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Fred Schauer says that there are domains of constitutional doctrine that are too hard for theorists to resolve. He's right about that. He identifies the unconstitutional conditions metadoctrine as one within that "too hard" domain. He's right about that, too. Moreover, he's right about many of the other "too hard" doctrines he identifies.

What I intend to do in my comments on Fred's paper then is not to disagree with him in any important way, for I think his analysis is substantially correct. Rather, I intend to try to provide a theoretical account of why there cannot be satisfactory theoretical accounts of certain doctrinal areas. I hope that even if Fred is correct, and the various constitutional doctrines he discusses cannot be justified theoretically, at least there can be a theoretical explanation for why he is correct.

I shall start with the easiest area, the Dormant Commerce Clause. The *Bacchus*[1] case was useful for me for several years—and the *West Lynn Creamery*[2] case is even better—in raising for my students the question how can you tell the difference between a discriminatory tax (or regulation) and a discriminatory subsidy. Orthodox Dormant Commerce Clause doctrine has it that the former is unconstitutional while the latter is constitutionally permissible. If the former were permissible, nothing would be left of the Dormant Commerce Clause, at least as it applies to state protectionism. If the latter—subsidies—were unconstitutional, little sense would remain of the idea of separate states with particular concern for their own citizens' welfare.[3]

But how draw the line between illegitimate tax and regulatory discrimination on the one hand, and legitimate subsidy on the other? What *Bacchus* and *West Lynn* show is that it can't be done. Moreover, all state interferences with the market designed to benefit local producers or consumers display the same economic vices: they shift wealth from out-of-staters and the general mass of in-staters to a smaller and usually better organized group of in-staters, so that not only are competing states beggared, but so too is the protectionist state overall. Moreover, in these respects, protectionist state regulations do not differ from many non-discriminatory state regulations of the economy. A

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1. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

2. West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994).

3. *See* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 490-92, 530-49 (1981).

desire to reward Minnesota's timber industry by banning plastic milk containers will have the same bad effects on Minnesota whether the plastics industry is largely out-of-state or is exclusively in-state.[4]

Now I think it is easy to explain why the Dormant Commerce Clause jurisprudence has come a'cropper this way. I think that it has done so because it is a doctrine that never should have existed. I agree with Justice Scalia and his academic allies who argue that the Commerce Clause is not a direct limitation on state power.[5] The Dormant Commerce Clause doctrine is a constitutional oxymoron. And if it tries to move beyond the narrow area of state exploitation of geographical location in order to extract rents from interstate commerce and into the area of state protectionism, it will run headlong into *West Lynn* and *Bacchus*, which it has.

The theoretical explanations of other "too hard" doctrines are different. Before turning to unconstitutional conditions, I would like to mention a couple of my favorite examples of "too hard" doctrines: the religion clauses and equal protection.

The religion clauses are, I think, one of the Constitution's "grim jokes." One cannot come up with a principled way of granting free exercise exemptions from regulation without at some point engaging in assessing the truth or falsity of religious doctrine, the very thing the Establishment Clause must forbid if it forbids anything.[6] Although every constitutional theorist alludes to the "tension" between the religion clauses, in fact the relation is not one of tension but of outright contradiction. Indeed, at a deep theoretical level, I think it can be shown that there cannot be a neutral, nonsectarian vantage point from which to assess sectarian claims.[7]

(Of course, some constitutional scholars contend the religion clauses were meant to serve only as statements that the federal government had no power to regulate in the area of religion.[8] They, like Scalia and others regarding the Dormant Commerce Clause, believe that the modern, rights-oriented view of the clauses is illegitimate, and that the doctrinal disarray is traceable to the misstep of not recognizing this.)

Equal protection is another constitutional grim joke. Again, it would not be so if it were a narrow rule that perhaps did nothing more than demand the repeal of the Black Codes. As a general mandate that classifications be "justified," however, it looks outward to some moral theory to give an account of such justification. And moral theory is imperialistic. By that I mean that moral theory provides a complete blueprint for governmental action, one that leaves

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4. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

5. *See* American Trucking Ass'ns v. Smith, 496 U.S. 167, 202 (1990) (Scalia, J., dissenting); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569.

6. *See* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1254-70 (1994).

7. *See* Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 793-94 (1993).

8. *See* STEVEN D. SMITH, FOREORDAINED FAILURE 17-26, 119 (1995).

little if any room for discretion, politics, etc., and no room for treating benefits as "optional"—that is, capable of being leveled up or leveled down.[9] But equal protection doctrine assumes that the benefits it is concerned with *are* optional. And it assumes as well that the justifications for classifications do *not* make the rest of the Constitution otiose. Yet, justifications that look beyond the Constitution's text to morality obey no such constraints.

I conclude with the area of unconstitutional conditions. Although some parts of the metadoctrine may be theoretically explicable—I think, for example, Tom Merrill's "public goods" theory does a nice job in a limited domain[10]—I think Fred Schauer is correct that larger portions of the area, and particularly large portions of conditions on free speech, cannot be theoretically rationalized. I focus particularly on the areas of government speech and government employment, or *Rust*[11] and *Pickering*[12] for short. The discussion of these areas of free speech applies more generally, however, to the intersection of the optional benefits of the modern affirmative state and the classical liberal rights of speech, religion, and privacy. It is particularly applicable to *Rosenberger*[13] and to vouchers and other aid for religious schools.

These areas exhibit a fundamental theoretical contradiction characteristic of liberalism, at bottom the same one that I mentioned in connection with the religion clauses. Freedom of speech at its core mandates governmental neutrality with respect to the content of speech. (What would freedom of speech *be* without content neutrality?) And the religion clauses are thought to require a similar governmental neutrality with respect to religion. Darwinism and Creationism, round Earth theories and flat Earth theories, support for Clinton and opposition to Clinton—all can be expressed without penalty.

On the other hand, government cannot run educational systems—or for that matter, anything else—without taking sides on such issues.[14] It cannot warn of the dangers of AIDS and then turn around and gainsay that warning, as private citizens arguably have a right to do. It cannot counsel live birth *and* abortion. And President Clinton surely has a right to require his aides to keep any unflattering opinions they have of him to themselves on pain of losing their jobs, as school boards have a right to refuse to hire exponents of pederasty as school teachers.

In short, the government, whenever it acts, acts in a partisan way. Indeed, I would assert—to bring the earlier discussion of religion more squarely back into play—that government, whenever it acts, acts in a sectarian way. The justifications it provides for infringing liberties are always of the same form: not impinging these liberties would trample on other people's values, values

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9. *See* Larry Alexander, *Constitutional Theory and Constitutionally Optional Benefits and Burdens*, 11 CONST. COMMENTARY 287 (1994).

10. *See* Thomas W. Merrill, Dolan v. City of Tigard: *Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859 (1995).

11. Rust v. Sullivan, 500 U.S. 173 (1991).

12. Pickering v. Board of Educ., 391 U.S. 563 (1968).

13. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510 (1995).

14. *See* Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989).

which we, the government, believe trump the liberties. That view is inescapably partisan. Therefore, if the Constitution—a liberal document—demands governmental neutrality with respect to ideas, religious and secular, then the Constitution is a grim joke as a theoretical manner.

There is another reason why the unconstitutional conditions metadoctrine is such a mess, a reason that ties into my earlier discussion of equal protection and, indeed, into many areas of constitutional law. The Constitution has increasingly come to be viewed, not as a list of fixed, determinate rules, but as a source of heavily moralized "principles." The various terms that our constitutional vocabulary employs—"legitimacy" and "compellingness" of state interest for example—invoke morality. Yet, as I said in connection with equal protection, morality is imperialistic. There is no reason to think that what morality demands can be severed into distinct principles that correlate with the discrete provisions of the Constitution, or even that posited norms that constitute what the Constitution *is* correspond perfectly with what morality prescribes ought to be. Indeed, it is probably only our fervent desire that what the Constitution *is*, is what, in our opinion, it ought to be, that leads us to view it as a repository for Dworkinian principles and not as a set of narrower and only partially reconcilable rules.[15]

Yet, decide cases we must, and so we shall. Just don't ask for a theoretical justification of our decisions. Not only is that too hard, it's impossible.

15. *See generally* Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION 279-327 (Andrei Marmor ed., 1995).