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### Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions

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## Articles

# Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions

Mitchell N. Berman\*

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## Introduction

The Supreme Court’s feverishly anticipated decision in *National Federation of Independent Business v. Sebelius*<sup>1</sup> (“the Health Care Decision”

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\* Richard Dale Endowed Chair in Law, Professor of Philosophy, The University of Texas at Austin. For extremely helpful comments, challenges, and suggestions, I thank workshop audiences at the law schools of DePaul University, the University of Michigan, Florida State University, the University of Chicago, Duke University, and the University of Texas. For especially valuable

or “*NFIB*”) regarding the constitutionality of the Patient Protection and Affordable Care Act (colloquially known as “Obamacare”) produced three main holdings concerning two critical provisions of the Act.<sup>2</sup> The first two holdings concerned the “individual mandate” that requires most Americans to maintain “minimum essential” health insurance. First, a 5–4 majority held that this provision exceeded Congress’s power under the Commerce Clause.<sup>3</sup> Second, a different 5–4 majority held that this same mandate, which requires those who fail to secure the minimum required health insurance to pay a tax penalty to the IRS, is a constitutional exercise of Congress’s taxing authority.<sup>4</sup> The third holding concerned “the Medicaid expansion,” which expanded the class of persons to whom the states must provide Medicaid coverage as a condition for receiving federal funds under the Medicaid program.<sup>5</sup> By the more lopsided margin of 7–2, the Court struck down this provision as an impermissible condition on the provision of federal funds to the states.<sup>6</sup>

Of these three holdings, the third—concerning what is often called Congress’s “conditional spending power”—is apt to have the most far-reaching consequences beyond health care. The Court’s Commerce Clause ruling was predicated on the fact that, in a majority’s estimation, Congress was here imposing an unprecedented affirmative obligation upon individuals to enter commerce rather than, as is customary, regulating behavior that was already commercial.<sup>7</sup> Because Congress could not have been expected to impose many—or any—such affirmative obligations even had the dissenters prevailed on the Commerce Clause issue, this ruling will likely have little future impact. And Congress rarely needs to resort to its taxing power to achieve regulatory ends when it can regulate “directly” on the strength of its

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contributions—at these events, in conversation, or by means of written comments on prior drafts—I wish to particularly acknowledge David Adelman, Matt Adler, Sam Bagenstos, Joseph Blocher, Oren Bracha, Curt Bradley, Curtis Bridgeman, Sam Buell, I. Glenn Cohen, Lee Fennell, Joey Fishkin, Andrew Gold, John Golden, Daniel Halberstam, Bernard Harcourt, Don Herzog, Scott Hershovitz, Andy Koppelman, Guha Krishnamurthi, Marty Lederman, Sandy Levinson, Dan Markel, Richard McAdams, Richard Primus, Jed Purdy, Garrick Pursley, David Rabban, Larry Sager, Mark Schankerman, Margo Schlanger, Neil Siegel, Stephen Siegel, Charlie Silver, James Spindler, David Strauss, Kevin Toh, and Hannah Wiseman, with apologies to those whom I have overlooked. I am also grateful to Paul Still for timely research assistance.

1. 132 S. Ct. 2566 (2012).

2. Whether there were three main holdings, more, or fewer, could be quibbled with. Those who see fewer would contend that the first main holding I identify—that the “individual mandate” was not a permissible exercise of Congress’s commerce power—is better characterized as dicta in light of the Court’s determination that that provision was a permissible exercise of Congress’s taxing power. Those who see more would elevate to “main holding” status other rulings in the case, such as those concerning the anti-injunction act and severability. For my purposes, nothing turns on these possible disagreements.

3. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2593.

4. *Id.* at 2575, 2600 (Roberts, C.J.).

5. *Id.* at 2629 (Ginsburg, J., dissenting in part).

6. *Id.* at 2608 (Roberts, C.J.).

7. *Id.* at 2589–90.

commerce power.<sup>8</sup> So the Court's relatively expansive interpretation of Congress's taxing power is not of great moment going forward precisely because its relatively restrictive interpretation of Congress's commerce power is not. But Congress makes habitual (a critic might even say "profligate") use of its conditional spending power.<sup>9</sup> Accordingly, if, as appears to many, the Court has tightened the restrictions on this power, the implications could be profound.

Unfortunately, of the three holdings, the last is not only the most potentially significant, but also the one supported by the least clear rationale. At first blush, to be sure, the majority's reasoning seems straightforward. The key precedent on which the majority drew, *South Dakota v. Dole*,<sup>10</sup> had announced a four-part test governing Congress's use of its spending power to induce state behavior that Congress could not mandate: the spending program must promote "the general welfare," the condition must be unambiguous, the condition must be related to the national interests that the spending would advance, and the condition may not require state recipients to violate the Constitution themselves.<sup>11</sup> No Justices in *NFIB* expressed concern that the Medicaid expansion violated any of these limitations.

In addition to these four restrictions, however, the *Dole* Court read the Spending Clause to impose limits on Congress's ability to "coerce" the states in ways that it could not directly mandate under its other Article I powers.<sup>12</sup> "[I]n some circumstances," the Court observed, "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" <sup>13</sup> It is this prohibition on coercion or compulsion that, a majority of the Court concluded, doomed the Medicaid expansion.<sup>14</sup> While candidly acknowledging that they could provide no guidance regarding how the line between inducement and compulsion would be assessed going forward, seven Justices nonetheless deemed the conditional offer that the Medicaid expansion embodied impermissibly coercive because it gave states "no choice" but to accept.<sup>15</sup>

That, to repeat, is how things appear at first blush. As is often the case, things look rather less clear on second look. For several reasons, it is uncertain that this "no choice" thesis fully captures the majority's reasoning.

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8. Cf. *id.* at 2578–79 (stating that Congress uses its taxation power when it cannot directly regulate, and contrasting that with its Commerce Clause powers).

9. See, e.g., Bob Drummond, *Limits on Spending Power Seen as Health Ruling's Legacy*, BLOOMBERG (July 1, 2012), <http://www.bloomberg.com/news/2012-07-01/limits-on-spending-power-seen-as-health-ruling-s-legacy.html> (stating that Congress has used its conditional spending power in many areas).

10. 483 U.S. 203 (1987).

11. *Id.* at 207–08.

12. *Id.* at 211.

13. *Id.* (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

14. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (Roberts, C.J.).

15. *Id.* at 2603–04, 2606–07.

Among the most important are these. First, neither opinion that combined to constitute the majority on this question—Chief Justice Roberts’s for himself and Justices Breyer and Kagan, and the joint opinion of Justices Scalia, Kennedy, Thomas, and Alito<sup>16</sup>—disputed Justice Ginsburg’s observation, dissenting on this point, that it would be constitutionally permissible for Congress to repeal the Medicaid Act in its entirety and then enact a new law that mirrored the preexisting law with the Medicaid expansion.<sup>17</sup> Yet if the states had no choice but to accede to the Medicaid expansion, it is hard to see why they would have any more choice but to accede to this new hypothetical Medicaid Act. Second, several passages from the Roberts opinion hint that the constitutional vice was not exactly that states had no real choice other than to accept, but rather that Congress had an impermissible purpose in crafting this particular conditional proposal.<sup>18</sup>

Given the vast potential significance of the Court’s holding on conditional spending and the manifest lack of clarity regarding its rationale, a comprehensive and critical assessment of this holding is urgent. That is the ambition of this Article.

The Article advances many claims, some with conviction, others more tentatively. Ruthlessly simplified, the core theses are these. First, insofar as the majority rested its holding of unconstitutionality on the ground that the amount of funds that a state would lose by not agreeing to the condition was so great as to compel the states to accept, that is a highly dubious rationale. Second, it does not necessarily follow that the Court’s bottom-line conclusion was wrong. A more promising rationale for that conclusion would be the one merely hinted at by the Chief Justice: Congress’s threat to withhold all Medicaid funds from a state if it did not agree to provide for a new class of beneficiaries would constitute the constitutional wrong of coercion if animated or infected by a bad purpose. Taken together, then, the first and second points are these: *compulsion and coercion are not the same things, and the constitutional wrong that conditional spending offers more plausibly instantiate is that of coercion, not of compulsion.*

Third, the basic principles that govern whether a conditional spending offer from the national government to the states is unconstitutionally coercive are not particular to the conditional spending context. Instead, they lie at the heart of a general solution to the ubiquitous puzzle of

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16. That joint opinion was styled a dissent. But on the particular question on which I am focusing—whether Congress may constitutionally threaten to withhold all Medicaid funding on a state’s refusal to accept federal funds to provide Medicaid coverage to a new class of beneficiaries—the votes of these four “dissenters” were necessary to constitute a majority. Accordingly, I will refer to the opinion of Justices Scalia, Kennedy, Thomas, and Alito as “the joint opinion.” Given this Article’s focus, I reserve the term “dissent” for the opinion by Justice Ginsburg, writing only for herself and Justice Sotomayor on this point.

17. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2629 (Ginsburg, J., dissenting in part).

18. *See id.* at 2605–06 (Roberts, C.J.) (discussing Congress’s purpose of using the Medicaid expansion to drastically expand coverage and essentially recreate Medicaid).

“unconstitutional conditions”—that is, the puzzle regarding whether and under what circumstances it is constitutionally permissible for government to condition a benefit on an offeree’s exercising or not exercising its constitutional rights in some preferred way.<sup>19</sup> Fourth, application of these general “trans-substantive” principles to the instant case suggests that the Medicaid expansion probably was coercive and therefore the Court was probably right—though not for the reasons it gave—to hold that that provision exceeds our best understanding of constitutional limits on Congress’s power.<sup>20</sup>

These four theses are developed over five parts. Part I unpacks the arguments advanced in the two opinions that together made up a majority on the Spending Clause question and elucidates the key concepts upon which much of the analyses in the body of the Article will rely—namely, coercion, and compulsion. (Following convention, I will underline these words when I am invoking the concepts and when I think that, given the context, a reminder will be useful.) This Part shows that the majority on this point effectively interpreted what the joint opinion terms “the anti-coercion principle”<sup>21</sup> in Spending Clause jurisprudence as an “anti-compulsion principle”—that is, as a rule that disables Congress from inducing the states to act in accord with the wishes of the national government by offering benefits on terms that the states could not, as a practical matter, reject.

Part II casts doubt on the soundness of such a rule. Contract law, on which the Chief Justice and the joint opinion both rely, does not offer the support they claim. Very likely, the best argument for it is the one advanced by the state challengers to the Act. Without meaningful limits on Congress’s spending power, they argued, federalism-based limits on Congress’s other powers “would be for naught.”<sup>22</sup> Therefore, “a judicially enforceable outer limit on Congress’s power to use federal tax dollars to coerce States is . . . a constitutional necessity.”<sup>23</sup> There is merit to that argument. But it does not quite support the conclusion drawn. A judicially enforceable limit on

19. The heart of a general solution, but not the entirety of it: a conditional offer that does not amount to coercion might be unconstitutional on other grounds. Coercion is the *distinctive*, but not the *sole*, constitutional wrong that conditional offers might instantiate. See generally Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1 (2001).

20. This conclusion takes as a given the correctness of the anti-commandeering decisions, *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). I am sympathetic to the suggestion that the best understanding of our constitutional order would leave Congress with more authority to mandate behavior by the states than current case law allows. But this Article analyzes Spending Clause jurisprudence under the assumption that Congress could not mandate state participation in the Medicaid program.

21. The joint opinion deploys this term unhyphenated. I have taken the liberty of inserting a hyphen because doing so makes it easier to distinguish visually the two construals of this principle that I identify.

22. Brief of State Petitioners on Medicaid at 20, *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566 (No. 11-400).

23. *Id.*

Congress's ability to coerce the states through conditional spending grants need not assume the form of an anti-compulsion rule given the availability of an anti-coercion rule instead. Indeed, as Part II further shows, constitutional doctrines outside the spending context strengthen the appeal of an anti-coercion principle while undermining the plausibility of an anti-compulsion principle. Part III seeks to make readers more receptive to a true anti-coercion principle, and to mitigate objections from the church of stare decisis, by developing the claim, already noted, that the Roberts opinion actually flirts with this alternative construal of the critical principle.

Part IV—the longest and most complex part of the Article—examines whether the conditional offer embodied in the Medicaid expansion constitutes impermissible coercion. Because, as noted above, I believe that the conditional spending problem is, in critical respects, just an instance of the more general problem of “unconstitutional conditions,” the first task of this Part is to develop and defend a general account of the circumstances in which it can be unconstitutionally coercive for government to offer “benefits” on condition that the offeree not exercise one of its constitutional rights.<sup>24</sup> That general account centers on a denial of the oft-stated and widely held belief that, if a rightholder (be it an individual or a state) is not entitled to some particular boon, then government may withhold it for any reason at all without offending the Constitution. To the contrary, I argue, government unconstitutionally penalizes the exercise of a right if it withholds a benefit for certain bad purposes or reasons. In other words, I challenge the conventional scholarly wisdom that maintains that the concept of penalty is incoherent or normatively inert. The Part's second task, accordingly, is to apply that general account to the Medicaid expansion. In concluding (tentatively) that the statute runs afoul of general principles regarding coercion and penalty, Part IV, in effect, returns to critics of the Medicaid expansion what Part II had taken away.

Part V considers objections, and articulates refinements, to my general analysis of coercive offers—including the general analysis of penalties—and to the application of that account to the Medicaid expansion.<sup>25</sup> That final Part will underscore a point that warrants emphasis at the outset: I present the analyses that follow not as a watertight argument in support of a single “bottom-line” conclusion, but as a *framework* for analyzing conditional offers by the state—a framework that is filled out more fully and confidently

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24. An account could be “general,” though not universal or exceptionless. See *infra* Part V, Objection 4.

25. For an early presentation of some of the ideas developed here, see my comments posted to the blog Balkinization while *NFIB* was pending. Mitch Berman, *Coercion, Compulsion, and the ACA*, BALKINIZATION (Apr. 6, 2012, 3:49 AM) <http://balkin.blogspot.com/2012/04/coercion-compulsion-and-aca.html>; Mitch Berman, *More on Unconstitutional Conditions and the ACA*, BALKINIZATION (Apr. 8, 2012, 10:05 AM) <http://balkin.blogspot.com/2012/04/more-on-unconstitutional-conditions-and.html>. I am very grateful to Sandy Levinson for prodding me to post on the topic and to Jack Balkin for providing an excellent forum for a productive exchange.

here, sketched more thinly or tentatively there. Readers who end up rejecting my (avowedly uncertain) judgment that the Medicaid expansion was unconstitutionally coercive need not, for that reason alone, reject *in toto* the machinery I propose. The analysis that follows consists of a fair number of moving parts. They do not all stand or fall together.

## I. Of Coercion and Compulsion

Those portions of the three opinions that address whether it is constitutional for Congress to threaten to withhold all of a state's Medicaid funding for existing beneficiaries (the blind, the disabled, the elderly, pregnant women, and needy families with dependent children) unless it accepts new funding, with associated conditions, for a new class of beneficiaries (adults, including those without children, with incomes up to 133% of the federal poverty level) are long, totaling over fifty pages together. Despite their combined length, however, one single theme leaps out most plainly: this case seemingly turns, for all the Justices, on a vice they call "coercion." Both the Roberts opinion and the joint opinion squarely conclude both that this particular condition is unconstitutional because it is "coercive" or constitutes impermissible "coercion," and that what makes this so is that it leaves the states with "no real choice" but to accept. Making clear that this is how she reads the majority,<sup>26</sup> Justice Ginsburg objects that "[t]he coercion inquiry . . . appears to involve political judgments that defy judicial calculation."<sup>27</sup>

Accordingly, the first step toward understanding the grounds of, and possible difficulties with, the Court's reasoning in support of its Spending Clause holding must be to get clear on just what the Court means by "coercion."

### A. *Conceptual and Terminological Preliminaries*

Anyone familiar with Supreme Court case law on conditional spending prior to *NFIB* will have noticed this striking feature: the Court routinely uses the terms "coercion" and "compulsion" in a loose fashion, sometimes treating them as synonyms, sometimes not, and never carefully defining either.

Take, to start, the very brief passage from *Dole* in which the Court appears to proscribe conditions "so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>28</sup> Although this passage is routinely read—including by Chief Justice Roberts and by the authors of the joint opinion—to prohibit "coercion," its literal import is to proscribe "compulsion," the overwhelming implication being that coercive offers that

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26. *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. at 2639–40 & n.24 (Ginsburg, J., dissenting in part).

27. *Id.* at 2641.

28. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).



do not amount to compulsion are permissible. That is just a single passage, so should not be over-read were it unusual. In fact, though, the failure carefully to distinguish coercion from compulsion is entirely representative of the case law.<sup>29</sup>

That Supreme Court Spending Clause opinions fail to distinguish between coercion and compulsion in any analytically satisfactory manner is further evidenced by a glance at the work of the best constitutional lawyers. For a striking illustration, consider the principal brief filed by the state challengers in the health care litigation, authored by former Solicitor General Paul Clement. From *Dole*'s declaration that an exercise of Congress's spending power would violate the Constitution if it were "so *coercive* as to pass the point at which 'pressure turns into *compulsion*,'" that brief draws the lesson that "Congress may not use its spending power *coercively*."<sup>30</sup> It also deems "the *coercion* doctrine" violated on the grounds that "the ACA . . . *compels* the States to act in ways that Congress could not *compel* directly."<sup>31</sup> Further examples of the brief's apparent conflation of coercion and compulsion could be multiplied with ease: these few passages are all culled from a single page.<sup>32</sup>

Chief Justice Roberts endorses the very same conflation of coercion and compulsion, or equivocation between them, when stating the issue:

The States . . . contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is *coercing* the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not *compel* the States to enact or administer a federal regulatory program."<sup>33</sup>

This pattern of usage is frequently a strong indication that the speaker or author lacks a firm grasp on the precise idea or concept she is groping for. She has a rough sense of the idea, or knows the vicinity, but hasn't nailed it down. I don't mean this as a biting criticism. It is hard work always to identify the precise concept that we have dimly or loosely in mind, and not

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29. See, e.g., *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 687 (1999) (quoting *Dole*'s "point at which 'pressure turns into compulsion'" passage, and then concluding that "the point of *coercion* is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity" (emphasis added)).

30. Brief of State Petitioners on Medicaid at 27, *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (2012) (No. 11-400) (emphasis added).

31. *Id.* (emphasis added).

32. *Id.*

33. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601 (Roberts, C.J.) (quoting *New York v. United States*, 505 U.S. 144, at 188 (1992)) (emphases added).

always worth the effort. Not infrequently, the loose grasp is good enough for our purposes.

But not infrequently it isn't. And that is what should worry us here. If the words "coercion" and "compulsion" are not synonymous, but rather capture or are best associated with different concepts, then we cannot tolerate looseness or imprecision in any case in which the two pull apart. When confronting any conditional offer that plausibly coerces the states to accept without compelling acceptance or conversely, any offer that subjects the states to compulsion but not to coercion, it becomes essential to identify which is the constitutional wrong—coercion or compulsion, or perhaps the union of the two, or something else entirely—and then to carefully establish that the features of the program or provision under review make out the concept that is constitutionally significant and not the related concept that might be constitutionally irrelevant.

In the remainder of this section, I aim to establish that coercion and compulsion *are* different concepts. This is a modest claim. To forestall possible misunderstanding, I should emphasize that I am not offering definitions of the *words* "coercion" and "compulsion." I am offering accounts of two distinct concepts to which I am affixing the distinct words "coercion" and "compulsion" as handy labels. Of course, I do believe that the ordinary meanings of the words correspond closely enough to the concepts as I demarcate them to make it reasonable to employ these words and not others. I hope and rather expect that readers will share those judgments. But please keep in mind that our goal here is to focus on the concepts rather than the words. I am trying to make two concepts, and the respects in which they are different, tolerably clear. If you understand the concepts to which I will refer by the words "coercion" and "compulsion," then the argumentative uses to which I will put these concepts will not be jeopardized if you also harbor doubts about the extent to which you would define our existing words "coercion" and "compulsion" to match the concepts as I roughly describe them. (Similarly, although I think I am offering accounts of two distinct concepts, I believe that nothing turns on whether you share that judgment. If you believe that I am misdescribing the concepts that I am calling "coercion" and "compulsion," you may treat the two phenomena that I distinguish as simply that—phenomena. The important questions will turn out to be whether the fact, if true, that a conditional spending offer instantiates this or that phenomenon warrants the judgment that the conditional offer is constitutionally problematic. What are the best accounts of the concepts of coercion or compulsion should not distract us.)

Coercion is generally thought to be a type of wrong. It's something that we presumptively ought not to engage in, and that properly subjects us to

criticism, censure or, at a minimum, a demand for justification, if we do.<sup>34</sup> Of course, there are many and diverse types of wrongs. To a first approximation, coercion is the wrong of exerting *wrongful* pressure on a subject to do as the coercer wishes.<sup>35</sup> 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."<sup>36</sup> Roughly, then, a threat is coercive, or constitutes coercion, if it would be wrongful for the threatener to carry it out.<sup>37</sup>

Compulsion, in contrast, is not a wrong—at least not all by itself. It is a description, if possibly a normatively freighted one, of certain circumstances of action, namely those in which, for one reason or another, our choices are very substantially constrained.<sup>38</sup> Again to a first approximation, one is compelled to do such-and-such, or is subject to compulsion, when there is some coherent sense in which one could not have done otherwise. Compulsion can be produced in various ways. For example, it can be the product of extremely powerful irrational urges, like those arising from addiction or other forms of mental disorder.<sup>39</sup> Alternatively, it can be the product of rational pressure to pursue the course of action that powerfully dominates all alternatives in a severely circumscribed choice set.<sup>40</sup> Depending on other factors, the descriptive fact that one has acted in the face of compulsion may or may not serve, normatively, to make out a type of excusatory or mitigating condition.<sup>41</sup> In short, compulsion is a state of affairs to which, ideally, we would not be subject, and that, when present, can potentially ground relief from responsibility or liability.

Again, these are first-pass accounts of the two concepts. Either or both might benefit from refinement. For our purposes, though, exquisite precision

34. Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 47 (2002).

35. *Id.*

36. See Martin Gunderson, *Threats and Coercion*, 9 CAN. J. PHIL. 247, 248 (1979) (describing dispositional coercion as involving "the threat of sanctions").

37. This is the dominant understanding in the philosophical literature. For overviews, see Scott Anderson, *Coercion*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), available at <http://plato.stanford.edu/archives/win2011/entries/coercion>; William A. Edmundson, *Coercion*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 451 (Andrei Marmor ed., 2012). Important works that defend and develop this claim include ALAN WERTHEIMER, COERCION (1987); Gunderson, *supra* note 36; and Vinit Haksar, *Coercive Proposals [Rawls and Gandhi]*, 4 POL. THEORY 65, 68–70 (1976). For my contribution to the general philosophical literature, see generally Berman, *supra* note 34.

38. See Robert Audi, *Moral Responsibility, Freedom, and Compulsion*, 11 AM. PHIL. Q. 1, 3 (1974) (suggesting that people who act with limited choices may be acting with less freedom); see also Vincent Brümmer, *On Not Confusing Necessity with Compulsion: A Reply to Paul Helm*, 31 RELIGIOUS STUD. 105, 105–06 (1995) (suggesting that choice can be limited by factual circumstances without destroying freedom of choice).

39. See Audi, *supra* note 38, at 5 (illustrating that internal compulsions such as obsessions, phobias, and irresistible impulses can lead to unavoidable actions).

40. Matt Zwolinski, *Sweatshops, Choice, and Exploitation*, 17 BUS. ETHICS Q. 689, 701 (2007).

41. *Id.*

is not essential. These provisional accounts are sufficient to establish the critical point that these are distinct concepts. And that claim is demonstrated by the fact that there exists both compulsion-without-coercion and coercion-without-compulsion.

Here's just one quick example of compulsion-without-coercion. Law student, L, accepts a job with a firm that represents clients to whom L strenuously objects or that, in any other fashion, runs contrary to important principles or values of L's. L wouldn't accept the job but for the facts that it is L's only offer and that L has very substantial loan obligations. L can properly answer, in response to the charge that she has compromised her principles, that she "was compelled" to do so or "had no choice." Nonetheless, L wasn't "coerced into" accepting the job and nobody—not the firm or anybody else—is properly charged with coercion.

And here's an example of coercion-without-compulsion: T, a thug, threatens H with some moderate violence—say, a broken finger—unless H turns over his briefcase. H complies. Unbeknownst to T, the briefcase contains most of H's and W's savings. When H returns home and reports the robbery, H's spouse, W, is aghast. "How could you possibly have given up all our funds for Junior's education?!" W demands. If H responds that he "was compelled to do so" or "had no choice," W could be right (depending upon the details, of course) to reject the claim. H was not compelled to give up that money. Given the threat he faced, H should have run or resisted. Yet T did engage in coercion. T didn't merely try to coerce H, for he did, after all, succeed. Assuming that T threatened H with unpleasantness that T was wrong to threaten but that H could have endured and should have under the circumstances, T coerced H into giving up his money, though H wasn't compelled to do so.<sup>42</sup>

Naturally, countless interactions amount to both coercion and compulsion—what we might term either coercion-through-compulsion or compulsion-by-coercion. "Your money or your life" is a paradigm. That is to be expected because coercive proposals are intended to induce compliance with a condition or demand, and the issuer of the proposal—the coercer—understands that success in this aim is a function of the pressure that the target of the coercion experiences, and not the bare wrongness of the consequence threatened.<sup>43</sup> But the key point is that coercion and compulsion are analytically distinct and can and do come apart in the real world.

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42. In response to Justice Ginsburg's observation that it would cost states little to accept the Medicaid expansion, Chief Justice Roberts objected that "the size of the new financial burden imposed on a State is irrelevant in analyzing whether the State has been coerced into accepting that burden. 'Your money or your life' is a coercive proposition, whether you have a single dollar in your pocket or \$500." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2605 n.12 (2012) (Roberts, C.J.). He is quite right. My point here is that "Your money or I'll break your arm" is also "a coercive proposition." But depending upon the context it might not be one that amounts to compulsion.

43. Gunderson, *supra* note 36, at 253–54.

Coercion and compulsion are both characterizations of features of events in which one agent exerts pressure on another to do as the first agent wishes. At the risk of some simplification, compulsion is constituted by the *amount* of pressure and coercion is constituted by its *character*.

The critical question, therefore, is this: In the context of constitutional challenges to the Medicaid provisions of the ACA (and in the spending context more generally, and—just possibly—in other conditional offer contexts more generally still), which is or should be the operative concept—coercion or compulsion? This question cannot be answered by simply pointing out that “it’s called ‘the anti-coercion principle,’ stupid.” As we will see, the word “coercion” is sufficiently plastic or ambiguous to encompass both concepts, coercion and compulsion (and perhaps other concepts as well).

*B. The “Anti-Coercion Principle” as an Anti-Compulsion Principle*

Given the ambiguity of the word “coercion,” the joint opinion starts, very helpfully, by expressly acknowledging that “coercion” requires definition. “Once it is recognized that spending-power legislation cannot coerce state participation,” the opinion observes, “two questions remain: (1) What is the meaning of coercion in this context? (2) Is the ACA’s expanded Medicaid coverage coercive?”<sup>44</sup> Without missing a beat, it then announces that

The answer to the first of these questions—the meaning of coercion in the present context—is straightforward. As we have explained, the legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States’ choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power.<sup>45</sup>

In short, despite its reference to the “anti-coercion principle,” the standard the joint opinion actually deploys would be more accurately termed (in the language of this Article) an “anti-compulsion principle.” Justice Ginsburg is not far off when observing that, “[f]or the joint dissenters, . . . all that matters, it appears, is whether States can resist the temptation of a given federal grant.”<sup>46</sup>

Furthermore, the Chief Justice’s opinion, for himself and Justices Breyer and Kagan on this point, seems largely in accord. “Permitting the Federal Government to force the States to implement a federal program

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44. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2661 (joint opinion).

45. *Id.*

46. *Id.* at 2640 n.24 (Ginsburg, J., dissenting in part).

would threaten the political accountability key to our federal system,” it reasons.<sup>47</sup>

“[W]here the Federal Government directs the States to regulate, 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.” Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. . . . But when the State has no choice, the Federal Government can achieve its objectives without accountability . . . .<sup>48</sup>

And in this case, the opinion concludes, the states really do lack a choice. “The threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”<sup>49</sup> By striking down this condition, the opinion thus “limits the financial pressure the [federal government] may apply to induce States to accept the terms of the Medicaid expansion.”<sup>50</sup> Just like the authors of the joint opinion, then, the Chief Justice understands the anti-coercion principle from conditional spending jurisprudence to police compulsion.

## II. Compulsion, Really?

Suppose the states have “no choice” but to agree to provide coverage for the ACA’s new class of Medicaid beneficiaries because the cost to them of doing without Medicaid funds at all is so enormous, and therefore that the Medicaid expansion subjects them to compulsion. Of course, the states do not *literally* have no choice in the matter. But if compulsion exists only when an offeree has “no choice” but to accept, and if “no choice” in this context means, well, *no* choice, then compulsion would be a nearly useless concept. Even seemingly paradigmatic instances of compulsion (including “your money or your life”) would turn out not to be compulsion at all. And certainly the states could never be compelled by the threat of a withdrawal of federal funds, contrary to the assumption in *Dole* and *Steward* that this is a theoretical possibility. The lesson is that “no choice” must be taken idiomatically, not literally, and be given a looser construction. Thus, compulsion exists when an offeree has no *reasonable* choice or no choice that it would be remotely rational for it to adopt, or something like this.<sup>51</sup>

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47. *Id.* at 2602 (Roberts, C.J.).

48. *Id.* at 2602–03 (internal citations omitted) (quoting *New York v. United States*, 505 U.S. 144, 169 (1992)).

49. *Id.* at 2605.

50. *Id.* at 2608.

51. Recognizing that “no choice” cannot be taken literally, the joint opinion and Chief Justice Roberts sometimes qualify the phrase; “no real choice” is a favorite alternative. *See, e.g., id.* Insofar as “real” contrasts with “fake,” it cannot be the most apt qualifier to have been selected. But it does adequately signal that there are difficulties here that require attention. For analysis of

However the “no choice” standard is interpreted, it will be sufficiently vague as to license doubts that it meets the “judicial manageability” bar for judicially enforced constitutional doctrine.<sup>52</sup> But put that worry aside. So long as an anti-coercion principle remains part of judicial Spending Clause doctrine, and if it forbids compulsion, then whatever the difficulty of evaluating borderline cases, it is hard to contest the majority’s conclusion on the facts of this case. The Medicaid expansion threatened states with the aggregate loss of \$233 billion per year, equaling over 10% of all state budgetary outlays.<sup>53</sup> The judgment that it would be so damaging for a state to sustain the loss of so many funds as to compel it to accept the new deal, if not quite inescapable,<sup>54</sup> is more than reasonable. If the majority holding is wrong, then, it is more likely because the majority was wrong to conclude that Congress is barred from making offers that the states are compelled to accept, without more. The question is this: *why* should we understand the anti-coercion principle as one that disables Congress from using its spending power to craft offers so attractive that states are compelled to accept?

In posing the question this way, I do not mean to gain any mileage from characterizing the proposal as an “offer” rather than as a “threat.” I prefer to adopt the convention according to which, strictly speaking, every biconditional proposal consists of both a conditional offer and a conditional threat: the offer (threat) is the conditional proposal that contains the consequent that the proposal-maker anticipates the recipient will find the more (less) attractive of the two. Thus, the merchant’s “two-for-one” offer is also a threat not to give you two if you don’t buy one; the robber’s threat to kill you if you don’t hand over your money is also an offer to let you live if you do. Of course, it would ring false to describe the first proposal as a “threat” or the latter as an “offer.” But I think the much-explored question of whether a particular proposal *as a whole* is better characterized as a threat or an offer distracts us from the normatively important questions.<sup>55</sup>

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different ways to cash out the “no choice” standard, and of difficulties that attend to each, see Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to Do So*, 78 IND. L.J. 459, 517–21 (2003).

52. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2641 (Ginsburg, J., dissenting in part) (“The coercion inquiry . . . appears to involve political judgments that defy judicial calculation.”).

53. *Id.* at 2605 (Roberts, C.J.); *id.* at 2664 (joint opinion). Although the joint opinion describes this sum as “equaling 21.86% of all state expenditures combined,” that figure reflects the percentage of state spending that is comprised by state and federal Medicaid funds aggregated. Brief of State Petitioners on Medicaid at 15, *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566 (No. 11-400).

54. For an intriguing presentation of doubts, see Brian Galle, *Does Federal Spending “Coerce” States?: Evidence from State Budgets*, 107 NW. U. L. REV. (forthcoming 2013).

55. For elaboration and defense of this position, see Berman, *supra* note 34, at 55–59. See also E. Allan Farnsworth, *Coercion in Contract Law*, 5 U. ARK. LITTLE ROCK L.J. 329, 333 (1982) (“Nothing is gained by attempting to distinguish offers from threats for the purposes of the law of duress. Since a claim of duress can only succeed if the threat was one that the law condemns, the significant task is not to distinguish offers from threats but to distinguish those threats that the law condemns from those that it does not condemn.”). The canonical effort to distinguish *threats* from

Accordingly, we can rephrase the question: why should we understand the anti-coercion principle to disable Congress from using its spending power to threaten states with consequences so unattractive that they are compelled to comply with the stated condition?

A. “. . . *Much in the Nature of a Contract*”

In seeking an answer, we might start with the joint opinion. Recall its assertion that

The answer to the first of these questions—the meaning of coercion in the present context—is straightforward. . . . [T]he legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States’ choice to accept or decline the offered package. Therefore, if States really have no choice other than to accept the package, the offer is coercive, and the conditions cannot be sustained under the spending power.<sup>56</sup>

I observed that, in this short passage, the opinion contends that “coercion” means compulsion. Indeed, it claims that this is straightforward or uncontroversially true. What, we might now ask, makes this correct, let alone straightforwardly so?

In large measure, the joint opinion’s answer is: the Court’s conditional spending precedent, *Dole* in particular.<sup>57</sup> But *Dole* is a slender reed on which to rest. We have already seen that *Dole*, like other spending cases, used the words “coercion” and “compulsion” so cavalierly as to instill significant doubt that the authors knew precisely what concepts they were after.<sup>58</sup> Moreover, the somewhat ambivalent manner in which *Dole* invoked the anti-coercion principle (however that principle may be construed) provides further reason not to put all of one’s pineapples in this particular basket. It would have been easy enough for the *Dole* majority to plainly announce *five* requirements that any condition attached to federal spending grants to the states must satisfy: it must promote the general welfare, be unambiguous, be germane to the federal interest in the spending program, not induce the states to violate the Constitution, and not coerce the states into accepting. Instead, Chief Justice Rehnquist’s opinion listed the first four restrictions in a single paragraph and then, only after determining that none condemned the condition on highway funds at issue in that case, introduced *Steward Machine*’s ruminations on coercion almost as an afterthought.<sup>59</sup> Justice Ginsburg draws from this expositional curiosity the conclusion that *Dole*

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*offers* is Robert Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 447–53 (Sidney Morgenbesser et al. eds., 1969).

56. *Nat’l Fed’n of Indep. Bus.*, 162 S. Ct. at 2661 (joint opinion).

57. *Id.* at 2659, 2661 (citing *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987)).

58. See *supra* notes 28–29 and accompanying text.

59. *Dole*, 483 U.S. at 207–11.



only “mentioned, but did not adopt, [this] further limitation.”<sup>60</sup> That might be too grudging. But a weaker and more defensible lesson is that, if alternative interpretations of the anti-coercion principle are reasonably available, *Dole* alone provides less robust support for the interpretation adopted than one would hope for.

Happily, and to its credit, the joint opinion does not rest its interpretation solely on passages from Spending Clause precedent that could conceivably be characterized as dicta. Instead, it invokes contract law principles. “When federal legislation gives the States a real choice whether to accept or decline a federal aid package,” it explains, “the federal-state relationship is in the nature of a contractual relationship. . . . And just as a contract is voidable if coerced, the legitimacy of Congress’s power to legislate under the spending power . . . rests on whether the State *voluntarily* and knowingly accepts the terms of the ‘contract.’”<sup>61</sup>

Parsed as an argument, the joint opinion’s reasoning on this score runs something like this: (1) Congress’s power to legislate under the spending power is informed by contract law principles; (2) contract law prohibits coercion; (3) therefore, rules governing exercises of the spending power properly prohibit coercion; (4) the meaning of coercion for purposes of contract law is compulsion; (5) therefore, the meaning of coercion in the spending context is compulsion.

Premise (4), though unstated, is implicit. After all, by observing that meaning must be expressly ascribed to “coercion” in the spending context, the joint opinion acknowledges that the term is ambiguous or at least not transparent. It also says—or, at a minimum, strongly implies—that the limits on Congress’s spending power arise from principles of contract law, or from the same more fundamental considerations that undergird contract law: “[J]ust as a contract is voidable if coerced, the legitimacy of Congress’s power to legislate under the spending power . . . rests on whether the State *voluntarily* and knowingly accepts the terms of the ‘contract.’”<sup>62</sup> So premise (4) is necessary support for (5).

But premise (4) is false. Contract law does recognize a defense termed, interchangeably, “coercion” or “duress.” As the Restatement of Contracts provides, “If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable.”<sup>63</sup> What makes a threat “improper” is notoriously fuzzy. A threat to commit a crime or tort would count, of course, but so too would a “breach of the duty of good faith and fair dealing” under an existing contract, and, when it produces unfair terms, a threat to perform an act that

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60. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. 2566, 2634 (2012) (Ginsburg, J., dissenting in part).

61. *Id.* at 2659–60 (joint opinion) (emphasis in original) (citations and internal quotation marks omitted). Roberts relies squarely on the contract law analogy too. *See id.* at 2602 (Roberts, C.J.).

62. *Id.* at 2660 (internal quotation marks omitted).

63. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

“would harm the recipient and would not significantly benefit the party making the threat.”<sup>64</sup> The important point, though, is that the fact that one party had “no choice” but to accept a contract or a contractual condition is never sufficient alone to make the contract voidable.<sup>65</sup> There must always be, in addition to the lack of “reasonable alternative[s],” an “improper threat.”<sup>66</sup> In short, duress or coercion, in contract law, requires something very much like the conjunction of coercion and compulsion.

The doctrine of unconscionability likewise will not support the idea that legal consequences should follow from the mere fact that one party to an agreement has “no choice” other than to accept.<sup>67</sup> Comment 1 to § 2-302 of the Uniform Commercial Code offers an essentially circular definition: “The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”<sup>68</sup> Farnsworth’s treatise states that

[t]he most durable answer [for what unconscionability is] is probably that of the court in *Williams v. Walker-Thomas*: “Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties [a.k.a. procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [a.k.a. substantive unconscionability].”<sup>69</sup>

Most significantly for present purposes, “judges have been cautious in applying the doctrine of unconscionability, recognizing that the parties often must make their contract quickly, that their bargaining power will rarely be equal, and that courts are ill-equipped to deal with problems of unequal distribution of wealth.”<sup>70</sup> In particular, “[c]ourts have resisted applying the doctrine [of unconscionability] where there is only procedural unconscionability without substantive unfairness.”<sup>71</sup>

Both the joint opinion and Roberts’s opinion place great weight on the Court’s much-quoted observation in *Pennhurst State School & Hospital v. Halderman*<sup>72</sup> that “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.”<sup>73</sup> From this premise, the

64. *Id.* § 176(1)(d), (2)(a).

65. *Id.* at § 2-302 cmts. a–b.

66. *Id.*

67. I am grateful to John Golden for encouraging me to emphasize this point.

68. U.C.C. § 2-302 cmt. 1 (1996).

69. E. ALLAN FARNSWORTH, *CONTRACTS* § 4.28, at 301 (4th ed. 2004); *cf. id.* at 299 (describing unconscionability as “incapable of precise definition”).

70. *Id.* at 302.

71. *Id.*

72. 451 U.S. 1 (1981).

73. *Id.* at 17.

*Pennhurst* Court concluded that “[t]he legitimacy of Congress’s power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”<sup>74</sup> Plucking the adverb “voluntarily” from its contract law context, the *NFIB* joint opinion concludes that an exercise of the spending power is unconstitutional if the offeree has “no choice” but to accept.<sup>75</sup> Contract law principles do not support that expansive reading of what makes acceptance *involuntary*. A contract is not voluntary for purposes of contract law if it is the product of duress or unconscionability. And both doctrines require some form of impropriety by the offeror—an impropriety that is not made out just by the fact that the offeror crafted terms that it knew the offeree could not reasonably reject.<sup>76</sup>

The bottom line is that “coercion” in contract law does not mean compulsion, and there is no principle of contract law that permits a contract to be voided just because one party had “no choice” but to accept. This being so, the joint opinion is not entitled to its blithe assertion that the “anti-coercion principle” is offended by an offer that effectively “compels” acceptance or, put otherwise, that “coercion” in Spending Clause jurisprudence means compulsion. It might. But analogizing a state’s agreement to comply with conditions on the receipt of federal funds to private agreements governed by contract law furnishes no support for this assertion. To the contrary, if it is true, as the joint opinion suggests, that the limitations on Congress’s spending power derive from the same source as do the limits on “coerced” contracts, and if it is true, as the Restatement provides, that “coercion” in contract law requires coercion, then the conclusion to draw is radically opposed to that which the joint opinion asserts: “coercion” in Spending Clause jurisprudence requires coercion, and not compulsion (or not only compulsion).<sup>77</sup>

Again, all that I have just written still falls short of conclusively establishing that a majority in *NFIB* was wrong to enforce an anti-

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74. *Id.*

75. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2661 (2012) (joint opinion).

76. The *Pennhurst* Court might have appreciated all this. For after briefly referencing voluntariness, the Court’s opinion says nothing more about it and proceeds to examine knowingness, ultimately dismissing a lawsuit against a state defendant on the grounds that the particular duties that plaintiffs alleged the state had assumed when accepting federal funds for the developmentally disabled had not been stated with sufficient clarity. Despite repeated citations to *Pennhurst* both by Roberts and by the authors of the joint opinion, the holding of that case adds essentially nothing to the requirement, subsequently set forth in *Dole*, that conditions on spending be unambiguous.

77. Remarkably, the contract law-inspired case for a compulsion-based interpretation of the spending doctrine’s “anti-coercion principle” is weaker still. Even when coercion has been made out in contract law, the remedy is that the contract is *voidable*. Here, the majority substantially weakens the notion of coercion—from, roughly, the conjunction of coercion and compulsion to (mere) compulsion—and also substantially strengthens the remedy. If the joint opinion were serious about the contract analogy, the lesson would be that states could, without adverse consequence, back out of deals to which they had agreed under compulsion. The majority goes beyond that to disable Congress even from making offers that subject the states to compulsion.

compulsion principle against Congress's use of its spending power. It could be that contract law furnishes a much less appropriate analogy for conditional offers of federal funds to the states than the majority assumes. However close or distant the analogy, we should nonetheless pause to reflect on why contract law does not permit any legal consequences to follow from the mere fact that the offeree of a contract proposal had "no choice" but to accept. It takes that approach because a contrary rule would be absurd. People often accept deals because they have no good choice in the matter. Consider law school graduate, L, in my hypothetical above. It would be crazy to prevent the law firm from making an offer just because it would give L "no choice" but to accept. Such a rule would make it nearly impossible to employ persons with radically limited options. Not surprisingly, then, courts adjudicating contract disputes have rejected a bare anti-compulsion principle time and again.<sup>78</sup>

### B. *Beyond Contract Law*

But perhaps the cases are distinguishable based on the source of the pressure. In the law firm case, even if we rightly say that L had "no choice" other than to accept the firm's offer and thus "was compelled" to accept it, we would not rightly say that *the law firm* compelled L to accept. We would say, instead, that financial straits compelled L's acceptance. With respect to the Medicaid expansion, in contrast, defenders of the majority's reasoning might say that the states were not compelled simply by circumstances to accept, but also that the statute, or Congress, compelled them to accept. The pressure was exerted by Congress and not by other forces or circumstances.

This is a tendentious description of the facts of the case. It seems more accurate to say that the states, much like L, would have been compelled to accept by facts about the world. Each state has many citizens and residents who are unable to provide for their own medical care; the state's populace demands that it ensure that health care be made available for these needy folks; and the resulting financial obligations are too great for the state comfortably to handle.<sup>79</sup> Sure, each state would have greater capacity to provide medical care for its needy if the national government did not tax its citizens to fund the national Medicaid program. On the other hand, if Congress didn't create Medicaid, the states might well find themselves back in a race to the bottom, the logic of which would also frustrate their ability to furnish substantial medical assistance to the poor and disabled. So

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78. For a representative decision, but explained with Judge Posner's characteristic lucidity, see *Selmer Co. v. Blakeslee-Midwest Co.*, 704 F.2d 924, 926–29 (7th Cir. 1983).

79. See Diane Rowland & Adele Shartzter, *America's Uninsured: The Statistics and Back Story*, 36 J.L. MED. & ETHICS 618, 619, 626 (2008) (outlining the growing number of uninsured and noting public opinion being generally in favor of covering those uninsured); KAISER COMM'N ON MEDICAID & THE UNINSURED, HENRY J. KAISER FAMILY FOUND., THE UNINSURED: A PRIMER 14 fig.13 (2010), available at <http://www.kff.org/uninsured/upload/7451-06.pdf> (showing that states pay for 30% of uncompensated care for the uninsured totaling \$17.2 billion).

Congress's net contribution to the pressures that combine to give states "no realistic choice" other than to accept the deals proposed in the ACA is highly uncertain.

Furthermore, even granting that Congress played some causal role in contributing to the circumstances that conspire to compel the states to agree to the new Medicaid conditions contained in the ACA, much more still needs to be said to justify the conclusion that Congress should be disabled from making the offer. In other contexts, the fact that one party is causally responsible for pressure exerted upon another is still insufficient, absent coercion, to disable it from exerting pressure that effectively compels another party to accept its offers.<sup>80</sup> Individuals and governments alike are often permitted to be agents of compulsion.

Plea bargaining presents perhaps the best example. 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, any given defendant 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 is unconstitutionally coercive.<sup>81</sup> In our terminology, however, all that this establishes is that plea bargaining can constitute compulsion. Yet the fact that the pressure that might compel a defendant to accept is exerted by the government, and not merely by the world at large, does not furnish a credible basis for challenging the plea offer.<sup>82</sup>

Don't misunderstand: plea bargaining should not be immune from constitutional scrutiny. Sometimes, even often, it might constitute the wrong of coercion.<sup>83</sup> My claim here is only that the fact, without more, that the threat of a stiff sanction might give a particular defendant no reasonable choice other than to accept is not a plausible basis for invalidating the offer of a much-reduced sanction in exchange for a guilty plea. Courts have appropriately recognized as much. As a unanimous Supreme Court explained over forty years ago:

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80. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196, 209–10 (1995) (asserting that the government is permitted to "exert[] pressure on defendants to plead guilty and to abandon a series of fundamental rights" in the absence of "fraud or coercion").

81. See, e.g., Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment, and Alienation*, 68 *FORDHAM L. REV.* 2011, 2016 (2000); John H. Langbein, *Torture and Plea Bargaining* 46 *U. CHI. L. REV.* 3, 12 (1978).

82. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (rejecting a prisoner's constitutional challenge to a plea bargain and stating that "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty").

83. For that different argument, see Berman, *supra* note 19, at 98–103.

The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, . . . apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. *All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas*; the 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.<sup>84</sup>

The jurisprudence of plea bargaining, then, supports and strengthens the lesson that contract law teaches: ordinarily, the fact that one party effectively compels another party to accept a deal by offering a benefit on terms that the latter could not reasonably reject is not adequate grounds for bringing adverse legal consequences to bear on the offeror—even when the offeror has played a part in making the threatened state of affairs as unattractive to the offeree as it is.

But ordinarily is not invariably. In at least one context other than conditional spending the Supreme Court has endorsed an anti-compulsion principle: the Establishment Clause. If that principle is sound in that context, perhaps it is sound in the conditional federal spending context too.

The key Establishment Clause case, of course, is *Lee v. Weisman*,<sup>85</sup> a 5–4 decision authored by Justice Kennedy. Deeming it “beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise,”<sup>86</sup> the Court proceeded to hold unconstitutional officially led prayers at high school graduation ceremonies on the grounds that “the government may no more use social pressure to enforce orthodoxy than it may use more direct means.”<sup>87</sup> The objectionable social pressure, the Court explained, consisted of “public pressure, as well as peer pressure” exerted “on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.”<sup>88</sup> Moving seamlessly between “coercion” and “compulsion,” the Court further emphasized that

[t]his pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. . . . It is of little comfort to a dissenter . . . to be told that for her the act of

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84. *Brady v. United States*, 397 U.S. 742, 750 (1970) (emphasis added).

85. 505 U.S. 577 (1992).

86. *Id.* at 587.

87. *Id.* at 594.

88. *Id.* at 593.

standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.<sup>89</sup>

Finally, the majority dismissed impatiently the state's contention that "attendance at graduation and promotional ceremonies is voluntary."<sup>90</sup> This argument, it announced,

lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. . . . Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.<sup>91</sup>

In several respects *Lee* might appear to be a useful precedent for the *NFIB* majority on the spending issue. First, under the label "coercion," *Lee* deployed the concept of compulsion. Second, the Court rejected a nominal or formalistic approach to the question of whether a right holder enjoyed a meaningful choice in favor of an inquiry into practical realities. Third, having reasoned that a right holder's nominal choice was not voluntary "in any real sense," it concluded that the challenged practice amounted to unconstitutional "coercion" or "compulsion."<sup>92</sup>

Yet the authors of the joint opinion cannot easily avail themselves of the support that *Lee* might offer, for two of them—Justices Scalia and Thomas—have denounced the *Lee* analysis in just the respects that matter here. Indeed, the central thrust of Scalia's opinion for the four *Lee* dissenters was precisely that *the majority deployed an indefensible conception of coercion*.<sup>93</sup> Although he agreed with "the Court's general proposition that the Establishment Clause 'guarantees that government may not coerce anyone to support or participate in religion or its exercise,'" Scalia could "see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty . . . a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud."<sup>94</sup> Importantly, Scalia's objection was not that, while the majority properly understood "coercion" to exist when the government exerts too much pressure on a target, it erred in finding the line between tolerable

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89. *Id.*

90. *Id.* at 594.

91. *Id.* at 594–95.

92. *Id.* at 599.

93. *Id.* at 632 (Scalia, J., dissenting) (attacking a "boundless, and boundlessly manipulable, test of psychological coercion . . .").

94. *Id.* at 642.

and excessive pressure crossed on the facts of the case. Rather, as he emphasized some years later, his disagreement with the *Lee* majority concerned “the form that coercion must take.”<sup>95</sup> And for Scalia, to repeat, the form that coercion must take is a threat to impose a legal penalty.

Not only for Scalia is this the case. As Justice Thomas reiterated a dozen years after *Lee*, in his *Elk Grove Unified School District v. Newdow* concurrence, “*Lee* adopted an expansive definition of ‘coercion’ that cannot be defended”<sup>96</sup>—“a notion of ‘coercion’ that . . . has no basis in law or reason.”<sup>97</sup> The legally significant kind of coercion (at least for purposes of the Religion Clauses), Thomas insisted, was precisely the kind that Scalia had previously identified: “that accomplished ‘by force of law and threat of penalty.’”<sup>98</sup> Naturally, precisely what this means turns on what Justices Scalia and Thomas mean by “penalty.” We’ll explore that question in Part IV. For the present, we can conclude merely that *Lee*’s compulsion-prohibiting spin on the Establishment Clause’s own “anti-coercion principle” should not be welcome support for the authors of the *NFIB* joint opinion.<sup>99</sup>

### C. *Blurring the Lines of Political Accountability*

The previous section showed that analogies to contract law, plea bargaining, and the law of religion do not support the proposition that conditional offers of federal funds—or, equivalently, conditional threats to withdraw or not to provide federal funds—are normatively problematic just because they give states no reasonable choice but to accept.<sup>100</sup> In fact, those analogies do more to undermine the claim. It remains, then, to consider whether there are good arguments for an anti-compulsion rule in the conditional spending context that are particular to that context and do not depend upon principles or considerations that sweep more broadly. Perhaps even if an anti-compulsion rule makes little sense in most or all other legal domains, the relationship between the national government and the states is *sui generis* in respects that justify such a rule here.

The majority does advance such an argument, one grounded in the theory, first floated in the anti-commandeering decision *New York v. United*

95. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 908–09 (2005) (Scalia, J., dissenting).

96. 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

97. *Id.* at 49.

98. *Id.* (quoting *Lee*, 505 U.S. at 640 (Scalia, J., dissenting)).

99. Well, not for all of them. Justice Kennedy, one of the authors of the *NFIB* joint opinion, was also the author of *Lee*. According to the Blackmun papers, though, and for whatever it may be worth, Kennedy was a late convert to the view he eventually penned. Having been assigned after conference to write the majority opinion upholding the prayers, Kennedy concluded after several months that his “draft looked quite wrong,” causing him to switch his vote and thus produce a new 5–4 majority going the other way. Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, March 4, 2004, <http://www.nytimes.com/2004/03/04/us/documents-reveal-the-evolution-of-a-justice.html?pagewanted=all&src=pm>.

100. For a discussion of these analogies, see *supra* notes 78–84 and accompanying text.



*States*,<sup>101</sup> that national coercion of the states “blurs the lines of political accountability.”<sup>102</sup> We already saw that Chief Justice Roberts relies on this consideration.<sup>103</sup> So too does the joint opinion. Quoting *New York* extensively, the joint opinion reasons that

Where all Congress has done is to “encourag[e] state regulation rather than compe[l] it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. [But] where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.” . . . When Congress compels the States to do its bidding, it blurs the lines of political accountability. If the Federal Government makes a controversial decision while acting on its own, “it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.” But when the Federal Government compels the States to take unpopular actions, “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.” For this reason, federal officeholders may view this “departur[e] from the federal structure to be in their personal interests . . . as a means of shifting responsibility for the eventual decision.” And even state officials may favor such a “departure from the constitutional plan,” since uncertainty concerning responsibility may also permit them to escape accountability. If a program is popular, state officials may claim credit; if it is unpopular, they may protest that they were merely responding to a federal directive.<sup>104</sup>

This passage is hard to read with a straight face. The Court was, after all, deliberating over the fate of a law universally known as “Obamacare.”<sup>105</sup> That inconvenient datum might be taken to cast doubt on the suggestion that the Constitution must be interpreted to proscribe federal spending programs that exert too much pressure on the states lest federal officials escape

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101. 505 U.S. 144, 168 (1992).

102. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2660 (2012) (joint opinion).

103. See *supra* note 47 and accompanying text.

104. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2660–61 (joint opinion) (internal citations omitted).

105. The reasoning is also at least somewhat hard to take from avowed originalists. For those scoring at home, the “blurred accountability” principle represents structural reasoning. Insofar as the joint opinion’s embrace of the anti-compulsion principle rests on this rationale, it is not obviously justified by ordinary meaning originalism and therefore requires more elaboration than most originalists have provided regarding the relationship between structural principles or implications and a text’s public meaning. For my critiques of originalism, see generally Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009), and Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 246 (Grant Huscroft & Bradley W. Miller eds., 2011).

accountability for an unpopular law. But even if we abstract from the context of utterance, the claim should still strike us as resting upon a model of political accountability that is almost breathtakingly naïve.

It's not that I think there is nothing to this bit of political science wisdom. There just isn't enough to justify a flat rule that conditions on federal-spending grants to the states exceed Congress's power if they leave states "no real choice" other than to accept. The problem arises from the fact that the majority's 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 fully entitled to attach conditions to its spending programs that exert so much pressure on the states as to make it, let us say, very hard for state officials to decline. But as soon as the magnitude of pressure that a conditional offer exerts crosses the magical line that separates "pressure" from "compulsion," "voluntary" from "involuntary," and "really hard choice" from "no choice," the offer is invalid.

This is an implausible place to draw a constitutional line. To be sure, courts must routinely craft doctrine that attaches dichotomous consequences to phenomena that lie on either side of a largely arbitrary dividing line. The problem here is not, then, that the majority's line is arbitrary. The problem is that the line is perverse.

On any remotely realistic picture of American political and electoral dynamics, 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.<sup>106</sup> In the former case, it is much easier for a modestly informed voter to realize that the policy she dislikes was forced upon the states and therefore is the responsibility of federal agents.<sup>107</sup> 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.

The authors of the joint opinion deem it "unmistakably clear. . . . that every State would have no real choice but to go along with the Medicaid Expansion."<sup>108</sup> They're right: it *is* unmistakably clear.<sup>109</sup> That's why a perfectly sensible concern with blurred lines of political accountability cannot justify the rule they defend. That concern would more sensibly *permit* congressional action at the extremes—either straightforward

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106. For a brief summary of other criticisms of the Supreme Court's accountability theory, including citations to other authors, see Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1632–33 (2006).

107. *Cf. id.* at 1632 (suggesting that the accountability issues of commandeering are exaggerated because engaged citizens are able to track the level of government responsible for particular initiatives).

108. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2662 (joint opinion).

109. But perhaps I should say that it *seems* unmistakably clear yet might not be. *See supra* note 54.

commands to the states or inducements so weak as to be accepted only by the wholehearted—and *prohibit* or constrain offers that alter the option sets faced by state offerees in ways too complicated and subtle for voters to intelligently assess. Of course, I am not advocating that conditional spending offers that exert significant pressure short of compulsion should be prohibited. My point is only that the consideration on which the majority Justices would rely does not carry them where they wish to go.

### III. Roberts, Once More

If, as Part II argues, it makes little sense to interpret our Constitution to prohibit Congress from using offers of federal funds to compel states to accede to conditions that Congress could not mandate, that does not cast doubt on the “anti-coercion principle.” That principle could be construed as one that prohibits Congress from using offers of federal funds to coerce states to accede to conditions that Congress could not mandate. Little argument is necessary to establish that *this* is a sound principle. It follows from what I have elsewhere termed “the threat principle”: ordinarily, if it is wrong to  $\phi$ , it is wrong to threaten to  $\phi$ .<sup>110</sup> And few people are ever moved to contest that principle.<sup>111</sup>

No, the objection to interpreting the Spending Clause as circumscribed by a true anti-coercion principle is not that Congress should be free to coerce the states into accepting behavioral conditions that Congress could not mandate. The objection is that that constraint is essentially meaningless. Because the states are not constitutionally entitled to federal funds,<sup>112</sup> the threat to withhold them is never a threat to act wrongfully, *constitutionally speaking*, therefore threats to withhold federal funding from states can never constitute any type of coercion that is constitutionally cognizable. Consequently, the objection continues, a constitutional limitation on

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110. See Mitchell N. Berman, *Blackmail*, in THE OXFORD HANDBOOK OF THE PHILOSOPHY OF CRIMINAL LAW 37, 39 (John Deigh & David Dolinko eds., 2011). The “paradox of blackmail” is the criminal law counterpart to the puzzle of unconstitutional conditions: both ask how it can be wrongful within a particular normative system to threaten what would be permissible, within that system, to do (i.e., withhold a governmental benefit, disclose an embarrassing secret). My solutions to the two puzzles are analogous. In my view, Bill Edmundson is mistaken to assert that blackmail demonstrates that a proposal can be wrongfully coercive for reasons that do “not derive from or depend upon the wrongness of the declared unilateral plan [i.e., the conduct threatened].” Edmundson, *supra* note 37, at 457. In both cases, the *seemingly* permissible conduct threatened may be *impermissible* when undertaken for certain reasons, and the fact of the conditional offer might have evidentiary bearing on whether those reasons are present.

111. Nuclear deterrence is not a counterexample. If, as most people believe, it is morally permissible, all things considered, to threaten nuclear retaliation against a nation that launches an offensive nuclear attack, that is not because the threat does not constitute the moral wrong of coercion. It is because exceptional circumstances might justify engaging in the wrong of coercion, as is true of most moral wrongs, and because deterring nuclear attack provides adequate justification.

112. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2630 (“States have no entitlement to receive any Medicaid funds; they enjoy only the opportunity to accept funds on Congress’ terms.”).

Congress's spending power that is fairly described in "anti-coercion" terms must proscribe more than coercion.<sup>113</sup> I will argue in the next Part that this objection rests on a mistaken premise. It *can* be constitutionally wrong to withhold funds to which a state is not constitutionally entitled, and therefore can be constitutionally wrong—the wrong of coercion—to conditionally threaten to withhold them.

But this is getting ahead of ourselves. Here I aim only to bolster doubts raised in the previous Part about the coherence or soundness of the anti-compulsion principle as applied to federal spending programs by showing that the Chief Justice does not endorse that principle as unambiguously as a first read of his opinion suggests. I have already said that the Roberts opinion appears to maintain, with the joint opinion, that the Medicaid expansion is unconstitutional because it gives states "no choice" but to accept.<sup>114</sup> That is, the condition is impermissible, in Roberts's estimation, precisely because it amounts to impermissible compulsion. Yet several passages in Roberts's opinion indicate ambivalence on his part regarding whether the fact that a conditional spending offer by the federal government would compel state acceptance is sufficient to render the proposal unconstitutional.

#### A. *The Modification Mystery*

The first puzzle arises from Roberts's evident concern with whether the Medicaid expansion is a modification of the preexisting Medicaid program or, instead, a new program. Rejecting Justice Ginsburg's suggestion that "existing Medicaid and the expansion dictated by the Affordable Care Act are all one program simply because 'Congress styled' them as such,"<sup>115</sup> the Chief Justice's opinion concludes that the Medicaid expansion is in fact a new program, largely on the grounds that it "accomplishes a shift in kind, not merely degree."<sup>116</sup> The dissent strenuously disagrees.<sup>117</sup> Put aside for the moment who's right. The mystery is simply that Roberts should care. If, as Roberts appears to maintain, the dispositive constitutional question is whether the states had a "real choice" regarding whether to accept the

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113. Cf. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1456 (1989) ("There is good reason to turn elsewhere in a search for the rationale of unconstitutional conditions doctrine, both because the necessary baselines are elusive, once government benefits in this context are conceded to be gratuitous, and because government, which differs significantly from any given individual, can burden rights to autonomy through means other than coercion. Coercion thus begins rather than ends the inquiry.").

114. See *supra* note 15 and accompanying text.

115. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2605 (quoting *id.* at 2635 (Ginsburg, J., dissenting in part)).

116. *Id.* at 2605 (Roberts, C.J.).

117. *Id.* at 2635–36, 2639–41 (Ginsburg, J., dissenting in part).

Medicaid expansion, it is not at all clear why the conclusion would differ depending on how that expansion is “properly viewed.”<sup>118</sup>

Seemingly, the answer is this: When enacting the original Medicaid provisions, Congress had expressly reserved “[t]he right to alter, amend, or repeal any provision” of the statute.<sup>119</sup> Therefore, if the Medicaid expansion effected by the ACA was properly deemed an “amendment” to the preexisting Medicaid program, then notice of its possibility is fairly attributed to the states. But if the expansion were not an amendment, then the Court could conclude that it wasn’t foreseeable. Attributing just this rationale to the Chief Justice, Justice Ginsburg asserts—without contradiction—that his claim that “the expansion was unforeseeable by the States when they first signed on to Medicaid” constitutes one of “three premises, each of them essential to his theory.”<sup>120</sup>

But this is no solution to the mystery at all. Congress cannot, simply by reserving the right to amend a program, manufacture the authority to create amendments that exceed its constitutional authority. As the states rightly objected, the federal government’s heavy reliance on its reservation of rights “confuses foreseeability and coercion.”<sup>121</sup> The relevant question “is not whether States had any warning that Congress might exploit their dependence on Medicaid funding to coerce compliance with a massive expansion of the program, but whether Congress’s coercive action is permissible.”<sup>122</sup> If it is not permissible because it compels acceptance by giving states no choice other than to acquiesce, then the fact that the states can be held to have seen it coming is of no moment, for what they should also have seen coming is a judicial invalidation of the effort.

We can view the same point through a slightly different lens—through Roberts’s intimation that it would have been permissible for Congress to accomplish exactly what it attempted through the Medicaid expansion had it first repealed the preexisting Medicaid program in its entirety and then enacted a new law that consisted of the prior law plus the Medicaid expansion. Justice Ginsburg takes the permissibility of this gambit for granted, framing the question that the Medicaid expansion presents around just that assumption: “To cover a notably larger population, must Congress take the repeal/reenact route, or may it achieve the same result by amending existing law?”<sup>123</sup> Again, Roberts does not deny this is so. To the contrary, his brief footnote response—that, due to practical or political considerations,

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118. *Id.* at 2605 (Roberts, C.J.).

119. 42 U.S.C. § 1304.

120. *Nat’l Fed’n of Indep. Bus.*, 132 S.Ct. at 2630 (Ginsburg, J., dissenting in part).

121. Brief of State Petitioners on Medicaid at 41, *Nat’l Fed’n of Indep. Bus.*, 132 S.Ct. 2566 (No. 11-400).

122. *Id.* at 42.

123. *Nat’l Fed’n of Indep. Bus.*, 132 S.Ct. at 2629 (Ginsburg, J., dissenting in part).

repeal and reenactment “would certainly not be that easy”<sup>124</sup>—strongly implies his agreement that it would be constitutional in the unlikely event it were to occur. Again, though, it is mysterious why this should be if the constitutionally relevant inquiry is whether states have a realistic option to reject Congress’s proposed deal.

### B. *The Reasons Riddle*

For a second puzzle, consider Roberts’s curious response to the states’ “claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion of health care coverage effected by the Act.”<sup>125</sup> “Given the nature of the threat and the programs at issue here,” he observed,

we must agree. We have upheld Congress’s authority to condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the “general Welfare.” Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such 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.<sup>126</sup>

The response appears to maintain that Congress’s purposes or reasons for action are constitutionally relevant and that, in enacting the Medicaid expansion, Congress was motivated by bad ones.<sup>127</sup> 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 something of a riddle 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 be neither here nor there that the threat “serves no purpose other than” to secure compliance.

And why does it matter whether “the conditions are properly viewed as a means of pressuring the States to accept policy changes”? We know from *Steward Machine*, by way of *Dole*, that pressure by itself does not constitute compulsion.<sup>128</sup> So one might have thought, consistent with the body of Roberts’s opinion, that how the conditions “are properly viewed” is again

124. *Id.* at 2606 n.14 (Roberts, C.J.).

125. *Id.* at 2603.

126. *Id.* at 2603–04.

127. *See id.* at 2606–07 (Roberts, C.J.) (“Congress may not simply conscript state agencies into the national bureaucratic army, . . . and that is what it is attempting to do with the Medicaid expansion.”) (citations and internal quotation marks omitted).

128. *See supra* note 13 and accompanying text.

irrelevant. If the conditions are properly viewed “as a means of pressuring the States,” but the pressure exerted leaves the states with some choice in the matter, then the condition does not produce compulsion and is constitutional. Contrariwise, if the pressure exerted leaves the states with “no choice” in the matter, then we would have compulsion, hence unconstitutionality, even if the conditions are “properly viewed” in some other light.

In short, this passage appears to consider it relevant to the constitutional inquiry—perhaps, indeed, fully inculpatory—that Congress’s “purpose” behind this particular threat to withhold a benefit was to “pressure” reluctant states into behaving in a manner that Congress could not mandate. But it is not clear why, on an unadorned anti-compulsion construal of the governing constitutional principle, Congress’s reasons for acting should be relevant.

### C. *The Penalty Puzzle*

A final puzzle attaches to Roberts’s tantalizing but 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. “Nothing in our opinion,” concludes the Chief Justice near the end of his spending power analysis,

precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. *What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.*<sup>129</sup>

This short passage provokes at least two questions. First, what does it mean to “penalize” a state (or to impermissibly “penalize” a state)? Presumably “to penalize” is equivalent to “to impose a penalty.” So we could rephrase the question: What is a “penalty”? Second, what is the relationship between penalties and compulsion?

We should not have to travel far for an answer to the first query. As luck would have it, resolution of the taxing power question turned precisely on the Court’s answer to the question of whether the provision that required citizens who fail to secure minimum health insurance coverage to pay a sum to the IRS levied a “tax” or imposed a “penalty.”<sup>130</sup> Justices Scalia, Kennedy, Thomas, and Alito, in dissent on this point, concluded the latter.<sup>131</sup> Chief Justice Roberts, in a portion of his opinion joined by the remaining justices, concluded the former.<sup>132</sup> Whether one concludes that the putative tax was or was not a “penalty,” surely one must first know what it is for an

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129. *Nat’l Fed’n of Indep. Bus.*, 132 S.Ct. at 2607 (Roberts, C.J.) (emphasis added).

130. *Id.* at 2594–600.

131. *Id.* at 2652–55 (joint opinion).

132. *Id.* at 2600 (Roberts, C.J.).

exaction to be a penalty. And Roberts is quick to endorse the definition offered by past cases: “[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission.”<sup>133</sup> In full accord on the definitional point, the joint opinion declares that “[o]ur cases establish a clear line between a tax and a penalty: A tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.”<sup>134</sup>

Unfortunately, whatever the merit to this conceptualization of penalty in the tax context, it cannot be what Roberts has in mind when charging that the Medicaid expansion impermissibly threatens to penalize non-acquiescing states. The state challengers to the provision argue, and a Supreme Court majority agrees, that conditions on the new Medicaid funds transgress the “anti-coercion principle” because non-participation in the new program is not a realistic option.<sup>135</sup> But nobody argues, and it is not plausible, that the Medicaid expansion makes non-participation in the new program “unlawful.” So if, through the Medicaid expansion, Congress is threatening “to penalize states that choose not to participate in that new program,” it must be the case that the withdrawal of benefits to which a state is not constitutionally entitled can constitute a penalty even when the withdrawal is predicated on something other than “an unlawful act or omission” by the state. The problem is that Roberts offers the reader no clue, outside this brief and enigmatic passage, regarding what concept of penalty he means to employ.

Actually, the problem runs deeper if we are to insist that whatever conception of penalty Roberts might have dimly in mind must fit with the anti-compulsion reading of his opinion. To see why such fit is doubtful, imagine (contrary to fact, I am willing to assume) that a state’s existing Medicaid funding, though substantial, were not so great that the state could not reasonably choose to forgo it as the price for not accepting the Medicaid expansion. Imagine too that a state were to exercise its practical option to say no and that, as a result, Congress were to take away all its Medicaid funding. How should we analyze the case?

Three possible characterizations of Congress’s action seem most eligible: (1) withdrawal of funding under these circumstances does not “penalize” the affected state, and is permissible; (2) withdrawal of funding under these circumstances does “penalize” the affected state, and is impermissible; and (3) withdrawal of funding under these circumstances does “penalize” the affected state, but is nonetheless permissible. (The fourth logical possibility—that withdrawal of funding does not “penalize” the state, and is impermissible—is a nonstarter.) None of these possibilities sits well with an unadorned “anti-compulsion” reading of the Chief Justice’s opinion.

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133. *Id.* at 2596 (internal quotation marks omitted) (quoting *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996)).

134. *Id.* at 2651 (joint opinion) (internal quotation marks and citations omitted).

135. *Id.* at 2662–64 (joint opinion).



Possibility (1) is not attractive, for it makes the presence of compulsion constitutive of whether an exaction is a penalty, yet it is commonplace that there are some exactions properly denominated penalties that one could rationally choose to incur. Possibility (3) is also not attractive because it seems to make penalty analysis do no work at all. On reading (3), Roberts should not have said (as he did) that Congress is not free to penalize states that choose not to participate in the new program; he should have said only that Congress is not free to compel states into participating. That leaves possibility (2). How plausible this proposition is must await further analysis of the concept of penalty. But if it does prove plausible, it creates tension with the view that, for Roberts, it is decisive that rejecting the Medicaid expansion was not a real or realistic option for the states. On possibility (2), Roberts would be saying not only (or not even) that Congress may not compel states to accept the Medicaid expansion, but also (or rather) that Congress may not threaten to penalize states that don't.

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To summarize, Chief Justice Roberts's opinion, written for himself and for Justices Breyer and Kagan, provokes at least three questions. First, what is the relevance of the fact, if true, that the Medicaid offer was not a modification of the preexisting Medicaid program? Second, what is the constitutional significance of Congress's reasons for structuring the Medicaid expansion as it did? Third, what is a "penalty" for Spending Clause purposes (or more generally), and how does the concept of penalty interact with those of compulsion and coercion?

The presence of these puzzles demonstrates that Roberts, Breyer, and Kagan might well have harbored doubts—doubts wholly consistent with the equivocal language used in Spending Clause precedents—about the "straightforward" anti-compulsion reading of the "anti-coercion principle" favored by the joint opinion. But they do more than that. As we will see, these puzzling aspects of the opinion lend support to (I do not say they "compel") the interpretations of coercion and penalty that I offer in the next Part.<sup>136</sup>

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136. In a careful and thorough analysis of the *NFIB* Spending Clause holding, Sam Bagenstos maintains that my analysis of conditional spending confronts "two significant problems." Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 *GEO. L.J.* (forthcoming 2013) (manuscript of August 2012 at 34). The second is that it has overly broad implications. I address this worry as the fifth objection in Part V, *infra*. The first problem is that my analysis "would not be an attractive interpretation of the Roberts opinion," in part because whereas I end up concluding that *Dole* was wrongly decided, the Chief Justice accepts it unquestioningly. *Id.* at 38.

Given this criticism, I should make very clear that I do not claim that my analysis is an interpretation of the Roberts opinion. While I do claim that features of his opinion cohere well with my analysis, I fully agree with Bagenstos that my analysis is inconsistent with some things that the Chief Justice says. Endeavoring to make better sense of that opinion than my analysis does, Bagenstos advocates (somewhat half-heartedly) what he calls "the anti-leveraging principle," which provides that "[w]hen Congress takes an entrenched federal program that provides very large sums

#### IV. The Medicaid Expansion and the Anti-Coercion Principle, Rightly Understood

Readers sympathetic to the Medicaid expansion are likely to find the arguments to this point, if persuasive, heartening. If what I have argued so far is correct, the Medicaid provisions of the ACA should be held unconstitutional only if the consequence that the biconditional proposal threatens to impose on a non-accepting state—withdrawal of all Medicaid funding—would be unconstitutional. And common wisdom holds that this cannot be. As the amicus brief for former Surgeon General David Satcher and others maintains, “[f]or the financial inducement offered by Congress to become unconstitutionally coercive, that inducement must, at a minimum, deprive the state of something *to which the state is otherwise entitled*.”<sup>137</sup> And, the argument continues, no state is entitled to federal Medicaid funds.<sup>138</sup> I argue in this Part that the major premise is mistaken.

My argument proceeds in three steps. Subpart IV(A) formulates and provisionally defends a general principle concerning one likely entailment or corollary of constitutional rights. I call this the “anti-penalty principle” mostly because it is apt, but also because that designation makes for a pleasing companion to the anti-coercion principle we have already been discussing. The next two steps assess the Medicaid expansion in light of this general principle. Subpart IV(B) introduces a highly stylized or schematic understanding of the Medicaid expansion as consisting of three discrete conditional offers: an offer of funds for the blind, the disabled, the elderly, and poor families with dependent children; an offer of funds for adult childless poor; and an offer to render states eligible for the first offer only if they accept the second. It concludes that, if this is how the Medicaid expansion is fairly or properly viewed, it runs afoul of the anti-penalty principle and, as a consequence, of the anti-coercion principle too. Subpart IV(C) considers whether the conclusion from subpart IV(B) changes when we recharacterize the Medicaid expansion as a single program or package.

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to the states and tells states that they can continue to participate in that program only if they *also* agree to participate in a separate and independent program, the condition is unconstitutionally coercive.” *Id.* at 5. The warrant for this principle is that only it makes sense of all aspects of Chief Justice Roberts’s opinion. A central difference between my approach and Bagenstos’s, accordingly, concerns just how seriously each of us takes all aspects of that opinion. As I read Bagenstos, he appears to assume that Roberts’s opinion is fully coherent and well thought out. I, in contrast, read the opinion as gestural and at least partly inchoate. Divining normatively defensible parameters for the exercise of Congress’s spending power is a real challenge. In light of both the difficulty of the problem and the somewhat meandering tenor of Roberts’s opinion, I find it more plausible and profitable than does Bagenstos to understand that opinion to be grasping toward a solution rather than to have captured one.

137. Brief for David Satcher et al. as Amici Curiae Supporting Respondents at 2, *Florida v. U.S. Dep’t of Health and Human Servs.*, 132 S.Ct. 2566 (2012) (No. 11-400), 2012 WL 588459, at \*2 (emphasis added).

138. *Id.*

Although I acknowledge that this is a difficult question, I conclude that, on the facts of this case, it probably does not.

#### A. *The Anti-Penalty Principle*

1. *Introduction to Unconstitutional Conditions.*—We saw in Part III that there exists what the Justices described as a well-established definition of “penalty”: a penalty is an exaction imposed as punishment for unlawful conduct.<sup>139</sup> That well-settled definition, however, is localized. It is the definition accepted in the tax context for distinguishing exactions that are and are not permissible exercises of Congress’s taxing power: the exaction is permissible if a “tax,” impermissible if a “penalty.”<sup>140</sup> It does not apply across the legal board. In particular, courts have frequently used or gestured to a very different conception of penalty in “unconstitutional conditions” cases.<sup>141</sup>

Although courts and commentators often refer to the “unconstitutional conditions doctrine,” if a doctrine is a set of rules or tests, then there is no such doctrine—at least none with more than trivial content.<sup>142</sup> 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. Federal offers of funds to states on the condition that they exercise their sovereign prerogatives in any fashion that Congress could not mandate raise the conditional offer problem. So too do countless offers of benefits conditioned on the waiver of individual rights: welfare grants for the poor conditioned on their agreement to be subjected to warrantless, suspicionless searches,<sup>143</sup> subsidies for public broadcasters conditioned on their agreement not to editorialize,<sup>144</sup> lower criminal sentences conditioned on a defendant’s waiver of his right to put the state to

139. See *supra* subpart III(C).

140. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2651 (2012) (joint opinion).

141. See, e.g., Wyman v. James, 400 U.S. 309, 340 (1971) (stating that the right to welfare benefits conditioned on warrantless searches amounts to a civil penalty).

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. When a statement of the doctrine’s content is provided, it often goes something like this: “Essentially, this doctrine declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly.” William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445–46 (1968). Courts have, on occasion, said such things. But I’d be surprised if anybody in a generation has believed that broad claim to be true, which suggests that it could be an accurate rendition of the doctrine only if everybody believed that the “unconstitutional conditions doctrine” is false. Not everybody does, so it must have different content.

143. E.g., *Wyman*, 400 U.S. 309 (1971); *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006).

144. *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

its burden of proof,<sup>145</sup> land use variances conditioned on a landowner's grant to the public of some of its property rights,<sup>146</sup> and on and on. Since the earliest cases that first self-consciously identified the conditional offer problem, way back in the 1870s,<sup>147</sup> courts have failed so spectacularly to analyze the problem in a coherent or even consistent fashion as "to make a legal realist of almost any reader," as Seth Kreimer aptly put it.<sup>148</sup> The only rendering of the "unconstitutional conditions doctrine" that is remotely faithful to the cases would maintain that sometimes conditional offers of the foregoing sort are permissible, while sometimes they aren't.<sup>149</sup>

Be that as it may, courts have, predictably, experimented with a variety of analytic approaches. And one of the more common turns on the concept of a penalty. The idea, very simply (perhaps a little too simply, as we will see), is that it is unconstitutional to penalize the exercise of a constitutional right.<sup>150</sup> Call this succinct claim "the anti-penalty principle" (AP). It is defeasible. Put in familiar terms, penalizing a constitutional right infringes but does not violate the right. Thus:

AP: It is presumptively unconstitutional for the government to penalize the exercise of a constitutional right.

Furthermore, by dint of the straightforward idea that it is impermissible to threaten what it is impermissible to do (the heart of a true anti-coercion principle), it is also presumptively unconstitutional to *threaten* to penalize the exercise of a constitutional right.

Judicial statements that endorse AP or something very close to it are common. We have already seen, for example, that Justices Scalia and Thomas approved it in *Lee v. Weisman*<sup>151</sup> and that the Chief Justice at least flirts with it in *NFIB*.<sup>152</sup> We also observed that, for this proposition to be useful, we will need to know what "penalty" and "penalize" mean—something that the frequent judicial endorsements of AP rarely divulge. One might reasonably complain, therefore, that AP is not, by itself, terribly informative. But even if not as informative or fully specified as we'd like, I anticipate that most readers, likely operating with just an inchoate sense of what a penalty is, will find it rather intuitive. Quickly: May the state

145. *E.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

146. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

147. The earliest cases involved state laws that conditioned the grant of corporate privileges on an out-of-state corporation's agreement not to remove suits filed against it to federal court. For a discussion, see Berman, *supra* note 19, at 59–70.

148. Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984).

149. *Id.*

150. For discussion and analysis of this principle in the case law, see Sullivan, *supra* note 113, at 1433–43.

151. *See supra* subpart II(B).

152. *See supra* subpart III(C).

withdraw eligibility for free school lunches from the children of mothers who obtain abortions? Surely not. And why not? Because doing so impermissibly penalizes a woman's exercise of her constitutional right to an abortion.<sup>153</sup>

I think we are therefore entitled to embrace AP as a working hypothesis—a hypothesis, I emphasize, not a conclusion.<sup>154</sup> The goal for this section, accordingly, is to develop conceptions of “penalty” and “penalize” pursuant to which AP is in fact true. Moreover, because AP is so frequently invoked in an effort to explain why some conditional offers of “benefits” (i.e., largesse, advantages, or things of value to which the beneficiary is not constitutionally entitled) are unconstitutionally coercive, we hope further for a definition of penalty that will capture at least some withdrawals or denials of benefits. In short, the desiderata for a definition of penalty are (1) that it render AP true and (2) that it encompass at least some failures or refusals to furnish benefits (as just defined).

2. *The Baseline Problem.*—Here's a first stab, courtesy of the Court's Self-Incrimination Clause jurisprudence tracing back to its 1965 decision in *Griffin v. California*.<sup>155</sup> The Fifth Amendment privilege against self-incrimination, the Court has consistently held, permits defendants not only to remain silent, free from criminal punishment, but also “to suffer no penalty

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153. An alternative explanation would be that the state is impermissibly trying to discourage women from exercising their right to an abortion. But this is a bad explanation. It is true that the state is prohibited from trying to influence exercises of some rights. For example, it may not act for the purpose of encouraging or discouraging attendance at houses of religious worship. But this is not true of all rights, and, as a matter of positive law, the state is permitted to try to encourage women to “choose life.” You might think that is a mistaken decision. Maybe it is, maybe it isn't. The critical point is that the hypothetical action described in the text should strike us as plainly unconstitutional even assuming arguendo that the state is constitutionally permitted to try to discourage women from exercising their right to an abortion. That is, the state may not try to discourage women from having abortions by the particular means of threatening to penalize them if they do.

154. At least one eminent commentator has denied this. Cass Sunstein once went so far as to conclude that “[t]he Constitution offers no general protection against the imposition of penalties on the exercise of rights.” 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, 603 (1990) [hereinafter Sunstein, *Anachronism*]. That is, he flatly denied AP. He could maintain this position, however, only because he already accepted a definition of penalty (a non-normative one, to jump ahead) according to which AP is false. The other possibility is to accept AP and then try to formulate a conception of penalty that vindicates it. I think the second approach far preferable because most of us start with a strong (though necessarily defeasible) pretheoretical commitment to AP.

Revealingly, when he later converted his 1990 article into a book chapter, Sunstein softened his rejection of an anti-penalty principle. The claim then became that “[i]t is *not clear* that there is any general protection, in the Constitution, against penalties on rights.” CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 300 (1993) (emphasis added). That is a very different claim, for indeed it is *not* “clear” that AP is true. It is only “likely” or “intuitively plausible.” The task is to see whether “penalty” can be specified in a manner that vindicates AP. As it turns out, the specification that I will propose is different from that which Sunstein assumes. See *infra* note 177.

155. 380 U.S. 609 (1965).

... for such silence.”<sup>156</sup> And “penalty,” the Court has emphasized, “is not restricted to fine or imprisonment. It means ... the imposition of any sanction which makes assertion of the Fifth Amendment privilege ‘costly.’”<sup>157</sup> Given its embrace of the anti-penalty principle, and consistent with its understanding of “penalty” as governmental conduct that makes exercise of the right more costly, the Court has prohibited, for example, the prosecution from commenting on the accused’s silence,<sup>158</sup> the court from instructing jurors that silence is evidence of guilt,<sup>159</sup> and the organized bar from sanctioning non-testifying attorneys.<sup>160</sup>

*Griffin* provides a starting point, but its use of the adjective “costly” cannot stand without qualification. The Constitution does not plausibly forbid actions that make exercise of Fifth Amendment rights costly in some abstract or objective sense. The underlying notion must be comparative. Let us then read *Griffin*’s definition of penalty to cover actions that make individual conduct “more costly.” For this definition to be useful, we need as well an answer to the question “more costly than *what?*” The “what” is standardly termed the “baseline.” Thus do we have the following proposed definition of penalty and penalize:

P: Any governmental act or omission, G, penalizes (i.e., imposes a penalty upon) some conduct, C, by an actor, A, if G makes C more costly for A than C would have been for A [had the appropriate baseline state of affairs obtained].

So far, so good. But not far enough. Plainly, we need to replace the bracketed language with a specification of the appropriate baseline.

Although, in principle, any number of conceivable baselines might be identified, most or all will fall into one of two classes: either normative or non-normative.<sup>161</sup> A normative baseline is constituted by the treatment that the agent, A, *should* get.<sup>162</sup> Non-normative baselines fall into at least two subclasses: positive and counterfactual.<sup>163</sup> A positive baseline is constituted by some actual state of affairs, such as the state of affairs that A in fact enjoyed prior to the governmental act or omission in question (a historical

156. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

157. *Spevack v. Klein*, 385 U.S. 511, 515 (1967) (quoting *Griffin*, 380 U.S. at 614).

158. *Id.*

159. *Id.*

160. *Id.* at 514.

161. To simplify the discussion, I will put aside possible combinations of normative and non-normative baselines. This is a legitimate simplification because my goal in this section is to present sympathetically the objections that scholars have raised *against* efforts to solve the conditional offer problem by invoking the anti-penalty principle. Complicating the menu of possible baselines is a move for proponents, not opponents, of AP.

162. Kreimer, *supra* note 148, at 1373–74.

163. *See id.* at 1359, 1363, 1371 (identifying three types of baseline: equality, history, and prediction, the latter of which correspond to the non-normative positive and counterfactual baselines); *see also* Berman, *supra* note 19, at 13 (identifying Kreimer’s equality, history, and prediction baselines as “positive (‘history’ and ‘prediction’) and normative (‘equality’)”).

baseline) or the state of affairs that agents similarly situated to A enjoy in the jurisdiction or elsewhere (a comparative baseline).<sup>164</sup> A counterfactual baseline is constituted by what the world would look like under some specified counterfactual circumstance, such as the state of affairs that A would enjoy if the government were disabled from conditioning a benefit in the particular way that it has, and thus would have to provide it either more broadly or less broadly.<sup>165</sup>

With this thumbnail taxonomy of possible baselines in hand, we reach the difficulty that confronts proponents of a penalty-based solution to the conditional offer puzzle: “the baseline problem.”<sup>166</sup> The supposed problem is that no non-normative baseline provides a specification of P pursuant to which AP is true, and no normative baseline provides a specification of P pursuant to which it encompasses any non-provision of “benefits.” Thus, the baseline cannot be specified in any fashion that provides a definition of penalty that satisfies both of our stated desiderata: (1) that it renders AP true and (2) that it shows that at least some failures to provide benefits impermissibly penalize rights.

Let us take these two claims in order. Take the most obvious candidate for a non-normative baseline: the “historical” baseline. Fleshing out P by allowing history to constitute “the appropriate baseline” yields the following definition, that we can denominate P1:

P1: Any governmental act or omission, G, penalizes some conduct, C, by an actor, A, if G makes C more costly for A than C would have been for A prior to G.

P1 is a conceivable stipulative definition of “penalty.” However, it is not a definition that makes AP true. An increase in postage rates makes many exercises of First Amendment rights more costly than they would be absent the increase. The decision to locate a polling place here rather than there makes it more costly for some people to exercise their right to vote. These and countless other governmental actions make exercise of rights more costly than they would be absent those actions, yet do not plausibly raise constitutional alarms. Again: We are not looking for just any definition of “penalty” that minimally comports with linguistic usage; we are hunting for a definition of “penalty” that makes AP true.

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164. See Kreimer, *supra* note 148, at 1359–64 (examining “history as a baseline” and “equality as a baseline”).

165. The seminal exploration of the types of baselines that might help solve the conditional offer problem is Kreimer, *supra* note 148. See also, e.g., Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289 (1989).

166. Sometimes the “baseline problem” is raised as a challenge for accounts of constitutional “penalties.” More often, it arises in the context of assessing whether conditional offers of benefits can ever be wrongfully “coercive.” Because the most common way in which a threat to withhold a “benefit” can constitute coercion will be that it penalizes the exercise of a constitutional right, these two formulations of the baseline problem are fundamentally the same.

If P1 does not fit the bill, here's a specification of P that does make AP true:

P2: Any governmental act or omission, G, penalizes some conduct, C, by an actor, A, if G makes C more costly for A than C would have been for A had A received that to which A is constitutionally entitled.

This is a somewhat complicated way to say that government penalizes conduct by treating the actor who engages in the conduct less well than the actor should be treated, constitutionally speaking. It is therefore the most natural reflection of a normative baseline. Unlike P1, P2 makes AP true—indeed, P2 makes AP tautological. But it makes AP true in a way such that AP cannot be violated by the withdrawal or nondisbursement of benefits, precisely because benefits are defined as goodies to which the beneficiary is not constitutionally entitled. P2 does not satisfy our second desideratum.

On the basis of reasoning like this, some of the leading constitutional theorists of our day have concluded that the withdrawal of benefits can never penalize rights in any sense of “penalizing rights” that is constitutionally suspect, which is also to say that *threats* to withdraw benefits (on failure of stated conditions) can never be unconstitutionally coercive. As Kathleen Sullivan concluded in an influential article, “To hold that conditions coerce recipients because they make them worse off with respect to a benefit than they *ought* to be runs against the ground rules of the negative Constitution on which the unconstitutional conditions problem rests.”<sup>167</sup>

3. *The Baseline Solution*.—I believe that this scholarly near-consensus is mistaken. Its error is to suppose that the set of eligible normative baselines is exhausted by states of affairs describable without reference to government's reasons for causing them, or allowing them to obtain. The “penalty skeptics” (or “coercion skeptics”) maintain that if an actor is not constitutionally entitled to be provided with a benefit, then it cannot be improper for the state to withhold it.<sup>168</sup> What they do not adequately appreciate is that government's reasons for actions might be constitutionally

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167. Sullivan, *supra* note 113, at 1450; *see also, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 79 (1996) (“Where the government has no obligation to provide the subsidy at all, it makes no one legally worse off by conditioning the subsidy on desired behavior. Under this test, however, the conditional-offer doctrine does no work.”); Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 373 (2008). *See generally* Larry Alexander, *Understanding Constitutional Rights in a World of Optional Baselines*, 26 SAN DIEGO L. REV. 175 (1989).

168. A common formulation is that benefits can be withheld “for any reason or no reason at all.” For a charming illustration that people often say such a thing without reflection, see Rankin v. McPherson, 483 U.S. 378, 383–84 (1987): “Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression.” Obviously, McPherson's possible entitlement to reinstatement contradicts the supposition that she was dischargeable “for any reason.”



relevant, such that the non-provision of a benefit to which a would-be beneficiary is not constitutionally entitled can be unconstitutional because of the reasons for which it is not provided.<sup>169</sup> Put in a familiar vocabulary, the skeptics focus exclusively on the outputs of state action, wholly neglecting the inputs.

If government's reasons for action (including inaction) are constitutionally relevant, then we should entertain the possibility that the non-provision of benefits is unconstitutional if motivated by bad reasons, and the task becomes one of identifying the reasons that count as bad. Here's a rough-cut proposal: government may not withhold benefits it would otherwise provide for the purpose either of discouraging agents from exercising their constitutional rights or of punishing them for doing so.<sup>170</sup> Stated differently, if government has reasons to provide a particular benefit to a particular potential beneficiary, it may not withhold that benefit in order to make the exercise of constitutional rights costly or painful. Let us try to convert these general thoughts into a definition of penalty, formulated as a specification of P:

P\*: Any governmental act or omission, G, penalizes (i.e., imposes a penalty upon) some conduct, C, by an actor, A, if G makes C more costly for A than C would have been for A had the government not undertaken G and if the government engaged in G, rather than not-G, for the purpose of making C more costly or painful.

Please take P\* as a work in progress. Very likely, it can be improved upon. The core idea, again, is that if government could have made C less costly than it did make C, but did not choose that path because of—and not in spite of—its anticipation that its action would prove costly to A (presumably, for deterrent or punitive reasons), then its pursuit of the more costly-to-A path imposes a penalty on A's doing of C. Put in the language of reasons, *the state may not take the expected fact that a proposed course of action would make the exercise of rights more costly or more painful as a reason in favor of that course of action.* (More costly or more painful than what? More costly or more painful than would be the case if the state did otherwise.)

Two things about P\* merit emphasis. First, it is not the case that, on this definition, all withholdings of benefits amount to a penalty. The University of Texas School of Law, a state actor, offers a faculty position to Lucy Taylor, conditioned on her agreement to teach tax. She declines, as is her constitutional right. In response, UT carries out its threat not to employ

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169. This objection is not original to me. See, e.g., John H. Garvey, *The Powers and Duties of Government*, 26 SAN DIEGO L. REV. 209, 224 (1989) (noting that it is often said that the government cannot withhold benefits for a bad reason).

170. By acting "in order to punish" or "for the purpose of punishing," I mean that one acts on vindictive or retributive non-instrumental reasons for imposing costs or hardship.

her. This non-provision of a benefit need not be tainted by any purpose that renders it a penalty. That withholding the job would make Taylor's exercise of her right not to teach tax more costly or painful need play no role in the Law School's deliberation. It may simply be that the Law School has inadequate affirmative reason to employ Taylor if doing so would not fill its curricular needs.<sup>171</sup>

Second, that some action by the state does penalize some conduct is not enough to render the state action suspect. Some conduct the state is entirely free to penalize. Criminal punishments are penalties on the proposed account, for the state imposes them to make the proscribed conduct more costly or painful than it would be otherwise, and does so for the purpose of discouraging and/or punishing it.<sup>172</sup> But they are unproblematic precisely to the extent that people do not have a right to engage in the conduct criminalized and thus penalized. The claim—represented by AP—is that *the state is obligated not to penalize the exercise of rights*. Part of what it is to have a constitutional right to  $\phi$  is to have a right not to be penalized for  $\phi$ ing—in the sense of penalty captured by P\*.<sup>173</sup> Thus, combining the anti-penalty principle, AP, with P\* as the specification of what a penalty is yields the following principle:

AP\*: It is presumptively unconstitutional for the government to make the exercise of a constitutional right more costly for the right holder than it would be had the government acted otherwise where the government would have acted otherwise but for a purpose of making the exercise of the right more costly or painful.

I have now formulated the suggestion in a variety of ways that approximate one another even if they don't correspond precisely.<sup>174</sup> I have not yet provided argument for it. I do not believe that any slam-dunk argument in favor of it exists. For example, AP\* cannot be deduced from incontrovertible first principles or even from principles that, if controvertible, are not in fact contested. The best argument for AP\* must be largely coherentist: First, AP\* is highly plausible on its face. Second, AP\* best

171. I am assuming that the Law School would not want to hire Taylor if she could not, or would not, teach tax. But the case could be otherwise. The Law School might deem Taylor a sufficiently attractive candidate to warrant hiring her regardless of her curricular commitments. In that case, the conditional offer would be extended as a way to pressure or induce her to teach a subject that would make her yet more attractive. For a discussion of this possibility, see *infra* Part V, Objection 6. I am grateful to David Strauss for pressing me on just this point.

172. Again, see *supra* note 170 for what I mean by the "purpose" of "punishing."

173. Not all rights are rights to  $\phi$ . I mean the claim in text to accommodate these other types of rights too.

174. One respect in which the formulations differ concerns how the bad purposes or reasons function in the state's deliberation—in particular, whether the reasons I identify turn the withholding of a benefit into a penalty only if they serve a but-for role, or if they serve any motivating function, or are "substantial factors," and so on. See Berman, *supra* note 19, at 27 & n.103. I leave this an open question for now.

accounts for widespread intuitions about a wide range of cases, actual and hypothetical, and for judgments about cases that, if not immediately intuitive, withstand critical scrutiny.<sup>175</sup>

The latter claim cannot be fully demonstrated in this Article, given the number and diversity of cases that a coherentist analysis would have to address. I have, however, taken a stab at the project elsewhere.<sup>176</sup> Here, I can proceed only some distance toward establishing the plausibility and attractiveness of AP\*. As a first step, let us consider two hypothetical cases, what I will call *Vindictive Sentencing* and *Short Zoning*.

*Vindictive Sentencing*

Harris is convicted of robbery, a second-degree felony punishable under state law by a sentence of imprisonment from two to twenty years. Judge Davis imposes a sentence of ten years. Harris appeals his conviction on the grounds that a motion to exclude certain eyewitness testimony was improperly denied. The court of appeals agrees and vacates the conviction. Harris is convicted on retrial and once again comes before Judge Davis for sentencing. This time, however, Judge Davis imposes a sentence of twenty years. She explains this longer sentence in open court: “We simply cannot have guilty people challenging this court’s orders with impunity.”

*Short Zoning*

The three-member local land use commission is considering what zoning restrictions to impose on beachfront property. Commissioners Smith and Jones observe that height limits of forty feet would adequately serve the community’s environmental and aesthetic interests. Commissioner Brown, speaking last, agrees. But he also observes that a thirty-foot limit would allow the Commission to extract concessions from homeowners in exchange for permission to build up to forty feet. “Good point,” says Commissioner Smith. “Brilliant,” adds Commissioner Jones. They vote unanimously to limit beachfront property to thirty vertical feet.

After the new zoning rules go into effect, the Johnsons, owners of a beachfront lot, seek a variance from the height restrictions that would allow

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175. Note that I do not maintain that the conjunction of AP and P\* *perfectly* accounts for widespread intuitions about a wide range of cases. Some of my conclusions with regard to actual cases differ from what the courts have held; some may differ from your own intuitions. The method of reflective equilibrium requires that we be willing to abandon some of those case-specific intuitions in order to produce a set of mutually supportive beliefs that we can accept on reflection better than any alternative set. For elaboration, see Berman, *supra* note 105, at 259–61. To be sure, if application of AP\* yields conclusions that you are firmly convinced are mistaken, even on deep reflection, and if AP\* really does require those conclusions (it might be supplemented, in a non-ad hoc way, by other principles that would save the case-specific judgment), then you are warranted in rejecting AP\* or modifying it. But do not expect perfect coherence at the outset. Some of our judgments about individual cases might be mistaken.

176. See generally Berman, *supra* note 19; Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,”* 55 VAND. L. REV. 693 (2002).

them to build a forty-foot home. They argue, among other things, that a forty-foot house on their lot would not block their inland neighbors' views and that, because nearby beachfront houses are comparably tall, their requested construction would not alter a uniform aesthetic. The commission asks the Johnsons to grant a public easement across their beach in exchange for the variance. The Johnsons refuse and the commission denies the variance.

I expect readers to share the judgments that Judge Davis's imposition of a twenty-year sentence violated Harris's constitutional rights and that the Commission's denial of the Johnsons' requested variance violated their constitutional rights. But why? After all, Harris was not constitutionally entitled to a sentence of less than twenty years, and the Johnsons were not constitutionally entitled to build a forty-foot-tall house. Constitutionally speaking, both were "benefits" that the state could withhold.

The answer, I suggest, is supplied by AP\*. Harris has a constitutional right to appeal his conviction. Judge Davis penalized him for exercising this right by denying him the benefit of a lower sentence as retribution for exercise of that right. The Johnsons have a constitutional right not to have property taken from them without just compensation. That is the right they invoke when refusing to grant a public right of access across their beach. The Commission penalized them for exercising their right when denying them a benefit for the purpose of discouraging them or similarly situated others from insisting on their right in like circumstances. The combination of P\* and AP explain why these actions are unconstitutional, as surely all agree that they are.<sup>177</sup>

In fact, this analysis corresponds extraordinarily well with actual Supreme Court decisions that approximate *Vindictive Sentencing* and *Short Zoning: North Carolina v. Pearce*<sup>178</sup> and *Nollan v. California Coastal Commission*<sup>179</sup> respectively.

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177. Recall Cass Sunstein's rejection of AP. See *supra* note 154. "The clearest example" he can muster for the proposition that "the government can legitimately 'penalize' the exercise of constitutional rights through selective funding" is government's funding of public but not private schools. See Sunstein, *Anachronism*, *supra* note 154, at 603 & n.42, 609–10. But the non-funding of private schools, even when conjoined to the funding of public schools, does not, according to P\*, penalize parents' right (grounded in the Free Exercise Clause) to send their children to private school. That non-funding of private schools makes it harder or more costly to exercise parents' rights over the education of their children need not figure into the government's reasoning at all. Because public and private schooling may differ in various ways—including regarding the extent to which each tends to promote class and racial integration and the extent to which government can influence the curriculum—the state may on legitimate grounds value the former more highly than the latter. Put differently, the state may decide that free education open to all members of the community, provided and shaped by the polity in a collective capacity, is a distinct type of good, and one worth providing.

178. 395 U.S. 711 (1969).

179. 483 U.S. 825 (1987).

*Pearce* involved consolidated challenges to longer criminal sentences imposed after defendants successfully appealed a first conviction but were convicted again after retrial.<sup>180</sup> In contrast to the hypothetical *Vindictive Sentencing* however, in neither case did the resentencing judge announce his reasons for the longer sentence.<sup>181</sup> The Court started by declaring basic principles:

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, “penalizing those who choose to exercise” constitutional rights, “would be patently unconstitutional.” And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to “chill the exercise of basic constitutional rights.” But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. “A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant.”<sup>182</sup>

In short, “Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.”<sup>183</sup>

Because “[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case,”<sup>184</sup> the majority proceeded to announce that vindictiveness would be conclusively presumed “whenever a judge imposes a more severe sentence upon a defendant after a new trial,” unless the reasons for the more severe sentence “affirmatively appear.”<sup>185</sup> Twenty years after *Pearce*, in *Alabama v. Smith*,<sup>186</sup> the Court overruled this strict prophylactic rule.<sup>187</sup> But no Justice in the *Pearce* line of cases has disputed the general principle that a vindictive reason for giving a criminal defendant a longer sentence than he had received previously is unconstitutional even where the defendant is not constitutionally entitled to a

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180. *Pearce*, 395 U.S. at 713–14.

181. *Id.* at 726.

182. *Id.* at 723–24 (internal citations omitted).

183. *Id.* at 725.

184. *Id.* at 725 n.20.

185. *Id.* at 726.

186. 490 U.S. 794 (1989).

187. *See id.* at 795 (“We hold that no presumption of vindictiveness arises when the first sentence was based upon a guilty plea, and the second sentence follows a trial.”).

shorter sentence.<sup>188</sup> Moreover, no Justice has taken issue with the *Pearce* majority's observation that the vindictive sentence is unconstitutional because it amounts to a forbidden "penalty."<sup>189</sup>

The basic idea applies to vindictiveness outside of the criminal justice context. In *Perry v. Sindermann*,<sup>190</sup> for example, a teacher in the Texas state college system alleged that the state declined to renew his contract because, as president of the local teachers association, he had criticized the Board of Regents.<sup>191</sup> In reasoning and language that nearly mirrors the general principle endorsed by *Pearce*, the Supreme Court reiterated that,

even though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.<sup>192</sup>

*Perry's* declaration that "there are some reasons upon which the government may not rely," in particular that it "may not . . . deny a benefit to a person because of his constitutionally protected speech or associations" restates what I described as the core idea behind P\*: "[T]he state may not take the expected fact that a proposed course of action would make the exercise of rights more costly or more painful as a reason in favor of that course of action."<sup>193</sup> Penalty skeptics have not given this possibility a serious hearing.

*Nollan* is much like *Short Zoning*, except that it lacks a record in which relevant governmental actors announce that they impose more stringent zoning rules than they believe are necessary to serve the public interest, for the purpose of using the offer of a variance to extract a waiver of rights that the state could not mandate. In the absence of that "smoking gun," the question in *Nollan* became whether such a purpose could be inferred from the fact that the zoning rule and the extraction demanded as a condition for its non-enforcement served somewhat different purposes: the height limitation served the public's interest in being able to see the coast from

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188. *See id.* at 798–99 (surveying and approving of cases that used the presumption of vindictiveness).

189. *Pearce*, 395 U.S. at 724.

190. 408 U.S. 593 (1972).

191. *Id.* at 594–95.

192. *Id.* at 597.

193. *See supra* note 168 and accompanying text.

some distance inland; the easement served the public's interest in being able to traverse the beach.<sup>194</sup>

The Supreme Court divided, 5–4, on just this question. A majority thought the purposes that would constitute a penalty—in the sense marked out by P\*—could be inferred from the structure of the proposal: “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.”<sup>195</sup> The dissenters thought the inference unwarranted.<sup>196</sup> But they did not disagree that, if denial of the requested permit were in fact animated by the purposes that the majority ascribed to the land use commission, the denial would unconstitutionally penalize the Nollans' Fifth Amendment rights.<sup>197</sup>

Notice this. “Extortion” is fairly understood as theft by coercion. In the majority's estimation, then, the Commission's offer to the Nollans—we'll give you a construction permit if and only if you cede a lateral easement to the public—violated an anti-coercion principle.<sup>198</sup> But that anti-coercion principle is manifestly not an anti-compulsion principle. Suppose the Nollans wanted only to make a modest addition to their existing home. The threat to deny permission to do so would not, in that event, give them “no choice” or even “no practical choice” other than to accept: they could live happily as they were. Still, the threat would impermissibly threaten a penalty, on the majority's estimation. Remarkably, *Nollan* was decided just three days after *Dole*.<sup>199</sup> Both cases raised the conditional offer problem, and both evaluated the conditional offers before them against principles fairly described in “anti-coercion” terms. But the *Dole* “anti-coercion principle” is really an anti-compulsion principle, while *Nollan* endorsed an anti-coercion principle. *Nollan* was on sounder normative footing.

194. *Nollan v. Cal. Coastal Comm.*, 483 U.S. 825, 836–37 (1987).

195. *Id.* at 837 (internal quotation marks and citations omitted).

196. *Id.* at 849–50. In my view, the dissenters had the better of the argument. The majority's assertion that “the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was,” *id.* at 837, is nonsense. Nonetheless, the majority's approach might make sense if understood, not as a claim about metaphysics or logical deduction, but instead as a determination that the judiciary should police exactions by means of a judicial rule that conclusively presumes a conditional permit offer to threaten a penalty when the public interests served by the restriction and by the exaction differ. This, however, would be a prophylactic rule—what I would term a prophylactic “decision rule.” (On the meaning of “constitutional decision rules,” see *infra* note 231 and accompanying text.) That would be fine with me, but uncomfortable for Justice Scalia, the author of *Nollan*, given his jeremiad against prophylactic rules in his *Dickerson* dissent. *Dickerson v. United States*, 530 U.S. 428, 457–61 (2000) (Scalia, J., dissenting).

197. See *Nollan*, 483 U.S. at 843 (Brennan, J., dissenting) (suggesting that if the majority were correct that the regulation exceeded the state's police power, it would be an unconstitutional taking).

198. See, e.g., BLACK'S LAW DICTIONARY 623 (8th ed. 2004) (defining “extortion” as “obtaining something . . . by illegal means, as by force or coercion”).

199. *Nollan*, 483 U.S. 825 (1987) (decided on June 26th); *South Dakota v. Dole*, 483 U.S. 203 (1987) (decided on June 23rd).

As *Pearce* and *Nollan* illustrate, it will often be hard to determine whether a given non-provision of a benefit *is* a penalty in the sense captured by P\*, and also, therefore, whether some conditional offer of a benefit threatens a penalty in that same sense. More fundamentally, though, they teach that, epistemic difficulties aside, the state may not penalize rights. Without qualification or dissent, they affirm AP\*.

4. *Beyond the Hypothetical*.—The previous subsection aimed to bolster the plausibility of AP\* by analyzing hypothetical cases in which the types of reasons or purposes necessary to make out a penalty were patent. The actual cases that I paired with the hypotheticals raise the question of whether we can ever infer the bad purposes from the structure of the proposal itself, without having to put words into the mouths of the key governmental actors. I pursue that question here—and answer it in the affirmative—by analyzing the most important conditional spending precedent: *South Dakota v. Dole*.

*Dole* involved a challenge to federal highway spending law that conditioned 5% of the funds that a state would be authorized to receive for highway construction and repair on its maintenance of a minimum legal drinking age (MLDA) of at least 21.<sup>200</sup> The Court, recall, determined that the proposal was not unconstitutionally “coercive,” but interpreted “coercion” to mean compulsion:

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. . . . Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.<sup>201</sup>

The Court was surely right to conclude that the proposal did not constitute compulsion. I have argued, however, that the normatively meaningful concept is coercion. And the offer would have been coercive if it would have been unconstitutional for Congress to withhold the offered benefit (some portion of federal highway funds) on failure of the condition. Furthermore, given the specification of the anti-penalty provision captured by AP\*, non-provision of that benefit would have been unconstitutional had it been motivated by a purpose to discourage or punish exercise of a state’s right to maintain a MLDA under 21.

Keep in mind: we are inquiring into the reasons the offeror would have for *withholding the benefit* at  $t_2$  on non-satisfaction of the stated condition; we are *not* inquiring into the public-serving reasons for *extending the*

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200. 483 U.S. at 203.

201. *Id.* at 211–12.



*proposal*, or for attaching this particular condition, at  $t_1$ . (This is an absolutely critical distinction that even sophisticated readers have missed,<sup>202</sup> if you glide past it, then you have no chance to understand the analysis.) Often, though not invariably, government is constitutionally permitted to offer benefits on condition precisely as a means of inducing a rightholder to waive the protection of a constitutional right or to exercise her right in a manner that the government prefers.<sup>203</sup> The conditional spending power, plea bargains, and even governmental employment all depend upon this fact. It is crucial, however, that in many or most cases where the deployment of such conditional offers is permitted, government would lack (much or any) affirmative reason to provide the offered benefit if the offeree refuses to abide by the stated condition, in which event the failure, at  $t_2$ , to provide the offered benefit would not itself be motivated, as was the offer at  $t_1$ , by a waiver-inducing purpose. This is true of prosaic offers not involving the government too: if I offer you \$10 for the shirt off your back, and if you decline, then what best explains my consequent failure to provide you with the benefit of \$10 is simply that I lack an 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 punitive or waiver-inducing purpose.<sup>204</sup>

There's a pretty simple test for determining whether the offeror would have acceptable reasons for withholding the benefit. This test is imperfect but good as a first pass. Imagine two things: first, that there is only a single offeree, not a class of them; and second, that the offeror knows that the offeree will not accept the deal, i.e., that it will not comply with the condition. Would the offeror, if genuinely motivated to advance the public interest, nonetheless withhold the benefit at issue? If so, then the withholding of the benefit does not penalize the offeree for exercising its right. If not, then the withholding of the benefit does penalize the offeree for exercising its right, in which case the conditional proposal threatens an unconstitutional penalty, hence constitutes the constitutional wrong of coercion.

A hypothetical contrasting case facilitates the analysis.<sup>205</sup> Suppose that by 1984 every state had a minimum drinking age of 21, except for South Dakota, which maintained a legal drinking age of 18, and that each state had a minimum *driving* age of 18, except for North Dakota, which imposed a minimum driving age of 55. Wanting to induce each state to change its outlying policies, Congress

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202. See, e.g., Bagenstos, *supra* note 167, at 378 (erroneously stating that “Berman treats a federal funding condition as imposing a penalty whenever *the law* has the purpose of influencing the states’ behavior”) (emphasis added) (internal quotation marks omitted).

203. When this is, and is not, a permissible purpose for governmental conduct must be determined by provision- or rights-specific analysis; it cannot be resolved by the principles or considerations that are general to a trans-substantive framework for thinking through the conditional offer problem.

204. This is a profoundly important distinction. We will return to it.

205. This comparison first appeared in Baker & Berman, *supra* note 51, at 537–39.

directed that a state would lose 5% of the highway funds it would otherwise receive if it maintained a minimum drinking age under 21 and would lose all of its highway funds for imposing a minimum driving age over 18. Both conditions amount to congressional threats to withhold a benefit.<sup>206</sup>

But as I have just emphasized, that alone can't make either proposal coercive. On our best account of coercion, the proposal is coercive if carrying out the threat would be unconstitutional, and, per AP\*, carrying out the threat would unconstitutionally penalize the states' (presumed) sovereign right to set a drinking or driving age as it wishes if done in order to make the exercise of such a right costlier.

Now imagine, though, that both Dakotas reject the conditions. What interests would justify Congress in carrying out its threat to withhold highway funds—5% of South Dakota's, all of North Dakota's? The story with respect to North Dakota might go like this. The higher the minimum driving age, the smaller the number of cars on the roads and the smaller the number of accidents. If the latter numbers are very small, then improvements to road conditions could net only a very small reduction in accidents and their associated costs. Therefore, every federal dollar spent on North Dakota road improvements purchases a much smaller social welfare benefit than is purchased in the other states. So if North Dakota (or any other state) insists on maintaining an unusually high minimum driving age, federal funds could produce a higher return in their next best use than when devoted to highway improvements in that state.<sup>207</sup>

It's all well and good for a state to maintain a very high driving age, Washington might therefore think, but because the highways in such states will be so underused, the national interest is not well-served by improving them. In short, withholding the offered funds on failure of the driving-age condition need not serve any interest in punishing North Dakota or in shaping state behavior, which is to say that withholding the funds does not penalize North Dakota, in which event the conditional threat to withhold such funds is not coercive.<sup>208</sup>

This story is rather less plausible with respect to South Dakota, however.<sup>209</sup> To be sure, improving road conditions and raising the minimum

206. *Id.* at 537.

207. *Id.*

208. *Id.*

209. In the real world, of course, this story is not very plausible with respect to North Dakota either. For one thing, Congress could (in fact, does) introduce annual highway miles driven into the ordinary formula for allocating highway funds, in which case introducing driving age as a separate factor would be redundant. But this driving age hypothetical is designed merely to show that not all conditional spending proposals involve threats to withhold federal funds under circumstances in which such withholding would be undertaken for an improper reason. It illustrates that proposition by showing what form a counterexample would take even if it would not itself, in all probability, constitute such a counterexample. In any event, any objection to the example could be met by tweaking the hypothetical. So, for example, I could ask you to imagine that the technology necessary to measure annual highway miles driven does not exist or is prohibitively expensive to employ.

drinking age (from 18 to 21) might each increase net social welfare. But that's not the issue. The issue is whether the extent to which improving road conditions increases net social welfare is itself contingent upon the minimum drinking age. Put another way, the issue is whether the *increase* in highway safety that Congress would buy by giving a state funds with which to improve its highways varies depending upon that state's minimum drinking age, such that the higher a state's MLDA (within the relevant range), the greater is the increase in highway safety that federal highway dollars purchase. Because if it doesn't, then withholding federal highway funds on failure of the condition does not serve a legitimate federal interest except as mediated by a purpose—the type of purpose that turns a permissible non-provision of a benefit into an impermissible imposition of a penalty—to discourage states from refusing the federal demand. That is, if \$X spent on highway maintenance and construction would reduce highway accidents (or injuries or accident costs) y regardless of whether the state has an MLDA of 18 or 21 (albeit from different baselines), then Congress's non-provision of some portion of that \$X because a state maintains the lower MLDA is only intelligible as a means to punish the recalcitrant state or to discourage other states from similarly refusing the federal condition.

All of this is put conditionally. So, what are the facts? Are road improvements less valuable in states with lower drinking ages, all else equal? It is hard to imagine why they would be. If anything, it is more plausible to suppose that road improvements buy marginally *greater* decreases in accidents where driving conditions are more dangerous, such as where a greater percentage of drivers are impaired. In any event, nothing in *Dole* or the relevant legislative history suggests even remotely that any member of the Court or of Congress believed road improvements are of less value in states with lower drinking ages. The conclusion is thus warranted, if not quite inescapable, that withholding highway funds from South Dakota served a purpose in punishing or discouraging the exercise of a state's right to set its own MLDA. The action that Congress's offer threatened would therefore violate the anti-penalty principle, and the threat itself would thus violate the anti-coercion principle. *Dole* was wrongly decided.

While I do not find this conclusion jarring, I know from conversation that some constitutional scholars find the correctness of *Dole* much harder to give up. I would simply urge readers who share that view to reconsider. As a spur to reconsideration, the reader whose sympathies run more liberal and more nationalist than do those of most critics of either *Dole* or the Affordable Care Act might reflect on two hypotheticals: (1) Congress conditions some (significant) percentage of federal funds for education on a state's continued criminalization of marijuana use, either generally or for medical purposes; and (2) Congress conditions some (significant) percentage of federal funds for economic development projects on a state's elimination or non-adoption of laws that prohibit discrimination in the private sector on the basis of sexual orientation. It is reasonably clear that both laws would pass muster

under *Dole*.<sup>210</sup> Granted, this is not an *argument* against *Dole*. But some readers may find that it pumps anti-*Dole* intuitions.

More generally, our task, as I see it, is to distill general constitutional principles that seem plausible on their own and that best explain and justify a large set of intuitions that survive reflection about the proper resolution of a large set of conditional offer cases. Our goal should be to articulate and refine a set of general principles that best cohere with case law, with intuitively sensible outcomes across the unconstitutional conditions space, and with yet more general normative principles that seem plausible and attractive and that have explanatory power in their domains, all while keeping in mind that the principles that cohere “best” might still cohere imperfectly. As in any exercise designed to achieve reflective equilibrium, we must be prepared to give up some intuitions with which we start. With that in mind, it’s not as though analysis that begins with a philosophically defensible interpretation of the anti-coercion principle and with a conception of penalty that vindicates an anti-penalty principle yields conclusions that undermine *McCulloch* or *Marbury* or *Brown*. Let us not treat *Dole* as sacrosanct. It can be abandoned.<sup>211</sup>

### B. *The Three-Offer Analysis*

We now have most of the tools necessary to determine whether the Medicaid expansion is unconstitutionally coercive on the grounds that it threatens to penalize the exercise of the state’s constitutional rights. I propose to address that question in two steps. In this section, I analyze the proposal as the Chief Justice did, namely as a new program distinct from the rest of Medicaid. In the next, I investigate whether this is the best or fairest way to parse the Medicaid expansion and, if not, what should be the constitutional bottom line.

What does it mean to view the Medicaid expansion as a new program, distinct from the rest of Medicaid? It means, I think, that the entire bundle is

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210. These hypothetical statutes would easily satisfy four of the *Dole* requirements, at least under present doctrine: they are for the general welfare and unambiguous; they do not violate any independent constitutional bar; and they do not pass the point at which pressure becomes compulsion. They would also pass the germaneness prong so long as Congress could identify a purpose for the condition that “bear[s] some relationship to the purpose of the federal spending.” *New York v. United States*, 505 U.S. 144, 167 (1992). That would be child’s play. (1) Decriminalization of marijuana is objectionable in part because it is likely to increase marijuana use by minors, thus impeding their intellectual development; the condition and the funding are both geared toward improving children’s intellectual development. (2) Private anti-discrimination laws are objectionable (even if justifiable, all things considered) in part because they cause risk-averse private actors to take economically inefficient precautions against liability; the condition and the funding are both geared toward promoting economic growth. For elaboration on the ease with which *Dole*’s relatedness prong can be satisfied, see Baker & Berman, *supra* note 51, at 499–503.

211. But what if *Dole* was rightly decided? How far, wonders Glenn Cohen in private correspondence, can readers who would not abandon *Dole* despite my analysis follow me? It’s impossible to say. It all depends upon the particular reasons one has for finding my analysis of *Dole* unpersuasive.

properly conceptualized as consisting of three biconditional proposals. In simplified and stylized form, they are as follows:

*Proposal 1* (the preexisting Medicaid program): We (the federal government) will give you (a state) \$X for the medical needs of the blind, the disabled, the elderly, and needy families with dependent children in your state if and only if you comply with various conditions, C1 (that we are disabled from mandating).

*Proposal 2* (the new Medicaid expansion): We (the federal government) will give you (a state) \$Y for the medical needs of the childless poor adults if and only if you comply with various conditions, C2 (that we are disabled from mandating).

*Proposal 3* (an ACA requirement): We (the federal government) will make you (a state) eligible to receive and thus to accept Proposal 1 if and only if you accept Proposal 2.

To contend, as the state challengers did, that the Medicaid expansion is unconstitutional because it threatens to withdraw all Medicaid funding from states that do not agree to the conditions on receipt of funds for a new class of beneficiaries is just to contend that Proposal 3 is unconstitutional. Given AP\*, the constitutionality of Proposal 3 depends on the reasons the federal government would have for withdrawing a state's eligibility to accept Proposal 1 in the event that it does not accept Proposal 2.<sup>212</sup> In particular, Proposal 3 would unconstitutionally penalize a state's supposed constitutional right to decline Proposal 2<sup>213</sup> if carrying out the action threatened would be animated by a purpose in making the exercise of that right more costly or painful. (Hence solutions to the second and third puzzling features of Chief Justice Roberts' opinion—what I termed the Reasons Riddle and the Penalty Puzzle: whether the Medicaid expansion abridged the anti-coercion principle depends upon whether it threatened to penalize the states' rights, and whether the act threatened would amount to a penalty depends upon the reasons or purposes fairly ascribable to Congress.)

Surely Congress would have the proscribed purposes were it to carry out the act that Proposal 3 (call this "the Linking Proposal") threatens.<sup>214</sup> Even if not constitutionally obligated to do so, Congress has good and

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212. "Depends" is a little too strong. Conceivably, Proposal 3 could be unconstitutional even if it does not threaten a penalty and hence isn't coercive. See *supra* note 19. In this case, though, no other basis for its unconstitutionality seems remotely likely.

213. See *supra* note 20.

214. "Wired" plea bargains in which a plea bargain offered one defendant is conditioned not only on her pleading guilty, but also on her co-defendant accepting a plea bargain offered him, can also be analyzed as two separate conditional offers supplemented by a linking proposal. Whether the linking proposal in wired plea bargains is unconstitutionally coercive for threatening to penalize a defendant's constitutional right to put the state to its burden of proof is a separate question that I do not address here, except to register my disagreement with the D.C. Circuit's observation that the answer to this question reduces to "whether the practice of plea wiring is so coercive as to risk inducing false guilty pleas." *U.S. v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992). I am grateful to Dan Markel for drawing the practice, and the case, to my attention.

legitimate reasons for granting a state funds to provide for the medical needs of disabled persons, blind persons, and poor families with children. These reasons are essentially ones of humanity or beneficence.<sup>215</sup> Now suppose that some state—Florida, let’s say—chooses not to comply with the conditions (C2) necessary to receive additional federal funds earmarked for the medical needs of poor, childless adults. It is hard to imagine how that fact cancels or weakens the reasons Congress has to provide the funds described in Proposal 1. The blind, disabled, and poor children in Florida are just as in need of public medical assistance and just as deserving (however needy or deserving that might be), regardless of Florida’s decision with respect to Proposal 2. Therefore, the conclusion is nearly irresistible that the federal government’s purpose (or, if you prefer, a purpose fairly attributable to the federal government) for withholding the benefit of eligibility for Proposal 1 on failure of Florida to comply with the condition in Proposal 3 is to make it costly for Florida to exercise its constitutional right to decline Proposal 2, thereby inducing it to change its decision or discouraging other states from following Florida’s example. On our best rendering of the anti-penalty principle—the rendering captured by AP\*—that is simply not a permissible reason for the government to treat a rightholder less well than it otherwise would.

If the analysis in the preceding paragraph is correct, and if the Medicaid expansion is fairly viewed as a new and distinct program, we are almost ready to conclude that the Medicaid expansion is unconstitutionally coercive for unconstitutionally threatening to penalize a state’s exercise of its constitutional rights. Almost, but not fully. I said two paragraphs ago that, given AP\*, Proposal 3 would unconstitutionally penalize a state’s supposed constitutional right to decline Proposal 2 if carrying out the action threatened would be animated by a purpose in making the exercise of that right more costly or painful. That is not exactly what AP\* says. The anti-penalty principle speaks in terms of “presumptive” unconstitutionality. That is, penalizing rights is *pro tanto* or defeasibly unconstitutional, but potentially justifiable. In a familiar vocabulary, to penalize a right is to *infringe* the right but not necessarily to *violate* it. It is therefore open to defenders of the ACA to argue that even if carrying out the threat contained in Proposal 3 penalizes a state’s constitutional rights, doing so is justified by the national

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215. I reiterate that it is essential to distinguish two situations in which the national government does not provide an offered benefit after a state executes its constitutionally protected decision not to comply with a stated condition. *See supra* note 204 and accompanying text. In the first, the failure of the condition leaves the national government without affirmative reason to provide the benefit; in the second, the national government has affirmative reason(s) to provide the benefit notwithstanding failure of the stated condition but allows such reason(s) to be overridden by countervailing reasons. In the first type of case, withholding the benefit will not penalize exercise of the right. In the second, withholding the benefit will penalize exercise of the right if the overriding reason involves a purpose to make the state’s exercise of its constitutionally protected decision more costly.

government's weighty interests in improving the provision of health care in this country by making it more effective and less expensive.

The extent to which (a) the threat to penalize a state's constitutional prerogatives would in fact advance this national interest and (b) this national interest could not be advanced comparably well by means that do not call forth a demand for heightened justification are matters that depend upon messy empirical assumptions and causal hypotheses; they cannot be thoroughly evaluated from the comfort of a constitutional theorist's armchair. Therefore, I will content myself with two observations. First, the dispute would no longer be about whether the Medicaid expansion is coercive in a constitutionally meaningful sense—by hypothesis, it is—but about whether it is *justifiably* coercive. Second, however we should assess whether the justificatory burden is satisfied, whether by the compelling-interest test or otherwise, it cannot be enough that the Medicaid expansion serves valuable ends. The whole point of anti-penalty and anti-coercion principles is that constitutional rights impose significant constraints on the means that the state may adopt even in pursuit of good goals. I am highly skeptical that this coercion can be justified, but acknowledge that the question should be considered open—though, in my view, only ajar.

### C. *A Package Deal—Or Not?*

I think it fairly plain that the Medicaid expansion at least infringes a true anti-coercion principle when conceived as the conjunction of three conditional proposals. This explains why Chief Justice Roberts took pains to describe the Medicaid expansion as a new and distinct program.<sup>216</sup> This section addresses whether his conclusion really did depend, as he seemed to believe it did, upon his contested characterization of the Medicaid expansion. We can break this fundamental question into two subordinate ones: First, assuming *arguendo* that the Medicaid expansion is unconstitutionally coercive if fairly viewed as a new program, is it also unconstitutionally coercive if fairly viewed only as a modification of, or amendment to, the existing Medicaid program? Second, if not, how do we adjudicate the dispute between the majority and Justice Ginsburg regarding how the Medicaid expansion is “properly viewed”?<sup>217</sup> (Notice that, no matter our answers to these two questions, we have a good solution to the first of the three puzzles identified in Part III—the Modification Mystery. Whether the Medicaid expansion is separate from the rest of Medicaid seemed clearly irrelevant on anti-compulsion reasoning. It looks likely to be relevant on anti-coercion reasoning even if careful analysis persuades us that it isn't.)

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216. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2575 (2012) (Roberts, C.J.) (stating that “the expansion accomplishes a shift in kind, not merely degree”).

217. *Id.* at 2605.

Although this is a natural way to proceed, I think it will turn out not to be felicitous. There is no metaphysical truth regarding whether some set of benefits offered on some set of conditions is one program or a combination of programs each constituted by some subset of all benefits offered on some subset of all the conditions.<sup>218</sup> My instinct is to formulate the question in normative rather than metaphysical terms. In particular, we should ask whether, even allowing Congress to designate any bundle of offers as a single program, a state challenger should be entitled to insist that courts analyze the program as smaller conditional offers, in which acceptance of one serves as an additional condition for another, on the model employed in the previous section. We can call this the disaggregation problem.

A solution to the problem starts by acknowledging that neither polar position is tenable. On the one hand, an offeree cannot have *carte blanche* to carve programs as it sees fit. Consider the employment context. Simplified, the deal proposed by a state employer to a would-be employee is: “If you agree to conditions a, b, c, d, e, and f, we agree to give you \$X.” If the employee were permitted to disaggregate this bundled offer into separate conditional offers, we’d be forced to allocate percentages of \$X to each condition, and I see no good way to do that. Medicaid itself (even putting the ACA expansion aside) is an extraordinarily complex program that could be parsed as a bundle of hundreds or thousands of analytically distinct conditional offers. On the other hand, the governmental offeror does not have unlimited freedom to bundle discrete deals into one massive deal. Surely Congress could not lump all its present conditional spending deals (for education, highways, Medicaid, etc.) into a single “Super Program” that offered a huge sum in exchange for compliance with a vastly large set of conditions. To allow that gambit would be to eviscerate any in-principle limit on the federal government’s ability to manipulate states into doing its bidding. Perhaps that would be a better system, but it is disingenuous to contend that such a system would be faithful to the interests or values that underlie our system of federalism. Unfortunately, while neither extreme position is acceptable, no test or standard for navigating between the poles presents itself as obvious.<sup>219</sup> I am disposed to believe that the disaggregation problem is genuinely hard.<sup>220</sup>

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218. Compare an observation made earlier: instead of asking, following the lead of Robert Nozick, whether some biconditional proposal itself is a threat or an offer, we should ask whether the conditional threat that is one component of the proposal is wrongfully coercive. *See supra* note 55 and accompanying text.

219. “Germaneness” or “relatedness” reasoning won’t do the trick. *See Baker & Berman, supra* note 51, at 512–17.

220. For other recognition of both the importance and difficulty of the problem, see Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 736–41 (1994).



A preliminary step toward proposing a solution is to identify the potentially relevant factors or considerations.<sup>221</sup> Here are several: (1) whether the provisions that constitute the putative single program were adopted all at once or separately; (2) the extent to which the type and amount of benefit can be allocated to distinct conditions or groups of conditions objectively or, instead, would be arbitrary or require inescapably contestable judgments; (3) the extent to which realization of the purposes behind one disaggregated conditional offer depends upon satisfaction of a separate disaggregated conditional offer; and (4) the extent to which allowing the offerees to pick and choose among conditions would burden administration of the program. If these and other candidate factors point in the same direction with respect to any specific proposal to disaggregate what the offeror would present as a single program, then courts may provisionally resolve that particular dispute while deferring to a later case the more difficult work of determining just which of these factors are relevant and just how they should be combined—in a multi-factored balancing test or in something more rule-like.

In the case of the Medicaid expansion, all four of these factors seemingly do point in the same direction—in support of disaggregation. (1) The Medicaid expansion was enacted after a coherent program (itself the product of many statutes over many years) already existed.<sup>222</sup> (2) It clearly identifies the new conditions that must be satisfied to receive new dollars.<sup>223</sup> (3) The medical needs of each class of beneficiaries can be served whether or not a state agrees to serve the needs of other classes.<sup>224</sup> (4) Allowing states to opt out of the expansion would not appear to create substantial administrative difficulties for the Department of Health and Human Services.<sup>225</sup>

If I am correct that each factor by itself weighs in favor of disaggregation, then states should be entitled to have courts analyze the

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221. For the moment, I'll pass over whether a given factor is relevant causally or constitutively, on the one hand, or merely evidentiarily, on the other.

222. See *Medicaid: A Timeline of Key Developments*, KAISER FAMILY FOUND., [http://www.kff.org/medicaid/timeline/pf\\_entire.htm](http://www.kff.org/medicaid/timeline/pf_entire.htm) (describing the various statutes that have impacted the Medicaid program over the years).

223. See KATHLEEN S. SWENDIMAN & EVELYNE P. BAUMRUCKER, CONG. RESEARCH SERV., SELECTED ISSUES RELATED TO THE EFFECT OF *NFIB v. SEBELIUS* ON THE MEDICAID EXPANSION REQUIREMENTS IN SECTION 2001 OF THE AFFORDABLE CARE ACT 3 (2012), available at [http://www.ncsl.org/documents/health/aca\\_medicaid\\_expansion\\_memo\\_1.pdf](http://www.ncsl.org/documents/health/aca_medicaid_expansion_memo_1.pdf) (stating that the allocation of federal funds depends upon whether states meet the ordinary Medicaid standards or meet the higher standards established by the ACA).

224. *Id.*

225. The Congressional Budget Office's estimates, updated after the Health Care Decision, do not address administrative costs, indicating that those costs are not substantial. See CONG. BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION 5 n.9 (2012), available at <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf> (the updated estimates "do not include federal discretionary administrative costs, which will be subject to future appropriation action").

conditional offers as discussed in the previous section even if Justice Ginsburg gets the better of Chief Justice Roberts in their debate over whether the Medicaid expansion “is in reality a new program”<sup>226</sup> (and assuming that that is a meaningful question). Tentatively and provisionally, then, courts should analyze the Medicaid expansion as the trio of offers described in the previous section, and should therefore accept the conclusion already advanced: the ACA threatens to penalize the states’ right to decline to provide health coverage for a new class of beneficiaries, and thus runs afoul of the normatively meaningful “anti-coercion principle.”

There is another possible way to resolve the disaggregation problem that similarly avoids the need for courts to resolve whether some cluster of benefits and conditions is “in reality” one program or more, but is more structured, less impressionistic. At the first stage of analysis, courts should allow an offeree to disaggregate a putative program into distinct conditional offers in whatever fashion it chooses so long as it provides persuasive grounds for linking the benefits and demands as it does. Imagine a program that offers benefits {B1, B2, . . . Bn} to states that agree to conditions {C1, C2, . . . Cn}. If the state offeree is willing to comply with all conditions except C2 and proposes to decouple the conditional offer of benefit B1 on condition C2, in order to comply with the complex conditional offer that remains, it must explain why C2 pairs with B1 and not with, for example, B2. This is essentially to treat factor (2) as a threshold requirement.

If the offeree can pass this threshold, then the second stage of analysis directs courts to evaluate the program in disaggregated form. In particular, it directs them to determine whether “the Linking Proposal” is coercive—a question that, I have argued, depends on the reasons the offeror (the federal government in cases of conditional offers to the states) would have for carrying out the threat to deny eligibility for the conditional offer that remains after decoupling. It is at this second stage that factors (3) and (4) become relevant. If a state’s noncompliance with condition C2 either would frustrate the interests that compliance with conditions *except* for C2 would otherwise serve (i.e., if complementarity among conditions obtains), or would create significant administrative difficulties, then it is not the case that the offeror, in carrying out the Linking Proposal threat to withhold benefits, would act for the purpose of making it costly for states to exercise their supposed rights to decline condition C2. It strikes me as reasonably clear that the Medicaid expansion would not survive this more structured analysis.

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226. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605 (Roberts, C.J.). *Compare id.* at 2605–06 (Roberts, C.J.) *with id.* at 2635–36 (Ginsburg, J., dissenting in part) (illustrating the difference between Roberts’s view of the expansion as a new program and Ginsburg’s opposing view). Roberts’s characterization of the Medicaid expansion and its relationship to the history of amendments to the Medicaid program is powerfully criticized in Nicole Huberfeld et al., *Plunging into Endless Difficulties: Medicaid and Coercion in National Federation of Independent Business v. Sebelius*, 93 B.U. L. REV. (forthcoming 2013).

In any event, given the centrality of reasons to my analysis, the most fundamental point can be simply encapsulated: “We insist on the Linking Proposal because that is what the program requires” is not an adequate response by the federal government to a state requesting disaggregation. In our ordinary lives, we treat that as a “bureaucratic” answer, in the pejorative sense, and rightly reject it with exasperation. We should reject it in this context too.

## V. Frequently Advanced Challenges (FACs)

In this final Part, I raise and respond to the objections to my analysis that I have encountered most often. Some of these objections are simply mistaken. Others helpfully invite clarification or qualification that I have reserved for this stage.

*Objection 1:* “Your analysis depends on the assumption that the constitutionality of state action can depend upon the reasons or purposes for which a legislature acts. But the Constitution does not police purposes.”

Response: Oh, please. Of course it does, as many commentators have repeatedly and persuasively shown.<sup>227</sup> The best way to read most decisions that state or suggest otherwise is as declaring not that the constitutionality of legislative or executive action cannot depend upon the reasons, purposes, or motives that lie behind the challenged action,<sup>228</sup> but rather that courts ought not to inquire into those reasons, purposes, or motives. (This is sometimes clear enough from the opinion itself, but sometimes requires a little charity in interpretation.)

The distinction lies at the heart of what I have elsewhere dubbed the “two-output thesis.”<sup>229</sup> On this picture of the logic of constitutional adjudication, courts do two things in constitutional adjudication upstream from announcing a fact-specific holding: they interpret the Constitution to yield a legal norm or proposition; and they craft rules or tests—doctrine—to

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227. See, e.g., Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. Rev. 1784 (2008); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297 (1997); Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 71–73 (1997) (analyzing constitutional inquiries into legislative purposes).

228. I have been speaking of actions and reasons (and kindred notions) as distinct things: there is an action of not providing a benefit and there are reasons, purposes, or motives for which an actor (here, Congress or “the national government”) might engage in that action. But it is also possible to inscribe reasons or purposes within the actions themselves, in which case we could isolate the action of (for example) not providing a benefit for the purpose of making the state’s choice more costly. On this view, instead of asking about Congress’s reasons for withholding the benefit, it would be more perspicuous to inquire into the “internal logic” of the withholding, or of the proposal. This point warrants further development; at present, I simply flag it.

229. See Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220 (2006).

implement or administer that legal norm or proposition.<sup>230</sup> I have called the courts' interpreted constitutional norm "a constitutional operative proposition," and the tests that courts craft and lay down for future courts to apply when determining whether the operative proposition is satisfied "constitutional decision rules."<sup>231</sup> But whatever the vocabulary and underlying conceptual framework, whether *courts* should police legislative or executive reasons, purposes, or motives is a separate question from whether such deliberative inputs can bear constitutively on the constitutionality of the governmental action. In general, we should think first in terms of what the Constitution, rightly interpreted, allows, commands, and prohibits. Only once we have a good handle on that, in my view, should we address what sensibly implementing judicial doctrine would look like.

*Objection 2:* "You rely upon a contested definition of 'penalty.' I don't think that 'penalty' is best defined as P\* defines it."

Response: It is true that I believe that I have deployed an understanding of the concept of penalty that corresponds fairly well with the ordinary definition of "penalty." (The same is true with respect to coercion and "coercion.") But, as I have urged, that is not essential. Don't fixate on the words.

The substance of my claim is that it is unconstitutional to *make exercise of a right more costly than it would be but for a purpose in discouraging or punishing exercise of the right*. I then call the italicized phenomenon a "penalty." Though I believe this is an account that accords reasonably well with existing usage of the word, nothing turns on it. If you balk at that concept as a definition of our current word "penalty," fine.<sup>232</sup> I am once again after a concept or normative principle; I'm not playing at lexicography. That conventional meaning of the word "penalty" is of little import is reflected by the fact that AP\* does not even use it.

*Objection 3:* "Your view denies that Congress may pursue ends through conditional spending that it could not pursue directly and thus would return

230. The earliest presentations of this basic view are Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975), and Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). See also, e.g., Fallon, *supra* note 227; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

231. See generally Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). I explore the particular use of non-standard decision rules to administer operative propositions that turn on governmental purposes in Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1518–33 (2004) (discussing Commerce Clause doctrine), and Mitchell N. Berman, *Managing Gerrymandering*, 83 TEXAS L. REV. 781, 828–53 (2005) (discussing partisan gerrymandering).

232. Concededly, if the activity that I label penalty is too distant from ordinary usage of the word "penalty," then I am not entitled to gain support for my view from the penalty passage I quote from Chief Justice Roberts's opinion. I think that I am in fact entitled to some mileage from his passage, but I can do without it.

us to the discredited doctrine of *United States v. Butler*<sup>233</sup> that Congress may not use its spending power to “purchase a compliance which Congress is powerless to command.”<sup>234</sup>

Response: No, my analysis does not revive *Butler*. Congress may try to induce behavior that it could not mandate by offering inducements just so long as it would have adequate reasons not to provide the benefits offered in the event that a state offeree declines the deal—reasons that do not depend upon the expectation that non-provision of the offered benefit would prove costly or painful to the offeree. I provided a hypothetical example in my discussion of *Dole*.<sup>235</sup> Proposals 1 and 2, in the disaggregated analysis of the ACA, are additional examples.

*Objection 4*: “Your analysis assumes that states are right holders. But it is a mistake to equate the putative ‘rights’ held by states with the genuine ‘rights’ held by individuals. Even if the Constitution is rightly interpreted to obligate government not to penalize the exercise of true rights, Congress is not similarly disabled from penalizing actions by states.”

Response: My specification of the anti-penalty principle—AP\*—posits that it follows from the possession of a constitutional right that the correlative duty-holder may not burden the right for certain reasons. Objection 4 can be construed to make two contentions: first, that, even if this is true of claim-rights, it is not true of those nominal rights that, in Hohfeldian terms, are privileges;<sup>236</sup> and second, that the “rights” that states have against the federal government are in fact privileges, not claim-rights. Whereas claim-rights correlate with duties, privileges correlate with disabilities.

I do not know what argument would support the first part of this contention. It seems to me more plausible that AP\* is a corollary of privileges and of claim-rights. But perhaps “concomitant” is more apt than “corollary” here: I do not contend that AP\* either is part of the concept of a right or is logically entailed by the possession of a right. So *the grounding, and therefore the scope, of AP\* warrants further investigation*, leaving me open to being persuaded that the Constitution is not best understood to protect states’ “rights,” or some subset of them, against penalization.

*Objection 5*: “On your analysis, not only would the Medicaid expansion be invalid, but so too would aspects of the Medicaid program that preexisted that expansion. To see why, consider Proposal 1 in the Three-Offer Analysis. According to that Proposal, the federal government offers each state, conditioned on compliance with some specified demands, \$X for the medical needs of the blind, the disabled, the elderly, and poor families with

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233. 297 U.S. 1 (1936).

234. *Id.* at 70.

235. *See supra* section IV(B)(4).

236. *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

dependent children. But that offer could itself be disaggregated into five proposals in which each of the first four is a conditional offer of funds for one class of beneficiaries (the blind, the disabled, etc.), and the fifth is the Linking Proposal that conditions state eligibility for any one of the first four offers on a state's acceptance of the other three. Thus, if the Medicaid expansion threatens to penalize states for exercising their presumed right to decline one offer, so too did the rest of Medicaid. More generally, your analysis threatens wide swaths of federal spending programs that have not previously been suspect.<sup>237</sup>

Response: There is no question that the analysis I have proposed would threaten some conditional spending programs that had seemed unproblematic under *Dole*. That conclusion should not by itself prove too alarming if we can pry ourselves from the grip of the status quo bias. That said, there are several reasons why the implications of my framework for conditional spending programs are not as radical or far-reaching as might appear at first blush.

The first two I have already touched on. First, there is the disaggregation problem: many programs consisting of a bundle of conditional offers may not be disaggregable at a state's behest. Second, given the many difficulties and dangers that attend judicial inquiry into purposes, as AP\* requires, courts might appropriately decide to administer these basic constitutional principles and understandings by means of under-enforcing constitutional decision rules.<sup>238</sup>

The third reason I have not yet emphasized, but it is more important than one might take its late appearance to signal. As I have already stressed a couple of times, the withholding of a benefit on the failure of a stated condition will not be a penalty if the failure of the condition undermines or cancels whatever reason the offeror (here, the national government) would have to provide the benefit. (If you don't agree to give me your shirt, I simply lack reason to give you the \$10 I had offered.) That the national government would have some affirmative reason to provide the benefit notwithstanding a state's decision not to comply with a stated condition is thus a necessary condition for the non-provision of the benefit to constitute a penalty. What I wish to emphasize now is that this necessary condition is not sufficient.<sup>239</sup> Even if Congress would have some affirmative reason to provide an offered benefit notwithstanding the state's noncompliance with a condition, non-provision of the benefit does not amount to a proscribed penalty if the reasons that militate against providing the benefit, and that

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237. For a particularly strong expression of this objection, see Bagenstos, *supra* note 136, at 35–38.

238. I read Justice Ginsburg's observation that "[c]ourts owe a large measure of respect to Congress' characterization of the grant programs it establishes" as in essence a plea for a deferential decision rule. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2636 (Ginsburg, J., dissenting in part).

239. See *supra* note 215, where the point is implied but not highlighted.

Congress treats as overriding, do not depend upon making the state's exercise of its rights more costly. And for purposes of evaluating social welfare programs, the most notable reasons that might fit this bill arise from government's legitimate interests in not exacerbating morally meaningful inequalities, and in not being party to what it takes to be morally problematic behavior, even if constitutional.

Both interests can be illustrated with a single hypothetical. Suppose that Congress offers states federal matching funds for the purpose of combatting four big killers: \$W for lung cancer, \$X for breast cancer, \$Y for heart disease, and \$Z for HIV/AIDS. State S agrees to accept the first three matching offers but not the fourth. Naturally, Congress would not be expected to provide State S with \$Z for HIV/AIDS prevention, and its failure to provide that benefit would not amount to a penalty. But I'd go further. I think it plausible that Congress could refuse to provide any of the offered funds on S's refusal to provide matching funds for HIV/AIDS *even though the national interest in combatting cancer and heart disease in State S is served equally well regardless of whether that state agrees to partner with Congress to combat HIV/AIDS*. Congress might reason that State S's choices amount to morally wrongful discrimination of a sort with which it wishes not to be complicit. If such reasoning is fairly attributable to Congress, then the overriding reason for which it acts in withholding the benefit need not involve punishing or discouraging State S's exercise of its right not to participate in a federal-state program to combat HIV/AIDS. In this case, non-provision of funds for the other diseases would not run afoul of the anti-penalty principle. Possibly, on reasoning much like this, many bundled offers that *are* fairly disaggregable do not threaten to penalize rights. (Possibly, this reasoning might even save the Medicaid expansion, though my instinct is to evaluate claims of this sort with a skeptical eye lest the anti-coercion principle be too easily evaded.)

*Objection 6:* "What you call 'threatening a penalty,' I call 'bargaining.' It is a ubiquitous feature of commercial negotiation that, in an effort to secure a greater portion of the benefits of exchange, parties threaten not to consummate a deal on terms that they recognize would in fact serve their interests. Consider, for example, the brief story, presented earlier, of the University of Texas Law School and faculty candidate Lucy Taylor.<sup>240</sup> It might be that, taking opportunity costs into account, UT would genuinely prefer not to employ Taylor if she refuses to teach tax. But it might be otherwise: the school might prefer to hire her no matter what she teaches to not hiring her at all, while preferring to hire her as a tax instructor most of all. Similarly, it might prefer to hire her at an annual salary of \$X to not hiring her at all, while most preferring to hire her at a salary of \$X-n. On your analysis, the state actor threatens to penalize Taylor's constitutional

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240. See *supra* note 171 and accompanying text.

right not to sell her labor on any particular terms if it conditions its offer of employment on her agreement to teach tax or to accept a salary lower than \$X. Yet those are implausible conclusions: surely such negotiating behavior is constitutionally unobjectionable.”

Response: I agree that such negotiating behavior is constitutionally unobjectionable. The state, as employer, must be entitled to bargain by means of threatening not to consummate a deal even on terms that exceed its reservation price. This is true even though its reason to carry out its threat, in the event that its conditions are not accepted, would be to vindicate the efficacy of its threats going forward. The difficult question, I think, concerns the breadth of this concession. When neither contracting party has a claim on the full transactional surplus, bargaining should be licensed precisely because there is no good way to allocate the surplus that bypasses bargaining.

But the relationships between the state and its citizens (or other persons subject to its jurisdiction), and between governments in a federal system, are different in varied ways from the relationships between private parties who contract with each other to advance their respective self-interests. Accordingly, one possible lesson from the employment hypothetical is that states are entitled, just like private parties, to haggle over transactional surpluses when acting essentially as private parties, i.e., when they are acting (more or less) as what Dormant Commerce Clause doctrine terms “market participants,”<sup>241</sup> but not otherwise. When the state, acting in its sovereign capacity, offers benefits to agents that hold rights against it, the interests that undergird the rights and the nature of the state’s relationship to its beneficiaries might combine to direct that the offeree *does* have a claim on the full transactional surplus. Though the details of this argument remain to be worked out, I do suspect that this is at least sometimes true. And when it is, we are left without reason to accept that the state must be permitted to bargain by means of threatening penalties.

Furthermore, even to the extent that government, when *not* acting as a market participant, ought to be constitutionally permitted to “bargain” over the terms by which it distributes benefits to rightholders, it does not follow that it should enjoy the same latitude to threaten to withhold an offered benefit as do most private contracting parties. For one thing, inequalities of bargaining power loom especially large here. One plausible conclusion would be that government may not strive to secure greater benefits of exchange by threatening a penalty on terms that compel acceptance. This is not to contradict anything argued in Part II. There I argued not that compulsion is always normatively irrelevant, but only that it does not, *by itself*, have the normative significance that seven members of the *NFIB* Court attributed to it.<sup>242</sup> Indeed, the contract law doctrine of coercion (see subpart

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241. For a good discussion, see Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395 (1989).

242. See *supra* Part II.



II(A)) saliently exemplifies that legal consequences might sensibly follow from the *conjunction* of coercion and compulsion.

*Objection 7:* “Is your central thesis, then, that the Medicaid expansion was unconstitutionally coercive unless, for any of several different reasons, it wasn’t? If so, shouldn’t you be embarrassed to have devoted fully 30,000 words to this claim?”

Response: To address these questions in reverse order: yes, and no. With respect to my latter answer, it bears emphasis that this paper is not intended as an argument that the Medicaid expansion was unconstitutional. It is intended as an analysis of the respects in which related but distinct normative concepts or principles—what I have labeled coercion and compulsion—properly bear on the constitutionality of offers of benefits conditioned on the recipient’s waiver or non-exercise of a constitutional right, with a focus on conditional spending offers issued by the federal government to the states. According to the analysis I offer, some conclusions strike me as firm if not unassailable (like that the compulsion-centered reasoning that four Justices in *NFIB* put forth unequivocally is not sound<sup>243</sup>) whereas others are tentative. If, as I believe, there exist principles and considerations that, when combined in the right way, are fairly described as a “solution” to the conditional offer problem, that solution will not be remotely algorithmic. The most we can hope for of a proposed solution is, as Seth Kreimer counseled a generation ago, that “it at least gets the easy cases right, explains why the hard cases are hard, and allows argument to center on the appropriate factual and legal issues.”<sup>244</sup>

## Conclusion

In *National Federation of Independent Business*, the Court held, 7–2, that the Medicaid expansion provision of the Affordable Care Act amounts to unconstitutional coercion.<sup>245</sup> And it amounts to coercion, so the majority reasoned, because, by threatening to withhold *all* Medicaid funds from states that would decline the offer of new funds for a new class of beneficiaries, Congress presented states with a nominal choice that was functionally “no choice”—no choice because states could not rationally entertain one of the two nominal options.<sup>246</sup> The new conditional offer was unconstitutionally coercive, in short, because it compelled states to accept.<sup>247</sup>

The *NFIB* majority was half right: the Medicaid expansion probably *was* coercive in the particular sense that it compelled acceptance. But, I have argued, the majority provides no good reason to believe that *that* sense of

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243. See *supra* subpart II(A).

244. Kreimer, *supra* note 148, at 1301.

245. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2575 (2012) (joint opinion).

246. *Id.* at 2574–75.

247. *Id.* at 2574.

coercion is, all by itself, constitutionally meaningful, and there are powerful reasons to doubt it. If this is right, then it might seem to follow that, contrary to the majority's conclusion, the states' challenge to the Medicaid expansion gains no traction from an "anti-coercion principle." That conclusion, however, would be premature. Perhaps different meaning could be given to "coercion," and perhaps the Medicaid expansion might transgress an anti-coercion principle understood in those different terms.

In fact, there are other senses of coercion "out there," available for deployment. Normative theorists have coalesced around one in particular. According to this favored sense of coercion (and to a first pass), a conditional proposal is coercive if it would be wrongful for the maker to do as it threatens.<sup>248</sup> I have argued that the anti-coercion principle against which conditional offers of benefits are properly evaluated should incorporate this understanding of coercion (call it coercion, proper) and not the one that the majority employs (call it compulsion). I have also argued that embrace of the premises that conditional offers (which are also, necessarily, conditional threats) are presumptively unconstitutional when they amount to coercion, and are not presumptively unconstitutional just because they amount to compulsion, does not—contrary to prevailing scholarly wisdom—entail that conditional offers of benefits to which offerees are not legally entitled can never be unconstitutionally coercive. Withholding benefits can impermissibly penalize right holders when done in order to make exercise of a right costly or painful. Not incidentally, all of this jibes with features of the Chief Justice's reasoning that are hard to square with a superficial reading of that opinion pursuant to which compulsion does all the normative work.

I reiterate—here beating a horse that I would hope to be well-interred by this point—that my analysis of federal conditional spending is not conditional-spending particular. It depends upon two claims of far greater generality: (1) the state should not engage in the constitutional wrong of coercion, understood as conditionally threatening what would be constitutionally wrongful to do; and (2) the state may not penalize the exercise of constitutional rights in the sense of imposing adverse consequences—relative to the consequences it would otherwise impose or allow to obtain—for the purpose of punishing or discouraging the exercise of the right.

Of course, we wish to know how these general principles apply to the Medicaid expansion. I have concluded that the threat to withhold all Medicaid funds from states that would decline the offer of new funds for a new class of beneficiaries most likely does threaten to penalize the states' constitutional right to decline that offer and thus amounts to impermissible coercion. If so, the majority reached the right bottom line, though for the wrong reasons. This conclusion, though, is not ironclad. There are several

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248. See Gunderson, *supra* note 37, at 248 (explaining that coercion involves the threat of sanctions).

possible avenues for avoiding it consistent with acceptance of the anti-coercion and anti-penalty principles as I have glossed them. For example, perhaps it is constitutionally permissible for Congress to penalize states for exercising their constitutional “privileges” or prerogatives even while it is not permissible for any level of government to penalize individuals for exercising their constitutional rights. Or perhaps a state that would accept Medicaid funding for some classes of beneficiaries but not for others would thereby exacerbate morally meaningful inequalities such that Congress might refuse to allow a state this choice for reasons that do not constitute a penalty.

Because some readers will understandably hunger for a more decisive constitutional bottom line, I will close by recommending that consumers and producers of constitutional scholarship focus more keenly than is the fashion on general principles and concepts of normative and constitutional reasoning. The application of these general principles and concepts to concrete fact patterns will frequently depend upon contestable judgments that are irreducibly subjective (to some nontrivial degree) and with respect to which constitutional theorists may lack comparative expertise. Accordingly, scholars’ insistence on trying fully to resolve difficult concrete disputes predictably contributes, as Mike Seidman and Mark Tushnet diagnosed some years ago, to “the tendentious debate that has made constitutional argument so unproductive in the modern period.”<sup>249</sup>

Perhaps, then, we should worry a little less about case-specific holdings and a little more about the state of our normative building blocks. Put more pointedly, when a court opines, say, that some action does or does not amount to coercion or to a penalty, then our first and most fundamental task is to insist, if possible, that such judgments comport with defensible accounts of the relevant concepts, and are applied consistently across cases and lines of authority (absent good reason to the contrary). We can and should appraise the job courts do in wielding the tools at their disposal. But we provide an even greater service by refining the tools.

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249. SEIDMAN & TUSHNET, *supra* note 167, at 77.