to define the mission of the university’s program. The *Southworth* Court, by the way, did not consider whether students had adequate alternative options in higher education.

who use a sorting perspective have to decide what counts as “healthy” and certain rights claims will prevail regardless: embracing sorting does not mean rejecting a domain for rights claims that are not contingent on choice. Nonetheless, many standard rights claims would weaken. Third and more ambitiously, a sorting perspective could recommend efforts to encourage and preserve a healthy sorting dynamic. That is, exit and sorting themselves depend on commitments to certain rights or structures, and sufficient enthusiasm about sorting will justify efforts to maintain those rights and structures.³⁹ Most of the examples in this essay do not depend on this level of ambition, but we do not want to stop with moderate tinkering.

To begin, consider the basic argument commonly made about sorting in many fields of legal, social, and economic inquiry. People differ and places differ. Instead of offering everyone the same homogenizing entitlements wherever they are, we can let them migrate and coalesce into decentralized political communities that fit them best. If governments offer different policy packages, and if citizens intelligently select among them, government offerings should better match citizens’ preferences, including preferences for diversity. In this respect, sorting is a powerful response to fundamental disagreement, but one that operates quite differently from rights claims that are traditionally the focus of constitutional law.

This is not a static view on which democracy or government becomes irrelevant and a consumer-oriented perspective on life must dominate: rather, sorting can improve the functioning of democratic government. Mobile citizens provide powerful signals to governments when they move with their feet. Their preferences might often be revealed more reliably through migration than through cheap talk or voting. For this reason, political communities will be responsive to valued members who might leave as well as potentially valuable outsiders who might enter (Cox & Posner 2009, 1422–1426). Of course, there are dangers associated with homogenization and institutions that mimic popular preferences without deliberating about them, but there are equally large risks when preferences are ignored. And those citizens who opt into a community probably are more likely to help make that package work than citizens who had no choice in the matter. In this respect, sorting is one response to the problem of effective government.

39 To some extent, exit and sorting will influence constitutional law and law more generally, whether we like it or not. Political communities and other organizations often compete to attract certain kinds of people and investments (and to spurn others), and people will continue to move and invest across boundaries regardless. Furthermore, it is not always clear who has power to design legal systems in a way that will increase or decrease exit and sorting. So while we consider it ambitious to try to influence the amount of sorting going on in the real world, we do believe such efforts can be successful.

Finally, a sorting system can yield socially valuable experimentation where uncertainty persists. Liberated from the imposition of universal rights in contested territory, smaller government units might innovate and provide information about consequences for everyone else. Without doubt, many people are so confident about the proper goals for society and the best means for achieving those goals that innovation becomes unimportant. But many of us are willing to accept enough doubt about means and ends in a changing world with diverse populations that innovation becomes centrally important. In this respect, sorting is one response to uncertainty.

On the most optimistic view, then, sorting helps solve issues of citizen satisfaction, government responsiveness, and policy experimentation. There is no reason to shield constitutional theory from these issues; dealing with disagreement, governance, and innovation in the face of uncertainty have been part of such theorizing for a good-long time.

If we stopped here, we might end with an old-fashioned rejection of all unconstitutional conditions claims (*Paul v. Virginia*, 75 U.S. 168, 181 (1869) (addressing foreign corporations); *McAuliffe v. Mayor of New Bedford*, 29 N.E.2d 517, 517–518 (Mass. 1892) (Holmes, J.) (addressing public employees)). And since we have explained that such claims comprise basically all constitutional claims, some might expect that we would close with an argument for the end of constitutional law. But that would misunderstand the implications of the sorting perspective.⁴⁰

For sorting to help solve any of the problems that are the subject of conventional constitutional law, the dynamic must be a meaningful and beneficial possibility. It should not be enough to gesture at unrealistic alternatives or to take realistic alternatives as necessarily socially beneficial. Identifying the conditions under which sorting dynamics will be meaningful and beneficial is itself an important project for constitutional law. More ambitiously, the sorting perspective suggests that constitutional law and theory should be oriented toward protecting or promoting the possibility of beneficial sorting—that is, toward ensuring that the real world does not approximate the single-polity perspective of early Rawls. Doing so will inevitably mean elevating the importance of certain rights or structures or commitments that have long languished at the margins of mainstream constitutional theory.

At the level of the individual, enforceable exit rights would become a centerpiece of constitutional law. This would not be a radical change within the United States when it comes to political communities. Our judges acknowledge

40 And we mean “constitutional law” in several forms—most obviously, legal norms that constitute the state and its relationship to the rest of the society, but also including supreme law and fundamental value commitments.

a “firmly established and repeatedly recognized” right to interstate travel (*United States v. Guest*, 383 U.S. 745, 757 (1966); *Saenz v. Roe*, 526 U.S. 489 (1999); *Crandall v. Nevada*, 73 U.S. 35, 48–49 (1867)), despite its hazy relationship to constitutional text. In fact, judges in the past have indicated that this federal constitutional right is protected from interference by private parties, not just government officials, at least when Congress uses its enforcement authority (Tribe 1988, 351–352). And although interlocal relocation is not free, many well-off segments of our population have the right and the resources to exit and relocate across local political boundaries. Furthermore, international exit is protected by American legal tradition: those who are dissatisfied with the United States are free to emigrate and even to renounce their citizenship.⁴¹ The closest thing we have to a formal exit prohibition is an expatriation tax for relatively wealthy individuals who renounce their citizenship (26 U.S.C. §§ 877 and 877A; Internal Revenue Service, *Expatriation Tax* (Nov. 16, 2010), <http://www.irs.gov/businesses/small/international/article/0,,id=97245,00.html>). That said, the international level is not so simple. While no modern democracy generally and seriously restricts the right of its people to leave as a matter of official policy, authoritarian regimes regularly do. A sorting perspective helps highlight the costs of those restrictions, although it might not offer immediate advice on how to eliminate those costs.

Exit rights are not particularly valuable if they are not accompanied by a right to enter somewhere else. No entry right implies that an exit right is useless or, equally problematic, that no sorting dynamic is possible. Within the United States, constitutional law seems to recognize this fact and makes interstate rights of exit and entry nearly mirror images of one another. As a formal matter, the same seems true for interlocal migration and for some other forms of sorting that we reference below (Section 4.2(a)), although this is less clearly established in constitutional doctrine. In any case, this symmetry is far from true globally. Nearly all nation states, including those with unfettered exit rights, seriously restrict the right to entry. Moreover, formal entitlements do not always yield realistic options. Even at the local level, not every home and not every living arrangement are permitted by law in every location, even if local governments are not running their own immigration offices. Exclusionary zoning can be a powerful tool in the United States (Frug 1996, 1082–85; Briffault 1990, 352–354; Glaeser & Gyourko 2002, 26, 30).

41 Although its existence is widely accepted and often implicitly assumed by courts, a right of international emigration is not so easily sourced in existing constitutional precedent. Consider, for example, *Zemel v. Rusk* (381 U.S. 1, 3–4, 16–17 (1965)), which held that the executive was not obliged to permit foreign travel to Cuba for a personal fact-finding mission.

The varying level of entry barriers has several implications. First, differences in international, interstate, and interlocal sorting may lead to significant differences in the relevant constitutional norms. Voice-type rights claims might be a function of the scope of the rights to exit and enter. On this view, voice-rights restrictions that are impermissible at the national level sometimes might be tolerated at the state level and possibly the local level, depending on the viability of exit and entry elsewhere for the complaining party (Samaha 2006, 150–177). Second, there is a reciprocal point: the scope of the right to *enter* might be a function of the strength of voice-type rights claims elsewhere. That is, at least some sorting-based theories of constitutional law could make the right to enter state *A* contingent on the status of a person's rights claims in state *B*. This possibility is also largely overlooked by modern constitutional doctrine and theory.⁴²

Even if there are no legal obstructions to sorting, people might not have the resources to exercise exit rights intelligently or at all. People tend to lack perfect information, perfectly rational judgment, and unlimited resources. They might be unaware of the options, mispredict what they want or need, or be unable to afford the costs of exit in material, psychological, and temporal terms. It also might turn out that people sort over things like employment opportunities and housing needs, rather than over public goods and packages of rights (Rhode & Strumpf 2003)⁴³—though, we should emphasize, it is difficult to separate the character of an economic environment from the attendant legal environment, and insensitivity to the political features of the states has ambiguous implications for constitutional theory.⁴⁴ Regardless, whether anyone has the power to give people the tools to engage in sorting, the impact of a sorting perspective depends on resourceful people. Without the resources, healthy sorting will not happen and will not influence the evaluation of constitutional rights.

Much of the above recognizes ways in which sorting can fail at the level of individuals, yet perhaps the most important feature of sorting is that it is a

42 Perhaps the best-known exception is the right to asylum, which conceptually makes a person's right to enter a state as an asylee contingent on the person's home state seriously interfering with her rights. But once this framework for thinking about rights is identified, many additional possibilities immediately become obvious. Consider, for example, the oft-discussed "right to family reunification."

43 For studies with somewhat less skeptical conclusions about sorting over public goods in the United States, see Fischel (2001, 60–61), Malani (2008), and Banzhaf & Walsh (2008).

44 If ordinary people do not sort on public policy, one could say that there is little harm from political communities choosing their own policy packages because ordinary people do not care—or that somebody else must check these choices because somebody should care or because ordinary people do not care only because they are unfortunately burdened by other demands.

collective enterprise. It requires a hospitable structure and not just resourceful individuals. This raises a series of additional concerns.

Consider, for example, the coordination problems. People might coagulate into like-minded environments that produce herd behavior and group polarization, rather than peaceful and open-minded experimentation (Sunstein 2003, 5–13; Sunstein 2000, 74–75; Samaha 2006, 174–175). Failure to see or engage with difference might be a destructive consequence of certain forms of sorting (Young 2000, 108–120, 188–189; Bollinger 1986, 9–10, 140–144). In addition, the members of a political community might affect the quality of the community's public goods, making the distribution of citizen types across jurisdictions a subject of public concern and of strategic behavior (Fennell 2001, 10–31; Liebman 1999). Relatedly, certain types of political community might be desired by many, yet difficult to maintain—a problem with the stability of some sorting equilibria. For example, ensuring the availability of racially diverse options might require special engineering not provided by crude sorting systems (Schelling 1971). Perhaps more important, some people might be consistent losers in the so-called competition, stuck outside of desirable political communities for one reason or the other. “Undesirables” might be shunned by every attractive political community.

Furthermore, both detrimental and beneficial externalities influence the level and health of sorting. These problems are illustrated by jurisdictions that successfully invest or innovate only to have their ideas copied or their citizens exit without giving back, as well as jurisdictions that get ahead by selfishly polluting or otherwise harming neighboring jurisdictions. Preventing or compensating for such inter-jurisdictional spillovers might require a centralizing mechanism and such mechanisms might themselves be seriously homogenizing. Difficult questions also arise regarding the size and the number of political communities and other exit options. There are efficiency tradeoffs involving economies of scale, for instance (Alesina & Spolaore 2005). Theoretically there might be optimal points within given settings, but those points will be hard to locate with confidence.

This preliminary discussion allows us to restate longstanding concerns about sorting (Frug 1999, 168–173; Rose-Ackerman 1983, 56–57) and, at the same time, suggest a rough test for beneficial sorting. A test that would dictate outcomes in particular controversies would need greater specification, but an outline can be offered even in this space. And this outline will indicate the goals for an ambitious pro-sorting project, as well as the standard by which a less ambitious sorting perspective would evaluate the status quo. Either way, attention would shift toward system-level analysis and group behavior, not simply individualized rights to this or that.

The considerations would include, not necessarily in order of importance: (i) adequate information, cognitive ability, and material resources for private parties who are supposedly choosing political communities or other institutions; (ii) adequate attention to unpopular classes of people who risk becoming untouchables instead of the subject of attention and competition; (iii) adequate checks on detrimental and beneficial sorting externalities flowing across borders, to ensure respect for outsiders and incentives for innovation,⁴⁵ along with a normative orientation to tell whether competing political communities are racing to the top or to the bottom; and (iv) adequate variation across political communities to the extent that people's values continue to vary or that the expected value of experimentation remains net beneficial. This system-level focus would mean that, unlike conventional constitutional injuries that can be identified at the level of individual treatment, constitutional injuries would often be identifiable only by looking at the collective consequences of the sorting enterprise—by examining systems and structures rather than particular complaints (Cox 2005).⁴⁶

If a sorting system appears healthy on all of these measures, some observers will nonetheless demand side constraints in the form of universal human rights or objective goods that are not subject to deal-making or experimentation. Some kind of freedom for political thought, communication, and association are leading possibilities, along with a prohibition on human slavery. We have no objection to continued efforts at drawing up more-or-less universal minimum standards of political justice in a world that often falls far short of ideal (e.g., Rawls 1971, 1999; Sen 1992, 39–55; Nussbaum 2000, 4–6, 78–82).

45 A related issue involves interlocal, interstate, and international agreements. Governments do not only bargain with private parties. They also bargain with each other. There must be a basis for assessing whether agreements (or cartels) that alter the scale and scope of government are helpful or harmful.

46 For now, we leave aside the implications for judicial review. But the topic is obviously important. Our first reaction is great skepticism about the ability of today's courts to perform the analysis well. However, one might find beneficial pockets for judicial review even on a sorting perspective—and, in any event, strong-form of judicial review might be an attribute of a political community over which people and their capital might sort.

A related agenda item for our sorting perspective is fashioning a mechanism for validating unconstitutional conditions claims, despite the implications of our large-frame analysis. Political jurisdictions should be able to insulate rights claims from counterattacks that point to exit opportunities or discretionary government benefits. These guarantees might be justified by popular demand, by a theory of justice, by the need to experiment, or by some other reason. And perhaps a political jurisdiction could “precommit” to honor fairly explicit promises not to condition (some set of) constitutional rights on abstention from (some set of) government benefits; certain welfare rights clauses in state and foreign constitutions might be robust enough for this purpose, if interpreted broadly. More work can be done on rights-protecting mechanisms. We certainly are not claiming that traditional constitutional rights cannot or should not be protected by individual political jurisdictions. Some conditions should be unconstitutional.

However, as with the proper scope of exit and entry rights, it is unclear how nonsorting-oriented side constraints should be generated and enforced. Indeed, facilitating sorting is one strategy for learning about the possibilities and consequences of rights. That said, the demand for side constraints cannot and should not be ignored.

Which brings us back to a basic point: a sorting analysis is a constructive addition to constitutional theory, but it is not always rights-defeating. Some rights will be generated from inside a sorting perspective, as with exit and entry rights of some dimension, and other rights will be supported based on deep commitments that exist outside any sorting perspective. So even if it were possible to generate a perfectly stable and robust system of sorting with no pathologies—a Utopian impossibility—sorting would not swallow the rest of constitutional law. For people who are sensitive to diverse preferences, accountability problems, and experimentation in the face of uncertainty, the proper domain for sorting probably will be large. For those who are fairly certain about what constitutes the good life and the good society, the domain probably will be small. For no one, we think, will the proper domain for sorting be no space at all. And while much good work remains to be done on universal human rights, a sorting perspective on constitutional law deserves much more attention than it has received to date.

4.2 Growing Applications

Knowing when sorting is an appropriate substitute for traditional constitutional rights claims, or when sorting is the appropriate method for ascertaining the content of constitutional rights, is often challenging. Despite the challenges, sorting analysis is plausibly applicable to many constitutional issues in the United States now, and probably to many more issues in the future. Before this century is out, there might be few constitutional controversies that can be sensibly isolated from a sorting perspective. But we can begin more modestly.

4.2.1 Short-term Implications

In the short run, the analysis of a number of domestic constitutional issues can gain from a sorting perspective, even a modest one. As the above discussion makes clear, one set of issues involves constitutional law that may enable and promote healthy sorting. Thus, a central implication of our approach is that constitutional decision-makers should pay far more attention than they currently do to exit rights, entry rights, and the relationship between the two.

But even if we take today's opportunities for sorting as fixed, there are plenty of instances where current conditions indicate socially beneficial sorting without destructive consequences. The most promising situations are those in which

a live system of sorting across many options will likely enhance diverse citizen satisfaction, government responsiveness, and experimentation, while not raising worries about sorting-party resources, excluded undesirables, or uncompensated externalities. In such contexts, homogenizing constitutional rights claims are vulnerable. We should also stress that features associated with healthy sorting are not limited to situations involving people moving from one political jurisdiction to another. Geographically defined political communities might be the most familiar application of “voting with your feet,” but that catchphrase does not capture every kind of sorting. Sometimes sorting involves people and sometimes not; sometimes sorting involves geographic change and sometimes not; sometimes sorting involves whole governments and sometimes not.

Sweeping broadly, several classes of domestic constitutional claimants and government institutions can be identified as plausibly open to a sorting perspective. As for claimants, the initial crude cut involves those people who can be expected to sort without much trouble. They are the highly mobile in today’s globalized world: highly educated and highly skilled workers, and relatively wealthy people with cosmopolitan values.⁴⁷ These classes can be expected to possess the ability necessary to make informed choices, the resources to execute those choices, and the in-demand characteristics to make their choices meaningful. Other people tend to have less power and fewer options. Unfortunately, sensitivity to real-world opportunity has not been a strength of the many partisans who have made “love it or leave it” arguments. Too often, such arguments have been thrown at those with no realistic exit option, and so pointing to exit opportunities might now be associated with a heritage of ignorance or callousness. But an informed and intellectually honest sorting perspective does not have to carry that baggage. Certainly, we have no interest in a constitutional theory that scores cheap rhetorical points by directing every complainant to the door. Indeed, we think that a major challenge facing a sensible sorting perspective is political: those whose constitutional claims would be weakest under our theory are least likely to need constitutional law on their side, and perhaps most likely to secure constitutional rights when they want them.⁴⁸

47 Perhaps it is worth noting that we, your authors, have some of these characteristics and that, for this reason, our own constitutional complaints might be taken less seriously.

48 A similar political economy problem surfaces for orthodox rights theorizing along with other normative constitutional theories that are supposed to be sensitive to the needs of disadvantaged people (Bell 1980). Hence, such problems of politics and implementation are not reasons to reject a sorting perspective on constitutional law in favor of something else. But we are willing to highlight these practical challenges as a topic of interest for later work.

As for government institutions, the first rough cut involves the scale of the institution. Today, scale tends to track geographic coverage. As a general matter, sorting across government institutions tends to become easier as the scale of the governments becomes smaller. In part, this is strictly a function of size's effect on the number of options available to people. When there are many small governments, there are formally more choices than when there is one giant government. But scale is also important because it tends to correlate, particularly in modern democracies, with the presence of formal entry and exit restrictions, and sometimes with the practical ability to exit as well. Local governments usually have fewer formal restrictions on exit and entry—although, as we have noted, interlocal sorting is hardly available to everyone given exclusionary zoning and other practical barriers to entry (Section 4.1). It remains true that subnational states usually run far less elaborate immigration screens than national governments. Moreover, the proliferation of government institutions in close proximity makes formal choice more meaningful. The ability of Wall Street lawyers to pick among dozens of local governments that lie within a tolerable commuting distance is surely more important than simply the absolute number of local governments in the United States. Thus, we can differentiate national, state, and local forms of government, with a sorting perspective gaining more purchase as we move from larger to smaller subdivisions to the extent that meaningful sorting opportunities actually increase—and perhaps looking most attractive in large metropolitan areas where even people stuck with a single option in the labor market will have many options in the market for governments. After the geographic level of government, there seem to be fewer reliable proxies for an attractive sorting perspective. The general guidance would be to look for institutional sets with convenient and diverse options, whether only public or public plus private.

Moving beyond this preliminary sketch, we can identify a series of more concrete constitutional contexts that are ripe for sorting analysis today. The following discussion makes no effort to be comprehensive. Our aim is simply to sample a few areas to show the plausibility of the approach. But we can show a lot with only a few illustrations.

Before proceeding, we should emphasize an important point: sorting analysis need not be restricted to situations in which people are sorting over geographically defined political institutions. For ease of exposition, our discussion above focused principally on spatial sorting by natural persons. But while spatial sorting across political jurisdictions might be the most familiar application of the theory, sorting is not all spatial, and rights claimants are not always natural persons. The following examples make this clear. In fact, in the near term, sorting analysis might have the most power to change how we think about problems that do not involve people sorting spatially.

4.2.1.1 Economic regulation.—Consider economic regulation that inconveniences commercial enterprises. Without question, political jurisdictions compete to attract capital in several forms, which is relatively mobile. Whether the regulation involves working conditions, minimum wages, maximum hours, price controls, organizational structure, antitrust, or some other economic regulation, there often will be alternative political jurisdictions offering more convenient terms—if not in another city or state, perhaps in another country. This is not to say that the existing mix of regulation is perfectly efficient or fair. It is not. Nor are we suggesting that heterogeneity of economic regulation is an unalloyed good. Sometimes regulatory diversity will itself be an impediment to efficient globalized markets. Nonetheless, from a sorting perspective, this class of federal constitutional claims is relatively weak. This leaning is largely consistent with the post-1937 settlement in U.S. constitutional law, which downgrades many objections to market regulation, with partial and arguable exceptions such as takings of real property and inhibitions on truthful commercial advertising (e.g., *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 176 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). Moreover, one of the prominent exceptions to this settlement—restrictions on protectionist economic regulation via dormant commerce clause and equal protection doctrine (e.g., *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882–883 (1985); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184–185 & n.2 (1938))—might make sense within a sorting framework, as these forms of regulation interfere with firm entry and exit and thereby undermine one class of opportunities for sorting.⁴⁹

4.2.1.2 Public employees.—Moving away from geographic sorting, similar thoughts apply to government employees.⁵⁰ Theoretically, government might have a unique mission that separates it from a well-defined private sector. Practically, however, government operations have always overlapped with the private sector. If nothing else, many government employees must have skills

49 An important complication is that such national antidiscrimination norms can reduce one kind of variation in state and local government policies even as they facilitate capital migration, because they prohibit state and local governments from picking policies that treat newcomers differently than existing residents. This constraint on one dimension of variation might encourage some kinds of sorting, but of course, it might also discourage other kinds—particularly once we factor in the response of these governments to the constraints. After all, a government that must treat newcomers like long-term residents might prefer to have fewer newcomers.

50 While our focus here is on sorting between public and private employment, the idea that there is often a choice between sorting over governments and sorting over private institutions is a general and powerful point. Ultimately, taking into account sorting in both the public and private domains will probably begin to integrate constitutional and nonconstitutional legal analysis. After all, we are attempting to extend and enhance sorting theories from nonconstitutional realms, where it feels more natural to more people, to the center stage of constitutional analysis.

similar to those valued by private employers. True, public employees might have systematically different values compared to private employees (Rayner et al. 2011; Perry 1996), and this helps explain why they sorted into public service. On the other hand, sometimes an accountant is an accountant, an engineer is an engineer, and a lawyer is a lawyer. Furthermore, government experience is valuable to some private sector employers; revolving doors exist for reasons other than shakedowns. To the extent that a class of public employment is linked to a larger labor market with private employment, we might be much less troubled by constitutional complaints by government employees against their employer. This subset of government employees should have a more difficult time establishing speech rights or due process rights that might or might not be available to private employees. Note that this is not a crude “greater includes the lesser” assertion. We are attempting to select out government employees with the least plausible constitutional claims from a sorting perspective. And of course, a number of caveats could be made here along the lines suggested in our discussion above.⁵¹

4.2.1.3 Higher education.—The number of institutional options for higher education is large—cutting across public and private providers, offering a variety of content and pedagogy, and reaching across the country. In addition, applicants to these schools often have the resources and desire to consider several possible fits. Although financial aid might not be well-designed to facilitate optimal sorting, and many students remain tied to a particular geographic location for family or other reasons, no one doubts that a number of applicants have real choices and that many institutions are competing for student attention. Nor is the dynamic restricted to initial entries; transfer opportunities represent midstream exit. This live sorting dynamic casts light on constitutional challenges to state-run university policies, such as race-based affirmative action programs. These programs are now vulnerable to fairly aggressive judicial review under the Supreme Court’s contemporary equal protection doctrine (*Parents Involved in Community Schs. v Seattle Sch. Dist.*, 551 U.S. 701 (2007); *Gratz v Bollinger*, 539 U.S. 244 (2003); Ryan 2007, 135–136). But the burden on complaining students cannot be fully evaluated without understanding the panoply of options that they have. Only if all state universities must be the same as a matter of federal constitutional law can we say that sorting is plainly irrelevant. Obviously, there are counterpoints to be made against considering race in admissions decisions; many applicants to state universities have fewer resources and fewer options, which are constraints that state

51 One of these caveats involves a beneficial externality: the possible third-party benefits of speech by government employees about government (e.g., Sunstein 1993, 303–304), assuming the employees have something special to add and the state will not react by withdrawing services altogether.

universities are supposed to help overcome in the first place,⁵² and at some point, affirmative action programs might become so widespread that there is little room for sorting around them. But those concerns are not enough to prevent a sorting perspective from adding insight to the constitutional complaints of at least some university students.

4.2.1.4 Mass media.—People now use a variety of communications networks to receive and publish content, including broadcast, satellite, and cable. Moreover, it is easy for people to migrate across these technologies and the channels within them. The Federal Communications Commission (FCC) has not kept pace. Its decency regulations remain limited to the broadcast medium even as audiences rely ever more on other networks. Changes in technology plus stasis in regulatory coverage makes decency regulation the subject of ridicule and, once again, constitutional attack (*FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012)). Indeed, a long-standing response to those who support limits on risqué content is that sensitive audience members should “just change the channel.” But easy exit in this context cuts in the opposite direction, as well. Hardy audience members who prefer content driven by economic forces rather than government officials and affiliated interest groups are free to migrate away from broadcast. This leaves a large mainstream audience with the option of choosing stations with FCC oversight. One might say that government oversight becomes built into broadcaster brands. And those in the broadcasting business are hardly locked into that delivery mechanism. NBC is not an immobile asset; the people and capital behind its façade can migrate (and to a degree have migrated) into unregulated territory. What seems to be jurisdictionally underinclusive decency regulation has had the effect of enhancing audience choices, and making a sorting analysis more appropriate (*Samaha 2012*, 398–399).⁵³

These are just four possibilities for constitutional analysis in the United States today. Yet, our examples reach very different contexts and they demonstrate that a sorting perspective need not slant in orthodox left/right terms. One can

52 This fact highlights one reason why public and private institutions will not always be good substitutes. In many contexts, the state is designed to provide precisely what would be lacking in a world of pure private ordering.

53 A path-breaking version of this argument is Bollinger (1976, 26–27, 32–33, 36–37), who defended different treatment for broadcasting as opposed to print media facing access mandates as a compromise that reduces risks.

Due to resource constraints, some people will be left behind in the broadcast-only world. This makes us wonder whether resource-constrained viewers are more or less likely to support FCC decency regulation, and whether the extent of such opposition is enough to justify eliminating such regulation for others. Note that, in the recent *FCC v. Fox* case, the broadcasting parties did not oppose all FCC oversight.

find value in a sorting perspective whether one favors labor or capital, traditional culture or the *avant garde*, and so on. A sorting response is equally offensive to the constitutional claims of many different kinds of people. In that regard, a sorting analysis makes everyone's constitutional work harder.

4.2.2 Potentially Radical Long-term Implications

These immediate implications are important, but it is the long-term effects of a sorting perspective that are potentially radical. Over the coming decades, changes in how the world works will likely make a sorting perspective ever more plausible—and in the most unlikely places.

Consider sweeping technological changes. Transportation and communication costs have plunged over the last century or so. A pair of statistics calculated by Paul Rhode and Koleman Strumpf drive this fact home: the financial cost of traveling a mile in the United States fell by more than 60 percent between the beginning and the end of the 20th century (Rhode & Strumpf 2003, 1656, Figure 1), and the cost of a three-minute transcontinental telephone call dropped by over 99 percent to less than a dollar (*id.* 1657, 1658, Figure 2). Such costs probably will continue to drop while the quality of communication and transportation technologies continues to rise. As a result, these technologies will become accessible to more and more people around the globe. Cheap transportation makes exit more affordable, effective communication makes a change in location less significant, and both technologies make it easier to gather information about options. Perhaps most dramatically, the surge of social network and virtual reality technology will moderate fixations on physical proximity. Indeed, these technologies enable people to disaggregate their choice of a political and a social community. This raises monumental questions about the extent to which governments will continue to be equally bounded by geography; some political institutions are not so physically fixed today. It is even possible that mobility and communications will make governments less effectual over time. Either way, little imagination is required to envision transportation and communications technologies facilitating exit and sorting across political communities.

Moreover, the number of acceptable national options seems to be increasing. At least for those who desire relatively wealthy, relatively liberal democracies, the option set is larger now than it was a century or half-century ago, and it could be even larger in another half-century. This prediction depends on a growing number of economically well-off democracies around the world, along with declining relative prospects for the United States. Whether or not the United States becomes a mere sideshow to the power, wealth, culture, and prestige of countries such as China and India, a reasonable prediction is that the

quality-of-life gap between the United States and several other nations will close further in the coming decades.⁵⁴ If so, international migration will be less of a one-way phenomenon in this country. Instead of a country where immigration is a high-profile happening and emigration is not, out-migration could become an issue here as it is now in many other parts of the world.⁵⁵ With these trajectories, even federal constitutional rights in the United States would begin to seem like one part of one package of benefits and burdens that are comparable to a series of other offers.⁵⁶

Finally, increasing values diversity makes a global sorting perspective more natural. While many of us believe that it is ordinarily healthy for people to be exposed to values different from their own, there are times when the clash of values within the same political jurisdiction can be far too costly. Such situations highlight the problems that attend pervasive centralization of policy decisions. If worldwide values differences grow, it should become more comfortable to analyze decentralized policy in terms of the alternatives offered by multiple political communities.⁵⁷ Any assumption that all people can be served equally well by the same combination of rights, duties, political structures, and so on would continue to weaken (if it ever was strong).

To be sure, it is far from clear that global ideological variance is likely to increase over the century. In fact, part of the globalization story involves homogenization of cultures through economic and other contacts. But there are always concerns about another clash of civilizations, and the sorting perspective can take those fears into account. Moreover, closer to home, there are growing signs of not just ideological variance but also ideological polarization in which the tail ends of the distribution thicken and the middle wanes in significance. Polarization is one of most important stories of change in domestic politics during the past few decades (Pildes 2011), even if polarization turns out to be cyclical over long periods of time (Frymer 2011). And the trends extend beyond

54 This is an incautious prediction that we are willing to reconsider. Neoclassical economic theory suggesting income convergence, for example, has not held up very well under empirical testing (e.g., Knack 1996, 207–208, 221–223).

55 The Central Intelligence Agency posts net immigration data by nation in *The World Factbook*, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2112rank.html>. Recent data ranks the U.S. 23rd with a net of gain of 4.18 migrants/100,000 total population. The Northern Mariana Islands were ranked 220th (last) with a net loss of 57.46 migrants/100,000 total population. Climate change, by the way, has the potential to instigate another great migration on a global scale.

56 On the relationship of rights/entitlements packages to a global market for talent, see, for example, Cox & Posner (2009, 1426–1436), and Shachar (2011, 2101–2102).

57 This possibility is, of course, subject to all of our caveats above about coordination problems, externalities, and so on.

purely political contests: measures of religious fundamentalism and secularism, imperfect as they are, are both on the rise in the United States (Finke & Stark 2005, 244–248; Kosmin & Keysar 2008, 3, 26; Norris & Inglehart 2004, 89–95). Whether these trends will eventually reverse course is something no one can predict with confidence. In the religion example, “polarization” can increase insularity with respect to one class of people while increasing interaction across borders with another class, as when fundamentalists organize across racial lines (Synan 1997, 85–86, 95–97).⁵⁸ But serious values diversity is undoubtedly significant and persistent at the global level.

We are a long way from these predictions about the future of global sorting, and so perhaps we should not be surprised that our constitutional order does not honestly account for them. It might not need to do so for some time. Nonetheless, even today the obliviousness to a sorting perspective sometimes seems bizarre. To take one example from black letter federal constitutional law: according to the U.S. Supreme Court, the government may go ahead and kill its own citizens as punishment for committing certain crimes, but it may not take away their citizenship and politely escort them out of the country.⁵⁹ True, ranking death over exit is consistent with commonplace patriotic messages characterizing the United States as a beacon for the rest of the world and with assumptions that most people would rather not live anywhere else (in the strongest sense, actually). So perhaps the beliefs that support such messages are unshakable in the near term. Our point is that, in the long run, these advantages are not guaranteed and some global leveling is probably in store.

58 Compare Lublin (2011), who finds no systematic link between decentralization within nations and ethnoregional party success in national legislative elections.

59 On citizenship stripping, see, for example, *Vance v. Terrazas* (444 U.S. 252 (1980)), which required that the government prove by a preponderance of the evidence that an expatriating act was intentional, although permitting a rebuttable presumption that the act was voluntary; *Afroyim v. Rusk* (387 U.S. 253 (1967)), which held that a naturalized citizen could not be stripped of his citizenship for voting in a foreign election; and *Trop v. Dulles* (356 U.S. 86, 103 (1958) (plurality)), which rejected expatriation as a form of punishment under the eighth amendment in a case involving a wartime deserter convicted by court martial.

On banishment, see, for example, *Commonwealth v. Pike* (428 Mass. 393, 403–404 (1998)), which invalidated probation for carjacking conditioned on banishment from the state, though noting that more limited geographic restrictions are permissible; Snider (1998), who recounts the use of banishment in England and the colonies for more and less political reasons; and Saxer (2009, 1405–1411), who collects more modern cases that largely resist it.

Part of the Supreme Court’s concern about involuntary expatriation has been the risk of statelessness and related coordination problems (*Afroyim v. Rusk*, 387 U.S. 253, 268 (1967)). Banishment similarly can cause not only individual hardship and degradation, but also opportunities for political communities to selfishly externalize costs to other jurisdictions.

5. CONCLUSION

Where the Pledge of Allegiance is conducted, participants advert to “one Nation, under God.” This suits many people in the United States today. But however many gods there might be, there certainly is more than one nation. And more than one state, more than one city, more than one school, more than one stock, more than one bond, more than one bank, more than one plat, more than one home, more than one job, more than one channel, more than one church, more than one club, and more than one set of values. This article attempted to foreground the challenging but intriguing possibilities for a constitutional theory that recognizes these alternatives and differences. In part because choices across such alternatives are being made every day, nearly every constitutional claim in the United States is also an unconstitutional conditions question. Many of those questions, it turns out, still seem easy to answer. Others do not. And there probably will be more hard questions to face in the future as the plausibility of a sorting perspective increases. As a consequence, it seems to us, constitutional theory will get better by getting harder.

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