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CONDITIONAL SPENDING AND THE (GENERAL) CONDITIONAL OFFER PUZZLE

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1. TWO APPROACHES

There are two basic ways to think about the constitutionality of conditional funding offers from the national government to the states: as a localized problem subject to a localized solution, or as instantiating a broader problem subject to a more general analysis. The first perspective views conditional spending grants as, essentially, an issue of federalism. The second views it under the rubric of what is sometimes called “the unconstitutional conditions problem.”

In *NFIB*, the Court adopted the first approach—what I will call the “particularist perspective.” That is, all Justices analyzed the constitutionality of the Medicaid expansion by reference to concepts, tests, and principles that, as far as the several opinions revealed, the authors thought particular to conditional funding grants offered from the federal government to the states. No Justices drew upon, or sought to further develop, principles or analytical frameworks that purported to be general in the sense of applying to other sorts of conditional offers of benefits—for example, conditional proposals made *to individuals* rather than to states, or made *from state* governments rather than from the national government, or made *of* an offer to provide some benefit other than cash or cash equivalent. The Court’s particularism was consistent with spending power precedents and with a dominant, though not universal, scholarly trend.

Perhaps, though, the Court’s embrace of the particularist perspective was mistaken. In this essay, I explore the “generalist” alternative of analyzing the conditional spending problem as a subtype

of the more general problem of “unconstitutional conditions,” or what I prefer to call “the conditional offer problem” or “the conditional offer puzzle.”

The conditional offer problem arises whenever government offers a benefit that it is not constitutionally obligated to provide on condition that the offeree waive some constitutional right or protection. This, of course, describes the ACA’s Medicaid expansion: Congress offered states Medicaid funds earmarked for certain classes of beneficiaries—funds that are gratuities, constitutionally speaking—on condition that recipient states agree—as, constitutionally speaking, they need not—to partner with the federal government to provide medical insurance for other beneficiary classes. But the characterization is equally apt of countless other superficially dissimilar governmental offers. For example, government offers employment on condition that successful candidates agree not to exercise varied constitutional rights, including rights of expression; land use bodies offer zoning variances on condition that property owners relinquish particular property rights or grant easements that the state could not command (without paying just compensation); prosecutors offer reduced sentences or charges, on condition that defendants waive the rights to plead not guilty and to put the prosecution to its burden of proof.

The nearly ubiquitous tactic of conditioning benefits (defined as any sort of advantage that the governmental offeror is not constitutionally obligated to provide) on an offeree’s waiver of constitutional protections is rendered a “problem” or “puzzle” by two facts. First, everybody agrees that the tactic is sometimes permissible and sometimes impermissible. Second, courts and commentators are far from converging on any sorting mechanism. Despite voluminous case law and the efforts of many leading constitutional theorists over many generations,¹ judges and scholars have not agreed on a test or framework for determining whether a given conditional offer passes constitutional muster.

¹ See, e.g., Hale (1935), Van Alstyne (1968); Epstein (1988); Sullivan (1989).

Indeed, many scholarly defenders of conditional-offer particularism are moved precisely by the seeming failure of so many conditional-offer general solutions.²

I believe that such skepticism of conditional-offer generalism is misguided, and certainly premature. In my view, general normative principles and analytical frameworks *do* govern conditional offer problems that arise in diverse domains of constitutional law. The appropriate frameworks consist of many moving parts, ensuring both that they can accommodate relevant domain-particular considerations and that resolution in individual cases won't be remotely algorithmic. This essay criticizes the particularistic test employed in *NFIB*; sketches a competing general account; and explains why that alternative account offers prima facie support for the states' challenge to the Medicaid expansion.

2. THE ANALYSIS IN *NFIB*: THE ANTI-COMPULSION PRINCIPLE

Two opinions in *NFIB* constituted a majority on the Spending Clause issue: Chief Justice Roberts's for himself and for Justices Breyer and Kagan, and the joint opinion of Justices Scalia, Kennedy, Thomas and Alito. At first blush (I will show below that the Chief Justice's opinion is more ambiguous than initially appears), the two opinions sounded the same theme—namely, that the Medicaid expansion violated what the joint opinion termed “the anti-coercion principle.”

“Coercion” is a protean term: it can mean many things. Importantly, the two opinions seemed to mean essentially the same thing by it. To a first approximation, the *NFIB* Court understood coercion as the exertion of so much pressure on another's choice set so that she could not realistically do otherwise than the offeror desires or demands. Because I will reserve the term “coercion” for a nearby but distinct idea, I will rename the principle that the joint opinion explicitly invoked the “anti-

² See, e.g., Sunstein (1990); Schauer (1995); Alexander (1995).

compulsion principle.” The constitutional vice of the Medicaid expansion, on this view, is that it “compelled” the states to accept.

Let us assume *arguendo* that the Medicaid expansion did violate the majority’s “anti-compulsion” principle, i.e., that it compelled states to acquiesce, in the sense that they could not realistically or rationally decline. On that assumption, the critical question is legal not factual. It is whether the Court was correct that its anti-compulsion principle represents a true or correct principle of constitutional law.

To support its “anti-compulsion principle,” the majority advanced three main arguments. First, it invoked *Dole*’s suggestion that a conditional spending offer would exceed Congress’s spending power if it were “so coercive as to pass the point at which ‘pressure turns into compulsion.’”³ Both the Chief Justice and the joint opinion understood this language to signal that the relevant constitutional line turned on the magnitude of pressure exerted upon the state offeree to accept the federal proposal, and also understood the magnitude of pressure in terms of something like the rational acceptability, to the state offeree, of the alternatives.

Second, and relying upon other Spending Clause precedent,⁴ the majority reasoned that the exercise of Congress’s conditional spending authority was governed by contract law principles, that such principles establish that “the legitimacy of Congress’ power to legislate under the spending power . . . rests on whether the State *voluntarily* and knowingly accepts the terms of the ‘contract,’”⁵ and that voluntariness *vel non* depends on whether the state has a real or meaningful choice in the matter.

³ *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

⁴ *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1 (1981).

⁵ 132 S.Ct. at 2659–60 (joint opinion) (emphasis in original). Roberts relies squarely on the contract law analogy too. See 132 S.Ct. at 2602 (Roberts, C.J.).

Third, and drawing upon a supposed constitutional principle (previously advanced in the “anti-commandeering” cases, *New York v. United States*⁶ and *Printz v. United States*⁷) that forbids or disfavors action by the national government that “blurs the lines of political accountability,” the majority concluded that it is unconstitutional for Congress to effectively “compel[] the States to take unpopular actions” because “it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”⁸

3. THE PERILS OF PARTICULARISM

These three arguments provoke two observations.

First, as far as the two approaches identified in Section 1 are concerned, all three reasons are particular, not general. This is plain with regard to the first and third reasons. *Dole* directly concerned the constitutionality of conditional spending grants from Congress to the states, and the decision did not purport either to draw from, or to contribute to, a trans-substantive analysis of conditional offers. And the “blurred accountability” principle is a normative political theory regarding federalism: it concerns the distribution of power among sovereigns with overlapping authority, and bears no implications for conditional offers extended directly to individuals. In modest contrast, the contract law analogy *is* potentially general enough to govern or inform analysis of all conditional offers of constitutionally gratuitous benefits. In practice, though, it appears almost exclusively in cases involving conditional grants of federal funds to states, disappearing when offerees are individuals or when the benefits offered are something other than money.

⁶ 488 U.S. 1081 (1992).

⁷ 521 U.S. 898 (1997).

⁸ *NFIB*, 132 S. Ct. at 2660-61 (joint opinion).

Second, all three arguments in support of the legal premise that the Constitution prohibits conditional federal spending offers that “compel” state acceptance are remarkably weak.⁹ As the governing precedent, *Dole* might seem to provide strong support for an “anti-compulsion” principle. But that appearance is misleading, largely because one can doubt whether this principle, described in either “anti-compulsion” or “anti-coercion” terms, truly formed part of *Dole*’s holding. The *Dole* majority could have straightforwardly announced that any condition attached to federal spending grants to the states must satisfy *five* requirements: it must promote the general welfare, be unambiguous, be germane to the federal interest in the spending program, not induce states to violate the Constitution, and not coerce (or compel) the states into accepting. Instead, Chief Justice Rehnquist’s opinion listed the first four restrictions in a single paragraph and then, after determining that none condemned the condition on highway funds there at issue, introduced *Steward Machine*’s ruminations on coercion almost as an afterthought. Partly for this reason, one circuit court had declared, long before *NFIB*, that “the coercion theory is unclear, suspect, and has little precedent to support its application.”¹⁰ Surely this expositional curiosity afforded Justice Ginsburg some grounds for concluding that *Dole* only “mentioned, but did not adopt, [this] further limitation.”¹¹

If *Dole* provides less than robust support for the “anti-compulsion principle,” the majority’s two other arguments are even lamer. The Court’s use of the contract-law analogy falls little short of legal malpractice. While “coercion” does render a contract voidable, contract law’s meaning of that term is much narrower than the *NFIB* majority’s. As the Restatement of Contracts emphasizes, that one party had “no choice” but to accept a contract or a contractual condition is never sufficient to make the contract voidable. There must always be, in addition to the lack of “reasonable alternative[s],” an

⁹ Given space constraints, the argumentation in support of these contentions is much abbreviated. For fuller development, see Berman (2013): 1295-1308.

¹⁰ *Kansas v. United States*, 214 F.3d 1196, 1202 (10th Cir. 2000).

¹¹ 132 S.Ct. at 2634 (Ginsburg, J.).

“improper threat.”¹² Importantly, this is not a puzzling or controversial technicality: a market economy could not function well if contracting parties could void their commitments just because they had no reasonable choice other than to enter into the agreement. Yet the requirement that the offeror’s “threat” be “improper” is absent from the *NFIB* majority’s deployment of the contract law analogy.

Finally, the “blurred accountability” argument draws a constitutional line in an implausible place because the anti-compulsion rule marks off for special, disfavored treatment the polar case while permitting adjacent cases on the relevant continuum. On the majority’s approach, Congress is entitled to attach conditions to its spending programs that exert so much pressure on the states as to make it very hard for state officials to decline. But when the magnitude of pressure that a conditional offer exerts crosses the magical line that separates “real hard choice” from “no real choice,” and thus “pressure” from “compulsion,” the offer is invalid. Yet surely a federal offer that gives states “no choice” but to accept threatens accountability *less* than does an offer that puts substantial pressure on the states while leaving them some choice in the matter. In the former case, a modestly informed voter can discern that the policy she dislikes was forced upon the states and therefore is the responsibility of federal agents. In the latter, it will require vastly more sophistication for the voter to develop an informed view regarding whether the pressure was such that, all things considered, the state agents should or should not have acquiesced. Accordingly, a concern that lines of political accountability ought to remain crisp, even if of constitutional stature, cannot justify the rule the majority defends.

In sum: (1) the legal principle that grounded the majority’s holding with respect to the Medicaid expansion maintains that Congress may not confront states with spending proposals that the states could not realistically reject; (2) as far as the Court’s reasoning reveals, this “anti-compulsion principle” is particular to the context of federal conditional spending proposals extended to the states and not part

¹² Restatement (Second) of Contracts § 2-302 cmts. a-b.

of a more general framework for resolving conditional offer puzzles that arise elsewhere; and (3) the anti-compulsion principle is doubtful¹³ and poorly defended.

A natural hypothesis is that the weakness of the *NFIB* Court's anti-compulsion principle derives from its particularism. That is, perhaps the Court advanced the wrong principle precisely because it viewed the problem from the wrong perspective. Perhaps it would have adopted a different and more credible constitutional rule had it gone the generalist route. That hypothesis animates the remainder of this essay.

4. OF COMPULSION AND COERCION

I agree that coercion constitutes the heart of a general solution to the conditional offer problem.¹⁴ But what I mean by coercion is different from what was meant in *NFIB*. As I will use the term, coercion involves an attempt by an agent to induce a subject to do as the agent wishes by the particular means of exerting wrongful pressure on the subject's freedom to do otherwise. And the paradigmatic way of exerting wrongful pressure is by conditionally threatening to wrong the subject if she does not comply with the condition. I believe that this is a good stab at explicating the concept of coercion, but little is lost by treating it as a stipulated definition of the word.

Take a stock example: the gunman's conditional threat communicated via the demand "your money or your life." This threat constitutes both coercion and compulsion. It constitutes coercion because the act threatened—to kill the subject—is wrongful. It constitutes compulsion because that same act is so disagreeable to the subject as to make it true, in a normatively meaningful (but not literal) sense, that she has "no choice" but to accede. The gunman engages in both coercion and compulsion

¹³ For an extended defense of this particular proposition see Glenn Cohen's essay in this volume.

¹⁴ The heart, but not the entirety. A conditional offer that is not coercive might be unconstitutional in virtue of its purposes or effects. See Berman (2001): 42-44. For our purposes, the non-coercion-based grounds of unconstitutionality may be safely put aside.

because the pressure exerted by the prospect of the act threatened is both wrongful in character and very great in magnitude.

Contrast the gunman case with a schoolyard example. John tells his friend Miles, in strict confidence, that he fancies Priscilla. Miles then threatens to blab to Priscilla unless given John's pocket watch. Miles has engaged in coercion, or has issued a coercive threat, just in virtue of the fact that the act he conditionally threatens—to reveal a confidence—would be wrongful. And coercion is always a pro tanto wrong. But, very plausibly, Miles has not engaged in compulsion and if John does accede to the demand or the condition he has not been compelled. That is because the prospect that John faces if he refuses is not so onerous as to make it the case that he had “no choice” in a normatively robust sense. Imagine that John does comply with Miles's demand and that, sometime later, John's father inquires about the watch, a family heirloom. John's protest that he was compelled to give it away or that he had “no choice” other than to give it to Miles might not persuade. Yet John's father would agree that Miles committed a wrong—namely, the wrong of coercion.

In short, we have on the table two distinct but kindred concepts, “compulsion” and “coercion.” Section 2 observed that, pursuing a particularist line, seven Justices in *NFIB* found the Medicaid expansion to violate an “anti-compulsion principle.” Section 3 criticized the arguments they gave for this principle. I will further maintain both that the Constitution does embody an anti-coercion principle, and that this principle governs the constitutionality of conditional offers generally.

5. COERCIVE THREATS TO WITHHOLD BENEFITS

Immediately, though, we confront a worry. The conditional offer puzzle (or the “unconstitutional conditions problem”) arises only when the act that the government threatens is to withhold a benefit to which the offeree is not constitutionally entitled. (Strictly speaking, every “conditional offer” is conjoined to a “conditional threat.” So we can comfortably refer to the “threat”

and the “act threatened” even with respect to proposals more naturally described, overall, as offers. Thus, the merchant’s “two-for-one” offer also includes the “threat” not to give two if the would-be consumer does not purchase one. Here, “threat” is an analytic concept, not a normative one.)¹⁵ Therefore, many have contended, the acts that the conditional offers that interest us threaten can never be wrongful in a constitutional sense, in which case the conditional proposal can never amount to constitutionally cognizable coercion.¹⁶

This contention depends upon the assumption that if some boon is not a constitutional entitlement, hence amounts to a constitutional “benefit,” then government may withhold it for any reason at all. That, in my view, is a mistake. Reasons matter. Though the state may not be obligated to provide some benefit (a sum of money, a zoning variance, a criminal sentence of X years rather than X+n, or what-have-you), nonprovision of the benefit might nonetheless violate the Constitution if animated (or otherwise “infected”) by the wrong reasons. (Caveat: Ultimately, of course, much more needs be said about the ontology and epistemology of reasons or purposes in this context. For this short essay, however, promissory notes must suffice. Readers who are very attuned to these issues will notice that the exposition that follows elides potentially important distinctions.)

Blackmail provides an analogy. If you know (counterfactually!) that I am having an affair, you may tell my wife. I am not (absent other facts) legally or morally entitled to your silence and you are not legally or morally obligated to keep mum. Yet if you offer me your silence on condition that I pay \$10,000 you have engaged in a legal and moral wrong, the wrong denominated “blackmail.” How this can be has perplexed criminal law scholars, moral philosophers, and economists for generations.¹⁷ The solution to the puzzle, I submit, has two components. First, although you are not required to stay silent,

¹⁵ See, e.g., Farnsworth (1982): 333; Berman (2002): 55-59.

¹⁶ See, e.g., Sullivan (1988): 1450; Seidman & Tushnet (1996): 79; Alexander (1989); Bagenstos (2008): 373.

¹⁷ See the articles collected in “Symposium: Blackmail,” *University of Pennsylvania Law Review* 141 (1993): 1565-1989.

you do wrong me if you disclose my infidelity with knowledge of the harm it would cause and do not in fact believe that the disclosure is morally warranted all things considered, or if you are not in fact motivated by the potentially justifying reasons. Second, the fact of your conditional offer of silence is evidence that supports a defeasible inference that you would lack the right beliefs or purposes were you to make the disclosure you threaten. Of course, this is the barest sketch of the answer.¹⁸ The key point is that this account explains how blackmail can be legally and morally wrongful even though the offeree is not entitled to the “benefit” offered (i.e., silence). And it is an account that grounds the wrongfulness of blackmail in its coerciveness.

Return now to constitutional law. Suppose I am correct that it is wrongful, constitutionally speaking, for government to withhold a benefit that it is not constitutionally obligated to provide when it does so for the wrong reasons. What reasons are wrong?

Here’s a proposal: government may not take the expected fact that a proposed action would make exercise of some constitutional right more costly, burdensome, or difficult as a reason to favor that action. Naturally, government conduct (acts and omissions alike) affects the exercise of rights in diverse ways. Raising (or not raising) postage rates affects the cost and incidence of exercising expressive rights. A regulation of some substance or activity could make it harder or easier for members of a religion to perform a prescribed religious ritual. The default rule is that government may act despite anticipating or foreseeing that it would make exercise of a right more costly or difficult.¹⁹ In other words, that an action would have a deleterious effect on the exercise of constitutional rights is *not* a constitutionally decisive reason *against* the action. But that does not entail that the state may treat

¹⁸ I have defended it at length elsewhere. For my initial motive-centered account, see Berman (1998); for my revised belief-centered account, see Berman (2011). Concededly, this is a proposal, not settled wisdom. But for some empirical evidence that my account accords best with lay intuitions, see Robinson, Cahill & Bartels (2010).

¹⁹ This is a lesson of, e.g., *Washington v. Davis*, 426 U.S. 229 (1976), and *Employment Division v. Smith*, 494 U.S. 872 (1990).

expectation of such an effect as an affirmative reason *in favor* of the action. The proposal on the table is that it may not.

Government is under some form of obligation to, let us say, respect constitutional rights. That government may not take the fact that an action would burden a right as a consideration favoring that action is one aspect of this constitutional obligation of respect. Thus, for example, although government may build a road *despite* the burdens the road would foreseeably impose on Native American religious practices, it may not build the same road *because* it would burden such practices. Likewise, although government may have countless legitimate reasons not to provide welfare assistance for the poor, that the payments it contemplates might (through causal chains the details of which need not concern us) make it easier or less costly for poor people to vote or to worship or to bear arms is not among them.

When applying this proposal to conditional benefit offers, it will be crucial to clearly distinguish two related actions that government actually or hypothetically performs: the action of issuing a given conditional proposal, and the action that the proposal threatens (in these cases, the action of not providing a benefit). At this stage of the analysis we are focused on the latter, not the former. Because not providing a benefit upon an offeree's refusal either to waive a right or to exercise it in a preferred way burdens that decision (relative to the alternative action of providing it), the hypothetical or conditional government action of not providing the offered benefit is unconstitutional if it would be done *for the purpose* of imposing that burden or cost, as when done for the further purpose of discouraging future noncompliance with the condition, by this offeree or similarly situated others.

To forestall a common misunderstanding: my position is *not* that government may never act for the purpose of inducing a rightholder to waive the protection of a constitutional right or to exercise her right in a manner that the government prefers. Often, though not invariably, government is

constitutionally permitted to offer conditional benefits as an intended means to achieve precisely that.²⁰ Conditional spending would always be fruitless otherwise. But recall the two acts I insisted upon distinguishing. That the *issuing of a proposal* is done for the reason of inducing the offeree to waive a constitutional protection does not entail that *carrying out the act threatened* must also be done for that reason. In many or most cases where the deployment of such conditional offers is permitted, government would lack affirmative reason to provide the offered benefit if the offeree refuses to abide by the stated condition, in which event government need not act, when subsequently not providing the offered benefit, for the purpose of inducing the offeree to waive a constitutional protection.

Prosaic offers not involving the government might make this point clearer: When I offer you \$10 for the shirt off your back, the reason or purpose for my issuing the offer is to induce you not to exercise your right to keep your shirt. But if you decline, then what best explains my consequent failure to provide you with the benefit of \$10 is simply that I lack affirmative reason to provide it and not that I have affirmative reason to provide it but allow that affirmative reason to be overridden by a purpose in making exercise of your right costly.

The argument of this section can be summarized as follows. First, it is a constitutional wrong for government to engage in coercion (here, contrasted with compulsion), as by conditionally threatening to violate a constitutional right.²¹ Second, one way government violates a constitutional right is by treating a rightholder less well than it otherwise would because, and not merely despite, doing so would make exercise of that right more costly or burdensome. Because this latter claim applies to acts of commission and omission, government may not withhold a benefit that the balance of reasons would otherwise recommend just because nonprovision of the benefit would make exercise of a right

²⁰ When this is, and is not, permissible must be determined by provision- or rights-specific analysis, and not by general or trans-substantive principles or tests. Recall my earlier observation (n.14) that coercion is only part of a complete analysis of conditional offers.

²¹ By “wrong” I will mean a pro tanto wrong, thus potentially justifiable all things considered. Similarly, read “unconstitutional” as “defeasibly unconstitutional.”

more costly. It follows that government engages in the constitutional wrong of coercion when it conditionally threatens to withhold a benefit under circumstances in which the rationale for the threatened withholding, were it to occur, would be to make exercise of the constitutional right costlier.

Call it a “penalty” when government chooses not to provide a benefit or subsidy for an action in order to make exercise of a right more costly. The one-sentence summary of this essay’s core affirmative claim thus becomes: *Government engages in unconstitutional coercion when it threatens to penalize the exercise of a right.*

6. ILLUSTRATIONS OUTSIDE THE FEDERALISM ARENA

Given space constraints, the proposal just put forth cannot be rigorously defended (and, where necessary, qualified) here. (Recall the caveat I offered earlier about governmental reasons and purposes.) The present defense rests upon two prongs. First, I hope that readers will find the claim intuitively plausible enough to entertain it as a working hypothesis. Second, I now provide a few illustrations of its implications in an effort to modestly bolster the coherentist case. Because the case law is notoriously inconsistent, actual judicial decisions will not perfectly align with the analysis I offer. Nonetheless, a few instructive cases might strengthen the two-part claim that coercion-without-compulsion is unconstitutional, and that compulsion-without-coercion is not.

The facts of *Wyman v. James*²² exemplify the latter situation. A state AFDC program required beneficiaries to consent to home visits by caseworkers. James refused to allow the visit. One reason for unannounced visits is to ensure that the beneficiaries are in fact single-parent households, as the program requires. Therefore, government had genuine reasons, unrelated to an interest in making it costly for recipients to insist on their Fourth Amendment rights, to withhold the offered benefits on failure of condition: without the ability to undertake suspicionless visits, it might lack adequate

²² 400 U.S. 309 (1971).

assurance that the money was going to single-parent homes. On this assumption, the conditional proposal did not threaten a penalty and was not coercive. Yet it is plausible that James was sufficiently needy as to give her “no choice” but to accept the condition. In short, the proposal plausibly amounted to compulsion but not to coercion. On the general coercion-based account I am selling, it should have been upheld. And it was.

Conversely, consider this slight variation on the facts of *Nollan v. California Coastal Commission*.²³ A homeowner petitions the state zoning board for a variance from a building height restriction. The board offers the variance on condition that the homeowner cede to the public a lateral easement that it could not command without paying just compensation. Suppose (fill in the blanks as you wish) that we can be confident that the public interest does not justify the height restriction that is on the books and that the zoning board conditionally threatens to enforce. Rather, the height restriction has been set “too low” just to make possible proposals of this sort. If so, the board is threatening to penalize the homeowner for standing on her Fifth Amendment right to just compensation for a taking. The conditional proposal, therefore, is coercive. But very probably it did not compel acceptance: the homeowner could reasonably or rationally choose to lump it. This is coercion without compulsion. It should not be permitted. And it wasn’t.

Finally, consider plea bargaining. Given a sufficiently large differential between the sentence that a defendant would face if convicted after trial and the sentence he is offered to plead guilty, along with a sufficiently high expected probability of conviction if he goes to trial, he could find it simply irrational to reject the deal. That is, having no other reasonable or rational choice, he would be compelled to accept. Many academic commentators have concluded, on this basis, that plea bargaining

²³ 483 U.S. 825 (1987).

is unconstitutionally coercive.²⁴ In our terminology, however, this establishes only that plea bargaining can constitute compulsion. And the Court has consistently denied constitutional challenges predicated on this argument. As it once explained, “pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.”²⁵ That is correct. But it is not enough to insulate plea bargaining from constitutional challenge. If prosecutors overcharge or legislatures establish excessive punishments—in just the way, hypothesized above, that they might set overly restrictive zoning regulations—then the plea proposal constitutes a threat to penalize a defendant’s exercise of his right to a jury trial. It would be unconstitutionally coercive.

7. CONDITIONAL SPENDING AND THE STATES: *NFIB* REVISITED

This final section aims to establish two points. First, features of Chief Justice Roberts’s opinion suggest that he glimpses or is grasping for the coercion-based account that I have been outlining rather than the compulsion-based account that admittedly constitutes the dominant theme of his opinion and the entirety of the joint opinion’s analysis. Second, state challengers did have a strong *prima facie* case that the Medicaid expansion constituted unconstitutional coercion by threatening to penalize their constitutional right to decline to enter into a regulatory partnership to provide health insurance for a given class of beneficiaries.

Let us start with three features of Roberts’s opinion that cohere poorly with the supposition that he meant to endorse a straightforward anti-compulsion principle. First, he strongly intimated agreement with Justice Ginsburg, dissenting on this issue, that conditioning eligibility for funds earmarked for some beneficiaries on a state’s agreement to insure others would have been permissible had the several classes of beneficiaries, and the linkages among them, been established at the inception

²⁴ See, e.g., Blank (2000): 2016; Langbein (1978): 12.

²⁵ *Brady v. United States*, 397 U.S. 742, 750 (1970).

of the program.²⁶ But if the dispositive constitutional question is whether the states had a “real choice” regarding whether to accept a challenged condition, it is not clear why matters of timing, and of whether all the conditions are “properly viewed” as a single program, should be relevant.

Second, Roberts seemed to agree with the state challengers that the Act’s threatened withdrawal of eligibility for the preexisting Medicaid program “serves no purpose other than to force unwilling States to sign up for the dramatic expansion of health care coverage effected by the Act,” and seemed to agree as well that this observation is constitutionally relevant. “When,” he observed, “conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”²⁷ Yet if, as the anti-compulsion rendering of the anti-coercion principle appears to have it, a conditional offer exceeds Congress’s power just because it leaves the States with “no choice” but to accept, it is mysterious why Congress’s purposes should matter. If compulsion is the constitutional wrong, and if the ACA’s threat to withhold all Medicaid funding unless the recipient state agrees to cover a new class of beneficiaries does in fact “force unwilling States to [accede to that condition],” it should it be neither here nor there that the threat “serves no purpose other than” to secure compliance.

Third, Roberts introduced, near the end of his spending power analysis, an unexpected and underdeveloped suggestion that withholding a benefit to which a state is not constitutionally entitled is unconstitutional if non-provision of the benefit would penalize the exercise of a state’s constitutional prerogatives. “What Congress is not free to do,” he explained, “is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”²⁸ Yet he fails to explain

²⁶ 132 S. Ct. at 2605 (Roberts, C.J).

²⁷ 132 S. Ct. at 2603-04 (Roberts, C.J.).

²⁸ 132 S.Ct. at 2607 (Roberts, C.J.).

either what is involved in “penalizing” a state or what relationship obtains between penalties and compulsion.

All three puzzles disappear on the coercion-based analysis I have outlined. I have already explained why penalties and purposes are central to the coercion inquiry. And whether a particular condition is a late addition to a preexisting program or rather a part of the program from the start has evidential (but not operative) bearing on what the balance of legitimate and genuine reasons would dictate if a state did not accept one or another condition. In sum, features of Roberts’s opinion that seem misguided or nonsensical on an anti-compulsion rendering of that opinion make entirely good sense on an anti-coercion construal.

And what if Roberts had corralled what, just possibly, he was hunting? The anti-coercion principle that I have contended is part of a general solution to the conditional offer problem provides strong support for the states’ challenge to the Medicaid expansion. The gist is this: if the state declines to partner with the national government to provide Medicaid coverage for one class of beneficiaries, the national government’s balance of legitimate interests dictates that it should nonetheless supply the state with Medicaid funds for other classes of beneficiaries. The most plausible reason for refusing to do so is to vindicate the efficacy of the conditional threat as it applies to other states that have not yet decided whether to accept the deal. If this is so, then withholding the benefit is done for the purpose of making it costly for states to exercise their rights to decline to join with the national government with respect to any particular class of beneficiaries. That, I have contended, is presumptively unconstitutional, making the conditional threat coercive.

A comparison might help. Suppose the national government believes that children do less well when raised by gay or lesbian couples.²⁹ It therefore conditions some portion of federal funds to states that serve child welfare objectives on the state's not allowing gay couples to adopt. Many readers will intuit that this is unconstitutional. But why? To be sure, such a policy might violate the Equal Protection Clause. But that cannot be the whole story: the conditional offer is unconstitutional even if a discriminatory policy of this sort, if enacted by a state on its own volition, would face, and pass, rational basis review. The hypothetical offer also satisfies *Dole's* germaneness requirement: the condition and the program both serve interests in promoting child welfare.³⁰

The reason why this conditional offer would be unconstitutional mirrors the argument against the Medicaid expansion just sketched: (1) the legitimate reasons for providing states with federal funds for children apply whether or not the state agrees to bar gay couples from adopting children. (2) Withholding the benefit, then, can only be understood or explained as a means to make more costly exercise of a state's right to allow gay couples to adopt, thus discouraging states from maintaining that policy in the face of Congress's divergent preference. The conditional threat thus violates the anti-coercion principle. So too does the Medicaid expansion.

That, in any event, is the *prima facie* case for the states. There are many things to be said for the national government in its defense.³¹ Unfortunately, they cannot be addressed in a short essay. My

²⁹ For research that purportedly supports this conclusion see Regnerus (2012). I am very far from endorsing that judgment. I use this hypothetical, however, to pump intuitions supportive of the possibility that conditional spending offers might be unconstitutional for threatening a penalty, on the part of readers with liberal or nationalist sympathies who likely favored Ginsburg's position in *NFIB*.

³⁰ For discussion of the ease with which the germaneness requirement can be satisfied, see Baker & Berman (2003): 512-17. See also Transcript of Oral Argument in *Agency for International Development v. Alliance for Open Society International, Inc.*, No. 12-10, April 22, 2013 ("The government provides lots of funding to universities . . . so anything that would be germane to the general purpose of higher education presumably could be attached as a condition to those funds.") (Alito, J.).

³¹ One thing that might possibly be said for the national government—namely, that my analysis is inconsistent with the central precedent in this area, *Dole*—does not move me. In fact, under my analysis, *Dole* was, very probably, wrongly decided. (For details, see Berman (2013): 1329-33.) But I do not find that bullet too hard to bite.

more modest goal is to show that there is a genuine case in support of the conclusion that the Medicaid expansion violates the correct “anti-coercion principle” and not only the “anti-compulsion principle” to which a majority in *NFIB* gave its misplaced allegiance. I have not tried to identify, let alone to rebut, all possible avenues for resisting that bottom-line conclusion, some of which I find quite plausible.³² I have tried to explain why those who support the Affordable Care Act should treat the states’ challenge with greater seriousness than, by and large, they have given it. Just as importantly, those who already harbored doubts about the constitutionality of the Medicaid expansion have reason to be more sympathetic to a general solution to the conditional offer puzzle—a general solution predicated on coercion, not compulsion—than were the Justices who comprised the *NFIB* Court.³³

³² These wrinkles are explored in Berman (2013): 1340-46.

³³ I am grateful to Mark Hall and Alex Rajczi for very helpful comments on a prior draft.

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