Amdt1.7.13.1 Overview of Unconstitutional Conditions Doctrine

First Amendment:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

The "unconstitutional conditions" doctrine reflects the Supreme Court's repeated pronouncement that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[1] Although the doctrine is not limited to the First Amendment context,[2] many of the leading Supreme Court cases on unconstitutional conditions have involved the freedom of speech. While the doctrine does not have a formal test,[3] the basic principle is that the government normally may not require a person, as a condition of receiving a public benefit, to relinquish a constitutional right—most notably, by speaking or refraining from speaking on a certain subject.[4] How this principle applies in a particular legal challenge depends in part on the "benefit" offered by the government, which can take different forms, including public employment, a tax exemption, or government funding.[5]

Footnotes

1. ^ Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.").

2. ^ *Cf.*, *e.g.*, Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (conditioning a building permit's issuance upon an uncompensated, public right-of-access across the permit applicant's property violated the Fifth Amendment's Takings Clause); Donald v. Phila. & Reading Coal & Iron Co., 241 U.S. 329, 332 (1916) (holding that Wisconsin exceeded its authority by revoking out-of-state corporations' business licenses for removing lawsuits brought by Wisconsin citizens to federal court). *See* Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 5 (1988) (explaining that the doctrine is not "anchored to any single clause of the Constitution," and has been invoked in cases involving Congress's spending power, the states' police power, individual liberties, property rights, substantive due process, and equal protection).

3. ^ *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1419 (1989) (positing that the unconstitutional conditions doctrine "serves a limited but crucial role" in that it "identifies a characteristic technique by which government appears not to, but in fact does burden [individual] liberties, triggering a demand for especially strong justification by the state"); Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 5–6, 10 (2001) (advancing a "unified theory" of unconstitutional conditions that "centers on coercion" but also accounts for "particularistic constitutional doctrine").

4. ^ *Perry*, 408 U.S. at 597. Some legal scholars have argued that this principle is rooted in substantive due process considerations. *See, e.g.*, Zygmunt J.B. Plater & Michael O'Loughlin, *Semantic Hygiene for the Law of Regulatory Takings, Due Process, and Unconstitutional Conditions: Making Use of a Muddy Supreme Court Exactions Case*, 89 U. Colo. L. Rev. 741, 745, 796 (2018) (situating the unconstitutional conditions inquiry for permit exactions under Fourteenth Amendment substantive due process rather than the Fifth Amendment's Takings Clause).

5. ^ Licenses and permits sometimes are considered a government benefit that is subject to the unconstitutional conditions doctrine. *Compare* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013) (discussing the "special application" of the unconstitutional conditions doctrine in the context of land-use permits), *with* Matal v. Tam, No. 15-1293, slip op. at 19 (U.S. June 19, 2017) (plurality opinion) (concluding that unconstitutional conditions cases did not apply to a restriction on federal trademark registration). However, the state interests at issue in licensing may justify restrictions on protected speech and expression in some circumstances. *See, e.g.*, California v. La Rue, 409 U.S. 109, 118 (1972) (upholding a state regulation prohibiting nude dancing in establishments licensed by the state to serve alcohol).