

**CONTRACTING AROUND THE CONSTITUTION: AN
ANTICOMMODIFICATIONIST PERSPECTIVE ON UNCONSTITUTIONAL
CONDITIONS**

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ABSTRACT

The doctrine of unconstitutional conditions is notoriously opaque and complex, and scholars have long struggled to explain not only how it functions, but also why it exists in the first place. This Article draws on concepts from moral philosophy to provide new insight into these two important questions, at a time when clarity is urgently needed: the doctrine of unconstitutional conditions has increased markedly in current relevance during the Trump Administration, from challenges to the executive order threatening to defund “sanctuary cities” to the reimplementing of the “Global Gag Rule,” which prohibits non-governmental organizations that provide abortion counseling from receive federal funding.

This Article argues that “anticommodification discourse,” a set of arguments that holds certain goods and ideas must not be treated as “commodities” that can be bought and sold for money, elucidates recent developments in unconstitutional conditions jurisprudence and provides a coherent theory for how the Supreme Court has approached these kinds of cases. Moreover, the idea that rights, and even aspects of constitutional structure, should not be treated as commodities actually provides the normative underpinning for the doctrine’s existence. To demonstrate the analytical power of anticommodification discourse, the Article applies those principles to explain various problems in the realm of unconstitutional conditions, including recent Supreme Court cases on the First Amendment and the Affordable Care Act, the prevalence and acceptance of plea-bargaining, and the constitutional challenge to President Trump’s executive order on sanctuary cities. In doing so, the Article fills an important gap in the scholarship on unconstitutional conditions, as scholars have overlooked the importance of anticommodificationist principles to explaining, understanding, and justifying the unconstitutional conditions doctrine.

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INTRODUCTION

Unconstitutional conditions problems arise when the government conditions the receipt of a discretionary benefit upon the recipient's nonassertion of constitutional rights.¹ The doctrine of unconstitutional conditions is notoriously complex, convoluted, and inconsistent.² In fact, given the courts' incoherent approach(es) in unconstitutional cases, one commentator has suggested that the term "unconstitutional conditions

¹ See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 681 (2d ed. 1988); Sullivan, *infra* note 21, at 1415 ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("[T]he government may not deny a benefit to a person because he exercises a constitutional right." (internal quotation marks omitted) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983))).

² See, e.g., Cox & Samaha, *infra* note 3, at 62 & n.2 (describing unconstitutional conditions questions as "notoriously hard" and listing other scholarly attestations to the difficulty); Farber, *infra* note 20 (characterizing the doctrine as a "quagmire"); Sullivan, *infra* note 21, at 1416 (referring to the doctrine as "riven with inconsistencies" and as a "minefield to be traversed gingerly"); Leading Case, *McCutcheon v. FEC*, 128 HARV. L. REV. 201, 206 (2014) ("The Court's application of this doctrine has been criticized as inconsistent" and "unpredictable."); Hamburger, *infra* note 15, at 480 ("This enigma is notoriously complex, and unconstitutional conditions therefore are considered a sort of Gordian knot."); Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. L. REV. 989 (1995); TRIBE & MATZ, *infra* note 10, at 256 (noting the doctrine is "far from consistent"); Volokh, *infra* note 3, at 1030 (describing the doctrine as "incoherent").

doctrine” is itself an overly generous misnomer: instead, this body of law is perhaps better described as “a number of apparently unrelated (and perhaps incoherent) subdoctrines in different constitutional fields,”³ including Free Speech,⁴ Takings,⁵ criminal procedure,⁶ and Federalism.⁷ In light of this doctrinal disunity, “unconstitutional conditions” is better understood as a particular type of constitutional puzzle, which arises across varied contexts, rather than a particular doctrinal test that can be applied to analyze a constitutional problem.⁸

Certain scholars have claimed (somewhat derisively) that a paper on unconstitutional conditions demonstrates an author’s questionable judgment,⁹ perhaps partially because of the breadth and depth of the doctrinal confusion in this area. To the contrary, the pervasiveness of unconstitutional conditions questions across different constitutional fields is evidence of its pivotal role in preserving the integrity of our Constitutional rights and structure.¹⁰ This is all the more true in light of the Trump Administration’s recent efforts to leverage federal funds to pressure cities into

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- 3 Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1030 (2011); see also Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 68 (2013) (“Whether there ought to be one unified test for this jumble of contexts, there might not ever be.”).
- 4 See, e.g., *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013) (applying the unconstitutional conditions doctrine to freedom of speech); *Speiser v. Randall*, 357 U.S. 513 (1958) (same).
- 5 See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (applying unconstitutional conditions doctrine to the Takings Clause); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (same).
- 6 *United States v. Knights*, 534 U.S. 112, 118 n.4 (2001) (noting unconstitutional conditions argument in Fourth Amendment context); *United States v. Jackson*, 390 U.S. 570, 572 (1968); *United States v. Scott*, 450 F.3d 863, 866–67 (9th Cir. 2006); TRIBE, *supra* note 1, at 184; Melanie D. Wilson, *The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?*, 92 IOWA L. REV. 159, 201–08 (2006).
- 7 *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012); *South Dakota v. Dole*, 483 U.S. 203 (1987).
- 8 See Cox & Samaha, *supra* note 3, at 68; see also Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1316 (2013) (“Better to think and speak of a ‘conditional offer problem’ or a ‘conditional offer puzzle’—the difficulty of properly analyzing governmental offers of benefits that it is not constitutionally obligated to provide conditioned on the offeree’s waiver or non-exercise of a constitutional right.”). This Article will refer to such puzzles as “unconstitutional conditions questions” and will reserve the term unconstitutional conditions doctrine to refer to cases where courts have invalidated a particular condition. Cox & Samaha, *supra* note 3, at 68 & n.12 (distinguishing unconstitutional conditions questions from unconstitutional conditions doctrine and identifying scholars who use the term “doctrine” in this way).
- 9 Cox & Samaha, *supra* note 3, at 62 (“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.”).
- 10 LAURENCE H. TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 256 (2014) (describing the government offers of benefits conditional on the waiver of rights as a significant and “pervasive” feature of “modern governance”).

enforcing aspects of federal immigration law¹¹ and to discourage international nonprofits from offering abortion counseling.¹²

Actually, the ubiquity of unconstitutional conditions questions is a virtue rather than a vice. Scholars have noted that the unconstitutional conditions doctrine is not “anchored to any single clause of the Constitution.”¹³ That is because the doctrine instead serves as constitutional “glue,” filling in the interstitial space left between enumerated individual rights and structural limitations on government power.¹⁴ In this way, the unconstitutional conditions doctrine prevents the modern administrative state from leveraging its prodigious spending power¹⁵ to essentially purchase the waiver of individual rights¹⁶ and to distort our constitutional structure.¹⁷ As the “modern regulatory and welfare state” has expanded and the federal government has come to provide “more goods, services, and exemptions,” the government’s opportunities to condition such benefits on the “sacrifice of constitutional rights” have likewise increased.¹⁸ In this context, without the structural support provided by the interstitial glue of the unconstitutional conditions doctrine, the constraints our Constitution places on government power, embodied by the combination of individual rights and structural

¹¹ See generally Jeremy Diamond & Euan McKirdy, *Judge Issues Blow Against Trump’s Sanctuary City Order*, CNN POLITICS (Nov. 21, 2017, 1:02 PM), <http://www.cnn.com/2017/11/21/politics/trump-sanctuary-cities-executive-order-blocked/index.html>.

¹² Mark Joseph Stern, *Let Chief Justice Roberts Explain Why the Global Gag Rule is Unconstitutional*, SLATE (Jan. 27, 2017 12:37 PM), http://www.slate.com/blogs/xx_factor/2017/01/27/the_global_gag_rule_is_unconstitutional_and_john_roberts_can_explain_why.html.

¹³ Richard A. Epstein, Foreword, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10 (1988); Gary Feinerman, Note, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369, 1370 (1991).

¹⁴ Seminar: Constitutional Silences: Mapping Negative Legal Space, Harvard Law School, Nov. 4, 2015.

¹⁵ Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 481 (2012) (“[I]t is widely acknowledged that the powers granted by the Constitution to the government give it broad authority to spend and to place conditions on its expenditures.”); see also *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (approving Congress’s conditioning of federal funds on compliance with statutory and administrative directives as a power incident to Spending Power under Article I, Section 8, Clause 1).

¹⁶ See, e.g., *Speiser v. Randall*, 357 U.S. 513 (1958) (striking down law conditioning tax exemptions of waiver of freedom of speech).

¹⁷ TRIBE & MATZ, *supra* note 10, at 255 (“There’s something terribly wrong with the government breaking out its huge checkbook and buying the ability to violate our rights.”); Hamburger, *supra* note 15, at 480 (noting that the implications of unconstitutional conditions questions “are particularly concrete for the Constitution’s rights and structural limits.”); Ginny Kim, Note, *Unconstitutional Conditions: Is the Fourth Amendment for Sale in Public Housing?*, 33 AM. CRIM. L. REV. 165, 178 (1995) (“The government should not be able to use its tremendous spending power in a way that warps the normal distribution of rights.”).

¹⁸ Cox & Samaha, *supra* note 3, at 69; see also Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 604 (1990) (“In short, the doctrine filled a particular gap in post-New Deal constitutional theory by offering a means of placing limits on novel governmental activities.”).

limits, would collapse;¹⁹ the government could simply choose to “contract” its way around the Constitution.

Unconstitutional conditions questions, therefore, must be more than an academic “afterthought”²⁰—nothing less than our fundamental liberties and the integrity of our constitutional structure are at stake.²¹ President Trump’s recent executive order aimed at eliminating “sanctuary cities”²² typifies the problem and has propelled the obscure doctrine of unconstitutional conditions into the forefront of mainstream political discourse. That order threatens to withhold payment of billions of dollars in federal funding to cities unless those cities agree to cooperate with federal immigration law enforcement officials.²³ San Francisco and Santa Clara counties and Chicago have each filed suit to enjoin this order, and in November 2017, Judge Orrick of the Northern District of California granted a permanent injunction to San Francisco and Santa Clara that blocked enforcement of the executive order nationwide.²⁴ Notably, Judge Orrick’s order relied in part on the unconstitutional conditions doctrine and its role in preserving the federalist constitutional structure guaranteed by the Tenth Amendment.²⁵

The primary goal of this Article is theoretical: unconstitutional conditions plays an essential role in constitutional doctrine, but scholars have long struggled to “explain *why* conditions on government benefits that ‘indirectly’ pressure preferred liberties should be as suspect as ‘direct’ burdens on those

¹⁹ Hamburger, *supra* note 15, at 483 (“[T]he [federal] government’s total power or authority consists of the [enumerated] powers minus the rights and structural limits.”).

²⁰ Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 914 (2006) (“The fact that constitutional rights can be waived is usually something of an afterthought.”).

²¹ Hamburger, *supra* note 15, at 491 (arguing that significance of unconstitutional conditions, which have long been treated as peripheral, must be recognized, “for [such conditions] have become a means of evading much of the Constitution, including the Bill of Rights.”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1419 (1989) (noting unconstitutional conditions doctrine “identifies a characteristic technique by which government appears not to, but in fact does burden those liberties, triggering a demand for especially strong justification by the state.”).

²² A “sanctuary city” is a locality that “refuse[s] to help the federal government enforce its immigration laws” Devin Watkins, *5 Ways Trump’s Anti-Sanctuary City Orders Are Unconstitutional*, TIME (Mar. 31, 2017), <http://time.com/4720749/trump-sanctuary-cities-unconstitutional/>.

²³ *See id.*; Vivian Yee, *Judge Blocks Trump Effort to Withhold Money from Sanctuary Cities*, N.Y. TIMES, (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/us/judge-blocks-trump-sanctuary-cities.html?mcubz=0>.

²⁴ *Cty. of Santa Clara v. Trump*, No. 17-CV-00485-WHO, 2017 WL 5569835, at *2, *13 (N.D. Cal. Nov. 20, 2017). In a divided opinion, the Ninth Circuit affirmed without relying on the unconstitutional conditions doctrine. *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1234–35 (9th Cir. 2018). Instead, the court of appeals concluded that the executive order violated the separation of powers doctrine because the withholding of funds lacked congressional authorization. *Id.*

²⁵ *Cty. of Santa Clara*, 2017 WL 5569835, at *14.

same rights, such as the threat of criminal punishment.”²⁶ One persuasive, but incomplete, answer derives from concerns about the distributive impacts of government offers that condition benefits on the waiver of individual constitutional rights. It is true that these offers threaten to skew the distribution of power between the government and rightsholders and to systematically deprive poorer constituents of constitutional protections.²⁷ Given the government’s deep pockets, it will likely be able to afford to “purchase” waivers of constitutional rights from individual persons, if such offers are allowed. Moreover, the offer of rights-for-benefits will be harder to resist for poorer rightsholders, threatening a constitutional system that offers differential protection of fundamental rights depending on one’s socioeconomic status.²⁸ Despite the validity of these distributive concerns, however, they do not provide a complete theoretical justification for the doctrine.

This Article draws upon moral philosophical concepts to supplement the literature on unconstitutional conditions and elucidate its practical value as an “anticommodification”²⁹ doctrine. This anticommodification theory of unconstitutional conditions “identifies the harm in [such] conditions as the . . . treatment of rights as transferable objects.”³⁰ Professor Michael Sandel has helpfully identified two categories of anticommodification arguments: coercion arguments based on “inequality” and “corruption” arguments.³¹

²⁶ Sullivan, *supra* note 21, at 1419.

²⁷ *Id.* at 1490; Kim, *supra* note 17, at 168, 178 (expressing concern that poorer people will be disproportionately affected by government offers to purchase waivers of Fourth Amendment rights in exchange for public housing).

²⁸ *Cf.* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion) (raising concerns about differential justice for poor defendants).

²⁹ Margaret Jane Radin defines “commodification” as “the social process by which something comes to be apprehended as a commodity, as well as to the state of affairs once the process has taken place.” Margaret Jane Radin, *Contested Commodities*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 81 (Martha M. Ertman & Joan C. Williams eds., 2005) [hereinafter RETHINKING COMMODIFICATION]. “Commodities,” in turn, are understood to be “goods or services that are, or could be, bought and sold at some point.” Martha M. Ertman & Joan C. Williams, *Preface* to RETHINKING COMMODIFICATION, *supra*, at 3.

³⁰ Sullivan, *supra* note 21, at 1476–77.

³¹ Michael J. Sandel, *What Money Can’t Buy: The Moral Limits of Markets*, in THE TANNER LECTURES ON HUMAN VALUES 89, 94–96 (Grethe B. Peterson ed., 2000); *see also* I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 690 (2003) [hereinafter Cohen, *The Price of Everything*] (discussing inequality and corruption arguments). In his Tanner Lectures, Professor Sandel actually calls these two categories “coercion” and “corruption” arguments. Yet, as Professor Cohen has shown, scholars often group together a “family” of loosely related but distinct anticommodification arguments concerned with “harming or wronging” the seller. Cohen, *infra* note 106, at 75. This family of arguments includes arguments from coercion, as well as from exploitation, undue inducement, and justified paternalism. In addition, as Cohen explains, there is a distinct set of concerns, stemming from background conditions of inequality, about distributive fairness. *Id.* at 80–81; *see also* Cohen, *The Price of Everything*, *supra*, at 690–91 (describing “access” formulation” of Sandel’s original coercion objection

Coercion arguments express concerns about “the injustice that can arise when people buy and sell things under conditions of severe inequality or dire economic necessity.”³² A form of the coercion argument partially underlies the systemic worries about the distributive consequences of unconstitutional conditions—because of unequal background conditions, poor rightsholders will “sell” more rights to the government, altering the balance of power between rightsholders and the government and between classes of rightsholders.³³ On the other hand, corruption objections to commodification warn that certain moral and civic goods might be degraded or corrupted if they are valued and exchanged as commodities.³⁴ In short, from an anticommodificationist perspective, even if background conditions of socioeconomic inequality, which are the root cause of some of the aforementioned systemic distributive concerns, were hypothetically eliminated, there would still be something intrinsically wrong with allowing the government to condition benefits on the waiver of constitutional rights.³⁵

Unlike previous scholarship, which has effectively repudiated corruption objections to rights commodification,³⁶ this Article argues that the corruption objection is essential to an accurate theory of unconstitutional conditions. First, it claims that the corruption objection in fact partially explains some recent developments in unconstitutional conditions doctrine in the Roberts Court,³⁷ with special attention to First Amendment and Federalism cases, and that it also helps to reconcile the tension between unconstitutional conditions doctrine and reality of plea bargaining in the criminal justice

in Tanner Lectures, which “focuses on unequal access to the good, given an unfair background distribution of goods”). In more recent work, Professor Sandel groups together arguments about harm to the seller and distributive fairness under the umbrella of “inequality” arguments. See MICHAEL SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* 8 (2012). Consequently, I adopt the umbrella term “inequality arguments” to encompass concerns about harm to the seller as well as concerns about distributive fairness.

³² Sandel, *supra* note 31, at 94.

³³ Sullivan, *supra* note 21, at 1490. Sullivan actually identifies two distinct distributive problems that might result from unconstitutional conditions offers. First, horizontal redistribution would lead to a sort of governmental discrimination, whereby “those who comply with the condition and thereby get better treatment and those who do not.” *Id.* at 1496. Second, vertical redistribution threatens to create a system of “constitutional caste,” whereby different socioeconomic classes have differential access to constitutional rights. *Id.* at 1497.

³⁴ See Sandel, *supra* note 31, at 94.

³⁵ *Cf. id.* at 95 (“The argument from coercion offers no grounds for objecting to the commodification of goods in a society whose background conditions are fair.”); see also TRIBE & MATZ, *supra* note 10, at 255 (expressing moral discomfort at the government purchasing the ability to violate rights).

³⁶ See Sullivan, *supra* note 21, at 1489 (“Neither coercion, corruption, nor commodification theories satisfactorily explain why conditions on benefits that pressure preferred liberties should receive the same strict scrutiny as ‘direct’ constraints.”).

³⁷ See *Leading Case*, *supra* note 2, at 205 (pointing out that unconstitutional conditions doctrine is “undergoing something of a renaissance in the Roberts Court”). See generally TRIBE & MATZ, *supra* note 10, at 253–81 (analyzing unconstitutional conditions cases of Roberts Court).

system. Rather than embarking upon the ambitious (and perhaps foolhardy)³⁸ project of developing a grand unifying metatheory of unconstitutional conditions,³⁹ this Article simply seeks to revive the relevance of corruption arguments against the commodification of rights.

The Article's second claim is normative: the corruption objection encapsulates a compelling theoretic justification for the doctrine of unconstitutional conditions in cases involving individual rights and Federalism values. The only scholar to apply anticommodification theory to unconstitutional conditions problems ultimately rejected it as a theoretic justification for the doctrine,⁴⁰ and none of the more recent literature explicitly draws upon the corruption thread of the anticommodification debate.⁴¹ This Article builds upon recent scholarly forays into the

³⁸ See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 5 (2001) ("Indeed, a growing chorus of influential voices has begun to maintain that the search for any 'comprehensive theory of unconstitutional conditions is ultimately futile.'). Compare Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995) (arguing that a unifying theory is "unlikely to exist"); Larry Alexander, *Impossible*, 72 DENV. U. L. REV. 1007 (1995) (agreeing with and attempting to theoretically account for the accuracy of Schauer's assessment); Cox & Samaha, *supra* note 3, at 68 ("Whether there ought to be one unified test for this jumble of contexts, there might not ever be.") with Lynn A. Baker, *The Prices of Rights: Toward A Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1187 (1990) (claiming to identify a "positive theory" of unconstitutional conditions doctrine, which "reveals substantial underlying consistency in the decisions of the Warren, Burger, and Rehnquist Courts . . ."); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 862 (1995) (claiming theory of constitutional rights as "public goods" lends coherence to the doctrine of unconstitutional conditions).

³⁹ Roberto L. Corrada, *Justifying A Search for A Unifying Theory of Unconstitutional Conditions*, 72 DENV. U. L. REV. 1011, 1013 (1995) ("[A] unifying theory of the doctrine may be attainable, although such a doctrine is yet to be articulated.").

⁴⁰ Sullivan, *supra* note 21, at 1476–77.

⁴¹ The most thorough recent scholarly analysis of unconstitutional conditions has rejected the idea that rights can be "bought and sold," even if the rightsholder gives her fully informed, uncoerced consent. Hamburger, *supra* note 15, at 484; see also Volokh, *supra* note 3, at 1029 & n.312 (identifying Hamburger with the view that "the government generally shouldn't be able to achieve indirectly, by conditions attached to benefits, what it couldn't achieve by direct regulation"); Cox & Samaha, *supra* note 3, at n.11 (calling Hamburger's Article the "most recent full-blown treatment [of unconstitutional conditions] in the law literature"). Another recent commentator has characterized fundamental constitutional rights as "strong property entitlements," which are protected by both a duty of governmental non-interference (through regulation or exercises of police power) and of governmental non-discrimination "on the basis of whether a particular citizen is or is not willing to waive such constitutional right." W. Stephen Westermann, *Completing the Cathedral Taxonomy of Salient Legal Entitlement Forms: With Application of the New Entitlement Forms to Describe Constitutional Rights, Rationalize the Unconstitutional Conditions Doctrine and Better Understand Legal Personhood* 5–6 (Nov. 12, 2009) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1505049; cf. Sullivan, *supra* note 21, at 1496 (discussing how unconstitutional conditions doctrine protects against horizontal redistribution between rightsholders). On this view, the doctrine of unconstitutional conditions serves to enforce against the government the duty of non-discrimination intrinsic to fundamental constitutional rights.

unconstitutional conditions thicket, bringing the corruption objection to the foreground and demonstrating its normative and explanatory force as applied to unconstitutional conditions questions.

Part I provides an overview of unconstitutional conditions doctrine and reviews the normative theories of unconstitutional conditions proffered by prior scholars. Part II summarizes legal and philosophical scholarship to explain anticommodification discourse and the tools it supplies for analyzing unconstitutional conditions problems. Part III applies anticommodification discourse to explain and normatively justify certain unconstitutional conditions doctrines, including: (1) the Court's decision in *Agency for International Development v. Alliance for Open Society International, Inc.* (“AID”);⁴² (2) the constitutionality of plea bargaining, despite its similarity to unconstitutional conditions cases; and (3) Federalism cases, from *National Federation of Independent Businesses* (“NFIB”) v. *Sebelius*⁴³ to the recent constitutional challenges to the Trump Administration's sanctuary cities order. Part IV defends anticommodification discourse, as both a normative underpinning of and a tool for analyzing unconstitutional conditions questions, from the criticisms leveled by prior scholarship.

I. UNCONSTITUTIONAL CONDITIONS: CURRENT DOCTRINE AND THEORIES

Unconstitutional conditions questions arise whenever the “government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference.”⁴⁴ There are three basic elements to unconstitutional conditions problems.⁴⁵ First, there must be a rightsholder. (This could be an individual,⁴⁶ a corporation,⁴⁷ or a state.⁴⁸)⁴⁹ Therefore, unconstitutional conditions cases generally fall into two broad categories, depending on the rightsholder involved: individual rights cases and Federalism cases.⁵⁰

⁴² 570 U.S. 205 (2013). This case is analyzed in further detail below.

⁴³ NFIB v. Sebelius, 567 U.S. 519 (2012).

⁴⁴ Cox & Samaha, *supra* note 3, at 66 (quoting Sullivan, *supra* note 21, at 1421–22).

⁴⁵ See Volokh, *supra* note 3, at 1029.

⁴⁶ See, e.g., Speiser v. Randall, 357 U.S. 513 (1958).

⁴⁷ See, e.g., Frost & Frost Trucking Co. v. R.R. Comm'n of Cal., 271 U.S. 583 (1926).

⁴⁸ See, e.g., NFIB, 567 U.S. 519.

⁴⁹ See Sullivan, *supra* note 21, at 1428–29 (“Historically, unconstitutional conditions doctrine developed in three major areas of constitutional law: corporate rights against state regulation, state autonomy from federal encroachment, and individual rights.”).

⁵⁰ See, e.g., Jesse H. Choper, *Supreme Court and Unconstitutional Conditions: Federalism and Individual Rights*, 4 CORNELL J. L. & PUB. POL'Y 460 (1994) (comparing Court's application of unconstitutional doctrine to individual rights with Federalism cases).

Second, the government has discretion to confer a benefit but is not required to do so.⁵¹ These discretionary benefits generally include either exemptions from taxation or a regulatory burden, or government “largesse,” such as a direct subsidy, government job, or welfare benefit.⁵² Third, the government offers this discretionary benefit to the rightsholder on the condition that the right is waived.⁵³

A. *A Brief Doctrinal History*

In *Frost & Frost Trucking Co. v. Railroad Commission of California*,⁵⁴ the Supreme Court encountered a classic example of such a constitutionally problematic bargain.⁵⁵ The Court (the same one that decided *Lochner*⁵⁶) held that the California Truck Transportation Act, which would have made private carriers’ access to California highways conditional upon their agreement to operate as common carriers, was unconstitutional.⁵⁷ Because the due process clause of the Fourteenth Amendment⁵⁸ prohibited the legislature from simply commanding a private carrier to assume common carrier duties, the Act violated “the principle[] that a state is without power to impose an unconstitutional requirement as a condition for granting a privilege.”⁵⁹ Even after the demise of *Lochner*ist premises⁶⁰ underlying *Frost*, the doctrine of unconstitutional conditions retained significance.

After the New Deal, the expansion of the modern administrative state contributed to the proliferation of unconstitutional conditions problems.⁶¹ Today, “the unconstitutional conditions doctrine serves to mediate the boundary between constitutional rights and government prerogatives in the

⁵¹ See Sullivan, *supra* note 21, at 1424–25; Volokh, *supra* note 3, at 1029.

⁵² Sullivan, *supra* note 21, at 1424 (citing the definition of “government largesse” in Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

⁵³ See Volokh, *supra* note 3, at 1029 (discussing waiver of rights as condition for discretionary government benefit).

⁵⁴ 271 U.S. 583 (1926).

⁵⁵ See *id.* at 584.

⁵⁶ *Lochner v. New York*, 198 U.S. 45 (1905). During the so-called *Lochner* Era, the Supreme Court struck down many legislative attempts at economic regulations as violations of substantive due process under the Fourteenth Amendment. See Sullivan, *supra* note 21, at 1416 n.2 (citing *TRIBE*, *supra* note 1, at 567–74).

⁵⁷ *Frost*, 271 U.S. at 599.

⁵⁸ U.S. CONST. amend. XIV.

⁵⁹ *Frost*, 271 U.S. at 598.

⁶⁰ See, e.g., Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 880–82 (1987) (describing the “slow and wavering” demise of *Lochner* and identifying its end with the Court’s decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)).

⁶¹ Cox & Samaha, *supra* note 3, at 69; Epstein, *supra* note 13, at 73; Sunstein, *supra* note 18, at 604.

areas of spending, licensing, and employment.”⁶² During the Warren Court years, the doctrine was refashioned to protect individual liberties rather than the economic liberties of corporations.⁶³ *Speiser v. Randall*⁶⁴ and *Sherbert v. Verner*⁶⁵ are paradigmatic examples. In *Speiser*, Justice Brennan, writing for the Court, invalidated a California law that conditioned veterans’ receipt of a tax exemption on affirmation of loyalty to the United States government.⁶⁶ California’s benefits procedure threatened to deter constitutionally protected speech—in this way, the condition was a governmental attempt to indirectly accomplish what the First Amendment forbid it from enacting directly.⁶⁷ Similarly, in *Sherbert*, the Employment Security Commission of South Carolina denied a former state government employee’s application for unemployment benefits after she was fired for refusing to work on Saturday in accordance with her religious faith.⁶⁸ In another Brennan opinion, the Court analogized to *Speiser*, finding South Carolina’s denial of benefits violated the Free Exercise Clause of the First Amendment⁶⁹: just as the conditional tax exemption in *Speiser* deterred constitutionally-protected speech, South Carolina’s attempt to “condition the availability of benefits upon [Ms. Sherbert’s] willingness to violate a cardinal principle of her religious faith effectively penalize[d] the free exercise of her constitutional liberties.”⁷⁰

As future courts continued to grapple with unconstitutional conditions questions in the First Amendment realm, however, the doctrine became notoriously muddled and inconsistent.⁷¹ Most recently, the Roberts Court

⁶² Sunstein, *supra* note 18, at 593.

⁶³ See Sullivan, *supra* note 21, at 1416 (“[T]he doctrine of unconstitutional conditions reemerged under the Warren Court to protect personal liberties of speech, association, religion, and privacy just as it once had protected the economic liberties of foreign corporations and private truckers.”).

⁶⁴ 357 U.S. 513 (1958).

⁶⁵ 374 U.S. 398 (1963).

⁶⁶ *Speiser*, 357 U.S. at 528–29.

⁶⁷ *Id.* at 526.

⁶⁸ *Sherbert*, 374 U.S. at 399–401. Ms. Sherbert was a member of the Seventh-day Adventist Church. Saturday is the Sabbath Day of the Seventh-Day Adventist Church. *Id.* at 399 n.1.

⁶⁹ U.S. CONST. amend. I.

⁷⁰ *Sherbert*, 374 U.S. at 406.

⁷¹ Compare *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (upholding Department of Health and Human Services regulations that conditioned family planning organizations’ access to federal funds on organizations’ agreement to refrain from discussing abortion as a lawful family planning option because speech restrictions were related to the purpose of the government funding), with *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (striking down law conditioning civil legal aid organizations’ receipt of federal funds on organizations’ abstention from challenging constitutionality of welfare laws). See also Farber, *supra* note 20, at 927–28 (discussing *Rust*’s germaneness test, contrasting *Velazquez*, and suggesting the two cases might be irreconcilable); Volokh, *supra* note 3, at 1030 (describing First Amendment unconstitutional conditions doctrine as “strict in theory, complicated in fact”); Sullivan, *supra* note 21, at 1416–17 (noting doctrinal

ventured into the doctrinal morass in *Agency for International Development* (“AID”) *v. Alliance for Open Society International, Inc.*,⁷² holding that the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act violated the First Amendment by conditioning the receipt of federal funds on U.S.-based international aid organizations’ express avowal of an anti-prostitution policy.⁷³

The Roberts Courts also grappled with unconstitutional conditions upon “states’ rights” in one of its most publicly salient and politically-charged decisions: *NFIB v. Sebelius*.⁷⁴ In the relevant portion of that opinion,⁷⁵ the Court struck down the “Medicaid Expansion” provision of the Affordable Care Act (“ACA”) under the unconstitutional conditions doctrine.⁷⁶ The ACA “dramatically increased” states’ Medicaid obligations, requiring that, among other things, states’ “expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line.”⁷⁷ In order to induce state compliance, the Act conditioned states’ continued receipt of preexisting medical funds on acceptance of the expansion.⁷⁸ The Court held that this condition, which threatened states with the “loss of over 10 percent” of their annual budgets, was unconstitutionally coercive, leaving the states with “no real option but to acquiesce.”⁷⁹ Although the Chief Justice⁸⁰ grounded his reasoning in prior

inconsistency between *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987), and *Harris v. McRae*, 448 U.S. 297 (1980) and *Maher v. Roe*, 432 U.S. 464 (1977), as well as tension between *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) and *FCC v. League of Women Voters*, 468 U.S. 364 (1984)). Sullivan also points out that after *Sherbert*, “the Court has rejected every other claim that conditions on food stamps or welfare payments unconstitutionally burden rights to speech, expressive association, intimate association, or freedom from unwarranted searches.” Sullivan, *supra* note 21, at 1417. For example, in *Lyng v. Int’l Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW*, 485 U.S. 360 (1988), the Court rejected a First Amendment challenge to the constitutionality of an amendment to the Food Stamp Act, which precluded a household’s eligibility “to participate in the food stamp program during the time that any member of the household is on strike or shall increase the allotment of food stamps that it was receiving already because the income of the striking member has decreased.” 485 U.S. at 362, 364, 366, 369; *see also* Sullivan, *supra* note 21, at 417 & n.11 (discussing *Lyng*).

⁷² 570 U.S. 205 (2013). This case is analyzed in further detail below.

⁷³ *Id.* at 221. *See generally* TRIBE & MATZ, *supra* note 10, at 259–64.

⁷⁴ *See, e.g.*, Berman, *supra* note 8, at 1283 (describing *NFIB* decision as “feverishly anticipated”). *See generally* TRIBE & MATZ, *supra* note 10, at 271–77.

⁷⁵ *NFIB* produced three separate holdings. *See* Berman, *supra* note 8, at 1283–84.

⁷⁶ *NFIB v. Sebelius*, 567 U.S. 519, 588 (2012).

⁷⁷ *Id.* at 576.

⁷⁸ *Id.* at 581.

⁷⁹ *Id.* at 582; TRIBE & MATZ, *supra* note 10, at 273.

⁸⁰ Technically, the Chief Justice wrote for a plurality of the Court, joined only by Justices Kagan and Breyer. In an unsigned joint dissent, Justices Alito, Kennedy, Scalia, and Thomas also agreed the Medicaid expansion was unconstitutionally coercive. *NFIB*, 567 U.S. at 681 (Scalia, Kennedy, Thomas, Alito, J.J., dissenting); *see also* Berman, *supra* note 8, at 1286 n.16 (discussing the joint

precedent, relying on *South Dakota v. Dole*,⁸¹ the Court had never before struck down a spending condition as unconstitutionally coercive of the states before *NFIB*.⁸² This decision serves to highlight the disconnect between the Court's approach to unconstitutional conditions in federalism cases and individual rights cases.⁸³

This doctrinal inconsistency is not cabined to the individual rights vs. federalism dichotomy; instead, inconsistency is a pervasive feature of unconstitutional conditions doctrine generally. The individual rights cases discussed above primarily related to conditions on Free Speech, which might be considered “the paradigmatic constitutional right.”⁸⁴ Consequently, it is unsurprising that the Court has applied the unconditional doctrine with particular stringency in the First Amendment context.⁸⁵ Yet since the doctrine's inception in the 1800s, the Court has applied a staggering variety of doctrinal tests across a variety of constitutional contexts.⁸⁶ While conditions upon the Takings Clause⁸⁷ must be roughly proportional and must demonstrate an “essential nexus,”⁸⁸ conditions on the Fourth Amendment right against unreasonable searches are subject to a “reasonableness” analysis (at least in the employment context).⁸⁹ As a result, the doctrine of unconstitutional conditions generally is “best understood not as a single, large, and intricate portrait, but rather as a quilt of smaller, individually complete segments framed by a single broad border.”⁹⁰

dissenting opinion in *NFIB*). The votes of these four “joint dissenters” were necessary to constitute a majority on the unconstitutionality of the Medicaid expansion. *Id.*

81 483 U.S. 203, 209 (1987) (upholding law conditioning federal highway funds on states' adoption of drinking age of twenty-one).

82 See *NFIB*, 567 U.S. at 625 (Ginsburg, J., concurring in part, concurring in the judgment, and dissenting in part) (“The Chief Justice therefore—for the first time ever—finds an exercise of Congress' spending power unconstitutionally coercive.”); TRIBE & MATZ, *supra* note 10, at 273.

83 See Choper, *supra* note 50, at 463 (arguing Court should not apply a “coercion” test in Federalism cases and noting that coercion is “certainly” not the test used in individual rights cases); Peter A. Clodfelter & Edward J. Sullivan, *Substantive Due Process Through the Just Compensation Clause: Understanding Koontz's “Special Application” of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine's History*, 46 URB. LAW. 569, 581 (2014) (claiming that the “Court has been more receptive to individual's arguments” than Federalism arguments); Volokh, *supra* note 3, at 1030.

84 Farber, *supra* note 20, at 920.

85 See Volokh, *supra* note 3, at 1030 (characterizing First Amendment unconstitutional conditions doctrine as “strict in theory, complicated in fact” (footnotes omitted)); Westermann, *supra* note 41, at 15 (noting “the Court applies the unconstitutional conditions doctrine strictly with respect to First Amendment rights but flexibly with respect to constitutionally protected economic rights”).

86 Clodfelter & Sullivan, *supra* note 83, at 570–71.

87 U.S. CONST. amend. V.

88 Volokh, *supra* note 3, at 1030 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)).

89 *Id.* at 1030 (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 664, 671 n.2, 678–79 (1989)).

90 Baker, *supra* note 38, at 1196.

B. The Theories: What Should a Doctrine of Unconstitutional Conditions Do?

Given this “doctrinal mess,” it is unsurprising that scholars have put forth a plethora of normative approaches to unconstitutional conditions questions.⁹¹ These ideas can be broadly sorted into two scholarly camps.⁹² The first camp would treat constitutional rights no differently from property rights—an individual may waive or decline to exercise her constitutional rights, so why should she be prevented from exchanging such rights for a benefit? In fact, from this perspective, to block such an exchange of rights for money would be inefficient⁹³: in unconstitutional conditions cases, “people sell their constitutional rights in ways that, they believe, make them better off. They prefer the benefits of the agreement to the exercise of their right.”⁹⁴

Many more scholars have adopted a second normative orientation, which supports the application of the unconstitutional conditions doctrine to block certain exchanges of rights for benefits.⁹⁵ The scholars in the second camp, however, have offered a wide array of potential justifications for this general position. Some, such as Seth Kreimer and Mitchell Berman, identify coercion as the key symptom of constitutional infirmity in such exchanges.⁹⁶ Richard Epstein, on the other hand, suggests that unconstitutional conditions

⁹¹ Farber, *supra* note 20, at 928 (recounting the approach championed by Justice Kennedy); Berman, *supra* note 8, at 1316 n.142 (“You could read a dozen scholarly discussions of ‘the unconstitutional conditions doctrine’ before running into a clear statement of what the doctrine is supposed to say or what its content is.”); Cox & Samaha, *supra* note 3, at 68 (“There are plenty of ideas. It is just that there are no set doctrines for analyzing the question.”).

⁹² Volokh, *supra* note 3, at 1030.

⁹³ See, e.g., N. Gregory Mankiw, *Emerging Markets as Partners, Not Rivals*, N.Y. TIMES, (Feb. 12, 2011), http://www.nytimes.com/2011/02/13/business/13view.html?_r=5&ref=business (“Unlike a sports contest, which by necessity has a winner and a loser, a voluntary economic transaction between consenting consumers and producers typically benefits both parties.”).

⁹⁴ Frank H. Easterbrook, *Insider Trading, Secret Agency, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347; see also Sullivan, *supra* note 21, at 1478 (discussing Easterbrook’s position); Farber, *supra*, note 20, at 915 (claiming that bartering of constitutional rights “may seem paradoxical, but it should not be: having a right often means being free to decide on what terms to exercise it or not”); Volokh, *supra* note 3, at 1029 (“One could adopt a laissez-faire attitude and allow such deals generally, on the theory that this contract, like most voluntary transactions, presumptively benefits both parties.” (citing *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting); *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (Holmes, J.)); Westermann, *supra* note 41, at 5 (“[S]cholars have debated whether fundamental constitutional rights are properly viewed as property entitlements or mere default-rule privileges.”).

⁹⁵ See Volokh, *supra* note 3, at 1029 (describing this second orientation in the scholarly literature).

⁹⁶ See Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1301 (1984) (claiming “a threat abridges [constitutional] rights in ways an offer does not,” and suggesting “history,” “equality,” and “predictability” as “appropriate baseline[s]” against which coercion can be detected); Berman, *supra* note 38, at 6 (arguing a “governmental offer is (presumptively) unconstitutional if it is coercive, and that coercion has a coherent meaning supplied by bedrock constitutional logic that transcends the particularities that govern a specific region of constitutional law”); see also Berman, *supra* note 8, at 1287 n.19 (describing coercion as “the distinctive, but not the sole, constitutional wrong that conditional offers might instantiate”).

doctrine rightly blocks exchanges that would otherwise result in “redistribution of wealth along forbidden dimensions.”⁹⁷ Kathleen Sullivan has crafted yet another normative justification, locating the value of the doctrine in the systemic preservation of a particular distribution of rights.⁹⁸ Phillip Hamburger advocates for perhaps the strongest brand of the unconstitutional conditions doctrine, justifying the doctrine as a means of preventing governmental circumvention of constitutionally-prescribed limits on government power.⁹⁹

It is true that, as a practical matter, the Court has generally charted a “middle course” between these two scholarly positions.¹⁰⁰ This Article, however, decisively sides with scholars in the second camp, arguing along with Hamburger and others¹⁰¹ that the government should be presumptively prohibited from conditioning receipt of a benefit on waiver of an individual’s constitutional rights.¹⁰² For a normative justification of this position, and a partial descriptive explanation of the Court’s “middle course,” the Article turns to anticommodification discourse.

II. ANTICOMMODIFICATION THEORY

The scholarly debate over commodification seeks to “[a]rticulat[e] a principled line between what can and cannot permissibly be sold.”¹⁰³ Academic perspectives can generally be divided into two broad schools of thought on such questions. The pro-commodification camp defends, on freedom of contract grounds, the moral desirability of legal markets in “adoption, human organs, military service, and everything else,”¹⁰⁴ including constitutional rights.¹⁰⁵ Anticommodificationists, on the other hand, question the moral propriety of valuing certain goods in market terms¹⁰⁶ and

⁹⁷ Epstein, *supra* note 13, at 97.

⁹⁸ See Sullivan, *supra* note 21, at 1424 nn. 32–34, 1489–1505.

⁹⁹ Hamburger, *supra* note 15, at 492 (“By casting restrictions on liberty in terms of conditions rather than direct constraints, the government can escape not only its limited powers but also most of the limits on such powers, including most of the Bill of Rights.”).

¹⁰⁰ See Volokh, *supra* note 3, at 1030.

¹⁰¹ Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1049 (2014) (arguing that “speech rights are generally inalienable as against the government under the First Amendment, and therefore any abridgement of such rights by the government—whether direct or indirect—is subject to strict scrutiny.”).

¹⁰² In the conclusion, this Article suggests, as did Sullivan, *supra* note 21, at 1492 n.342, that a parallel analysis could be developed for Federalism cases.

¹⁰³ Cohen, *The Price of Everything*, *supra* note 31, at 689; see also Ertman & Williams, *supra* note 29, at 1–2.

¹⁰⁴ Ertman & Williams, *supra* note 29, at 2.

¹⁰⁵ See, e.g., Easterbrook, *supra* note 94.

¹⁰⁶ Like Professor Cohen, this Article understands markets in a broad sense, operating whenever a good “is provided due to the inducement of monetary or nonmonetary compensation, in whole or

ground their resistance to the commodification of certain goods, services, and relationships in non-market values such as equality, dignity, and solidarity.¹⁰⁷ Kantian ethics, for example, draw a sharp line dividing the proper valuation of persons and the proper valuation of things, based on respect for human rationality: “In the Kingdom of Ends everything has a price or a dignity. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity.”¹⁰⁸ Thus, from the Kantian perspective, there are only two modes of valuation: persons are valued according to respect, while things are valued according to use.¹⁰⁹ While not all anticommodificationists subscribe to Kant’s binary system of valuation, they are united by their rejection of the monistic, market-based valuation system of the commodificationists.¹¹⁰ Prior scholarship has soundly rejected anticommodification discourse as a theoretical justification for the

in part.” See I. Glenn Cohen, *Regulating the Organ Market: Normative Foundations for Market Regulation*, 77 LAW & CONTEMP. PROBS. 71, 71 n.1 (2014).

¹⁰⁷ See Ertman & Williams, *supra* note 29; Sandel, *supra* note 31, at 93–94 (arguing against “the extension of markets and of market-oriented thinking to spheres of life once thought to lie beyond their reach.”); see also ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 166 (1993) (“The realization of some forms of freedom, autonomy and welfare demands that certain goods be produced, exchanged, and enjoyed outside of market relations or in accordance with non-market norms.”); SANDEL, *supra* note 31, at 79 (“As markets and market-oriented thinking reach into spheres of life traditionally governed by nonmarket norms—health, education, procreation, refugee policy, environmental protection—this dilemma arises more and more often. What should we do when the promise of economic growth or economic efficiency means putting a price on goods we consider priceless?”); MICHAEL WALZER, SPHERES OF JUSTICE 103 (1983) (“[I]f money answereth all things, it does so, as it were, behind the backs of many of the things and in spite of their social meanings.”); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1987) (arguing the “characteristic rhetoric of economic analysis is morally wrong when it is put forward as the sole discourse of human life” and proposing instead that “we should evaluate inalienabilities in connection with our best current understanding of the concept of *human flourishing*” (emphasis added)); Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That is Not the Question*, in RETHINKING COMMODIFICATION, *supra* note 29, at 362, 365 (describing the “hostile worlds theory” in “contemporary critiques of commodification” and citing ROBERT KUTTNER, EVERYTHING FOR SALE: THE VIRTUES AND LIMITS OF MARKETS (1999)); ROBERT E. LANE, THE LOSS OF HAPPINESS IN MARKET DEMOCRACIES (2000); JEREMY RIFKIN, THE AGE OF ACCESS: THE NEW CULTURE OF HYPERCAPITALISM WHERE ALL OF LIFE IS A PAID-FOR EXPERIENCE (2000)).

¹⁰⁸ IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 93 (Lara Denis ed., 2005); Cohen, *The Price of Everything*, *supra* note 31, at 706 (quoting Kant); Anderson, *supra* note 107, at 9.

¹⁰⁹ Anderson, *supra* note 107, at 9; cf. Sally Satel, Joshua C. Morrison & Rick K. Jones, *State Organ-Donation Incentives Under the National Organ Transplant Act*, 77 LAW & CONTEMP. PROBS. 217, 235 (2014) (“[M]any advocates for donor compensation believe the potential for corruption to be illusory; the only thing capable of informing this debate would be future experimentation with different policies.”).

¹¹⁰ See Cohen, *The Price of Everything*, *supra* note 31, at 697–98; see also Anderson, *supra* note 107, at 141 (embracing pluralist, rather than monist, theory of value and arguing for “more stringent limits on markets than most liberal theories”).

unconstitutional conditions doctrine. The goal of this section is to demonstrate that this view is mistaken¹¹¹ and to thereby revive the normative relevance of anticommodification.¹¹²

A. Anticommodification: A Taxonomy

Anticommodification arguments have continued to evolve, and these contemporary developments can add significantly to our understanding of the theoretical groundwork for enigmatic questions of unconstitutional conditions.¹¹³ Professor Michael Sandel, a leading voice in the anticommodification debate, has offered a useful binary framework, organizing anticommodification arguments into two major categories.¹¹⁴ The first category is arguments from inequality¹¹⁵: such objections are grounded in concerns about “the injustice that can arise when people buy and sell things under conditions of severe inequality or dire economic necessity.”¹¹⁶ As Professor Glenn Cohen has demonstrated, however, this first category actually encompasses a set of related but distinct arguments, which must be further subdivided for the sake of conceptual clarity.¹¹⁷ Following Cohen, this paper subdivides inequality arguments into: (a) consent-based concerns about harms to the “seller” (or the rightsholder, in unconstitutional conditions problems) (“consent-based concerns”); and (b) distributive fairness concerns.¹¹⁸

¹¹¹ Note that I do not, however, dispute the validity of Sullivan’s systemic concerns about the distribution of rights. Instead, I re-categorize these concerns as examples of the “coercion” subcategory of contemporary anticommodification discourse, and I argue that Sullivan was too quick to dismiss the relevance of a second subcategory of arguments against commodification: corruption objections.

¹¹² For skepticism on the utility of the commodity/non-commodity, dichotomy, see generally Williams & Zelizer, *supra* note 107. Cf. Sally Satel, Joshua C. Morrison, & Rick K. Jones, *State Organ-Donation Incentives Under the National Organ Transplant Act*, 77 LAW & CONTEMP. PROBS. 217 (2014) (“[M]any advocates for donor compensation believe the potential for corruption to be illusory; the only thing capable of informing this debate would be future experimentation with different policies.”); see also Cohen, *The Price of Everything*, *supra* note 31, at 697–98; Anderson, *supra* note 107, at 141 (embracing pluralist, rather than monist, theory of value and arguing for “more stringent limits on markets than most liberal theories”).

¹¹³ See generally Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification*, in RETHINKING COMMODIFICATION, *supra* note 29 (charting the evolution of the commodification debate); SANDEL, *supra* note 31, (discussing trends in various industries).

¹¹⁴ See Sandel, *supra* note 31, at 94–95; Cohen, *The Price of Everything*, *supra* note 31, at 690.

¹¹⁵ See *supra* note 31 (explaining my derivation of the term “inequality arguments” to reference this category).

¹¹⁶ Sandel, *supra* note 31, at 94.

¹¹⁷ See Cohen, *supra* note 106, at 75; Cohen, *The Price of Everything*, *supra* note 31, at 690.

¹¹⁸ Cohen, *supra* note 106, at 75–80. In an earlier analysis, Cohen subdivided Sandel’s coercion category into “voluntariness” and “access” formulations. The voluntariness formulation would “ask[] whether consent to the transaction was truly voluntary, given society’s background

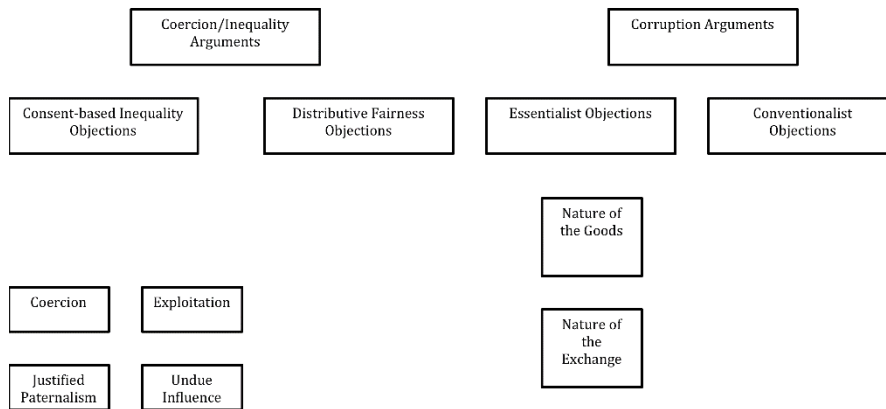


Figure 1 - Taxonomy of Anticommodification Arguments¹¹⁹

B. Consent-Based Inequality Objections

Consent-based concerns encompass four objections: (1) coercion; (2) exploitation; (3) undue influence; and (4) justified paternalism. Within this subcategory, coerced consent is perhaps most familiar, given its centrality in unconstitutional conditions case law.¹²⁰ In anticommodification literature, coercion refers to “the claim that poor sellers are improperly forced into selling [a good] . . . by recipients who have no right to propose [the sale], because the sellers have no reasonable economic alternative.”¹²¹

distribution of resources.” Cohen, *The Price of Everything*, *supra* note 31, at 690. This subdivision tracks what I refer to as “coercion” concerns, drawing on Cohen’s later work. Similarly, the access formulation, which “focuses on unequal access to the good, given an unfair background distribution of goods,” tracks what I refer to as distributive concerns. *Id.*

¹¹⁹ This diagram of the taxonomy is adapted from, and a slight elaboration upon, Cohen, *The Price of Everything*, *supra* note 31, at 689.

¹²⁰ See Sullivan, *supra* note 21, 1428 (“[T]he Court has repeatedly suggested that the problem with unconstitutional conditions is their coercive effect.”); Berman, *supra* note 38, at 12 (noting concept of coercion “captures the essence of what appears to be wrong in many unconstitutional conditions cases” and that “the Supreme Court has flirted for generations with the notion that conditional offers may prove unconstitutional by reason of their being coercive.”); *NFIB v. Sebelius*, 567 U.S. 519, 580 (2012); *South Dakota v. Dole*, 483 U.S. 203, 204 (1987) (holding condition “not so coercive as to pass the point at which pressure turns into compulsion”); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144 (1987) (“In *Sherbert, Thomas*, and the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee’s choice.”).

¹²¹ Cohen, *supra* note 106, at 75. Mitchell Berman provides an alternative but equivalent definition of coercion:

In classic commodification debates, such as the moral permissibility of paid surrogacy, coercion is the basis for concerns that only destitute “women [will] consent to commercial surrogacy because the \$10,000 reward represents an offer they cannot (autonomously) refuse.”¹²² In the unconstitutional conditions context, coercion objections manifest as concerns that the poor will waive their constitutional rights (i.e. under the Fourth Amendment) in exchange for financial benefits,¹²³ or that Congress will “us[e] offers of federal funds to coerce states to accede to conditions that Congress could not mandate.”¹²⁴

Besides coercion, other anticommodification arguments based on harm to the “seller” do not feature as prominently in unconstitutional conditions case law or commentary. Exploitation occurs where the buyer benefits from the transaction, the transaction is either harmful or unfair to the seller, and the buyer induces the seller to agree by taking advantage of a vulnerability on the seller’s part, without which the seller would not ordinarily agree to the transaction.¹²⁵ Exploitation can occur even without coercion (i.e. where the buyer has every right to make the offer in question).¹²⁶ In the context of organ sales, a much-debated commodification case, buyers might exploit organ sellers if the sale somehow harms the seller¹²⁷ or if “the buyer induced the seller to sell at a [low price] by taking unfair advantage of the seller’s poverty or other need, without which the seller would not have sold the organ.”¹²⁸ In the realm of unconstitutional conditions, exploitation might occur in a case like *Velazquez*,¹²⁹ where the government perhaps capitalized

[C]oercion is the wrong of exerting *wrongful* pressure on a subject to do as the coercer wishes. And the usual way in which one puts wrongful pressure on a target’s choices is by threatening to wrong him if he does not comply with the threatener’s “demand” or “condition.” Roughly, then, a threat is coercive, or constitutes coercion, if it would be wrongful for the threatener to carry it out.

Berman, *supra* note 8, at 1292 (footnotes omitted).

¹²² Cohen, *supra* note 106, at 75.

¹²³ See, e.g., Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 369 n.107 (2010) (discussing coercion in the context of Fourth Amendment conditions); *Wyman v. James*, 400 U.S. 309, 341 (1971) (Marshall, J., dissenting) (noting coercive nature of home-visit condition for receipt of welfare benefits).

¹²⁴ Berman, *supra* note 8, at 1308.

¹²⁵ Cohen, *supra* note 106, at 78.

¹²⁶ Cohen, *The Price of Everything*, *supra* note 31, at 690.

¹²⁷ In the context of regulated organ sales, this objection may be relatively weak: “the most widely discussed form of organ sale, kidney sale, is not terribly dangerous if performed in good conditions.” Stephen Wilkinson, *The Sale of Human Organs*, STAN. ENCYCLOPEDIA OF PHIL. (Oct. 22, 2015), <http://plato.stanford.edu/entries/organs-sale/#HarRis>. As Cohen explains, the proper test for whether a seller is harmed is “whether *ex ante* the seller is *all things considered* better off.” I. Glenn Cohen, *Transplant Tourism: The Ethics and Regulation of International Markets for Organs*, 41 J. LAW, MED., & ETHICS 269, 274 (2013).

¹²⁸ Cohen, *supra* note 106, at 78.

¹²⁹ 531 U.S. 533 (2001).

on the dire financial situation of civil legal aid organizations by offering such organizations federal funds in exchange for waiver of their First Amendment right to challenge the constitutionality of federal welfare laws. While exploitation occurs when the seller accepts a “raw deal,” the undue inducement argument worries that sellers are “being paid too much, the ‘offer [is] too good to refuse,’” such that their autonomy is compromised and the sale not fully voluntary.¹³⁰ Strains of the “undue inducement” argument, for instance, were present in *NFIB*, in both the contention that “every State would have no real choice but to go along with the Medicaid Expansion” and the Government’s argument that the “offer of federal funds associated with the expanded coverage is such a generous gift that no State would want to turn it down.”¹³¹

The three consent-based objections discussed so far (coercion, exploitation, and undue influence) all stem from concerns about imperfect consent.¹³² This anxiety about tainted consent is grounded in Kantian ethics, which hold that “humans cannot realize their true nature as free and rational beings if they are unduly influenced” by financial pressures.¹³³ The fourth seller-harm objection, “justified paternalism,” sets an even higher bar for morally satisfactory consent: the anti-paternalist objects to transactions where consent is perceived to be “involuntary, uninformed, or otherwise invalid because the seller lacks competence,” regardless of any formal consent by the seller.¹³⁴ From this perspective, blocking an organ sale protects the seller from taking an action that she might have avoided with perfect information.¹³⁵ Justified paternalism is perhaps particularly persuasive for blocking market-exchanges in light of recent literature on cognitive biases, such as “present bias (or a “particular desire for immediate consumption” or gratification) and optimism bias (the tendency of a person’s expectations to be better than actual outcomes).”¹³⁶ Paternalist intervention against the commodification of rights might therefore also be justified by a

¹³⁰ Cohen, *supra* note 106, at 78.

¹³¹ *NFIB v. Sebelius*, 567 U.S. 519, 673, 681 (2012).

¹³² See, e.g., Sandel, *supra* note 31, at 94 (“[M]arket exchanges are not necessarily as voluntary as market enthusiasts suggest. A peasant may agree to sell his kidney or cornea in order to feed his starving family, but his agreement is not truly voluntary. He is coerced, in effect, by the necessities of his situation.”).

¹³³ Cohen, *The Price of Everything*, *supra* note 31, at 690 (citing IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 434 [James W. Ellington trans., 1981] (1785)).

¹³⁴ Cohen, *supra* note 106, at 79.

¹³⁵ See Louis W. Fisher, Note, *Paying for Pushout: Regulating Landlord Buyout Offers in New York City’s Rent-Stabilized Apartments*, 50 HARV. C.R.-C.L. L. REV. 491, 514-515 (2015) (internal citations omitted) (discussing research on how cognitive biases distort rational decision making).

¹³⁶ *Id.* at 515.

concern that rightsholders might systematically undervalue their rights and waive their rights in return for less valuable benefits.¹³⁷

C. *Distributive Inequality Objections*

In addition to consent-based objections, anticommodification theorists also rely on arguments about distributive unfairness. Given background conditions of inequality, the commodification of scarce goods will lead to unequal access to the goods.¹³⁸ As Professor Sandel puts it, “[i]n a society where everything is for sale, life is harder for those of modest means.”¹³⁹ Thus, as commodification proliferates as a mode of valuation through different realms of society, including political access, healthcare, and education, the distribution of wealth comes to dictate the distribution of more and more socially valuable goods. As income inequality has widened, its effects have thus been exacerbated by “the commodification of everything” which has “ma[de] money matter more.”¹⁴⁰

In fact, legal scholars have long recognized distributive inequality as one of the primary normative concerns underlying the unconstitutional conditions doctrine.¹⁴¹ From this perspective, constitutional rights not only protect individual rightsholders but also, crucially, such rights help secure a particular distribution of power between the government and rightsholders and between different classes of rightsholders.¹⁴² The argument, in its simplest form, is that poor rightsholders will “sell” more rights to the government, altering the initial distribution of power set by fundamental constitutional rights.¹⁴³ While distributive inequality concerns certainly

¹³⁷ Cf. *id.* (“Moreover, ‘present biased’ thinking causes tenants to irrationally overvalue receiving a smaller sum immediately. Tenants thus accept buyout deals that are insufficient to sustain them in establishing a new tenancy and in exchange, they give up their access to affordable, rent-stabilized housing.” (footnotes omitted)).

¹³⁸ Cohen, *supra* note 31, at 690; Cohen, *supra* note 106, at 79. In *The Price of Everything*, the earlier of the two pieces, Cohen referred to this objection as the “access formulation” of the coercion objection. Cohen, *supra* note 31, at 690.

¹³⁹ SANDEL, *supra* note 31, at 8.

¹⁴⁰ *Id.*; see also Cohen, *supra* note 31, at 690 (giving several examples of distributive inequality resulting from commodification); Cohen, *supra* note 106, at 79 (discussing unfair distributive effects as an objection to organ sales).

¹⁴¹ See Sullivan, *supra* note 21, at 1486 (“In the end only the distributive strand helps to capture the problem with unconstitutional conditions, and even the distributive argument must be recast to fit this context.”).

¹⁴² *Id.* at 1490.

¹⁴³ *Id.* Sullivan actually identifies two distinct distributive problems that might result from unconstitutional conditions offers. First, “horizontal redistribution” would lead to a sort of governmental discrimination, whereby “those who comply with the condition and get better treatment” than those who do not. *Id.* at 1496. Second, “vertical distribution” threatens to create

animate the doctrine of unconstitutional conditions, previous scholars have been too quick to dismiss other aspects of anticommodification theory¹⁴⁴ as a theoretical justification for unconstitutional conditions doctrine. More specifically, such scholars have overlooked the second category of anticommodification arguments: the corruption objection.

D. *The Corruption Objection*

In addition to arguments from inequality, scholars have mounted a second, distinct objection to commodification, which Sandel refers to as the “corruption objection.”¹⁴⁵ The corruption objection holds that commodifying a particular good, service, or practice will denigrate, demean, or otherwise do violence to our shared understanding of how such goods, services, or practices should properly be valued.¹⁴⁶ From this perspective, there are multiple spheres¹⁴⁷ or modes¹⁴⁸ of valuation; corruption occurs when an exchange occurs without regard to these distinct modes of valuation, thus treating incommensurable goods as if they were commensurable.¹⁴⁹ For example, from a Kantian perspective, organ sales, even if perfectly consensual, are categorically impermissible, because the value of the human body and the value of money are incommensurable: the body is not properly valued as an object for use with a price but instead possesses a higher intrinsic value based on human dignity.¹⁵⁰

a system of “constitutional caste,” whereby different socioeconomic classes have differential access to constitutional rights. *Id.* at 1497.

¹⁴⁴ See *id.* at 1489–90 (“[W]hen a preferred constitutional liberty centrally entails autonomy of choice, it is problematic to declare that liberty inalienable . . . inalienability theory focuses too generally on problems with exchange.”).

¹⁴⁵ See SANDEL, *supra* note 31, at 9 (describing the “corrosive tendency of markets” and claiming “[p]utting a price on the good things in life can corrupt them”); *id.* at 44 (“[W]e corrupt a good, an activity, or a social practice whenever we treat it according to a lower norm than is appropriate to it.”); *id.* at 111 (“According to this objection, certain moral and civic goods are diminished or corrupted if bought and sold . . .”); Sandel, *supra* note 31, at 95; Cohen, *supra* note 106, at 73; Cohen, *supra* note 31, at 691–92.

¹⁴⁶ Cohen, *supra* note 106, at 73; Sandel, *supra* note 31, at 95.

¹⁴⁷ Walzer, *supra* note 107, at 97–103 (inquiring into the proper sphere of money).

¹⁴⁸ Anderson, *supra* note 107, at 8, 10 (identifying “use, respect, appreciation, consideration, and love as five different modes of valuation”).

¹⁴⁹ Cohen, *supra* note 31, at 692.

¹⁵⁰ See Immanuel Kant, *Of Duties to the Body in Regard to the Sexual Impulse*, in LECTURES ON ETHICS 155, 157 (Peter Heath & J.B. Schneewind, eds., Peter Heath, trans., 1997) (“Man cannot dispose over himself, because he is not a thing. He is not his own property . . . he is not entitled to sell a tooth, or any of his members.”); KANT, *supra* note 108, at 93 (“What has a price can be replaced by something else as its *equivalent*; what on the other hand is above all price and therefore admits of no equivalent has a dignity.”); see also Andrea Sangiovanni, *Why There Cannot be a Truly Kantian Theory of Human Rights*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 671, 686 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015) (noting Kant regarded dignity as a property of

In one way, corruption arguments are stronger than inequality-based arguments. Corruption arguments derive their force from judgments about the “the moral importance of the goods at stake” rather than from appeals to consent.¹⁵¹ Consequently, unlike inequality-based arguments, corruption objections would persist even if background conditions of inequality and the concomitant coercive effects of poverty were eliminated.¹⁵² The argument that market valuation degrades the intrinsic value¹⁵³ of a particular good, whether an organ or a right, depends on moral judgments rather than on purity of consent. For this reason, corruption arguments are also inherently more controversial than inequality-based objections “because they require inquiry into the [moral] ‘appropriateness’ of an exchange.”¹⁵⁴

Anticommodificationists approach the question of whether or not market valuation is morally appropriate for a particular good from two general perspectives: Conventionalism and Essentialism. Conventionalism, typified by philosophers such as Michael Walzer, assesses the moral appropriateness of market exchanges based on the prevailing social norms of a particular community at a particular time.¹⁵⁵ This approach, however, has many well-known and obvious pitfalls, including the risk of devolution into moral relativism and the difficulties of defining the relevant “community.”¹⁵⁶

Essentialism, on the other hand, determines moral appropriateness based on the “essence” of the good in question. Essentialism holds that “there is something objective and timeless in the good that requires a particular mode

humanity, meaning that humanity has an “unconditional, absolute worth,” and is “above all price”).

¹⁵¹ Sandel, *supra* note 31, at 95.

¹⁵² *See id.*

¹⁵³ As Professor Cohen has noted, corruption arguments usually take this “intrinsic form.” Cohen, *The Price of Everything*, at 692. n.13. The intrinsic corruption objection is principled and categorical: under no circumstances can market valuation be considered appropriate for the good in question. There is another permutation of the corruption argument, however, that is consequentialist and contingent: “Consequentialist Corruption justifies intervention to prevent changes to our attitudes or sensibilities that will occur if the practice is allowed.” *See id.*; Cohen, *supra* note 106 at 74. Like inequality arguments, the consequentialist corruption objection holds only if assuming certain empirical facts about the world. Cohen, for example, focuses on the consequentialist corruption argument to baby-selling: “children may find out how much their parents paid for them, this knowledge may spread in society,” which may in turn corrupt nonmarket values like the parent-child bond. Cohen, *The Price of Everything*, at 692. n.13. Such consequentialist concerns can be addressed by consequentialist policy solutions; intrinsic corruption objections, in contrast, are stronger because they cannot be addressed by consequentialist policy solutions and instead hold regardless of the empirical state of the world. *See id.* Intrinsic corruption arguments are therefore more convincing, and the rest of this paper focuses on intrinsic corruption.

¹⁵⁴ Cohen, *The Price of Everything*, *supra* note 31, at 693.

¹⁵⁵ *Id.* (noting Walzer’s approach to commodification). *See generally* WALZER, *supra* note 107, at 95–128 (discussing money and commodities in different markets).

¹⁵⁶ Cohen, *The Price of Everything*, *supra* note 31, at 694–95.

of valuation.”¹⁵⁷ As Glenn Cohen has helpfully illustrated, the Essentialist corruption argument can take two forms: the “Nature of the Goods” and the “Nature of the Transaction” formulations. The “Nature of the Goods” formula objects to any exchange where a “higher value” good (perhaps an organ) is exchanged for a lower value good (such as money)—in other words, according to this formula, corruption occurs whenever a “higher sphere” good is exchanged for a “lower sphere” good.¹⁵⁸

The scholarly debate on Nature of the Goods Essentialism is best understood when arrayed on a spectrum. At one pole, commodificationists, such as Richard Epstein, argue that all goods are commensurable (i.e., there is only one sphere) and therefore all voluntary transactions are permissible.¹⁵⁹ At the other end of the spectrum, is the seemingly insupportable idea that each individual good has a unique sphere of valuation and that therefore all transactions are corruption.¹⁶⁰ Prominent anticommodificationist thinkers fall somewhere in between these two poles. Michael Sandel, for example, distinguishes between market goods on the one hand, which are properly valued according to profit and use, and civic goods and sacred goods on the other, which are corrupted by commodification.¹⁶¹ Similarly, the pluralist-expressive theory of value developed by Elizabeth Anderson introduces a concept of “hierarchical incommensurability” between market goods and commodities and “paradigmatic higher goods such as human life, friendship, freedom and human rights.”¹⁶² The Nature of the Goods formula of Essentialism and its hierarchical distinctions between different, incommensurably valuable goods will be key in applying the anticommodification framework to unconstitutional conditions questions in the next section.

¹⁵⁷ Cohen, *The Price of Everything*, *supra* note 31, at 693.

¹⁵⁸ *Id.* at 696; *see also* text accompanying notes 148 and 149 (discussing higher and lower spheres and differential modes of valuation).

¹⁵⁹ *Cf.* Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 3 UTAH L. REV. 683, 698 (1995) (“Comparisons across different domains can be and often are made.”); *see also* Cohen, *The Price of Everything*, *supra* note 31, at 697 (describing the idea that “there are no spheres, or rather, everything falls within a single sphere, and therefore all exchanges are permissible.”).

¹⁶⁰ *See* Cohen, *The Price of Everything*, *supra* note 31, at 698 (describing unique spheres of valuation).

¹⁶¹ *See* SANDEL, *supra* note 31, at 9–10 (distinguishing between commodities, and cherished goods and civic duties and rights); *id.* at 37 (“Turning sacred goods into instruments of profit values them in the wrong way.”); *id.* at 203 (“[A]re there certain moral and civic goods that markets do not honor and money cannot buy?”); Sandel, *supra* note 31, at 94 (“[C]ertain moral and civic goods are diminished or corrupted if bought and sold for money.”); *see also* Cohen, *The Price of Everything*, at 697 n.29 (identifying Sandel with this three-part division).

¹⁶² Anderson, *supra* note 107, at 66; *see also id.* at 70 (“Two goods are incomparable in intrinsic worth if they are not candidates for the same mode of valuation.”).

As Cohen rightly points out, however, positions like Sandel's and Anderson's, which object to certain transactions based only on the Nature of the Good are by themselves unsatisfying: such arguments ultimately devolve into either intuitionism (failing to explain precisely what makes a particular exchange objectionable) or implausibility (failing to explain the empirical reality of considered social judgments about certain exchanges.¹⁶³)¹⁶⁴ Consequently, Cohen develops a second, Essentialist corruption argument: "The Formula from the Nature of the Transaction."¹⁶⁵ This formulation of the corruption objection focuses on the expressive nature of the transaction: transactions where higher-value goods are exchanged for lower value goods are value-denigrating when the exchange purports to establish a value equilibrium between the two goods.¹⁶⁶ For instance, even if selling one's blood or trading it for a commodity is value-denigrating, no corruption occurs in altruistic blood donation or sanguine gift-exchanges because gift transactions do not purport to express value-equilibrium.¹⁶⁷ Therefore, when considering the application of corruption objections to unconstitutional conditions problems, it will be important to consider potential arguments sounding in both the Nature of the Transaction as well as the Nature of the Good.¹⁶⁸

¹⁶³ Cohen provides the following example: "Within the 'sacred' category, a my-blood-for-your-blood exchange is acceptable, whereas a my-child-for-your-child exchange is value-denigrating." Cohen, *The Price of Everything*, *supra* note 31, at 703.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 705–06.

¹⁶⁷ *Cf. id.* at 706 ("That gifts do not express value equilibrium between goods of different modes is something they share in common with 'compensatory' damages in a suit for wrongful death and life insurance—the thing used to compensate is never presumed to substitute for the thing that has been given up.").

¹⁶⁸ Of course, the validity of corruption objections generally is in dispute. For skepticism about pluralist theories of value and a concomitant defense of utilitarian monism, see, for example, Epstein, *supra* note 159; Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2325–28 (1995) (rejecting commodification arguments against paid surrogacy), 2329–30 (rejecting arguments based on incommensurability in the same context). For a nuanced argument that corruption objections may not suffice to justify prohibition of "transplant tourism" (where patients travel abroad seeking to purchase an organ for transplant), see I. GLENN COHEN, PATIENTS WITH PASSPORTS: MEDICAL TOURISM, LAW, AND ETHICS 283–86 (2015) ("To be sure, this is not a complete refutation of this kind of argument for banning transplant tourism. There is more that might be said both in favor and against this type of argument, but for present purposes, I am content to leave the matter there with the hope that I have at least shown why I think the corruption argument is not the surest ground for arguing for a prohibition on transplant tourism."). Cohen's arguments, however, are relatively context-specific and do not necessarily apply to the unconstitutional conditions questions discussed below in this Article.

III. UNCONSTITUTIONAL CONDITIONS AS ANTICOMMODIFICATION: APPLICATION TO CASES

Although the corruption argument against rights-commodification has been absent from the literature since its dismissal in Kathleen Sullivan's seminal Article, this Section theorizes that, as a descriptive matter, the corruption objection helps to explain some of the Court's recent unconstitutional conditions decisions, especially in the First Amendment context. In addition, in the realm of constitutional criminal procedure, anticommodification theory provides a principled means of resolving the apparent "waiver paradox," where criminal protections can be waived through plea bargains but certain noncriminal rights cannot be waived under unconstitutional conditions doctrine.¹⁶⁹

The application of anticommodification arguments to unconstitutional conditions questions would in fact require the imposition of a duty of nonwaivability on individual rightsholders. For several reasons discussed below, this duty-creation is no reason to reject anticommodification arguments. To the contrary, the exchange of a right, a civic good, for a lower-sphere, market good, such as a financial benefit from the government, should be presumptively impermissible.¹⁷⁰ To allow such exchanges would be value-denigrating, as it would corrupt the moral worth of constitutional rights as civic goods, which citizens must possess in order to engage in independent democratic deliberation.

To highlight the relevance of the corruption objection to rights-commodification is not, however, to argue that this concept represents a "grand unified theory" of unconstitutional conditions.¹⁷¹ To the contrary, anticoercion can still have an important place in justifying unconstitutional conditions doctrine, and as *NFIB v. Sebelius* demonstrates, anticoercion is perhaps the primary animating principle underlying the Court's Federalism

¹⁶⁹ See Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 802 (2003).

¹⁷⁰ See Peter Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977, 979-80 (1986) (distinguishing between strong version of unconstitutional conditions doctrine, which is "an absolute prohibition, a rule that a state may *never* condition state-granted privileges on a person's not doing something he has a constitutional right to do" and a weaker version, which is a "presumptive prohibition, a rule that a state may not condition state-granted privileges on a person's not doing something he has a constitutional right to do, unless the state presents compelling state interests in support of its doing so").

¹⁷¹ See Ilan Wurman, Note, *Drug Testing Welfare Recipients as a Constitutional Condition*, 65 STAN. L. REV. 1153, 1178 (2013) ("Most commentators agree that the doctrine as applied by the Supreme Court defies any grand unified theory of unconstitutional conditions.").

decisions.¹⁷² Anticoercion is needed to protect against government attempts to force waiver of rights (or to alter structural distributions of power, like Federalism) where the exchange does not implicate a value-denigrating exchange. (*United States v. Jackson*, discussed below, is perhaps the paradigm example of a non-value-denigrating, but coercive, waiver of rights.)¹⁷³ Combining these two normative theories, anticoercion and anticorruption, this paper argues that the absence of government coercion may be necessary but is not sufficient to sustain the constitutionality of a conditioned benefit.

A. Anticommodification Impulses in Free Speech Cases

Anticommodification objections, particularly the corruption prong, may help to explain the Court's approach in some relatively recent unconstitutional conditions questions in the Free Speech context. Consider the landmark case of *AID v. Alliance for Open Society International, Inc.*,¹⁷⁴ in which the Court held that the government violated the First Amendment by conditioning the receipt of federal funds on U.S.-based international aid organizations' express avowal of an anti-prostitution policy.¹⁷⁵ In 2003, the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("Leadership Act") authorized \$15 billion dollars over five years to fund the work of nongovernmental organizations ("NGOs") with experience combating the AIDS epidemic worldwide.¹⁷⁶ The NGOs' receipt of these funds was conditioned on compliance with two requirements. First, no Leadership Act funds were to "be used to promote or advocate the legalization or practice of prostitution or sex trafficking."¹⁷⁷ Second, funds from the Act could not "provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking, except . . . to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency." (The Court referred to this second requirement

¹⁷² See, e.g., *United States v. Jackson*, 390 U.S. 570 (1968) (striking down law that unconstitutionally coerced waiver of jury trial right); sources cited *supra* note 96; see also *supra* Section II.A (discussing consent-based inequality objections to commodification).

¹⁷³ 390 U.S. 570 (1968).

¹⁷⁴ 570 U.S. 205 (2013).

¹⁷⁵ *Id.* at 221. See generally *TRIBE & MATZ*, *supra* note 10, at 259–64 (describing *AID* as a "landmark opinion").

¹⁷⁶ *AID*, 570 U.S. at 210 ("Since 2003, Congress has authorized the appropriation of billions of dollars for funding these organizations' fight against HIV/AIDS around the world."); *TRIBE & MATZ*, *supra* note 10, at 259. In 2008, the Act was expanded to authorize \$48 billion over the next five years. *Id.*

¹⁷⁷ *AID*, 570 U.S. at 210 (internal quotation marks omitted) (quoting 22 U.S.C. § 7631(e) (2012)).

as the “Policy Requirement.”)¹⁷⁸ A group of domestic NGOs involved in fighting HIV/AIDS abroad who received Leadership Act funds challenged the Policy Requirement condition as a First Amendment violation.¹⁷⁹ In an opinion by Chief Justice Roberts, the Court struck down the Policy Requirement as an unconstitutional condition on the NGOs’ exercise of their free speech rights.¹⁸⁰

For present purposes, the *AID* decision highlights the potential explanatory power of the anticommodification corruption objection in clarifying how the Court actually deals with unconstitutional conditions questions in the First Amendment context. Because other candidate theories, namely the so-called “scope of the program” test and the anticoercion test, for explaining the *AID* decision are respectively indeterminate or inapplicable, I argue that the corruption objection to rights-commodification provides an alternative basis upon which to interpret and understand the Court’s decision.

The Court in *AID* purports to apply a “scope of the program” test, which it derives from prior precedents:¹⁸¹ namely, *Regan v. Taxation With Representation of Washington* (“*TWR*”),¹⁸² *FCC v. League of Women Voters of California* (“*LWV*”),¹⁸³ and *Rust v. Sullivan*.¹⁸⁴ According to the *AID* majority, the key distinction in these conditional funding cases is “between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”¹⁸⁵ Yet upon closer examination, this test alone is unsatisfying as theoretic justification for the result in *AID*.¹⁸⁶

First, it is worth noting, as Lloyd Hitoshi Mayer has argued, that this “scope of the program” test represents a subtle reformulation of the test previously articulated by these three precedents, which instead focused on

¹⁷⁸ *Id.* (internal quotation marks omitted) (quoting § 7631(f)).

¹⁷⁹ *Id.* at 211.

¹⁸⁰ *Id.* at 221.

¹⁸¹ *Id.* at 214–217.

¹⁸² 461 U.S. 540 (1983) (upholding requirement that 501(c)(3) nonprofits do not engage in legislative lobbying).

¹⁸³ 468 U.S. 364 (1984) (striking down condition on federal funds received by noncommercial television and radio broadcasters, which required recipients to refrain from editorializing (including with private funds)).

¹⁸⁴ 500 U.S. 173 (1991) (upholding condition on recipients of funds under Title X of the Public Health Service Act, which prohibited recipients of Title X projects from engaging in abortion counseling, referral, and activities advocating abortion as a method of family planning).

¹⁸⁵ *AID*, 570 U.S. at 214–15.

¹⁸⁶ *Id.* at 217–18.

whether the government was funding the speech;¹⁸⁷ the *AID* Court instead shifted the inquiry to focus on whether the government was funding the program.¹⁸⁸ Therefore, the majority's attestations that prior precedent dictated its result in *AID* ring hollow.¹⁸⁹

Secondly, and perhaps more importantly, the "scope of the program" test appears wholly indeterminate.¹⁹⁰ The *AID* majority itself explicitly acknowledged several times the indeterminacy inherent in applying its "scope of the program" test.¹⁹¹ In fact, the application of the "scope of the program" inquiry in *AID* itself demonstrates its manipulability and thus its failure to provide a principled, theoretic justification for the result in this case. The majority was "confident that the Policy Requirement falls on the unconstitutional side of the line" separating "conditions that define the federal program and those that reach outside it."¹⁹²

It is not immediately apparent from the Chief Justice's opinion what the Court understands the limits of the program to be, but at the very least, the Court believed "the Policy Requirement goes beyond defining the limits of the federally funded program to defining the recipient" simply because it "requir[es] recipients to profess a specific belief."¹⁹³ The Court defined the "program" broadly, encompassing a general effort to combat AIDS internationally.¹⁹⁴ In contrast Justice Scalia, writing in dissent, put forth a

¹⁸⁷ See Mayer, *supra* note 101, at 1069–70 (describing how under the government-speech approach applied in *Rust*, *TWR*, and *LWV*, "such restrictions on the use of private funds might be justified if the recipient of the government funding was clearly identified as *speaking on behalf of the government* and a failure to maintain this level of separation would undermine or confuse that government speech" (emphasis added)).

¹⁸⁸ See *id.* at 1070, 1075 (describing how *AID* court reformulated the test to focus on the scope of the program rather than whether or not the government was "speaking").

¹⁸⁹ See *id.* at 1076 (claiming "the majority is . . . guilty of selective ignorance with respect to the relevant precedents.").

¹⁹⁰ See, e.g., Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 782 (2007) ("Difficulties in determining government purpose have come up in unconstitutional conditions cases. Courts may, of course, define purposes broadly or narrowly."); Sullivan, *supra* note 21, at 1474 ("[G]ermaneness theories founder on the extreme malleability of the concept of germaneness itself. Germaneness to the purpose of a benefit depends crucially on how broadly or narrowly that purpose is defined."); *id.* at 1476 (explaining theories based on germaneness to government purpose are underinclusive because "they fail to explain why *germane* burdens on constitutional rights should be regarded as benign").

¹⁹¹ *AID v. Alliance for Open Society Intern., Inc.*, 570 U.S. 205, 215 (2013) ("The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition."); *id.* at 217 ("[T]he distinction drawn in these cases—between conditions that define the federal program and those that reach outside it—is not always self-evident.").

¹⁹² *Id.*

¹⁹³ *Id.* at 218.

¹⁹⁴ Cf. Lerner, *supra* note 190, at 783 (explaining that the danger, from a civil libertarian perspective, in unconstitutional conditions cases implicating free speech is that courts will interpret the government's purpose too narrowly, allowing the government to pursue a broader ideological

more specific understanding of the scope of the program: “Elimination of prostitution *is* an objective of the HIV/AIDS program, and *any* promotion of prostitution—whether made inside or outside the program—*does* harm the program.”¹⁹⁵ From this perspective, the Policy Requirement fit within the scope of the program because admission of an “ideological opponent” (i.e. anyone unwilling to sign on to the Policy Requirement) would “frustrate the purpose of the program” by, among other things, allowing the opponent to use its private funds in pursuit of ideologically opposed advocacy.¹⁹⁶ While perhaps it is possible for courts to divine an objective programmatic government purpose, it is certainly a difficult task¹⁹⁷; either way, in the *AID* case, it does not provide a clear, principled explanation of the result.

Not only does the “scope of the program” test fail to explain *AID*, but also, as the dissent forcefully argues and as the majority implicitly concedes,¹⁹⁸ the anticoercion rationale at play in other unconstitutional conditions cases was simply inapplicable in *AID*.¹⁹⁹ In Justice Scalia’s words, “the contention that the condition here ‘coerces’ respondents’ speech is on its face implausible. Those organizations that wish to take a different tack with respect to prostitution ‘are as unconstrained now as they were before the enactment of [the Leadership Act].’”²⁰⁰ Consequently, we must look elsewhere for an explanation of the majority’s result.

My hypothesis is that the decision in *AID* can be explained, at least partially, by resort to the corruption objections to commodification, as described in Section II. Stripped of the cover provided by the inherently malleable “scope of the program test,” and immune from any concerns about coercion, the condition at issue in *AID* is revealed to be a naked attempt by

agenda while pretending its purpose is just to control government expenditures within a particular program).

¹⁹⁵ *AID*, 570 U.S. at 224 (Scalia, J., dissenting).

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., Lerner, *supra* note 190, at 784–85 (noting difficulty in discerning the purpose of government programs, which would require “digging deep” in legislative history of laws to “discover their true purposes,” but ultimately arguing such difficulty can be overcome in applying a germaneness-to-purpose test).

¹⁹⁸ *AID*, 570 U.S. at 226 (Scalia, J., dissenting) (“The majority cannot credibly say that this speech condition is coercive, so it does not.”); see also *TRIBE & MATZ*, *supra* note 10, at 261 (“Scalia was almost certainly right about the absence of direct coercion: the Act created a new funding source, one upon which no organizations were already dependent and that they were free to reject.”).

¹⁹⁹ See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 580–81 (2012) (discussing whether aspects of Congress’s financial inducement in the Affordable Care Act are overly coercive).

²⁰⁰ *AID*, 570 U.S. at 225 (Scalia, J., dissenting) (quoting *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 595 (1998) (Scalia, J., concurring in the judgment)); see also Mayer, *supra* note 101, at 1076 (agreeing that coercion is absent).

the government to purchase the constitutional rights of the recipients to speak freely on the subject of prostitution.²⁰¹

When *AID* is reframed in this way, the relevance of anticommodification concerns to this case becomes clear. Recall the two formulations of the essentialist corruption objection, developed above: (1) The Nature of the Goods Formulation; and (2) The Nature of the Transaction Formulation. Under the Nature of the Goods Formulation, a transaction should be barred if it involves the exchange of a higher sphere good (in this case, a constitutional right) for a lower sphere good (money).²⁰² From the Nature of the Goods perspective, there are at least two arguments that the free speech rights and financial benefits at issue in *AID* are incommensurable.

First, in terms of the Kantian dichotomy between persons, which are valued and respected according to their dignity, and things, which are valued according to their use,²⁰³ there is an argument that fundamental rights, such as the free speech right in *AID*, are too closely tied to human dignity to be exchanged for money. To engage in such an exchange would denigrate the value of the right, treating it as a thing to be used rather than as an aspect of dignity to be respected.²⁰⁴ The Kantian case for anticommodification is perhaps particularly strong in the First Amendment context, where the Court and scholars alike have closely linked the right of free expression with individual human dignity.²⁰⁵

²⁰¹ See Mayer, *supra* note 101, at 1077 (characterizing the condition in *AID* as a purchase).

²⁰² See *supra* notes 157–58158 and accompanying text.

²⁰³ See *supra* note 108 and accompanying text.

²⁰⁴ Cf. *id.*; MARGARET JANE RADIN, *CONTESTED COMMODITIES* 84 (1996) (“[T]he Kantian person cannot be conceived of as a fungible exchangeable object . . . [I]f we do not want to lose hold of Kantian personhood, we might think that market rhetoric should be culturally discouraged in cases in which market conceptualization harms personhood.”).

²⁰⁵ See, e.g., Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381, 412 (2011) (“Since the earliest days of its First Amendment jurisprudence, the Court has recognized that freedom of speech enhances dignity in both its identity and conscience dimensions,” even though dignity interests in free speech are less well-developed and less explicit in American than in European free speech jurisprudence.); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 173 n.18 (2011) (collecting First Amendment free speech cases where Court has invoked individual dignity as theoretic basis of the right). It is not inconsistent to hold that rights cannot be commodified because they are too closely associated with individual dignity, even though the decision to bar the exchange of rights for money itself impinges upon individual decisional autonomy. Cf. Sullivan, *supra* note 21, at 1446; William T. Mayton, “Buying-Up Speech: Active Government and the Terms of the First and Fourteenth Amendments,” 3 WM. & MARY BILL RTS. J. 373, 380 (1994) (arguing that “a right is customarily justified by principles of personal autonomy and dignity” and “[a]n implication of this autonomy in rights is that they are alienable”). To the contrary, “many scholars,” including libertarians like Randy Barnett and Richard Epstein, “concur that agreements alienating certain liberties should not be enforceable by the State.” Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 32–33 & n.152 (2016) (citing RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998); Richard A. Epstein, *Notice and Freedom of Contract in the*

Second, one might object to the commodification of free speech rights not as an affront to individual dignity but rather as a civic corruption. Under this framework, which draws on civic-republican political theory,²⁰⁶ fundamental rights are “civic goods,” which are “diminished or corrupted if bought and sold for money.”²⁰⁷ The right to vote, perhaps the quintessential civic good, cannot be purchased because to allow such an exchange would fundamentally denigrate the nature of the vote.²⁰⁸ Similarly, under this civic

Law of Servitudes, 55 S. CAL. L. REV. 1353, 1368 (1981). For example, it is obvious that “voluntary slavery” as well as other forms of agreement to “bonded labor,” are impermissible and unenforceable, regardless of whether an individual autonomously decides to enter into such an exchange of fundamental liberty for money. See Debra Satz, *Voluntary Slavery and the Limits of the Market*, 3 LAW & ETHICS HUM. RTS. 86, 87–89 (2009) (noting the existence of voluntary slavery in history and explaining that U.S. law makes “voluntary slavery contracts, debt slavery, specific performance as a remedy for breach, or contracts that are considered ‘unconscionable’” unenforceable, despite the inability of libertarianism or Paretian welfare economics to theoretically justify this unenforceability). One does not need to equate the right to free speech to the right against enslavement to accept the Kantian argument against rights commodification. The argument simply requires acceptance of the premise that free speech and expression are similarly so closely associated with individual dignity as bar the exchange of the right for money. Cf. KANT, *supra* note 150, at 157 (“Man cannot dispose over himself, because he is not a thing. He is not his own property . . . he is not entitled to sell a tooth, or any of his members.”); LARA DENIS, MORAL SELF-REGARD: DUTIES TO ONESELF IN KANT’S MORAL THEORY 103 (2013) (describing impermissibility of prostitution under Kant’s moral theory).

²⁰⁶ Civic republican political theory understands freedom to mean shared participation in self-government through deliberation with fellow citizens about the common good. See MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 5 (1996); Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1697 (1989) (identifying the following core tenets of republicanism: “human beings are essentially political animals, . . . they can fulfill their natures only by participating in self-government, and . . . the most important aims of the political community should be to promote virtue among the citizenry and to advance the common good”); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword, Traces of Self-Government*, 100 HARV. L. REV. 4, 18 (1986) (listing the following republican themes: “common good, civic virtue, participation, independence, corruption, and balance”); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1541 (1988) (identifying four core republican principles: (1) deliberation in politics; (2) “equality of political actors”; (3) the universalistic notion of the “common good,” realized through exercise of “practical reason”; and (4) “citizenship, manifesting itself in broadly guaranteed rights of participation”); see also LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 99–102 (2012) (discussing distinction between liberal and republican conceptions of freedom).

Civic republicanism rejects neutrality among differing visions of the good life, requiring instead a “formative politics,” which cultivates in its citizens certain civic virtues needed for true self-government. SANDEL, *supra*, at 5–6. Civic virtue and the common good are closely entwined concepts: republican political thought understands civic virtue to mean “the willingness of citizens to subordinate their private interests to the general good.” Michelman, *supra*, at 18 (citing GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (1st ed., 1986)).

²⁰⁷ Cf. Sandel, *supra* note 31, at 94; Cohen, *The Price of Everything*, *supra* note 31, at 697 (describing Sandel’s “tripartite division between market goods, civic goods, and sacred goods”).

²⁰⁸ See Sandel, *supra* note 31, at 118 (“Our reluctance to treat votes as commodities should lead us to question the politics of self-interest so familiar in our time. It should also lead us to acknowledge and affirm the republican ideals implicit but occluded in contemporary democratic practice.”); see

republican conception, rights, perhaps especially free speech rights, might be considered civic goods that simply should not be the subject of market transactions.²⁰⁹ This argument is related to but distinct from both arguments like Professor Merrill's, that rights with a large "public goods" dimension should be not be individually waiveable,²¹⁰ and from arguments like Professor Tribe's against individual waiver of relational rights, which protect against structural subordination.²¹¹ The public goods and/or relational nature of rights like free speech are features of the right, which identify it as a civic good. Yet the objection to the right's commodification, on this view, is not contingent on whether the right "produces external benefits."²¹² Instead, the civic republican objection is principled and holds irrespective of consequentialist claims about positive externalities. The civic value of certain rights, such as the free speech right,²¹³ are incommensurable with market

also Smythe, supra note 205, at 32–33 (implying strongly that we would reject the idea that courts should "enforce an agreement under which one individual or group of individuals paid another individual or group of individuals not to vote"); Pamela S. Karlan, Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System, 80 VA. L. REV. 1455, 1458 (1994) ("In contrast to the unambiguously autonomy-expanding character of anti-intimidation laws, anti-[vote]-trafficking measures actually restrict a voter's options. They treat voting as a "market-inalienable" activity so that votes cannot be bought or sold, but can only be cast or lost on election day.").

²⁰⁹ *Cf. Hamburger, supra note 15, at 539 ("Personal rights are matters in which there is a profound public interest. Indeed, they are matters in which the people have declared their interest. They therefore cannot be left to private individuals or institutions."); Mayton, supra note 205, at 376–77 ("[T]he First Amendment is not just about a personal right to speak. Instead, what the amendment primarily does is to establish free speech as a common good."); Westermann, supra note 41, at 6 n.12 ("Sales of rights such as speech rights and voting rights by individual citizens would also produce adverse effects on the overall citizenry.").*

²¹⁰ *See infra notes 293–294 and accompanying text.*

²¹¹ *See infra notes 295–298 and accompanying text.*

²¹² *Cf. Thomas W. Merrill, Dolan v. City of Tigard: Constitutional Rights as Public Goods, 72 DENV. U. L. REV. 859, 870 (1995).*

²¹³ *See, e.g., Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) ("[A]n individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."); see also Kristen M. Formanek, *There's No Such Thing As Too Much Speech: How Advertising Deregulation and the Marketplace of Ideas Can Protect Democracy in America*, 94 IOWA L. REV. 1743, 1754 (2009) ("Several English and American philosophers have discussed the concepts behind the First Amendment, which encompass both political-integrity ideals and an interest in American democracy. These concepts include: (1) Marketplace of Ideas—enabling the search for truth; (2) Safety Valve—giving citizens a chance to be heard rather than expressing political tension in destructive ways; (3) Self-Actualization—*

values and thus to treat such rights as commodities would be to impermissibly denigrate their value.

If one accepts either the Kantian or civic republican Nature of the Goods argument against the commodification of free speech rights in cases like *AID*, then it becomes clear that the condition in *AID* is also problematic due to the Nature of the Transaction. Recall that this formulation of the corruption argument objects to transactions where higher-value goods are exchanged for lower-value goods when the exchange purports to establish a value equilibrium between the two incommensurable goods.²¹⁴ The Nature of the Transaction formulation thus focuses the inquiry on the expressive nature of the transaction. The condition in *AID* is problematic precisely because it amounted to an effort by the government to purchase the organization's rights in exchange for financial benefit.²¹⁵ Because a purchase is by definition an expression of "value equilibrium" between goods and money, and given that the free speech right is a higher value good,²¹⁶ the potential exchange of rights for money in *AID* is impermissibly value-denigrating.²¹⁷

empowering people through expression; (4) Self-Governing Citizenry—creating an informed public; and (5) Checking Value—monitoring corporations, government, and other institutions.”).

²¹⁴ See *supra* note 166 and accompanying text.

²¹⁵ Cf. TRIBE & MATZ, *supra* note 10, at 255 (“There’s something terribly wrong with the government breaking out its huge checkbook and buying the ability to violate our rights.”); Hamburger, *supra* note 15, at 540 (“If the government can make a side deal to purchase its way out from under constitutional limitations, the Constitution cannot consistently limit government in its relation to the people, and the people cannot consistently rely on the law and the courts to hold the government accountable to them.”); Mayer, *supra* note 101, at 1049 (discussing *AID* and arguing generally that “the government is not permitted to buy an organization’s speech absent a compelling governmental interest in doing so and then only if the purchase is done in a manner that is narrowly tailored to serve that interest”); Westermann, *supra* note 41, at 6 n.12 (“[F]or the state to engage in wholesale purchases of fundamental constitutional rights would be a circumvention of the Constitution’s supermajority amendment requirement. Sales of rights such as speech rights and voting rights by individual citizens would also produce adverse effects on the overall citizenry.”).

²¹⁶ From the Nature of the Transaction perspective, the case might be different, however, if the government offers a private party access to a particular forum for speech on the condition that a party adopt “a policy explicitly opposing prostitution and sex trafficking, except . . . to the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organization, the International AIDS Vaccine Initiative or to any United Nations agency.” Cf. *AID v. Alliance for Open Society Intern., Inc.*, 570 U.S. 205, 210 (2013).

²¹⁷ As one commentator has already noted, the *AID* decision makes the Trump Administration’s reinstatement and expansion of the so-called “Global Gag Rule” constitutionally suspect as a doctrinal matter. See Stern, *supra* note 12. The “Global Gag Rule” is a policy that “prohibits all recipients of international family planning funds from providing abortion-related care, referring patients to abortion providers, or giving women information about abortions.” *Id.* For virtually the same reasons outlined in this Section with respect to the unconstitutional policy in *AID*, this policy also represents a morally problematic attempt to commodify free speech rights.

B. Anticommodification and Constitutional Criminal Law: Addressing the Waiver Paradox

An understanding of the relationship between the corruption objection to rights-commodification and unconstitutional conditions questions also yields new insights into what Jason Mazzone has described as the “waiver paradox”:

There is a paradox in constitutional law, revealed by a simple question: Can individuals give up constitutional rights in exchange for a benefit from the government? The answer is that it depends; but it depends in a quite accidental way. Two different doctrines govern whether a constitutional right may be waived . . . the Supreme Court has recognized that criminal defendants may waive various constitutional protections, including the Fourth Amendment right to be free from unreasonable searches and seizures, the Fifth Amendment right against self-incrimination, and the Sixth Amendment rights to a jury trial, to confrontation of witnesses, and to the assistance of counsel. Indeed, these criminal protections are routinely bargained away in exchange for reduced sentences, dismissal of additional charges, or other benefits, when defendants plead guilty pursuant to plea agreements. On the other hand, under the doctrine the Court calls the unconstitutional conditions doctrine, the Court has held that other provisions of the Constitution, particularly First Amendment rights, may not generally be waived, even if the government provides a substantial benefit in return.²¹⁸

Application of the corruption objection to rights-commodification may help to resolve the waiver paradox: despite other problematic implications of the current plea bargain system,²¹⁹ an anticommodificationist understanding of unconstitutional conditions allows us to reconcile our acceptance of non-coercive waivers of rights in the plea bargain context with our rejection with rejection of effective purchases of fundamental rights under the unconstitutional conditions doctrine.

The touchstone of the Court’s current constitutional doctrine on plea-bargaining is antioercion. As the Court noted in *Boykin v. Alabama*, “[s]everal federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial,” including the privilege

²¹⁸ See Mazzone, *supra* note 169, at 801.

²¹⁹ See, e.g., *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (“In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt.”); TRIBE & MATZ, *supra* note 10, at 269 (“Over 95 percent of criminal cases now end with plea bargains, meaning that one of our most treasured constitutional rights—the right to a jury trial—plays only a bit part in today’s criminal law.”).

against compelled self-incrimination, the right to trial by jury, and the right to confront one's accusers.²²⁰ When a defendant pleads guilty, the Court will apply the same voluntariness standard as it applies in assessing the admissibility of defendant confessions, which must be "intelligent and voluntary."²²¹ As the *Boykin* Court cautioned, "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality" when the waiver of constitutional rights is at issue.²²²

At the same time, it is important to keep in mind that the Court's assessment of whether or not coercion was present is, at bottom, an unavoidably and "inherently normative inquiry."²²³ For example, in *Bordenkircher v. Hayes*, the Court held that the Due Process Clause is not violated when the prosecutor "carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty."²²⁴ The Court reasoned that even though, "confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."²²⁵ There is nothing inherently unconstitutional in the fact that "the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."²²⁶ The absence of coercion is the limiting principle,²²⁷ but given the inherently normative nature of the coercion inquiry, how does the Court distinguish between permissible threats, as in *Bordenkircher*, and impermissible coercion, as in a case like *United States v. Jackson*, which held that the "death penalty provision of the Federal Kidnapping Act imposes an impermissible burden upon the exercise" of the Fifth Amendment right not to plead guilty and the Sixth Amendment right to a jury trial?²²⁸

²²⁰ 395 U.S. 238, 243 (1969).

²²¹ *Id.* at 242.

²²² *Id.* at 242–43.

²²³ *Cf.* Cohen, *supra* note 106, at 107 ("Of course, what kind of proposals one does or does not have the right to make is itself an inherently normative inquiry.").

²²⁴ *Bordenkircher v. Hayes*, 434 U.S. 357, 358, 365 (1978).

²²⁵ *Id.* at 364 (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

²²⁶ *Id.* (internal citations and quotation marks omitted).

²²⁷ *See id.* at 363.

²²⁸ *United States v. Jackson*, 390 U.S. 570, 572 (1968); *see also Bordenkircher*, 434 U.S. at 363 (citing *Jackson* in support of idea that it is unconstitutional "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights").

Anticommodification principles cast some explanatory light on this question, although anticommodification alone is insufficient to dissipate the shadow of confusion surrounding the Court's approach to coercive plea-bargaining and the problem of the waiver paradox generally. When reconceptualized with a focus on corruption concerns about rights-commodification, the plea-bargaining system is significantly different from the unconstitutional condition in *AID*: whereas the offer in *AID*, if accepted, would have essentially amounted to a rights-commodifying exchange of rights for money, plea bargains involve a non-commodifying exchange of some rights (the Fifth Amendment right against self-incrimination and the Sixth Amendment jury-trial right) for another right ("the most elemental of liberty interests"²²⁹—freedom from imprisonment by one's government).²³⁰ From this perspective, the absence of coercion (despite the intuitionist nature of the inquiry) is a necessary but not sufficient condition for constitutional plea-bargaining.

A comparison of *Lefkowitz v. Turley*²³¹ and *Lefkowitz v. Cunningham*²³²—both of which invalidated New York statutes that burdened the defendants' right against compelled self-incrimination—with *Bordenkircher* illuminates the argument: even though all of these cases invoke the anticoercion paradigm, the Court's approach draws an implicit line between impermissible rights-commodification and permissible rights-substitution in the realm of constitutional criminal law. The waiver paradox thus appears less paradoxical: corruption concerns about commodification, which, I argue, partially animate and justify the unconstitutional conditions doctrine, simply do not apply in the context of plea bargains. Thus, the Court is implicitly more willing to accept plea bargains as a constitutional exercise of governmental power.

Lefkowitz v. Turley provides the clearest example of the Court's latent corruption concerns about the commodification of criminal procedures rights, even though the Court's analysis is framed in anticoercion terms.²³³ In *Turley*, the Court confronted a New York statute that required cancellation

²²⁹ Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (O'Connor, J., plurality opinion).

²³⁰ Cf. TRIBE & MATZ, *supra* note 10, at 270 (arguing that Justice Kennedy's opinion in *Lafley* conceived of plea-bargaining "as a substitution of one type of right (a fair plea-bargaining process) for another (a fair trial)"); Westermann, *supra* note 41, at 6 ("[F]or a citizen faced with criminal prosecution, exchanging future uncertain determination of her prosecution via her Sixth Amendment jury trial right for certain determination on terms acceptable to the citizen pursuant to a plea bargain constitutes an exchange of the jury trial right for what, in her view, is a superior direct substitute for such right.").

²³¹ 414 U.S. 70 (1973).

²³² 431 U.S. 801 (1977).

²³³ See *Lefkowitz v. Turley*, 414 U.S. 70, 82–83 (1973) ("A waiver secured under threat of substantial economic sanction cannot be termed voluntary.").

of existing public contracts and disqualification from transacting with the state for five years “if a contractor refuses to waive immunity or to answer questions when called to testify concerning his contracts with the State or any of its subdivisions.”²³⁴ In an opinion by Justice White, the Court invalidated the statute, reasoning that “[a] waiver secured under threat of substantial economic sanction cannot be termed voluntary.”²³⁵ In response to the State’s argument that this economic penalty did not amount to coercion, Justice White described the magnitude of the economic harm a private contractor (an architect, in this case) would face if banned from contracting with the State, even though private sector work would remain available.²³⁶ Although this response sounds in anticoercion principles, it is hard to find a principled reason that the threat of economic sanctions would be coercive whereas the threat of indictment on more serious charges in *Bordenkircher* would not.²³⁷

Four years after *Turley*, the Court applied similar logic to strike down another New York statute in *Lefkowitz v. Cunningham*. The statute at issue in *Cunningham* provided that, if a political party officer refuses to answer a question under grand jury subpoena or to testify about his conduct in office, then his position will be terminated and he will be “prohibit[ed] from holding any other party or public office for a period of five years.”²³⁸ The *Cunningham* Court reaffirmed the principle from *Turley* and other earlier cases that it is unconstitutional to impose “penalties having a substantial economic impact” when an individual refuses to waive the Fifth Amendment right against self-incrimination.²³⁹ In this case too, the Court found that several negative “economic consequences” followed from refusal to waive under New York’s statute, and therefore, these penalties “constitute[d] economic coercion.”²⁴⁰ Although the Court offered additional, alternative reasons why the statute constituted coercion, including damage to the officer’s prestige and reputation²⁴¹ and the burden on his First Amendment right “to participate in

²³⁴ *Id.* at 71.

²³⁵ *Id.* at 82–83.

²³⁶ *See id.* at 83–84 (stating that “an architect lives off his contracting fees as surely as a state employee lives off his salary”).

²³⁷ *Cf. Bordenkircher v. Hayes*, 434 U.S. 357, 358, 365 (1978).

²³⁸ *Cunningham*, 431 U.S. at 802–03.

²³⁹ *Id.* at 806; *see also* *McKune v. Lile*, 536 U.S. 24, 27–28 (2002) (reaffirming the continuing vitality of the “penalty cases,” which “establish that the potential loss of one’s livelihood through, e.g., the loss of employment, *Uniformed Sanitation Men Ass’n, Inc. v. Commissioner of Sanitation of City of New York*, 392 U.S. 280 (1968), and the loss of the right to participate in political associations and to hold public office, *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) are capable of coercing incriminating testimony”).

²⁴⁰ *Cunningham*, 431 U.S. at 807.

²⁴¹ *Id.*

private, voluntary political associations,”²⁴² it seems “economic coercion” alone remains sufficient to invalidate conditions on the exercise of an individual’s Fifth Amendment privilege.

With *Turley* and *Lefkowitz* in mind, the question remains: how can we reconcile the fact that an economic penalty on an individual’s refusal to waive their Fifth Amendment right against self-incrimination is impermissibly coercive with the idea that “a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty”²⁴³ does not amount to coercion? I am not alone in questioning the claim that coercion is absent in the latter situation, despite its constitutional validation in *Bordenkircher*.²⁴⁴ Given the inherent manipulability of the coercion

²⁴² *Id.* at 808. In *Cunningham*, the Court found the law “coercive for yet another reason” in addition to economic coercion: “It requires appellee to forfeit one constitutionally protected right as the price for exercising another.” *Id.* at 807–08. This language is admittedly in some tension with the argument here, that plea-bargaining is permissible because it involves the exchange of rights for other rights and is therefore not value-denigrating. Yet because *Cunningham* frames this as an alternative to the economic coercion argument based on the *Turley* line of precedent, it does not undercut the idea that the Court is implicitly motivated by a desire to prevent the commodification of rights. Moreover, *Cunningham* derives the principle that one cannot be made to forfeit a constitutional right as the price for exercising another from *Simmons v. United States*, which held that “when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.” 390 U.S. 377, 394 (1968). Yet this case is not really about a bargain where one right is traded for another. In *Simmons*, the defendant could not have waived his Fourth Amendment right, which had already been allegedly violated by an unreasonable seizure. *United States v. Garrett*, 371 F.2d 296, 297–98 (7th Cir. 1966), *aff’d in part, rev’d in part sub nom.* *Simmons v. United States*, 390 U.S. 377 (1968) (describing the alleged Fourth Amendment violation). The purported violation had already occurred by the time of the suppression motion; defendant was only pressured to waive a particular remedy (the exclusionary rule) in exchange for exercise of the Fifth Amendment privilege. *Cf.* Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1774 (1991) (“[T]he fourth amendment, in its substantive dimension, prohibits unconstitutional searches, not the admission of unconstitutionally seized evidence at trial. Because any violation of the Constitution occurred in the past, outside of court, admission of the evidence is not an independent violation. On this understanding of the exclusionary rule, whether evidence should be suppressed in a particular case, or in general, is thus a question for the law of remedies.”). Finally, the strongest form of the *Simmons* principle, which prohibits making the exercise of one right contingent on the waiver of another, is fundamentally inconsistent with *Bordenkircher*, and perhaps plea bargaining generally, which permits such bargains of rights for other rights. While I agree with the *Simmons* and *Cunningham* Courts that these respective bargains of Fourth and First Amendment rights should be invalidated as impermissibly coercive, these two decisions do not eviscerate the force of the argument that corruption concerns about rights-commodification can distinguish permissible plea bargains from unconstitutional conditions. Anticoercion is a backstop, necessary for constitutionality in any bargain with the government, but under my framework, such bargains must also refrain from denigrating the value of constitutional rights.

²⁴³ *Bordenkircher v. Hayes*, 434 U.S. 357, 358, 365 (1978).

²⁴⁴ *See, e.g.*, Allison D. Redlich, *False Confessions, False Guilty Pleas: Similarities and Differences*, in POLICE INTERROGATIONS AND CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY 86, 99 (G. Daniel Lassiter & Christian A. Meissner eds., 2010), <http://www.albany.edu/scj/documents/Chapter3Redlich2010APAbook.pdf> (“Many scholars posit this choice between remaining in jail

inquiry,²⁴⁵ I posit that perhaps the presence of coercion is not truly what separates *Turley* and *Lefkowitz* from *Bordenkircher*. The economic aspect of the burdens invalidated in *Turley* and *Lefkowitz* were also subject to an initial anticommodification objection from corruption. By financially penalizing the exercise of the Fifth Amendment right, the statutes in those cases effectively set up a potential transaction under which incommensurable goods (rights vs. money) would be exchanged.²⁴⁶ Furthermore, in both cases, had the individuals accepted the government's offer and waived their rights to protect their financial interest, the effective purchase of rights would be impermissibly value-denigrating, expressing a perceived value-equilibrium between rights and money.²⁴⁷

By using the malleable concept of coercion, the Court is able to implicitly express its disapproval of rights-commodification. This anticommodification idea not only helps to resolve the tension between *Turley* and *Lefkowitz* on the one hand and *Bordenkircher* on the other, but also it helps to reconcile the apparent paradox in the juxtaposition of plea-bargaining jurisprudence with the unconstitutional conditions doctrine. The corruption objection provides a principled means of distinguishing between cases like *AID*, where the government attempts to purchase rights, and plea bargains, which amount to an exchange of "goods" (i.e. constitutional rights) subject to the same mode of valuation.²⁴⁸

C. Federalism and the Commodification of Constitutional Structure

The most politically salient unconstitutional conditions issues in recent memory have arisen not in the context of individual rights, but rather in the context of Federalism. First, in the 2012 case of *NFIB v. Sebelius*,²⁴⁹ the Court determined that the "Medicaid Expansion" provision of the Affordable Care Act ("ACA") violated the unconstitutional conditions doctrine.²⁵⁰ As noted above, the *NFIB* case was groundbreaking: never before had the Court found that the federal government violated the Constitution by conditioning funding to states on their acquiescence to a federal policy demand.²⁵¹

awaiting a trial (in which they are likely to be found guilty) and a reduced sentence or probation via a guilty plea is one of coercion.").

²⁴⁵ See Cohen, *The Price of Everything*, *supra* note 31, at 691.

²⁴⁶ Cf. *supra* notes 147–49 and accompanying text.

²⁴⁷ Cf. *supra* notes 166, 167, 193 and accompanying text.

²⁴⁸ Cf. TRIBE & MATZ, *supra* note 10, at 270; Westermann, *supra* note 41, at 6.

²⁴⁹ *NFIB v. Sebelius*, 567 U.S. 519 (2012).

²⁵⁰ See *supra* notes 74–82 and accompanying text.

²⁵¹ See *supra* note 82 and accompanying text.

More recently, the Trump Administration reignited public interest in this obscure area of doctrine by issuing an executive order that threatened to withhold federal funds from “sanctuary jurisdictions,” such as Chicago, New York, Los Angeles, and San Francisco, unless those cities agree to assist federal efforts to deport undocumented immigrants.²⁵² In November 2017, Judge Orrick of the Northern District of California enjoined enforcement of the sanctuary cities executive order as a violation of the unconstitutional conditions doctrine (among other things).²⁵³ In doing so, he relied on *NFIB* to conclude that the Administration’s funding threat was “unconstitutionally coercive.”²⁵⁴ Judge Orrick’s reasoning closely tracks the Court’s analysis in *NFIB*: the executive order violates the Constitution because (1) compliance with federal immigration law was “not an unambiguous condition that the states and local jurisdictions voluntarily and knowingly accepted at the time Congress appropriated these funds”; (2) there was an insufficient nexus between such compliance and most federal funding to the county-plaintiffs;

²⁵² See Exec. Order No. 13768 § 9(a), 82 FR 8799, 8801 (Jan. 25, 2017); Diamond & McKirdy, *supra* note 11; Ilya Somin, *Federal Court Rules that Trump’s Executive Order Targeting Sanctuary Cities Is Unconstitutional*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/21/federal-court-rules-that-trumps-executive-order-targeting-sanctuary-cities-is-unconstitutional/?utm_term=.2cea5a90ce99.

²⁵³ *Cty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017). The scope of the injunction was nationwide. *Id.* at 1219. The Ninth Circuit affirmed the district court decision but vacated the nationwide injunction due to an absence of sufficient findings to support nationwide application. *See Cty. of Santa Clara v. Trump*, 897 F.3d 1225, 1231 (9th Cir. 2018).

²⁵⁴ *Cty. of Santa Clara*, 275 F. Supp. 3d. at 1202. Notably, two months earlier, Judge Harry D. Leinenweber of the Northern District of Illinois had issued a nationwide preliminary injunction against enforcement of the executive order. *City of Chicago v. Sessions*, 264 F. Supp. 3d. 933, 946 (N.D. Ill. 2017). Judge Leinenweber’s decision, however, did not reach the unconstitutional conditions issue. *See id.* at 943 (“We do not reach the question whether the notice and access conditions violate the Spending Clause because, regardless, Congress did not authorize the Attorney General to impose them.”); *id.* at 946 (“As the City has not argued that the compliance condition violates the Spending Clause, the Court now turns to the [statutory] question.”). The Seventh Circuit affirmed the grant of preliminary relief against the executive order (without relying on the unconstitutional conditions doctrine). *See City of Chicago v. Sessions*, 888 F.3d 272, 293 (7th Cir. 2018). In June of 2018, the Seventh Circuit agreed to review en banc the narrow question “whether the preliminary injunction issued by the district court was properly applied beyond the City of Chicago to encompass jurisdictions nationwide.” *City of Chicago v. Sessions*, No. 17-2991, 2018 WL 4268817, *1 (7th Cir. June 4, 2018). Most recently, in December 2018, Judge Edgardo Ramos of the Southern District of New York similarly ruled that the executive order was unconstitutional, granting summary judgment to a coalition of states and New York City in two consolidated cases. *See New York v. U.S. Dep’t of Justice*, 343 F. Supp. 3d 213, 221 (S.D.N.Y. 2018). Judge Ramos’s reasoning does not rely on the unconstitutional conditions doctrine; instead, he concluded that the (1) executive order was not authorized by statute; (2) even if it were, such authorization would be unconstitutional under the “anticommandeering doctrine”; and (3) the executive order was arbitrary and capricious in violation of the Administrative Procedure Act. *Id.* at 227–41.

and (3) the threat to deny “hundreds of millions of dollars” was “so coercive as to pass the point at which pressure turns to compulsion.”²⁵⁵

Unlike the individual rights cases described above, it is explicitly clear from cases like *NFIB* and *County of Santa Clara* that anti-coercion, rather than anti-corruption, is the primary normative underpinning of the unconstitutional conditions doctrine in *Federalism cases*. In *NFIB*, for example, the Court couched its constitutional criticism of the Medicaid expansion in unequivocally consent-based language: “In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”²⁵⁶

As a normative matter, however, the Court’s preoccupation with “states’ rights” qua autonomy (i.e. a purely anti-coercion, consent-based theory of unconstitutional conditions) is misguided, and anti-commodification discourse can help us understand why. First, as prior scholarship has foreshadowed,²⁵⁷ the lexicon of distributive equality fits much better with Federalism-based unconstitutional conditions cases than liberty-based arguments about the purity of states’ consent. Instead, the Federalism principle embodied in the Tenth Amendment should be understood as reifying a particular structural distribution of powers between the federal government and the states, and the Constitution intends that distribution to be permanent, rather than subjected to a market-based system of exchange. Just as in the market for consumer goods, there are distributive consequences to “marketizing” the federal-state distribution of power: in such a market, the party with greater financial means have more access to the “good” in question. So too with the allocation of powers between the Federal government and the States—were we to allow the logic of the bargain to operate without constraint, the distribution of powers embodied in Article I and preserved by the Tenth Amendment would be reduced to an initial distribution, which the states and Congress can redistribute according to the logic of market exchanges.²⁵⁸

²⁵⁵ *City of Santa Clara*, 275 F. Supp. 3d. at 1215 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

²⁵⁶ *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012).

²⁵⁷ See Sullivan, *supra* note 21, at 1492 n.342 (“The discussion that follows focuses on individual rights, but a parallel argument could be made about the preservation of state autonomy against federal encroachment. However broad or shrunken the reigning conception of the sphere of state autonomy, the argument would go, the federal government is barred from invading that sphere in order to preserve the values of diversity and local variation embodied in federalism.”).

²⁵⁸ This Section is adapted from a paper I wrote for the *Constitutional Silences* seminar at Harvard Law School in Fall 2015. Seminar: Constitutional Silences: Mapping Negative Legal Space, Harvard Law School, Nov. 4, 2015.

At the same time, although the corruption objection to commodification is perhaps more intuitively appealing in the context of individual rights than in Federalism, anticorruption provides further normative justification for a robust doctrine of Federalism-based unconstitutional conditions. Just as the free speech rights protected by the First Amendment are degraded by their valuation in financial terms, the Constitution also arguably enconces certain Federalist values as “civic goods” via the Tenth Amendment. By “reserv[ing] to the States respectively, or to the people” any “powers not delegated to the United States by the Constitution, nor prohibited by it to the States,”²⁵⁹ the Constitution expresses an implicit judgment that “the values of diversity and local variation embodied in federalism” should be considered civic virtues.²⁶⁰ The anticorruption objection to commodification explains why the unconstitutional conditions doctrine should prohibit the federal government to bargain for the sale of these governmental virtues as commodities.

If this anticommodificationist justification for the unconstitutional conditions doctrine is taken seriously in the Federalism context, then the wisdom of Judge Orrick’s decision, along with the wisdom of *NFIB*, becomes apparent. In fact, the anticommodificationist approach to these cases vindicates Justice Brennan’s dissent in *South Dakota v. Dole*,²⁶¹ perhaps the seminal unconstitutional conditions Federalism case, which invented the much-maligned “nexus” test in upholding a condition on federal highway funding.²⁶² A principled anticommodificationist would agree with Justice Brennan that “regulation of the minimum age of purchasers of liquor falls squarely within the ambit of those powers reserved to the States by the Twenty-first Amendment. Since States possess this constitutional power, Congress cannot condition a federal grant in a manner that abridges this right. The Amendment, itself, strikes the proper balance between federal and state authority.”²⁶³ In some ways, recent unconstitutional conditions cases may signal a turn in the direction of Justice Brennan’s approach to these questions.

²⁵⁹ U.S. CONST. amend. X.

²⁶⁰ Sullivan, *supra* note 21, at 1492 n.342; *see also* Heather K. Gerken, Windsor’s *Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 594 (2015) (describing how Federalist structure promotes dialogue and integration through “discursive benefits of structure”).

²⁶¹ 483 U.S. 203 (1987).

²⁶² *See* TRIBE & MATZ, *supra* note 10, at 278 (explaining Brennan’s pro-Federalism vote in *Dole* by his attention to “legal design,” reasoning that he saw “little distinction between threats to the states and threats to individuals: bribery that threatened one constitutional restriction posted a threat to all constitutional restrictions”).

²⁶³ *Dole*, 483 U.S. at 212.

IV. UNCONSTITUTIONAL CONDITIONS AS ANTICOMMODIFICATION: A NORMATIVE DEFENSE

Prior scholarship on unconstitutional conditions has generally rejected anticommodification discourse as a theoretical justification for the doctrine. As this Article demonstrates, however, more recent developments in anticommodification discourse can add significantly to our understanding of the theoretical groundwork for enigmatic questions of unconstitutional conditions.²⁶⁴ Finally, this Section seeks to prove that anticommodification arguments are not only descriptively relevant but also are a normatively desirable theory for approaching unconstitutional conditions questions.

Other commentators, by largely overlooking the explanatory power of anticommodification discourse, have failed to fully comprehend the nature of the corruption objection, and thus have brushed over the nuanced differences between different positions on the Nature of the Good spectrum.²⁶⁵ Sullivan, for example, described the anti-commodification argument as “the view that some attributes are so closely connected to the person that their alienation would injure personal identity.”²⁶⁶ Reasoning that “constitutional rights are not generally thought of as sacred or as gifts,” she therefore proceeded on the mistaken assumption that the corruption objection (or what she called “personhood theory”) can be used to justify unconstitutional conditions doctrine only if one accepts the pseudo-Kantian argument that some rights are too closely associated with human dignity to be more morally alienable.²⁶⁷

Past scholars have also generally dismissed the corruption argument against rights-commodification out of solicitude for “decisional autonomy” as the foundational value animating the constitutional rights at stake in unconstitutional conditions questions:²⁶⁸

Because these [constitutional] rights protect the decision itself, the distinction between exercise of a right and its waiver or sale is blurred. The less clear the distinction, the more barring sale will interfere with rather than protect the seller’s rights. Scrutiny of the reasons one chooses to worship or not, or to carry a pregnancy to term or abort, for example, appears inconsistent with protecting individual sovereignty over the decision. . . . Declaring a constitutional right nonrelinquishable for the rightholder’s own good thus

²⁶⁴ See generally Radin & Sunder, *supra* note 113 (charting the evolution of the commodification debate); SANDEL, *supra* note 31, at 202–03.

²⁶⁵ See *supra* notes 158–62 and accompanying text.

²⁶⁶ Sullivan, *supra* note 21, at 1484–85.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1486.

contradicts the premise of the rightholder's exclusive jurisdiction over those questions. . . .

Put another way, making decisions inalienable creates duties. . . . But such duty-creation is inappropriate for constitutional liberties that consist of freedom *for* potential private decisions, rather than freedom *from* them. To oblige the exercise of speech or privacy rights would misconstrue their meaning. If the right to divulge the secrets of government employment is deemed inalienable—for example, in order to prevent government from insulating itself from public criticism—is *Snepp* then obliged to speak?²⁶⁹ If the abortion right is deemed inalienable—for example, in order to equalize the power relationship between men and women on the whole—are pregnant women obliged to choose abortion?²⁷⁰

This rejection of an anticommodification justification for unconstitutional conditions doctrine is misguided for at least two reasons. First, the concerns articulated above about creating obligations to exercise constitutional rights like speech or abortion, misconstrue that nature of the anticommodification argument by virtually ignoring the corruption objection: the corruption argument against rights commodification does not object to a rightholder's ability to decline to exercise her right to speak or her right to have an abortion.²⁷¹ Instead, the corruption argument objects much more narrowly to the exchange of a right for a lower-value good (such as a monetary benefits) because such an exchange expresses a value-denigrating conception of the right.²⁷²

In the abortion rights context, for example, an anticommodificationist might express concern over the fact that federal funds must be used to subsidize childbirth costs even though states can decline to fund medically necessary abortions. But the anticommodificationist's objection is grounded in the fact that this funding disparity effectively translates into a governmental purchase of abortion-rights waivers.²⁷³ This

²⁶⁹ Sullivan is alluding to *Snepp v. United States*, 44 U.S. 507 (1980), in which the Supreme Court rejected a former CIA agent's argument that the First Amendment prohibited enforcement of an employment agreement he signed with the Agency, which "expressly obligated him to submit any proposed publication for prior review" by the CIA. See *id.* at 509 n.3; see also Jonathan C. Medow, *The First Amendment and the Secrecy State*, 130 U. PA. L. REV. 775, 776 (1982).

²⁷⁰ Sullivan, *supra* note 21, at 1486–87. Here, Sullivan is apparently alluding to *Harris v. McRae*, 448 U.S. 297 (1980), in which the Court upheld the constitutionality of the Hyde Amendment, which restricted the use of federal funds under Medicaid to pay for abortions, despite the fact that *childbirth* medical costs were funded by a "a comprehensive medical benefits program." Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 337 (1985).

²⁷¹ See *supra* Part II.

²⁷² Cf. *supra* notes 157–58 and accompanying text (discussing the Nature of the Goods Formulation) and notes 165–68 and accompanying text (discussing the Nature of the Transaction objection).

²⁷³ See Tribe, *supra* note 270, at 336–37 ("That holding [in *Harris v. McRae*] was rendered especially dubious by the government's simultaneous decision—at considerable net public cost—to

anticommodificationist position is fully consistent with concerns for individual decisional autonomy, but it also recognizes that individual autonomy is not the only value at stake in debates about rights-commodification; society may also want to preserve the character of constitutional rights as “sacred” and/or “civic” goods by prohibiting value-denigrating exchanges.²⁷⁴ Of course, the idea that some exchanges involving rights are off-limits is an inherently normative value judgment, requiring a tradeoff between pure decisional autonomy²⁷⁵ and commitment to civic values.²⁷⁶

Second, even if it were correct that anticommodification arguments are in tension with “the premise of the rightholder’s exclusive jurisdiction” over decisions whether to affirmatively exercise her rights, it is an oversimplification to imagine that the only reason society might “[d]eclar[e] a constitutional right nonrelinquishable” is to promote “the rightholder’s own good.”²⁷⁷ Instead, we might declare a constitutional right nonrelinquishable to insulate rights, as civic goods, from value-denigration by blocking their exchange in return for economic benefits. This clarification of the actual value-tradeoffs at stake in debates about the commodification of rights points to the second shortcoming of Sullivan’s commodification analysis: she incorrectly presumes that the Constitution requires maximization of individual autonomy and concomitant rejection of “duty creation.”²⁷⁸

take *childbirth* for the same poor women *off* the private market by funding the necessary medical care within a comprehensive medical benefits program.”); *supra* note 270.

²⁷⁴ *Cf. supra* note 161 and accompanying text.

²⁷⁵ *Cf. supra* notes 93–94 and accompanying text; *see also* Easterbrook, *supra* note 94, at 347. *See generally* Epstein, *supra* note 168.

²⁷⁶ *See, e.g.,* SANDEL, *supra* note 31, at 203.

²⁷⁷ Sullivan, *supra* note 21, at 1486.

²⁷⁸ *Id.* at 1487; *cf.* Radin, *supra* note 1087, at 1854 n.21 (“Nontransferable rights that at the same time may implicate affirmative duties fall into a category I think of as community-inalienability. Examples are the right-duty to vote in political elections and the right-duty to become educated.”).

Individual autonomy is undoubtedly a core constitutional value,²⁷⁹ undergirding much of our constitutional rights jurisprudence, including the areas of free speech,²⁸⁰ gay marriage,²⁸¹ privacy,²⁸² abortion,²⁸³ and certain aspects of constitutional criminal procedure.²⁸⁴ It is a mistake, however, to assume that constitutional rights exist solely to maximize rightsholders'

²⁷⁹ See, e.g., Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 286–87 & n.21 (2003) (claiming that “[a]utonomy is the basic value underlying liberal society” and that “autonomy forms the basis for our system of laws and does so appropriately.”); Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175 (1982) (“The rise of autonomy as a fundamental value can be discerned not only in cases involving contraception, abortion, and other family and life-style issues, and in the reliance on privacy conceptions in recent fourth and fifth amendment cases.”); see also Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 22 (2015) (identifying “the idea that *all individuals* are deserving in equal measure of personal autonomy and freedom to ‘define [their] own concept of existence’” as an important aspect of the fundamental rights jurisprudence of Justice Kennedy in particular).

²⁸⁰ See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (holding the state court’s application of state public accommodation law to require inclusion of gay, lesbian, and bisexual descendants of Irish immigrants in a privately-organized St. Patrick’s Day parade “violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the *autonomy to choose* the content of his own message” (emphasis added)); *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 739 (2011) (same) (quoting *Hurley*, 515 U.S. at 573); see also Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1137 (1993) (describing the “quaint focus on autonomy” of “[t]raditional First Amendment doctrine” and noting Supreme Court’s hostility to a less individualistic, autonomy-based First Amendment jurisprudence); Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1172 (1993) (disagreeing with Post that Court has adopted a “pure autonomy mode” and arguing instead that Court’s jurisprudence represents “a variation . . . that combines the concern with autonomy with a deep distrust of government efforts to regulate public debate.”).

²⁸¹ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy.”).

²⁸² See, e.g., *Carey v. Population Servs., Int’l*, 431 U.S. 678, 687 (1977) (“Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.”); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965); June Aline Eichman, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Family Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 362 (1979) (arguing “that only an autonomy-based right is normatively acceptable, because a family-based right is subservient to majoritarian sentiment, and therefore ultimately fails to vindicate the privacy interests of the individual”). See generally Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); SANDEL, *supra* note 206, at ch. 4 (describing evolution of Court’s privacy jurisprudence from *Griswold* onwards, and noting rise of an autonomy-based notion of privacy).

²⁸³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992) (“*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”); see also Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1701 (2008) (noting *Casey* protects “forms of decisional autonomy” for women).

²⁸⁴ See, e.g., Berg, *supra* note 279, at 322 (claiming goal of doctrinal rules like *Miranda* warnings and Sixth Amendment right to trial waiver doctrine is to protect individual autonomy); Smith, *supra* note 279, at 175 & n.6 (identifying *Smith v. Maryland*, 442 U.S. 735 (1979), *Katz v. United States*, 389 U.S. 347 (1967), and *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) as autonomy-driven decisions).

decisional autonomy.²⁸⁵ For despite the centrality of autonomy in our constitutional value system, autonomy-maximization must be balanced against other significant constitutional values. For example, in the context of a criminal defendant's right to self-representation, as recognized by *Faretta v. California*,²⁸⁶ the autonomy value animating the right must be balanced to some extent against the criminal justice system's interest in "fairness, order, efficiency, and accurate outcomes"²⁸⁷; for this reason, the Court held in *Martinez v. Court of Appeal of California*²⁸⁸ that *Faretta's* right to self-representation did not extend to appellate cases. Furthermore, as Margaret Radin argues, some rights, such as the right to vote, actually might be better conceptualized simultaneously as duties that "ought to be exercised."²⁸⁹ The set of rights that fall into this category of "right-duties" will likely be more expansive if "one's views about the nature of the person and the nature of social life" are more communitarian; still, with respect to voting at least, there seems to be a general societal consensus that commodification should be impermissible, despite the undeniably "autonomy-restricting effect" such market-inalienability rules have on individual voters.²⁹⁰

Nor should we reject the anticommodification objection to unconstitutional conditions on the grounds that barring exchanges of rights would place individuals under duties.²⁹¹ This aversion to "duty-creation" is symptomatic of a wholly individualistic, autonomy-maximization theory of constitutional rights, which simply fails to account for the structural, relational nature of certain rights.²⁹² Once one recognizes that certain rights

²⁸⁵ See Sullivan, *supra* note 21, at 1486–87. See generally Berg, *supra* note 279, at 285 (developing an approach to waiver of rights "designed to maximize individual autonomy").

²⁸⁶ 422 U.S. 806 (1975).

²⁸⁷ Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 622 (2005).

²⁸⁸ 528 U.S. 152, 153 (2000) ("[A]lthough *Faretta's* conclusion that a knowing and intelligent waiver of the right to trial counsel must be honored out of respect for individual autonomy, [*Faretta*] is also applicable in the appellate context, this Court has recognized that the right is not absolute" (internal citation omitted) (citing *Faretta v. California*, 422 U.S. 806, 834 (1975))).

²⁸⁹ See Radin, *supra* note 108, at 1854 n.21.

²⁹⁰ Karlan, *supra* note 208, at 1460.

²⁹¹ See *id.*; Radin, *supra* note 108, at 1854 n.21.

²⁹² This failure is rendered all the more puzzling by the fact that Sullivan herself describes contemporaneous literature on structural, or relational, conceptions of rights, including Kreimer, *supra* note 96, Tribe, *supra* note 270, and others who "have argued for limits on government employees' power to sell their rights to divulge information about government acquired on the job, on the ground that the First Amendment protects more than speaker autonomy: it embodies a structural interest in well-informed public deliberation that even voluntary waivers will hinder." Sullivan, *supra* note 21, at 1479. To be fair, Sullivan's preferred theory of unconstitutional conditions as protecting a systemic distribution of constitutional liberty has a strong affinity with these conceptions of rights as structural or relational. See *id.* at 1506. Even so, her analysis papers over the relational conception of rights as a possible justification for imposing duties of nonwaivability on rightsholders when in her discussion of commodification; she simply states "[t]he relationship between 'structural' or 'relational' concerns and *inalienability*, however, remains

serve a structural, relational, and public purpose, rather than a solely individual-regarding purpose, then the imposition of an individual duty to refrain from exchanging rights does not seem as problematic as prior scholarship has assumed. In fact, as a descriptive matter, a relational understanding of constitutional rights has actually motivated courts to strike down certain conditional waivers of rights as unconstitutional. Thomas Merrill, for example, argues “when constitutional rights are perceived by courts as having a large public goods²⁹³ dimension, courts will be reluctant to enforce contracts in which individuals waive the exercise of the right in exchange for some discretionary benefit.”²⁹⁴

Other scholars have also argued in a normative register that certain rights should be nonwaivable because they are relational, rather than individual, and serve compelling public values. Laurence Tribe, for example, argues that certain rights are “relational and systemic” and therefore nonwaivable by individuals, given that “individuals are not their sole focus.”²⁹⁵ Rights such as those guaranteed by the Fourteenth Amendment’s Equal Protection Clause and the First Amendment’s Establishment Clause correspond to “systemic norms,” which protect not just decisional autonomy, but also the “structur[e] of power relationships to avoid the creation or perpetuation of hierarchy in which some perennially dominate others.”²⁹⁶ As Tribe argues, the systemic, relational character of rights like equal protection and due

unclear.” *Id.* at 1479. And while she promises that “the next sections [will] explore whether arguments for inalienability in the context of private market relationships can help to support arguments for inalienability in the unconstitutional conditions context,” *see id.*, the article never revisits the relevance of the relational-rights theory.

²⁹³ Under Merrill’s analysis, rights have a large public goods dimension when “the exercise of the right not only produces a private benefit for the rights-holder, but also generates positive externalities that benefit third parties or society more generally.” Merrill, *supra* note 212, at 862.

²⁹⁴ *Id.*; *see also* Robert F. Nagel, *A Comment on “Constitutional Rights as Public Goods,”* 72 *DENV. U. L. REV.* 889 (1995) (arguing that Merrill’s analysis results in a paradox where the “more crucial a right is to [] an individual, the more free the government should be to induce [an individual] not to exercise it”); David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 *VA. L. REV.* 519, 573 (1988) (noting, in analysis of waiveability of constitutional rights, “the willingness of the courts to expand notions of standing in the first amendment area reflects an awareness of the interests of third persons and the public generally in unrestricted speech.”).

²⁹⁵ Tribe, *supra* note 270, at 333; *see also* Hamburger, *supra* note 15, at 538–39 (arguing against “assumption that constitutional rights are [even] sometimes of merely personal interest” because rights exist to benefit “all persons within the protection of the law, including the groups and organizations formed by individuals” and “the rights protected by American constitutions were understood as limits on government imposed by the people” that cannot be waived by individual consent); *cf.* Radin, *supra* note 107, at 1854 n.21 (“Nontransferable rights that at the same time may implicate affirmative duties fall into a category I think of as community-inalienability . . . the more communitarian one’s views about the nature of the person and the nature of social life, the more all justifiable inalienabilities will be related to community.”). As examples of community inalienable rights, Radin identifies “the right-duty to vote in political elections and the right-duty to become educated.” *Id.*

²⁹⁶ Tribe, *supra* note 270, at 332–33 & n.14.

process militate against their treatment as market goods, which can be waived in exchange for money.²⁹⁷ For this reason, the franchise cannot be restricted to those who pay a poll tax nor can access to divorce costs be contingent on payment of court fees.²⁹⁸ Similarly, Jason Mazzone has argued for a “value-oriented approach to waiver” of constitutional rights, under which an “individual should not be permitted to waive a . . . right if waiver would, under the circumstances presented, undermine a substantial public value the right protects.”²⁹⁹ On this view, an individual may freely waive their rights only if no compelling public value is at stake.³⁰⁰

When one acknowledges that other systemic values besides individual decisional autonomy underlie certain constitutional rights, then the imposition of duties prohibiting waiver on rightsholders seems justified.

²⁹⁷ *Id.* at 334 (“Yet it is equally clear that government’s freedom to leave distribution to the market does not extend, under our Constitution, to *all* the things someone might need in order to exercise various constitutional rights—even those not clearly rendered affirmative by the constitutional text itself.”); see also Steven G. Gey, *Contracting Away Rights: A Comment on Daniel Farber’s “Another View of the Quagmire,”* 33 FLA. ST. U. L. REV. 953, 954–55 (2006) (arguing that, in addition to the individual-regarding function of rights, another “equally important function of rights is to structure the government’s relationship with the entire citizenry—including those who have no immediate intention of exercising the rights in question”). Sullivan’s normative justification of unconstitutional conditions doctrine as a means of preventing redistribution does have some resonance with Professor Tribe relational rights argument, but Sullivan’s approach, unlike mine, “focuses not on whether rights may ever be alienated, but rather on whether government may redistribute them.” Sullivan, *supra* note 21, at 1491 n. 336.

²⁹⁸ Tribe, *supra* note 270, at 334–35 (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966)); *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

²⁹⁹ Mazzone, *supra* note 169, at 865.

³⁰⁰ *Id.*

CONCLUSION

If the goal of this Article were to untwine the Gordian Knot of the unconstitutional conditions doctrine, it certainly did (and perhaps inevitably would) fail. The goal here was considerably more modest, however, aiming at least to pull loose a few more threads. In pursuit of this goal, the Article marshaled anticommodification discourse and attempted to recover its relevance, despite its rejection by previous scholars. Consequently, the premise was partially normative: for reasons grounded in either individual dignity or civic values, constitutional rights should not be treated as commodities. Yet even if these normative arguments are rejected, the Article suggests that there is strong evidence that, at least in the First Amendment and Federalism contexts, the arguments against constitutional commodification have explanatory power in understanding how the Court has treated unconstitutional conditions questions. This explanation of the doctrine resonates with and provides additional normative support for the arguments made by scholars³⁰¹ against the permissibility of even voluntary exchanges of rights, especially free speech rights, for financial benefits. In addition, the anticommodification approach elucidates an aspect of the waiver paradox, providing a principled means of distinguishing impermissible unconstitutional conditions from permissible plea bargains.

This Article also has further implications to be explored in later research. For example, the anticommodification corruption objection to rights commodification also explains and normatively justifies the Court's stricter approach to unconstitutional questions in fundamental rights contexts, like Free Speech, as compared to constitutionally-protected economic rights, like those secured by the Takings Clause of the Fifth Amendment.³⁰² Because the Takings Clause protects an economic right, money is by definition an adequate substitute for the right. Therefore, concerns about value-denigration do not apply in Takings cases. The ideas in this paper also carry doctrinal implications: if accepted, the premise of the corruption argument against commodification of rights would require revision of certain constitutional doctrines, such as the "abortion funding cases" and

³⁰¹ Hamburger, *supra* note 15, at 480–81 ("It . . . becomes apparent, at least as to rights and structural limits, that consent is irrelevant."); Mayer, *supra* note 101, at 1049 ("[T]he government is not permitted to buy an organization's speech absent a compelling governmental interest in doing so and then only if the purchase is done in a manner that is narrowly tailored to serve that interest.").

³⁰² See Westermann, *supra* note 41, at 15 (purporting to "resolve[] the apparent inconsistency in the way the Court applies the unconstitutional conditions doctrine strictly with respect to First Amendment rights but flexibly with respect to constitutionally protected economic rights such as entitlements related to land use").

unconstitutional conditions cases involving Fourth Amendment waivers.³⁰³ Although these threads of the unconstitutional conditions knot must (for now) remain in Gordian entanglement, hopefully this paper provided some tools, if not the proverbial Alexandrian sword, to aid future efforts.

³⁰³ See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) (upholding mandatory home visits by welfare officials as condition of receiving public benefits); *see id.* at 327–28 (Douglas, J., dissenting) (“Whatever the semantics, the central question is whether the government by force of its largesse has the power to ‘buy up’ rights guaranteed by the Constitution.”); cf. Steven D. Schwinn, *Reconstructing the Constitutional Case Against Mandatory Welfare Home Visits*, 42 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 42 (2008).