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In his paper in this issue of the *San Diego Law Review*, Professor Howard Abrams[1] takes me to task for my analysis of the doctrine of unconstitutional conditions as it appears in the Foreword to the Harvard Law Review 1987 Supreme Court issue.[2] Judging from his response, it is difficult to understand why he bothered with his analysis because he seems to find so little of value in what I have written. Instead, he uses the opportunity as a platform for the development of his own inchoate views, which in common fashion stress the importance of motivational analysis in dealing with unconstitutional conditions. Although he has an obvious familiarity with standard economic doctrine, he interprets it so austerely as to render it useless to attack this, or indeed any other, problem. A more sensible use of economic theory yields far richer fruit, and is consistent, I believe, with the positions that I have developed in the Foreword. Professor Abrams uses his economics to obscure the doctrinal outlines of the unconstitutional conditions doctrine. We would all have profited more if he had used his insights to advance understanding of the doctrine.

To facilitate my brief reply, I shall follow the organization of Professor Abrams' paper which divides his objections to my position into

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1. Abrams, *Economic Analysis and Unconstitutional Conditions: A Reply to Professor Epstein*, 27 SAN DIEGO L. REV. 359 (1990) [hereinafter Abrams].

2. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) [hereinafter Epstein, *Foreword*]. Strangely, Professor Abrams does not consider the elaboration of my views in the Symposium published in this Law Review: Epstein, *Unconstitutional Conditions and Bargaining Breakdown*, 26 SAN DIEGO L. REV. 189 (1989).

three parts. His first point is that I have not explained why the use of monopoly power by the government constitutes a situation that requires some constitutional supervision. His second point is that my economic analysis of the doctrine is necessarily flawed because it requires reliance upon the kind of motivational investigations that are ordinarily regarded as out of bounds by economic theory. His third point concerns what he considers to be my inadequate treatment of the externality problem as it normally arises in economic theory.

I. Is Monopoly Bad?

Yes. I take great comfort in having to defend my position against an attack that treats monopoly — indeed legal monopoly run by the state no less — as an acceptable state of affairs. Professor Abrams reaches this conclusion by invoking the criterion of Pareto improvement — a change is better only if it makes someone better off and no one worse off — but he does so in an unfortunate fashion. He looks only to the situation *after* the monopolist has gained possession of the monopoly. Because the monopolist is made worse off by the introduction of the competitive economy under Professor Abrams' theory, it is not possible to say that the world is better off with competition than it is with monopoly. It is not possible to make the direct comparison of the losses to the monopolist with the gains to the consumers as we move to the competitive regime. His argument is capable, of course, of extension in other areas, for we could also say that there is no social improvement when one removes the Jim Crow restrictions in the Old South or dismantles Apartheid in South Africa, for in each case those persons who supported the old order lose when it is displaced.

These striking conclusions rest upon an erroneous view of economic analysis. The right question to ask is *not* whether, with unsound institutions in place, any shift will be a Pareto improvement. The right question to ask is whether from an original position, individuals who do not know whether they will be a supplier or a consumer would prefer one institutional arrangement over the other. Within this framework all persons would opt for the greater total output under the competitive arrangement, because that arrangement would promise greater private returns to each of them. In essence, behind the veil of ignorance each person gets a fixed fractional share of the whole. Subject to that constraint, each person's own private interest is maximized only by maximizing the whole.

The same conclusion may also be reached by another route, the Kaldor-Hicks formulation, under which one social state is preferable to another if the individuals in one group could compensate the individuals in the other group for their losses and still remain better off

than they were before. By that standard, if consumers could organize costlessly, they could always buy off the monopolist. However, the monopolist could never buy off the consumers because the monopolist's gain from future monopolization *exceeds* the losses to consumers. Both of these results are true in all cases because the output under competition, where sellers price at marginal cost, is greater than it is under monopoly, where sellers price above marginal cost. Again, there is an asymmetry in the analysis that allows one state of the world to be preferred to the other. If Abrams is right, then, in effect, anti-trust law is misguided because the social gains would never justify limiting the use of monopoly power.

Using either of these tests of social welfare makes it possible to reevaluate the hypothetical example[3] presented by Professor Abrams under which the captain of the stranger ship arrives and promises to offer two coconuts to B as long as A destroys one of his own. B is also prohibited from compensating A with one or more of his coconuts. I pass by the obvious question — what is in it for the captain to make an offer that costs him two coconuts if accepted? — and turn to the central point. If A and B know in advance their separate roles, then it would be difficult to decide whether the losses to A were sufficiently weighty to offset the gains to B. However, that is not the situation at issue. The more precise parallel is a situation where A and B both know that this offer may be forthcoming, but have to decide their joint response to the offer before they know who will profit or lose from it: would A and B each agree to accept the captain's offer should he be the one to lose the coconut?

At this point, the inquiry turns on the level of risk aversion of the parties. If it is slight, they may be willing to bind the future loser to accept the offer (and each other not to collude with the captain in order to increase the likelihood that the losses will be imposed on the other party). It is a tricky question of whether the consequences of this hypothetical agreement should be imposed upon the loser if it is dreamed up after the fact. However, if the matter was put to them before the offer came, what is the difficulty we face if they decide that the risk is worth the gain? Surely if the offer were for 4000 or even 4 coconuts, we could see an easy acceptance ex ante. Why then dispute the decisionmaking strategy that works well in the easy cases just because we have to face the harder ones?

The institutional issues involved with the unconstitutional condi-

3. *See* Abrams, *supra* note 1, at 365.

tions cases often involve situations in which new monopolies are created by statute. There the analysis seems quite easy. Matters become more difficult when the monopoly has already been established and someone seeks to undercut it. In these cases where there has been a prior mistake, it is never possible to correct it without imposing certain net losses that are in some sense undeserved. However, where the allocative gains are large enough, it is probably worth changing the legal rules even though there will be some uncompensated losers. It is just impossible to correct for past institutional errors without breaking some private china. It is too much for Professor Abrams to ask for that level of purity in this context, when neither he nor anyone else could demand it in any other.

The difference between our two positions is well captured by looking at the situation that arose when foreign corporations claimed the right to do business within a state without having to surrender their right to remove cases to federal courts.[4] Professor Abrams first notes that here one sees the manifestation of monopoly power and then indicates that there is no way to show that the elimination of the restraint on removal makes everyone better off. Some local interests will have to win, for otherwise a statute allowing removal would not pass in the local legislature.

However, Professor Abrams' analysis is both misleading and incomplete. First, it is not clear that the statute will produce net benefits to in-state persons solely because it has commanded the in-state legislative majority. The complications of public choice are ever at work, and it is quite possible that the corporate winners from the restrictive legislation are sufficiently cohesive that they can organize a winning coalition even though consumers as a group suffer losses *greater* than the gains that producers obtain.

The case for striking down the condition becomes even more powerful when it is asked what happens if other states decide to follow the lead of the first state and impose similar restrictions on out of state corporations. Professor Abrams at one point insists that I have "fail[ed] to suggest a single context in which the doctrine of unconstitutional conditions has or could alleviate a problem of collective action."[5] This case makes good that omission, as he himself appears to acknowledge.[6]

There are net social losses when one state imposes the restriction. Other states now have an incentive to follow suit, in which case the winners and losers will be reversed, but the losses will outweigh the gains. Done over fifty states there is a perfect prisoner's dilemma

4. *See id.* at 368-69.
5. *Id.* at 361.
6. *See id.* at 382.

game. It pays each state to impose the restrictions on access to federal court against outsiders whether or not other states follow suit. Following the dominant strategy leads to a position that all states would choose to avert if they could have acted collectively. Imposing the unconstitutional conditions doctrine kills off that option. Faced with the choice of letting in the corporations or keeping them out, the corporations will be let in, as happened historically. The loss of trade that follows from their exclusion is so great that it hurts the insiders as well, and they will not engage in any self-destructive activities.

In the end, therefore, the systematic removal of all limitations on access to federal courts is likely to approach a Pareto superior position, given the distribution of the gains across all fifty states. What is true for the access to federal courts applies to the full range of discriminatory taxes that are routinely prohibited under other applications of the doctrine. Why Professor Abrams should doubt the institutional importance of the unconstitutional conditions doctrine is quite beyond me. His learned exposition of the standard monopoly conditions should have propelled him to the opposite conclusion. Indeed when first introduced by Gordon Tullock, it was for exactly that purpose.[7]

II. MOTIVATIONAL ANALYSIS

Professor Abrams also chides me for my willingness to use motivational analysis in order to handle difficult cases. In his view, because strict economic analysis can only deal with overt behaviors, the use of motive represents a regrettable lapse to traditional modes of analysis. However, a more sensible view of the situation allows us to see the *evidentiary* role that motivational analysis plays in any comprehensive evaluation of constitutional questions. As fully elaborated, the doctrine of unconstitutional conditions is an effort to detect attempted redistributions that should not be tolerated under the constitutional order.

In the case of taxation mentioned above, the protection against redistribution extended to all forms of economic activity, which is why taxes and other legal restrictions had to be kept uniform on both insiders and outsiders. In the post-1937 period, however, economic activities no longer receive, at least outside the interstate con-

7. *See* Tullock, *The Welfare Costs of Tariffs, Monopoly, and Theft*, 5 W. ECON. J. 224 (1967).

text, the same level of protection against government regulation. However, during this same period the rise of the second generation of "preferred freedoms" has only transferred the redistribution question from economic activities to, for example, freedom of speech or the troubled boundary between church and state. Now the concerns are not with overall economic efficiency, but with more limited social concerns such as redistribution between religious and nonreligious persons, or between Democrats and Republicans or vice versa.

One question that arises is how to identify cases in which these forms of illicit redistribution have taken place. Here the most obvious evidence of such a redistribution is the motivation of the groups that passed the legislation as gleaned from the statute itself or its legislative history. When there is evidence that the statute was meant to favor one group and to hurt another, evidence of motive is fairly probative on the ultimate question of economic effect simply because most interest groups know enough to choose the right means to achieve their stated ends. In principle it should be possible to show that a condition calls for an impermissible waiver of a constitutional right even in the absence of bad motive. Conversely, although with more difficulty, it may be possible to sustain a condition attached to a grant even where it has been made with bad motive. However, it is simply foolish to argue that the evidence is irrelevant just because it is not conclusive.

In the early highway cases, it seems clear that the regulations designed to frustrate competition between common carriers and other road haulers were struck down on precisely motivational grounds.[8] Professor Abrams does little to advance sound adjudication or legal analysis by saying that regulation of common carriers is not worth undertaking because the state may have to regulate *all* trucking simply because "it might be administratively unworkable to define 'common carrier' more precisely than as including all commercial haulers. Or it might be the case that commercial haulers are less likely to obey general traffic rules because the size of their vehicles makes them less susceptible to injury."[9] However, these idle "might have beens" are not good enough. There are many states that limit regulation to common carriers without facing undue definitional difficulties. A company that carries the goods of its private customers to market in its own trucks, as did Frost Trucking,[10] clearly falls outside of any conceivable definition. The lawyers in that case showed more wisdom than Professor Abrams on this point because they did not quibble over verbal niceties.

8. *See* Frost & Frost Trucking v. Railroad Comm'n, 271 U.S. 583 (1926).
9. Abrams, *supra* note 1, at 370.
10. *Frost*, 271 U.S. at 583-84.

Likewise, his second point is far wide of the mark. There is no evidence in the record that common carriers (even if correctly defined) are larger than other trucks; nor, if they are, is there any reason why a set of neutral traffic rules cannot subject them to heavier fines, and to tort liability with greater damage awards, should they be required. A rule that places the burden of proof on the state to prove its proper motivation is easily workable in this context, and could not be met in the *Frost* situation. There will be more difficult problems in other cases, such as those involving the denial of charitable deductions to organizations that engage in lobbying, which I think should be denied, at least if the rule is applied even handedly to all sides.[11] What I cannot understand is why, when information about the behavior of public bodies is hard to ascertain, Professor Abrams thinks that economic analysis should regard motivational questions as beside the point.

In dealing with motivational analysis, Professor Abrams particularly criticizes my analysis of *Nollan v. California Coastal Commission*.[12] As a matter of first principle, *Nollan* is one of the most difficult taking cases to understand even if it is agreed that the police power of the state is so broad that it can prevent a private owner from building on land without compensation to preserve, for example, the public view of the beach. Even after that premise is in place, the tactics of the Coastal Commission are most troublesome because its threat to deny the permit makes it impossible for us to have a direct comparison of the value of the easement to the public at large and the value to its owner. The basic point is that the nature of the choice in question forced the owner to compare the value of the easement with the value of the foregone improvement, where the former is manifestly worth less to the owner than the latter. The doctrine of unconstitutional conditions places a constraint on the governmental bargaining game that forces the right comparison.

Professor Abrams' contribution to this debate is little more than semantic. He first goes into a long detour about valuation in economics to conclude that exchanges do not necessarily allocate resources to their highest value uses where the parties are constrained to make direct exchanges (barter) of entitlements with each other.[13] True enough, but irrelevant as well, for as Abrams notices, the moment "we introduce money into this economy, we can free it from its pair-

11. *See*, Epstein, *Foreword*, *supra* note 2, at 78-79.
12. 483 U.S. 825 (1987).
13. *See* Abrams, *supra* note 1, at 375-76.

ing difficulty."[14] However, all condemnation proceedings can involve the use of money, so the constraints of barter disappear, and Abrams' initial sally is an idle intellectual disgression that fails to shed any light on the eminent domain problem at all. Indeed there is a nice irony here. Abrams has begun with an explanation of the inefficiency of a barter economy. One reason why the state should not be allowed to force the landowner to choose between the easement and the redevelopment is that the state's strategy introduces into the eminent domain process the element of barter inefficiency that Abrams identified elsewhere, namely, where the state gets to keep one of the entitlements, even though the private owner may attach a higher private evaluation to both.

Abrams only compounds the confusion with his further observation that "Professor Epstein mistakenly believes that a voluntary sale moves property to a higher value user."[15] Abrams' point here is a minor verbal quibble with no substantive significance. His basic norm is that economics does not allow us to make interpersonal comparisons of utility in a reasoned and demonstrable fashion. Any reference to value, high or low, is in his view an effort to render objective the idea of value which, in his view, must remain fully subjective. I share Professor Abrams' uneasiness with objective values.[16] Nonetheless, how the objective versus subjective value debate is resolved is of no consequence for the immediate purpose. So long as there is a voluntary sale, we know that there is a price above the value the seller attaches to the goods, but below that which the buyer attaches to the goods. The voluntary transaction allows us to rank the preferences between these two parties, and the terms "higher" and "lower" value are used to capture that relative ranking. Professor Abrams concedes as much because the point he trumpets in the text is quietly withdrawn in the accompanying footnote: "Of course, a voluntary exchange does produce a Pareto superior state (absent externalities), so that voluntary exchanges should be encouraged as beneficial to society."[17] This was my whole point. The use of the terms "higher" and "lower" value were not meant to undermine the dominant role of subjective value, but to reinforce it.

The difficulties with subjective value are, of course, far more than terminological when we move to the eminent domain context in which the state forces the taking of property against the will of its owner. With *Nollan*, however, it is possible, as I noted in the Fore-

14. *Id.* at 376.
15. *Id.* at 376-77.
16. *See* Epstein, *Postscript: Subjective Utilitarianism*, 12 HARV. J.L. & PUB. POL'Y 769 (1989).
17. Abrams, *supra* note 1, at 377 n.78.

word,[18] to develop the analysis without giving any special weight to subjective value. If the value of the easement to the state is less than its market value to the Nollans, then a fortiori its value to the state is less than its subjective value to the Nollans. The complication with subjective value does not weaken my analysis of *Nollan*; rather it strengthens it by increasing the likelihood that the property has moved from a higher to a lower value use.

In the end, it is highly ironic that Professor Abrams is supportive of the state's bargaining strategy in *Nollan*. He is well aware of the problem of aggregating individual preferences. He knows that the eminent domain law does not respect subjective values. He knows of the pitfalls pointed out by the public choice literature. Finally, he knows that under *Nollan* the state is not precluded from taking the viewing easement if it truly desires to do so because the state can still pay for the viewing easement if it so chooses. Herein lies the rub. I suspect that the state has not adopted this course of action subsequent to its defeat, and that it was indeed bluffing when it made the Nollans the ill-fated offer solely to extract the concession that the Nollans refused to make. Either way it hardly matters. If the easement was never condemned, then we know that the state did not value it highly enough to make the transaction worthwhile; if the easement was condemned, we now have valuable confirmation that the transaction was worth undertaking.

III. EXTERNALTIES

I will comment only briefly on Professor Abrams' examination of the externality question. Initially I raised the point in my paper to indicate that consent to an agreement by A and B should not be sufficient to allow them to kill or maim C, or indeed to bind C to any contractual obligation that C has not assumed. The external losses to C are likely to dwarf the gains to A and B, and we are better off imposing some limits on the contract. The difficulties here arise in distinguishing between those externalities, such as physical harm and monopoly, that should be constrained and ordinary competitive harms that should not be constrained. Both are in some sense externalities, and the differences between them cannot be suppressed entirely. Nonetheless, one simple ground of distinction does commend itself. Competitive externalities are those which would never be redressed by bargaining for the reasons set out in the beginning of this

18. Epstein, *Foreword*, *supra* note 2, at 62 & n.167.

Reply.[19] The disappointed competitor could never pay the successful competitor and its consumers enough money to make them want to return to the status quo ante. In a monopoly situation, the all-potent monopolist could be bought out by competitors and consumers, leaving everyone better off than before.

Abrams' discussion of externalities does not, however, center on these grand issues, but on my treatment[20] of the externalities problem as it arose in *Snepp v. United States*.[21] In *Snepp*, a former CIA agent challenged the right of the CIA to impose a prepublication review of his book under the contract that Snepp had signed while an agent under the CIA.[22] My position was, and is, that there was little in this contract that one would not expect to see in certain types of private employment arrangements. Further, the pressing need for confidentiality in intelligence work makes this condition an easy one to uphold against any charge that Snepp was coerced or pressured into waiving his first amendment rights of freedom of speech.

The clause of the agreement that was breached did not concern the content of the book as such, for the CIA agreed in principle that unclassified information could be published under the contract. What concerned the CIA was the possibility that published information would compromise classified information or sources. The prepublication review was necessary to address that issue. Yet it was forestalled by the decision to publish without submitting the book to that practice. If Snepp could get away without review, then so could everyone else. The constructive trust remedy on Snepp's proceeds of sale is an effective way to induce others to follow procedures when publication takes place before an injunction can be granted. When the CIA overreaches, the contract could allow Snepp to challenge the CIA's determination.

So conceived there seems to be no externality question raised in the case. However, Professor Abrams introduces one when he notes that the enforcement of the CIA agreement will impose an externality in the "loss to the public's right to read the story."[23] Again his point is far too cute. By his account every trade secret agreement or confidentiality arrangement would be subject to an externality attack, although there is good reason to believe that the production and sharing of information induced by its protection generates an enormous net social benefit. The same point applies here. There is no reason to assume that the public invariably benefits from the publi-

19. *See supra* at pages 396-97.
20. See Epstein, *Foreword*, *supra* note 2, at 68-70.
21. 444 U.S. 507 (1980).
22. *Id.* at 507-08.
23. Abrams, *supra* note 1, at 383.

cation of this CIA information. If the information is classified, publication places it in the hands not only of the public but also of our national enemies. Even with nonclassified information, many members of the public would prefer that certain things be done in private than disclosed to the entire world. They are willing to pay the price of being kept ignorant if they can ensure that others will be kept ignorant as well. Therefore, there are externalities of publication just as there are externalities of nonpublication.

Given the endless externalities that can arise, the range of possible solutions is very broad, and trying to aggregate these preferences is tricky business. However, in the range of solutions that are appropriate, there is something to be said for developing a uniform Congressional policy on the dissemination by individual employees. At least here the pros and cons of the disclosure will be considered in a more balanced fashion than they were by Snepp, whose sole interest was to line his own pockets. The first amendment works best when it protects those individuals who seek to publish information which they acquired from their own independent sources from censorship and review by the government. It works far more fitfully when the government seeks to restrain the activities of its own employees who have been entrusted with sensitive information. Given the balancing act implicit in the legislative scheme (which permitted prepublication review but not the censorship of unclassified information), there is little reason to believe that this statute is bad on its face, and none to believe that the CIA acted improperly given that Snepp bypassed its procedures and published his book secretly. Professor Abrams' facile and incomplete account of *Snepp* affords powerful, if indirect evidence, that the unconstitutional conditions doctrine is better directed toward government monopoly power than the soft externalities that abound everywhere in public life.

IV. CONCLUSION

In his parting words of wisdom, Professor Abrams seeks to wrap himself in the mantle of the great Judge Cardozo whose book *The Nature of the Judicial Process* contains words of praise for the uncertainty that is inevitable and necessary in the judicial process. However, in some sense the praise for Cardozo is misplaced because we should never seek to celebrate uncertainty in the law, even if on occasion we must be reconciled to it. In my *Foreword* I sought to show how the tools of modern bargaining theory, especially as they related to the formation of prisoner dilemmas and the use of monop-

oly power, could organize much of the inchoate intuitions about the doctrine of unconstitutional conditions. As ever, even after the basic scaffolding is in place, there will be hard cases, like *Nollan*, that test the limits of the doctrine and may in the end leave it exposed to fatal objection. However, intellectual progress is never made by ostentatious recountings of the known literature or heartfelt lamentations on the difficulty of doing systematic work. It is made by pushing beyond the known contours of knowledge and hoping that the basic thesis will survive the counterattacks that come its way. Professor Abrams' work is largely critical, wholly negative, and fundamentally misguided. It does nothing in and of itself to illuminate the decided cases, to resolve discordant lines of authority,[24] or to advance a unified theory of the subject matter that could be tested or evaluated by others. He adds nothing to the sum of human knowledge — even if he quotes Cardozo.

24. For example, in the introduction he notes that the unconstitutional conditions doctrine did not protect Bob Jones University. Bob Jones University v. United States, 461 U.S. 574 (1983). Yet he never stops to ask whether the decision is correct or incorrect. *See* Abrams, *supra* note 1, at 359. My criticism of *Bob Jones* is found in Epstein, *Foreword*, *supra* note 2, at 94-96.