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The Jurisprudence of Hypotheticals

Paul Gewirtz

In class the other day I was spinning out a "theory" about why the courts generally should not intervene to strike down affirmative action plans containing preferences for racial minorities if those plans are adopted by government entities predominantly controlled by whites. The details of my argument are not relevant here, but my basic point, crudely put, was that there are sufficient political checks on excess and unfairness when whites adopt those programs and that, therefore, the predicate for strict judicial review was not met. At that point one of my students raised his hand and, with the pleased expression of one who had learned the lessons of his masters, asked what the courts should do if presented with a government plan that preferred blacks for 100 percent of the slots indefinitely.

Since my days as a law student, hypotheticals of this type have irritated me. It was only recently, however, that I realized what "this type" was and what the irritant was. This type of hypothetical rests on a characteristic trick—if you will, a faulty "jurisprudence of hypotheticals." Among pedagogic and jurisprudential blunders, the flawed hypothetical may not be numbered a large or pressing one, although hypotheticals are a standard tool of legal analysis. But since life cannot be lived perpetually on the peaks, I would like once and for all to build a small burial mound for one private demon.

Hypotheticals are useful supplements to life. If life were a more prolific generator of fact patterns, or if our researches into life's actual fact patterns were vast enough, we would not need hypotheticals. They use the imagination to supply what life has not yet presented. The best hypotheticals pose a hard case, a testing case, for some theory or principle. In many "hard" hypotheticals, if the proffered theory is applied to the hypothesized facts the theory seems to generate a result that our intuitions reject. Or a "hard" hypothetical may present a fact situation about which we have uncertain or conflicting intuitions.

Something must be done to end the dissonance produced by the annoying hypothetical. The customary response is (1) to clarify one's

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theory (the theory may have seemed to require result *A*, but it really requires only *B*, *C*, and *D*, and, as such, remains a perfectly coherent theory); (2) to abandon one's theory (I thought that the theory required only results *B*, *C*, and *D*, but it also requires result *A*; and since it does, and since result *A* is intolerable, it's back to the drawing board); or (3) to reject people's intuition about result *A* and to reaffirm one's theory to an increasingly skeptical audience (you think that result *A* is intolerable, but it's really fine on grounds of justice, or at least on grounds of administrative convenience, and so is my theory). I suggest, however, that some hypothetical cases don't have to be decided on the merits. At times the proper response is to reject the hypothetical on threshold grounds.

In our class discussion of affirmative action, my position was that the court should generally defer to the political process when whites adopt preference programs that benefit blacks, and I argued that there are sufficient political checks against excess and unfairness so that a deferential standard of judicial review was appropriate. (The argument would obviously not apply if the political process is controlled by blacks and the possibility of racial "self-dealing" and unfriendly exclusion of whites is substantial.) My student's hypothetical asked whether deference could really be justified if a preference plan set aside 100 percent of the slots for blacks indefinitely. My position seemed to require a deferential judicial approach, and yet most partisans of preference programs would think the hypothesized program intolerable.

In fact, even the most deferential standard of constitutional review would allow judicial intervention in extreme cases (and perhaps this is one), but there is a better threshold response to the student's hypothetical. The student was assuming that such a plan had been adopted, while the very basis for my position favoring judicial deference—the position that he sought to undercut—was that there were sufficient checks in the political process so that that excess would not occur or would occur so infrequently that the courts should adopt a general standard of deference. One can challenge my argument about the way political checks function in this area, and thereby start to challenge the basic theory of judicial deference that I offered, but one cannot simply *assume* that the checks fail. The student's hypothetical did just that.

The hypothetical status of the student's question, in my view, is no accident. It asks for a decision on the merits of a case that my theory asserts will not come up or will come up so rarely that we should not be concerned. It points to bad results that my standard of judicial deference might imply, but it does so by assuming that the premise of deference is false, by assuming that the political process fails. *If* the premise of deference is wrong, then the theory of deference fails. But the matter to be debated is how hypothetical the hypothetical is. To the extent that the hypothetical demands an answer on the merits, it opens argument at the

wrong point. It poses a case that need not be answered on the terms proposed. To abstract some: if a theory is premised on a view about what kind of fact patterns actually will emerge in the real world, the theory cannot be attacked by a question that assumes that other kinds of fact patterns will emerge. These premise-denying hypotheticals represent an abuse of the imagination.

Another sort of abuse is manifested in a hypothetical posed by one of my law school professors ten years ago. What would the Supreme Court do if a state prohibited married couples from having more than two children? To us in 1970, such a law sounded monstrous. We fumbled in our grab bag of cases—at that point we had *Griswold v. Connecticut*, 381 U.S. 479 (1965), and not much more—and couldn't find very much. The posing of the hypothetical led many students to conclude either that we had better expand the *Griswold* principle quickly to encompass a broader range of human liberty than the opinion seemed to encompass or that there was a regrettable lack in the constitutional protection of human liberty. Our 1970 intuitions were that the hypothetical law was very offensive and if there were no constitutional principle that would forbid it, then that was deeply regrettable.

Perhaps, shaped by an awareness of the dangers of overpopulation, the moral intuitions of 1980 would differ from those of 1970. But that doesn't quite capture the root problem with this hypothetical. The problem is that the 1970 hypothetical appealed to our 1970 intuitions that *X* was monstrous, yet at the same time it assumed that a democratically elected legislature would have voted to do *X*. But the dissonance that the hypothetical created was false, since the hypothetical itself was implausible. No legislature in 1970 would have done *X*. That's why there was no judicial opinion to read; that's why our professor needed a hypothetical. If some legislature in the future actually did *X*, then it could only be because the world had changed a great deal. And if the world had changed that much, as the hypothetical implicitly assumes, then our moral intuitions and our "constitutional" intuitions would probably have changed too.

The flaw in the hypothetical is that it juxtaposes phenomena that would be possible only at different points in time—future legislation and present moral beliefs—and insists that we treat them as contemporaneous events. Everything is held constant except the legislative product. It is silly to respond to this kind of hypothetical in the terms proposed. There is simply no way to answer the hypothetical constitutional problem within such a time warp.

A notion that one must answer every hypothetical on the merits may rest on the belief that the meaning of constitutional norms cannot change twenty years from now, that constitutional principles are durable and unaffected by shifts in community values. On this view, the answer to a hypothetical depends upon the fixed content of these durable principles,

and that answer can be given now. But such a jurisprudence of hypotheticals rests upon a contested and doubtful constitutional theory. The practical content of constitutional principles has surely not been fixed over time but rather has changed as the world changes and the country's moral understandings change. This is both the way things have been and the way many people—I for one—believe things should be. Neither durable nor simply transient, neither history and text alone nor simply contemporary morality and philosophy, the meaning of our Constitution reflects the continual aspiration to define our society's fundamental conceptions, within boundaries determined by an inescapable continuity with our past and by present practices and needs. If one's theory is that the Constitution's meaning properly changes over time and reflects the values and conditions at the time of decision, or if one's theory of the proper judicial role posits that in some situations there are powerful and sufficient checks within the political process itself, certain hypotheticals need not be answered on the constitutional merits.

For judges, the obligation to answer hypothetical questions is intertwined with other general issues concerning the nature of the judicial function. At the least in the federal courts, the judicial power is limited to actual "cases or controversies," and a judge must decline to resolve purely hypothetical lawsuits, whether the hypothetical issues they pose are plausible or implausible. But more difficult questions about the obligation to answer hypotheticals surface for a judge in the course of deciding actual cases, when he considers the appropriate breadth or narrowness of a decision.

Some obligation to answer hypotheticals seems to arise from the traditional obligation of judges to base their decisions on general principles rather than simply *ad hoc* considerations. Hypotheticals press us to think about future cases and to formulate general principles that look beyond achieving a favored result in a single case. But which hypothetical cases other than the one in front of the judge must, in effect, be decided now, through the statement of a general principle going beyond the result in the particular case at hand? Put more conventionally, how general must an adequately general principle be? The answer depends on many factors, but it would be curious to suggest that the requirement of generality means that a judge should articulate a principle that would decide every conceivable hypothetical that occurs to him.

Judges, after all, are also counseled to decide cases on narrow grounds, a notion which qualifies the requirement of generality and in effect limits the judge's duty to resolve hypothetical cases. At least in part, I think, the view that cases should be decided on narrow grounds reflects a sort of temporal humility. A presently hypothetical case that might be covered by a broad principle may look different if and when it becomes real, not simply because the issues will be seen more concretely but because, as

noted above, the background conditions and values which shape evolving legal doctrines may have changed. Hypotheticals that look hard today may seem easier against a future background, or vice versa. Uttering a sweeping general principle today would create a precedent that either may bind too much of an unknown future or may have to be explicitly modified to accommodate changed circumstances when the imagined case actually comes up. Narrow principles, which avoid resolution of even plausible hypothetical cases, facilitate both continuity and change in doctrine.

These reasons apply all the more strongly to the implausible hypotheticals that have been the main subject here. Whatever other limits exist on the requirement of generality, my earlier discussion indicates one specific limit: a constitutional principle is adequately general even though it points to unpalatable results in presently implausible hypothetical cases or doesn't cover them at all.

In short, any notion that lawyers and judges are obliged to answer all hypotheticals on the merits rests upon a dubious theory. If one doesn't share that theory, the anxiety created by some hypotheticals is an artificial one. The play is presented on the wrong stage. Put another way, a less artificial way, the hypothetical creates a dilemma which the real life of law would probably spare us.
