
ARTICLE

UNCONSTITUTIONAL CONDITIONS AND THE CONSTITUTIONAL TEXT

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Federal and state actors sometimes condition access to benefits that they are constitutionally permitted but not obligated to provide on the willingness of recipients to engage in certain behavior that governments cannot compel directly. Current judicial doctrine treats such conditional offers as sometimes permitted and sometimes prohibited. But existing case law addressing such “unconstitutional conditions” challenges lacks a coherent account of when and why such conditional offers violate the Constitution. A wide-ranging academic debate has swirled around the doctrine, with commentators proposing various reforms to bring order to the courts’ confused and confusing jurisprudence.

A curious feature of this debate has been the relative inattention most participants have given to what the Constitution itself has to say on the subject. The comparative paucity of text-centered arguments in the unconstitutional conditions literature is likely attributable to a perception that the text has little or nothing to say on the issue. This Article challenges that assumption by demonstrating how the text can provide important insights regarding the permissible limits of conditional governmental offers. This analysis suggests that certain aspects of current judicial doctrine, including the presumed waivability of most significant individual rights guarantees and the courts’ tendency to focus on the “germaneness” of particular conditions to the government’s regulatory objectives as a measure of constitutionality, are likely consistent with a proper interpretation of the constitutional text.

But not every feature of current unconstitutional conditions jurisprudence is similarly textually defensible. In particular, this Article contends that efforts to extend

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the unconstitutional conditions framework developed in cases involving individual rights to the much different context of state-federal bargaining ignores important textual distinctions between the Constitution's individual rights guarantees and the structural limitations that allocate authority between the states and the federal government. And while the Constitution almost certainly places some limits on the permissible scope of state-federal bargaining, certain aspects of the Supreme Court's existing federalism jurisprudence—including the presumed invalidity of federal offers that "compel" or "coerce" state decision-making—lack any firm grounding in the constitutional text.

INTRODUCTION	749
I. PRELIMINARY OBSERVATIONS ON THE CONSTITUTIONAL TEXT	756
A. <i>A Constitution of Ends and Means</i>	757
B. <i>Two Textual Strategies for Limiting Government: Enumerating Rights Versus Enumerating Powers</i>	761
C. <i>The Scope of the Present Inquiry</i>	763
II. CONDITIONAL OFFERS AND INDIVIDUAL RIGHTS	765
A. <i>Rights Guarantees and Individual Empowerment</i>	765
B. <i>Duress and the Limits of Waiver as a Means of Empowering Government</i>	769
C. <i>Identifying "Duress" in the Constitutional Framework</i>	772
1. <i>Discretionary Benefits and the "Illegality" Conundrum</i>	773
2. <i>Equality as a Criterion of Constitutionality</i>	775
3. <i>Other Forms of Threatened Unconstitutionality</i>	788
4. <i>The Role of Compulsion</i>	795
D. <i>A Note on "Inalienable" Rights</i>	797
III. CONDITIONAL OFFERS AND STRUCTURAL LIMITS ON FEDERAL POWER	800
A. <i>Enumerated Powers and the Fallacy of "States' Rights"</i>	800
B. <i>Conditional Offers and Internal State Governance</i>	805
1. <i>Federal Power to Condition</i>	806
a. <i>Conditional Spending</i>	806
b. <i>Conditional Regulation</i>	813
2. <i>State Power to Accept</i>	815
3. <i>The Role of "Compulsion"?</i>	818
C. <i>A Note on Consent-Dependent Federalism Provisions</i>	823
CONCLUSION	826

INTRODUCTION

In theory, the constitutional status of any governmental decision can be slotted into one of three possible categories: constitutionally prohibited, constitutionally permitted, or constitutionally required.¹ In practice, sorting out which decisions fall into which category often involves substantial complexity, uncertainty, and disagreement. A particularly challenging set of questions that swirl around this classificatory project involves conditions placed on benefits that the government is constitutionally permitted but not required to offer. Conventional constitutional doctrine views such conditional offers as sometimes permitted, even when the condition requires behavior that the government would be constitutionally prohibited from requiring directly.² But since the late nineteenth century, the Supreme Court has tried to cabin the government's power by declaring certain conditional offers to be constitutionally prohibited.³ The resulting set of judicially developed rules governing such conditional governmental offers are conventionally referred to as the "unconstitutional conditions" doctrine.⁴

Unconstitutional conditions questions are "notoriously hard."⁵ The conceptual and doctrinal puzzles that surround the doctrine stem from the fact that most governmental benefits, as well as many important constitutional entitlements, are neither constitutionally required nor forbidden. That is, governments often possess the option of either providing a particular benefit or withholding access to it entirely.⁶ Likewise, possessors of constitutional rights often have the option of either asserting or voluntarily waiving their rights against the government, thereby empowering the government to act in ways that would otherwise be forbidden.

1 See Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1129 n.54 (2003) ("There are only three possible answers to any constitutional question: (a) constitutionally prohibited, (b) constitutionally permitted, and (c) constitutionally required.").

2 See Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109, 145 (2021) ("The case law leaves no doubt that the government can bring about certain actions through inducements that it cannot compel directly.").

3 See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1429-30 (1989) (discussing the emergence of the unconstitutional conditions doctrine "[i]n a series of turn-of-the-century cases involving challenges to state conditions on foreign corporation entry and on the use of the public highways").

4 See *id.* at 1415 ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.").

5 Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 62 (2013).

6 See *id.* at 64-65 (describing the classic unconstitutional conditions problem of conditioning access to roadways that the government had no obligation to build).

In theory, this overlapping domain of constitutional permissions would seem to create opportunities for mutually beneficial exchange. Rightsholders might choose to barter away particular legal protections in exchange for benefits that they value more highly.⁷ And government officials might be willing to offer more generous benefits if they could thereby secure the waiver of rights claims that risk impeding or frustrating important policy objectives. One possible doctrinal solution would be to simply treat all such conditional offers as constitutionally permitted.⁸ But both longstanding doctrine and broadly shared intuitions suggest that there should be *some* limits on the government's ability to condition the receipt of benefits on the waiver of constitutional protections.⁹

An alternative approach might be to declare all such conditional offers categorically forbidden. This framework would still require an explanation for why the placement of a condition on an offer of governmental benefits transforms the offer from permitted to prohibited.¹⁰ But it might at least offer a predictable and easily administrable rule to guide decision-making in this area.

Early Supreme Court opinions addressing the subject gestured at both the categorically permitted and categorically prohibited views.¹¹ But over time, the doctrine has developed in a more complicated, less predictable, and less coherent fashion by signaling that some government offers conditioned on sacrificing constitutional rights are permitted while others are prohibited, without offering much determinate guidance regarding which offers fall into

⁷ Cf. Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 347 ("In [unconstitutional conditions] cases, people sell their constitutional rights in ways that, they believe, make them better off If people can obtain benefits from selling their rights, why should they be prevented from doing so?").

⁸ See Sullivan, *supra* note 3, at 1417 ("Taking a narrow view of affirmative government obligations, those skeptical of the doctrine would hold that the government's greater power to withhold the benefit includes the lesser power to condition. And taking a broad view of free choice, the skeptics would treat any resulting burden on constitutional rights as just what the beneficiary bargained for.").

⁹ Sullivan, *supra* note 3, at 1419-21 (describing three arguments for limiting the conditions that the government can place on benefits).

¹⁰ This objection is typically framed around the intuition that the government's "greater power to withhold a gratuitous benefit always includes the lesser power to grant it on condition." Sullivan, *supra* note 3, at 1458; see also, e.g., *W. Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting) ("Even in the law the whole generally includes its parts. If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way.").

¹¹ Compare, e.g., *W. Union Tel. Co.*, 216 U.S. at 53 (Holmes, J., dissenting) ("If the State may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way."), with, e.g., *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593-94 (1926); (noting that a state "may not impose conditions which require the relinquishment of constitutional rights").

which category.¹² The resulting doctrine is “famously opaque”¹³ and notoriously “convoluted” and “inconsistent.”¹⁴ Scholars have described the unconstitutional conditions doctrine as, among other things, a “quagmire,”¹⁵ a “mess,”¹⁶ an “enigma,”¹⁷ a “minefield,”¹⁸ and an “intellectual and doctrinal swamp.”¹⁹ Even the label itself may be something of a misnomer because, as various scholars have observed, it describes not so much a single, unified doctrine but rather a cluster of loosely connected precedents groping toward solutions to a set of structurally similar conceptual and doctrinal puzzles.²⁰

The doctrinal disarray surrounding unconstitutional conditions questions has inspired numerous scholarly efforts to unravel the conceptual puzzles at the doctrine’s core and to guide courts toward a more coherent jurisprudence.²¹ To date, however, none of these proposals has carried the day,

12 See, e.g., Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1317 (2013) [hereinafter, Berman, *Medicaid Expansion*] (“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.”).

13 Randy J. Kozel, *Leverage*, 62 B.C. L. REV. 109, 111 (2021).

14 Louis W. Fisher, *Contracting Around the Constitution: An Anticommodificationist Perspective on Unconstitutional Conditions*, 21 U. PA. J. CONST. L. 1167, 1168 (2019); see also, e.g., Sullivan, *supra* note 3, at 1416 (characterizing the doctrine as “riven with inconsistencies”).

15 Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. STATE UNIV. L. REV. 913, 951 (2006).

16 Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1047 (2014) (“If there is any consensus with respect to the doctrine of unconstitutional conditions, it is that the doctrine is a mess both generally and in the specific constitutional contexts in which the courts have applied it.”).

17 Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012) (describing the doctrine as an “enigma” that “is notoriously complex, and unconstitutional conditions therefore are considered a sort of Gordian knot.”).

18 Sullivan, *supra* note 3, at 1416.

19 Farber, *supra* note 15, at 914.

20 See, e.g., Berman, *Medicaid Expansion*, *supra* note 12, at 1316 (“[I]f a doctrine is a set of rules or tests, then there is no such doctrine—at least none with more than trivial content. Better to think and speak of a ‘conditional offer problem’ or a ‘conditional offer puzzle’”); see also Cox & Samaha, *supra* note 5, at 68 (“‘Unconstitutional conditions doctrine’ actually designates a kind of problem calling for analysis rather than the analysis used to solve a kind of problem.”).

21 See, e.g., Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 7, 46 (2001) [hereinafter Berman, *Coercion*] (arguing that coercion provides “the key to unlocking the unconstitutional conditions puzzle” and that the government acts impermissibly when it acts for the purpose of penalizing the exercise of a constitutional right); Sullivan, *supra* note 3, at 1421 (arguing that unconstitutional conditions doctrine should focus “on the systemic effect of conditions on the distribution of rights in the polity as a whole”); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 26-28 (1988) (endorsing framework centered on identifying potential defects in the bargaining process arising from such factors as governmental monopoly power, collective action problems, or externalities); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1359-78 (1984) (proposing a test

either in the proverbial court of public scholarly opinion or in the real-world courts tasked with sorting out which conditional offers are to be permitted and which proscribed.²² Some scholars have questioned whether the search for an overarching theory or framework within which to situate unconstitutional conditions problems is even possible or desirable.²³

This Article seeks to shed new light on the problem of unconstitutional conditions by focusing on a seemingly obvious but nonetheless neglected resource—the text of the Constitution itself. The relative paucity of textual arguments in existing scholarly treatments of the unconstitutional conditions doctrine is noteworthy but not entirely surprising.²⁴ On the one hand, consideration of what the Constitution itself actually says about a particular type of government action seems relevant to assessing the constitutional permissibility of that action under virtually any interpretive theory.²⁵ Such consideration seems particularly important for those theories that emphasize text and enactment-era understandings as the primary (or, in some cases,

for assessing whether a particular governmental condition is unconstitutionally coercive by reference to three distinct baselines—history, equality, and prediction).

²² See Berman, *Coercion*, *supra* note 21, at 4-5 (noting that the most prominent frameworks proposed by academics “have left most observers unpersuaded”).

²³ See, e.g., Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 990 (1995) (contending that “the problem of the doctrine of unconstitutional conditions is . . . an intractable problem” and that a “solution” to the problem is thus “unlikely to exist”); 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, 594-95, 608 (1990) (arguing that the “unitary unconstitutional conditions doctrine” is an “anachronism” that should be abandoned in favor of a more granular set of doctrines focused on the assessing the effect of conditions on particular rights); Cf. Cox & Samaha, *supra* note 5, at 68 (“Whether there ought to be one unified test for this jumble of contexts, there might not ever be.”).

²⁴ The constitutional text has not gone completely unaddressed in the existing unconstitutional conditions scholarship. Professor Philip Hamburger has drawn upon a variety of text-centered arguments as part of a broader critique of existing unconstitutional conditions doctrine. See generally PHILIP HAMBURGER, *PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM* (2021). A few other scholars have looked to arguments about the textual meaning of particular provisions for guidance on discrete issues applicable to unconstitutional conditions problems. See, e.g., Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331-32 (1985) (examining the text of multiple provisions to determine the extent to which they “entail recognition of positive and not merely negative rights”). Works of this sort, however, are the exception rather than the rule, and there is a great deal more to say about the way in which the constitutional text speaks to the permissibility of particular conditional governmental offers.

²⁵ See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1195 (1987) (“Arguments from text play a universally accepted role in constitutional debate.”); J. Andrew Kent, *Congress’s Under-Appreciated Power To Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 858 (2007) (“Most interpretive methods start with the text and original meanings and purposes of the constitutional provision at issue, even if they ultimately move beyond those moorings and make additional interpretive moves.”).

exclusive) criteria of constitutional meaning.²⁶ At the same time, the lack of focus on text seems understandable given the protean nature of unconstitutional conditions questions, which reach across multiple textual provisions and span seemingly disparate doctrinal categories.²⁷ And given the absence of any explicit textual directive regarding the permissibility of conditional governmental offers, the constitutional text may seem to provide little to no guidance.²⁸

But this assumption proceeds too quickly. It is true that the constitutional text, standing alone, does not provide a comprehensive set of answers to the unconstitutional conditions puzzle. But it does not necessarily follow that the constitutional text has nothing important to say about the constitutional status of conditional governmental offers. In particular, this Article contends that a closer focus on the Constitution's text and structure, along with broadly accepted interpretive principles in place at the time of the document's enactment, can provide useful insights regarding the extent and limits of the government's capacity to condition offers of benefits on actions it cannot compel directly. This focus can also indicate areas of current doctrine where the quest for a single overarching framework for resolving unconstitutional conditions problems may have led courts astray.

Part I of the Article lays the groundwork for the argument that follows by making three preliminary observations concerning the constitutional text. First, Section I.A cautions against imputing to the text a greater degree of coherence than the text itself can fairly sustain. Second, Part I.B briefly notes the distinction between two textual strategies for limiting government power and protecting individual liberty—the enumeration of particular governmental powers and the enumeration of individual rights. Finally, Section I.C provides a few important caveats regarding the limited scope of

²⁶ See, e.g., Kesavan & Paulsen, *supra* note 1, at 1128 (asserting that textualism is “the sole, legitimate method for interpreting and applying the Constitution as authoritative, controlling law”); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 *YALE L.J.* 541, 552 (1994) (“Originalists do not give priority to the plain dictionary meaning of the Constitution's text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.”).

²⁷ See, e.g., Epstein, *supra* note 21, at 10–11 (observing that the doctrine of unconstitutional conditions is not “anchored to any single clause of the Constitution” but is rather “a creature of judicial implication” that “roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others”).

²⁸ See, e.g., Richard A. Epstein, *Our Implied Constitution*, 53 *WILLAMETTE L. REV.* 295, 309–10 (2017) (arguing that constitutional interpretation “constantly has to address questions to which the constitutional text does not supply written answers” and identifying the problem of unconstitutional conditions as one illustration); Louis Michael Seidman, *Reflections on Context and the Constitution*, 73 *MINN. L. REV.* 73, 76 (1988) (asserting that unconstitutional conditions problems “can be resolved only by reference to norms and conceptions that cannot be derived from the constitutional text”).

the inquiry set forth in this Article and the limited capacity of any single account to resolve all of the complex interpretive questions that might be raised by conditional offers of governmental benefits.

Part II examines what the constitutional text may tell us about conditional governmental offers that depend on a recipient's waiver of protections afforded by the Constitution's individual rights guarantees. Section II.A begins with a textual defense of the longstanding presumption that such rights are, in fact, subject to waiver. Although neither consent nor waiver are explicitly mentioned in the text of the most significant individual rights guarantees, these provisions would almost certainly have been understood in light of prevailing enactment-era interpretive conventions empowering individuals to waive legal protections that were enacted for their benefit.

Section II.B turns to an important limitation on the ability of waiver to expand governmental powers. As is true today, the ability of individuals to consent to the relinquishment of legal rights and protections in the eighteenth century did not extend to consent extracted through duress. The doctrine of duress ensured that individual consent was voluntary by enabling individuals to escape the consequences of concessions extracted through improper threats or pressure. But, as is also true today, the mere burdensomeness of declining a particular option or the unavailability of desirable alternatives was not sufficient to constitute duress. Rather, the duress exception was available only for actions or threats that were independently unlawful.

Therefore, recognizing duress as a limit on waiver of constitutional rights requires some account of what makes a particular governmental threat or offer unlawful, which is the task taken up by Section II.C. The most obvious answer suggested by the Constitution's text is that a condition should be regarded as unlawful when the threatened consequence of nonacceptance would itself be constitutionally forbidden. As subsection II.C.1 notes, however, limiting impermissible offers to those the Constitution forbids would seem to conflict with the conventional framing of the unconstitutional conditions puzzle, which posits an offer that the government is permitted to make without violating any separate constitutional restriction.²⁹

But, as subsection II.C.2 explains, this framing obscures the role of the Constitution's equality guarantees, which limit the range of distributional choices that governments can make with respect to even purely optional

²⁹ See Sullivan, *supra* note 3, at 1422 (noting that governmental benefits that give rise to unconstitutional conditions problems are those "benefits that government is permitted but not compelled to provide").

governmental benefits and burdens.³⁰ Because the Constitution constrains governments' ability to offer even optional benefits to some recipients but not others, the nonobligatory nature of governmental largesse does not necessarily render its threatened withdrawal constitutionally permissible. Rather, threats of constitutionally impermissible forms of unequal treatment may themselves be unconstitutional and thus an impermissible mechanism through which to extract a waiver of individual rights. Moreover, as subsection II.C.3 notes, conditional offers or threats may sometimes violate other constitutional restrictions as well, including limitations arising directly from the particular right or liberty whose exercise is pressured by the government's conditional offer. The resulting mix of possible limitations on governmental offers is likely to frustrate the formulation of any single all-purpose test for identifying and resolving unconstitutional conditions problems. But a more textually grounded way of thinking about the problem can at least clear up some of the confusion that has grown up around the unconstitutional conditions doctrine.

Section II.D briefly examines the possibility that some individual rights may be properly interpreted to preclude waiver on the part of the rights-holder, providing an additional constraint on the government's ability to extract concessions through conditional offers of benefits.

Part III turns to conditional offers that affect the balance of decision-making authority between the federal government and the states. Under current doctrine, the Court analyzes conditional offers of this type under a framework very similar to the framework it uses to assess offers affecting individual rights.³¹ But this assumed equivalence is misguided. Despite loose references to "states' rights" in popular and legal discourse, states do not possess the same sorts of "rights" that the Constitution confers on individuals. Rather, as Section III.A shows, the Constitution reflects a structural division of powers between the federal government and the several states. Unlike limitations resulting from individual rights guarantees, these structural limits cannot be waived or avoided by state acquiescence or consent.

Section III.B turns to the constitutional limits on federal offers of desirable benefits—either financial or regulatory—that are contingent on a state modifying its own internal laws or regulations. The permissibility of such bargains depends on the particular textual provision (or provisions) empowering the federal government to offer the particular benefit at issue, as well as any textual barriers to the states' capacity to accept. The combination

³⁰ On the textual source of the Constitution's equality guarantees, *see infra* notes 121-126 and accompanying text.

³¹ *See* Kozel, *supra* note 13, at 129-31 (describing current doctrine governing conditional offers from the federal government to the states).

of such provisions is almost certain to impose *some* limits on the permissibility of federal-state bargaining concerning the content of state law. But it is doubtful that these limits fully track the limits imposed by the Court's current doctrine governing conditional federal spending and regulation. In particular, there is substantial reason to doubt that the constitutional text supports the Court's modern jurisprudence treating the purported "compulsiveness" or "coerciveness" of conditional federal offers as a freestanding limit on Congress's constitutional authority.

Section III.C briefly considers a handful of constitutional provisions that make the permissibility of certain legal actions turn on the "consent" of the states. Even if, as argued in Part III.B, the constitutional text provides no strong grounding for a freestanding limit on "compelling" or "coercing" state compliance, one might reasonably assume that compulsion or coercion could nonetheless be seen as relevant where the Constitution itself requires state consent. But, as Section III.C shows, determining the relevance of compulsion and coercion with respect to such consent-dependent provisions depends on a choice between two potentially relevant background legal frameworks. The duress framework discussed in Section II.B as a guide for assessing individual consent is drawn from background principles of private law applicable to private contracts. But negotiations between sovereigns on the international plane were governed by a different framework grounded in the law of nations. Importantly, this international law framework did *not* recognize duress as a valid basis for sovereigns to escape their formal manifestations of consent in their dealings with one another. Though the matter is not free from doubt, Section III.C suggests that the international law paradigm might well provide the appropriate legal framework for assessing the validity of states' consent in their dealings with the federal government.

I. PRELIMINARY OBSERVATIONS ON THE CONSTITUTIONAL TEXT

Before proceeding to a consideration of what the constitutional text actually says about the permissibility of particular kinds of conditional offers by the government, it will be useful to start with two broad observations regarding the constitutional text as well as some caveats regarding the scope and limits of the present inquiry. Part I.A briefly discusses the significance of compromise as a consideration in reading the constitutional text, particularly where textually specified limits on government incompletely or imperfectly match the seeming background purposes underlying the relevant constitutional arrangements. Section I.B notes a distinction between two forms of enumeration—the enumeration of governmental powers and the enumeration of individual rights—as textual strategies for limiting

government and preserving individual liberty. Finally, Section I.C provides a few caveats regarding the limits of the textual analysis that will follow.

A. *A Constitution of Ends and Means*

In her justifiably famous study of the unconstitutional conditions doctrine, Professor Kathleen Sullivan described the doctrine as reflecting “the triumph of the view that government may not do indirectly what it may not do directly.”³² The intuition that governments should not be able to achieve indirectly what they cannot achieve directly reflects an important strain of thinking in the unconstitutional conditions case law and commentary.³³ But this description is subject to some well-known objections, including the observation that it is implausible as an account of current practices.³⁴ In numerous instances, the existing doctrine allows a government to condition discretionary benefits on behavior that it has no authority to mandate directly.³⁵

Another less widely discussed difficulty with the idea that governments cannot do indirectly what they cannot do directly is explaining why such indirection should be viewed as constitutionally problematic. Such a prohibition makes most sense under a functionalist view, which emphasizes the perceived background purposes underlying particular constitutional provisions.³⁶ From a functionalist perspective, it might be assumed that rules limiting government power are designed to serve particular purposes. Allowing governments to evade such limitations through creative invocations of their other acknowledged powers could threaten to disrupt the

³² Sullivan, *supra* note 3, at 1415.

³³ See, e.g., *Frost & Frost Trucking Co. v. R.R. Comm'n*, 271 U.S. 583, 593 (1926) (noting the concern that “constitutional guaranties” might be left “open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion”); *W. Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918) (“Acts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result.”) (citations omitted); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968) (“Essentially, this doctrine declares that whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly.”).

³⁴ See, e.g., Berman, *Medicaid Expansion*, *supra* note 12, at 1316 n.142 (“I’d be surprised if anybody in a generation has believed that broad claim to be true.”); Schauer, *supra* note 23, at 994 (describing “rhetoric of ‘the government cannot do indirectly what it cannot do directly’” as “poppycock if taken seriously”).

³⁵ See generally Farber, *supra* note 15, at 917-26 (describing case law from several doctrinal areas).

³⁶ See, e.g., Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 537 (1988) (describing functionalism as “a view of decision-making that seeks to minimize the space between what a particular decisionmaker concludes, all things considered, should be done and what some rule says should be done”).

constitutional system and frustrate the purposes that particular provisions were designed to serve.³⁷

The analysis that follows proceeds from a more formalist perspective, emphasizing the written words of the Constitution as reasons for decision independent of their perceived background purposes or motivations.³⁸ The analysis is informed by modern theories of textualism in statutory and constitutional interpretation, which emphasize that legislation often reflects decisions about not only the ultimate ends or objectives to be pursued by a particular enactment but also the particular *means* through which those objectives are to be pursued.³⁹ Because the outputs of multi-member legislative institutions inevitably reflect compromises among competing factions, it cannot be presumed that any particular provision will fully embody the background purposes that its proponents hoped to achieve. Rather, legislation often reflects “a decision to go so far and no farther” in pursuit of a particular goal.⁴⁰ Modern proponents of textualism in statutory interpretation thus argue that, at least where the text is clear, interpreters should adhere to the text’s explicit commands, even where doing so would lead to consequences that seem to be in tension with a statute’s perceived background purposes.⁴¹

There is reason to believe the Constitution’s text should be viewed in a similar light. Like federal legislation, the Constitution emerged from a complex drafting and ratification process that involved the accommodation of many competing and conflicting interests.⁴² As such, it is reasonable to

37 See *infra* notes 47-48 and accompanying text.

38 See Schauer, *supra* note 36, at 537 (“What makes formalism formal is this very feature: the fact that taking rules seriously involves taking their mandates as reasons for decision independent of the reasons for decision lying behind the rule.”); see also Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 396 (2002) (“The essence of legal formalism . . . lies in the insight that the meaning of a legal text may diverge significantly from the apparent purpose behind the text . . . but that treating a text as law . . . means following that text rather than the imagined objective behind it.”) (footnote omitted).

39 See, e.g., John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1310 (2010) [hereinafter, Manning, *Second-Generation*] (observing that modern textualists believe that “statutes reflect choices about means as well as ends” and that “the chosen means reflect the price that the legislature was willing to pay in order to achieve the desired ends”); Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 546-47 (1983) (observing that statutes reflect choices about not only ultimate objectives but also the means through which such objectives are to be achieved).

40 *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 68-69 (2000) (Scalia, J., concurring in the judgment); see also, e.g., Manning, *Second-Generation*, *supra* note 39, at 1310-14 (discussing the emphasis of textualist theories on respecting the compromise nature of legislation).

41 See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410 (2003) (“The legislative process, [modern textualists] argue, is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves that question.”).

42 See, e.g., MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 599 (2016) (“[W]ithout the various compromises negotiated at the

understand the document as reflecting a series of carefully wrought compromises among competing interests. As a result, the purposes that these competing interests seek to achieve may only partially and imperfectly be reflected in the document. Nevertheless, these background purposes still have a meaningful role to play in constitutional interpretation. Considerations of background purpose may be quite valuable in placing a provision in its proper historical and legal context and clarifying indeterminacies of meaning or application.⁴³ But the compromise nature of the Constitution's text does provide grounds for skepticism regarding interpretive approaches that seek to impose a greater degree of coherence on the document than a fair reading of its text will plausibly bear.⁴⁴

The compromise nature of the Constitution may leave open the way to various “workarounds,” through which an objective or outcome seemingly foreclosed by one piece of constitutional text may be achievable through the exercise of a different power that avoids the apparent obstacle.⁴⁵ Many unconstitutional conditions problems may arise from such attempted workarounds, involving efforts by government decision makers to seek to achieve by inducement what the Constitution forbids them to do by command.⁴⁶

From a functionalist perspective, the availability of such workarounds might be seen as particularly concerning. If the Constitution truly reflects a reasonably coherent and desirable framework of government, then allowing governmental actors to avoid constitutional limits on their power through

[Philadelphia Convention]—especially between small states and large states, and between slave states and mostly free states—no constitution would have been possible.”); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040–47 (2009) [hereinafter, “Manning, *Federalism*”] (emphasizing the centrality of compromise to the decisions made in the Philadelphia Convention).

43 See, e.g., John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84 (2006) [hereinafter Manning, *Textualists*] (“[W]hen a statute is ambiguous, textualists think it quite appropriate to resolve that ambiguity in light of the statute’s apparent overall purpose.”) (footnote omitted).

44 Cf. John F. Manning, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 20 (2014) [hereinafter, Manning, *Means of Power*] (observing that purposive approaches to interpretation tend to “mak[e] the law more coherent with its apparent background policy” but do so “by making it harder for Congress to exercise its . . . power to choose statutory means—and, in particular, to write incoherent, overbroad, or incomplete legislation”).

45 See Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503 (2009) (describing the potential for workarounds to exist “(a) when there is significant political pressure to accomplish some goal, but (b) some parts of the Constitution’s text seem fairly clear in prohibiting people from reaching that goal directly, yet (c) there appear to be other ways of reaching the goal that fit comfortably within the Constitution”).

46 See, e.g., Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L. J. 400, 480–81 (2015) (noting the connection between workarounds and unconstitutional conditions problems and observing that governments are “often permitted to accomplish indirectly what they are forbidden from doing directly by using the incentive of conditional funding”).

clever interpretation might seem improper.⁴⁷ Many proposed approaches to the unconstitutional conditions doctrine proceed from such functionalist premises.⁴⁸

But from a formalist perspective, the availability of such workarounds is not necessarily cause for concern. The combination of a restriction on pursuing a particular objective directly and the ability to pursue the same objective through some alternative means may simply reflect that the constitutional text only goes so far (and no farther) in limiting the government's ability to achieve a particular objective.

The Supreme Court has recognized the legitimacy of such workarounds in certain contexts. A well-known example is provided by *National Federation of Independent Business v. Sebelius (NFIB)*,⁴⁹ in which a majority of the Court concluded that Congress lacked power under the Commerce Clause to command individuals to purchase health insurance because its regulatory authority under the Commerce Clause extends only to the regulation of activity rather than inactivity.⁵⁰ But that same Court (through a differently constituted majority) concluded that the measure Congress had adopted—a required “shared responsibility” payment to the federal government by those who did not purchase insurance—could be re-framed as a tax rather than a penalty, thereby preserving its constitutionality.⁵¹ Because Congress's power to tax allows it to raise revenue in ways that are beyond its regulatory powers

47 Cf. Tushnet, *supra* note 45, at 1506 (noting that the “the fact that they can readily be characterized as yielding results inconsistent with the Constitution” gives “the term workaround . . . a slightly seedy resonance”). Of course, if one believes instead that particular constitutional provisions “do not . . . matter[] much in the structure of a well-functioning government,” *id.* at 1511, then working around such restrictions might reasonably be seen as much less worrisome.

48 See, e.g., Sullivan, *supra* note 3, at 1490 (proposing an “alternative approach” to the unconstitutional conditions doctrine “grounded in the systemic effects that conditions on benefits have on the exercise of constitutional rights,” and particularly on “the overall distribution of power between government and rightholders generally, and among classes of rightholders”); Epstein, *supra* note 21, at 14 (proposing a framework for addressing unconstitutional conditions problems that is “overtly functional and utilitarian”); see also Hamburger, *supra* note 17, at 481-82 n.2 (collecting additional scholarship reflecting “a functionalist approach . . . to sort out when the government can purchase rights and when it cannot”).

49 567 U.S. 519 (2012).

50 *Id.* at 546-61 (opinion of Roberts, C.J.) (concluding that Congress lacks power to impose the insurance mandate under both the Commerce Clause and Necessary and Proper Clause); see also *id.* at 650-57 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (agreeing with this conclusion).

51 See *id.* at 566 (opinion of Roberts, C.J.) (“[T]he shared responsibility payment may for constitutional purposes be considered a tax, not a penalty.”); see also *id.* at 589 (opinion of Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“I agree with The Chief Justice that . . . the minimum coverage provision is a proper exercise of Congress’ taxing power.”).

over commerce,⁵² the majority concluded that the measure was permissible even though it effectively allowed Congress to achieve through the indirect method of taxation an objective that it would be powerless to achieve through a more direct regulatory mandate.

Of course, *some* attempts at workarounds may fail on their own terms by proposing alternatives that either fail to avoid the original textual obstacle or run afoul of some other textual limitation.⁵³ But where an alternative approach is not directly foreclosed by some other textual restriction, *and* where the alternative succeeds in avoiding the principal textual obstacle, the Constitution poses no barrier to the workaround, no matter how ingeniously constructed it might be.

The relevant question in the unconstitutional conditions setting, therefore, is whether there is anything in the constitutional text that forbids a government from using its power over discretionary benefits or burdens to induce decision-making that it is powerless to compel directly.

B. *Two Textual Strategies for Limiting Government: Enumerating Rights Versus Enumerating Powers*

In considering the textual limits on governmental power set forth in the constitutional text, it is also important to keep in mind two distinct textual strategies the Constitution uses to limit government and to protect individual liberty: enumerating governmental powers and enumerating individual rights.⁵⁴

The original Constitution of 1787 focused principally on the former strategy, establishing a federal government with limited legislative authority over particular enumerated objectives, thereby preserving a residual sphere of state autonomy.⁵⁵ The Constitution's defenders contended that this enumerated powers scheme made a declaration of rights unnecessary because the federal government would lack sufficient powers to threaten individual

⁵² *Id.* at 571-72 (holding that the Constitution limits Congress's power to regulate inactivity under the Commerce and Necessary and Proper Clauses but "does not guarantee that individuals may avoid taxation through inactivity").

⁵³ *Cf.* Tushnet, *supra* note 45, at 1505 (noting the possibility of "fraudulent" workarounds that purport to avoid the principal textual limitation "[w]ithout locating some other constitutional text to use in working around the obstructive text").

⁵⁴ See, e.g., Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791*, 9 U. PA. J. CONST. L. 357, 357 (2007) (identifying enumerations of rights and enumerations of powers as among the strategies constitutional designers may employ to protect rights or interests they view as fundamental).

⁵⁵ See THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) ("[The proposed government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.").

rights.⁵⁶ But such arguments did not succeed in quelling demands for inclusion of an explicit declaration of rights.⁵⁷

The adoption of the Bill of Rights in 1791 added an additional layer of restrictions on federal power, the bulk of which focused on barring the federal government from abridging, infringing, or denying particular identified individual rights and liberties.⁵⁸ Later changes to the Constitution, including the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments, imposed further limits on federal power while also limiting the power of state governments to deny or abridge particular individual rights.

Conditional offers of governmental benefits can be used to circumvent both limits resulting from enumerated guarantees of individual rights—e.g., by conditioning access to desired benefits on the waiver or nonexercise of particular constitutional rights—as well as structural limits on federal power resulting from the enumerated-powers framework—e.g., by conditioning access to federal funding on states' willingness to enact regulatory measures that the federal government would be powerless to enact directly. Therefore, many analyses of unconstitutional conditions problems unsurprisingly start from the assumption that conditional offers that burden the exercise of individual rights and conditional offers that impinge upon the decision-making authority of state officials raise similar problems that call for similar solutions.⁵⁹ Modern judicial doctrine has also tended to treat limitations

⁵⁶ See, e.g., Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 COLUM. L. REV. 498, 510-12 (2011) (summarizing objections to the proposed Constitution premised on absence of a bill of rights and responses by the Constitution's supporters).

⁵⁷ See *id.* at 515 (noting the existence of "multiple calls from the state ratifying conventions for the inclusion of a declaration of rights in the Constitution").

⁵⁸ Two of the provisions ratified in 1791—the Ninth and Tenth Amendments—fit less comfortably within the individual rights framing. The Ninth Amendment provides a rule of construction that responds to a particular argument, put forth by the Constitution's defenders, that the addition of individual rights guarantees might provide a pretext for interpreting the federal government's enumerated powers more broadly. See U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); see also Williams, *supra* note 56, at 510-20 (describing the Amendment's background). The Tenth Amendment emphasizes the reserved role for the states implicit in the original enumerated powers structure. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

⁵⁹ See, e.g., Berman, *Coercion*, *supra* note 21, at 48 (proposing an approach to unconstitutional problems that "applies across all of constitutional law—from 'structural' areas of federalism and separation of powers through the entire range of individual liberties") (footnote omitted); Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 544-63 (2016) (proposing a framework to guide the assessment of conditions affecting both individual rights and federalism-based limits); Sullivan, *supra* note 3, at 1499-1503 (same); Epstein, *supra* note 21, at 14-15 (same).

affecting these two types of restrictions on governmental power in substantially similar ways.⁶⁰

But as the Parts that follow will show, the textual limits that result from individual rights guarantees and the textual limits that result from the Constitution's enumeration of powers are not interchangeable in the way such analyses assume. In particular, as the following discussion will demonstrate, individual rights guarantees often (though not invariably) confer upon rights-holders the ability to forego the protections those provisions afford, empowering individuals to permit certain government actions directed toward them that would otherwise be constitutionally forbidden.⁶¹ In contrast, structural limits on federal power are typically not amenable to waiver or surrender.⁶² To be sure, the federal government and the states both can and do bargain with and otherwise influence one another with regard to the ways in which they chose to *exercise* the authorities vested in them by the Constitution.⁶³ But such agreements (with very limited exceptions) do not alter the formal boundary between federal and state power or authorize the federal government to take actions that would otherwise be prohibited in the absence of any agreement.⁶⁴

The distinctive role of consent in the individual rights setting suggests that conditional offers of benefits that burden or penalize the exercise of individual rights may present different sorts of questions calling for separate analysis. For this reason, the analysis that follows will be divided into two separate parts that focus on conditional offers affecting individual rights guarantees and conditional offers relating to the scope of the federal government's enumerated powers, respectively.

C. *The Scope of the Present Inquiry*

As noted at the outset, this Article focuses on the constitutional text and what that text might tell us about the permissibility of certain types of

⁶⁰ Compare, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 579-80 (2012) (concluding that Congress “may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds” but may not use its power over spending to “pressur[e]” states into accepting policy changes), with, e.g., *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 144 (1987) (noting that the “salient inquiry” for purposes of determining whether the government’s denial of unemployment benefits violated the Free Exercise Clause was whether the denial “brings unlawful coercion to bear on the employee’s choice” between “fidelity to religious belief and continued employment”).

⁶¹ See *infra* Section II.A.

⁶² See *infra* Section III.A.

⁶³ See, e.g., Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1632-46 (2015) (discussing the pervasiveness of bargaining and “vigorous trading” between state and federal governments regarding the exercise of their respective constitutional authorities).

⁶⁴ See *infra* Section III.C.

conditional offers of discretionary governmental benefits.⁶⁵ Therefore, this Article does not aim to address how other familiar “modalities” of constitutional argument—such as arguments premised on precedent, nontextual structural considerations, or practical consequences—should bear on the decision-making of judges and other officials.⁶⁶ Proponents of different interpretive theories attach widely varying degrees of significance to such nontextual considerations and are thus likely to disagree about what to do when one or more such considerations point in directions that seem to diverge from the constitutional text.⁶⁷ But even those who view such nontextual considerations as legitimate and important generally view the text as providing a relevant (and important) consideration in constitutional decision-making.⁶⁸ I therefore hope that this Article’s conclusions will be of at least some interest to proponents of a broad range of constitutional theories while recognizing that some may view the text as a more conclusive determinant of constitutional decision-making than others.

Nor should proponents of strongly textualist interpretive theories necessarily expect this Article to provide comprehensive and conclusive guidance for resolving all unconstitutional conditions challenges. Given the vast array of circumstances in which conditional offer problems could potentially arise, any reasonably comprehensive analysis of what the constitutional text has to say on the issue might require a detailed examination of numerous constitutional provisions—conceivably spanning all, or at least the vast majority, of the Constitution’s nearly 8,000 words.⁶⁹ Such a detailed examination is well beyond the scope of the present Article (and the capacities of the present author).

The discussion of many important textual provisions will thus necessarily be addressed at a comparatively general level, glossing over many intricate

⁶⁵ See *supra* notes 24–28 and accompanying text.

⁶⁶ See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (identifying six modalities of constitutional argument, including textual and historical arguments, as well as arguments based on precedent, constitutional structure, “moral commitments,” and prudential considerations that “seek[] to balance the costs and benefits of a particular rule”); Fallon, *supra* note 25, at 1194–209 (setting forth a similar list of argumentative considerations).

⁶⁷ Cf. Richard H. Fallon, *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 541–44 (1999) (contrasting “text-based” theories of constitutional interpretation, which “rest their claim to acceptance on their fit with, or their capacity to explain, the written Constitution” with “practice-based” theories, which look to “the facts of social practice”).

⁶⁸ See, e.g., BOBBITT, *supra* note 66, at 12–13 (identifying arguments about text and enactment-era understandings of the text as among the relevant modalities of constitutional argument); Fallon, *supra* note 25, at 1193–94 (“[T]he implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed . . . by arguments concerning the framers’ intent.”).

⁶⁹ See Jefferson A. Holt, *Reading Our Written Constitution*, 45 CUMB. L. REV. 487, 487 (2015) (noting that the original 1788 Constitution contained 4,543 words, (and that the twenty-seven subsequent amendments adopted added a combined total of 3,048 words)).

(but potentially important) questions regarding their precise scope and application. In some places, this framework will involve suggesting possible interpretations without pausing to drill down on whether those interpretations reflect the correctly understood textual meaning.⁷⁰ In other places, the Article will consider a range of possible interpretations that have been suggested by others without seeking to reach a definitive conclusion regarding which interpretation reflects the true original meaning.⁷¹ This Article does not and could not possibly provide a definitive statement on the constitutional permissibility of every conceivable conditional offer governments might make. Rather, my goal is simply to foreground constitutional text as a relevant and important consideration in unconstitutional conditions cases and demonstrate that a closer focus on text-centered arguments may provide useful insights for resolving unconstitutional conditions challenges.

II. CONDITIONAL OFFERS AND INDIVIDUAL RIGHTS

A. *Rights Guarantees and Individual Empowerment*

Though it is black-letter law that most significant constitutional guarantees of individual rights may be waived or forfeited,⁷² the textual foundations of such waivability are rarely discussed. The Third Amendment expressly makes the scope of its protection turn on the absence of consent, providing: “No Soldier shall, in time of peace be quartered in any house, *without the consent of the Owner*, nor in time of war, but in a manner to be prescribed by law.”⁷³ A few other provisions clearly signal that only involuntary restrictions or impositions are forbidden.⁷⁴ But a great many simply say nothing explicit from which an inference of consent or waiver might be extracted.

⁷⁰ See, e.g., *infra* notes 200-201 and accompanying text (noting possible interpretations of the Free Exercise Clause and the Privileges or Immunities Clause that might inform the resolution of particular conditional offer problems).

⁷¹ See, e.g., *infra* subsection II.B.a (discussing conflicting theories regarding the textual source of Congress’s power over federal spending).

⁷² See, e.g., *Yakus v. United States*, 321 U.S. 414, 444 (1944) (“No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . .”).

⁷³ U.S. CONST. amend. III (emphasis added).

⁷⁴ See, e.g., U.S. CONST. amend. V (“[N]or shall any person . . . be *compelled* in any criminal case to be a witness against himself”) (emphasis added); U.S. CONST. amend. XIII (“Neither slavery nor *involuntary* servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . .”) (emphasis added); see also HAMBURGER, *supra* note 24, at 158-61 (suggesting additional examples).

The absence of an overt textual reference to consent should not, however, end the inquiry. Because “language has meaning only in context,”⁷⁵ the unadorned text of a constitutional provision, shorn of its surrounding context, can provide incomplete and even misleading guidance regarding its original meaning and significance.⁷⁶ And when considering the meaning of a document that carries the force of law, like the Constitution,⁷⁷ a particularly important source of such background context is provided by “original interpretive rules” and “original legal methods” that were widely shared by the relevant legal community at the time of a provision’s enactment.⁷⁸

One such interpretive rule that bears particular significance in the context of individual rights claims is the legal maxim: “*quilibet potest renunciare juri pro se introducto*”—meaning, roughly, that “[anyone] may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favour.”⁷⁹ This “*pro se introducto*” maxim (as I will refer to it for ease of exposition) reflected the intuition that parties should not be burdened by a legal entitlement that was intended for their benefit and should thus be able to renounce the benefit if they so choose. This maxim, which could already be described as an “old rule” by the beginning of the seventeenth century,⁸⁰ was widely applied by English courts as a guide for interpreting a variety of legal documents—including statutory conferrals of rights and municipal charters.⁸¹

⁷⁵ Manning, *Textualists*, *supra* note 43, at 110.

⁷⁶ *Id.* at 78 (“Because the meaning of language depends on the way a linguistic community uses words and phrases in context, textualists recognize that meaning can never be found exclusively within the enacted text.”).

⁷⁷ U.S. CONST. art. VI, cl. 2 (declaring the Constitution, along with federal statutes and treaties, to be the “supreme Law of the Land”).

⁷⁸ JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 140, 150 (2013) (“[T]he original methods approach uses the interpretive rules that were deemed applicable to the Constitution by the constitutional enactors. Because the enactors expected these rules to be applied, the meaning they produce is accurately described as having gone through the beneficial supermajoritarian process for constitution making.”); *see also, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131 (2017) (endorsing this view).

⁷⁹ HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 200 (Philadelphia, T & J.W. Johnson, 1845). On the role of maxims in the English common law tradition, *see generally* A.W.B. SIMPSON, LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW 283-89 (1987).

⁸⁰ *Beawfage’s Case* (1600), 77 Eng. Rep. 1076, 1080; 10 Co. Rep. 99 b, 101 a (“And this resolution agrees with the old rule, *sc. quilibet potest renunciare juri pro se introducto*.”).

⁸¹ *See, e.g.*, *Mayor and Burgesses of the Town of Berwick upon Tweed v. Johnson* (1773) 98 Eng. Rep. 680, 682; *Lofft* 334, 339 (detailing how burgesses of town waived charter privilege to limit trade by nonresidents by acquiescing in such trade for a continuous period of 170 years); *In re Anonymous* (1641) 82 Eng. Rep. 432, 433; *March N.R.* 107, 107 (allowing orphan to waive the statutory privilege of suing in the Court of Orphans in London if he should “conceive it more secure and better for him to sue in the Court of Requests”); *North v. Musgrave* (1639) 82 Eng. Rep. 410, 410; *March N.R.*

American courts and lawyers of the late eighteenth and early nineteenth centuries also embraced the *pro se introducto* maxim, including in cases involving constitutional rights.⁸² One particularly prominent example of such an invocation was provided by the Supreme Court in its 1819 decision in *Bank of Columbia v. Okely*.⁸³ The case involved a Maryland statute providing a state-chartered bank with a summary mode of recourse against certain creditors for notes “made expressly negotiable at the bank in their creation.”⁸⁴ The defendant argued that the statute was unenforceable as a violation of his Seventh Amendment right to a civil jury trial,⁸⁵ as well as a similar guarantee in Maryland’s state constitution.⁸⁶ Writing for the Court, Justice William

56, 57 (holding that plaintiff may voluntarily waive entitlement to portion of statutory damages remedy).

⁸² See, e.g., *Baker v. Braman*, 6 Hill 47, 48 (N.Y. 1843) (“[T]he maxim, *quilibet potest renunciare juri pro se introducto*, applies as well to constitutional law as to any other.”); see also, e.g., *Commonwealth v. Dailey*, 66 Mass. (12 Cush.) 80, 82-83 (1853) (citing the *pro se introducto* maxim in concluding that the state’s guarantee of criminal jury right was waivable); *Pritchard v. Denton*, 8 Watts 371, 372 (Pa. 1839) (citing the *pro se introducto* maxim in concluding that a party “may, by express words, agree to waive the privilege” afforded by the state constitution’s jury trial guarantee “and be bound by the decision of [a justice of the peace] alone”); *Berry v. Haines*, 4 N.C. (Car. L. Rep.) 311, 313 (1816) (“[A]lthough it is a dictate of natural justice, as well as a rule of the common law, that no one should be condemned unheard, or without having an opportunity of being heard, yet it is competent for a person to enter into a contract, by which he waives this right, *quilibet potest, &c.*”); *United States v. Smith*, 27 F. Cas. 1192, 1225 (C.C.D.N.Y. 1806) (No. 16,342) (argument of counsel) (arguing that the privilege afforded by the Fifth Amendment’s Self-Incrimination Clause was waivable pursuant to the *pro se introducto* maxim); *State v. —*, 1 Hayw. 2 N.C. (1 Hayw.) 28, 36 (1794) (argument of counsel) (arguing a state constitutional provision giving defendants a right to notice and opportunity to be heard “allows an exception to the rule when the defendant voluntarily renounces that privilege by the nature of his contract” because “[i]t is one of the maxims of [the] common law, that *Quilibet potest renunciare juri pro se introducto*”).

Many other early American courts similarly held that constitutional rights could be waived without explicitly referring to the *pro se introducto* maxim by name. See, e.g., *United States v. Rathbone*, 27 F. Cas. 711, 711 (C.C.S.D.N.Y. 1828) (No. 16,121) (“The right of trial by jury, secured by the constitution of the United States, is for the benefit of the parties litigating in courts of justice, and is a privilege they may dispense with if they choose.”); *Lee v. Tillotson*, 24 Wend. 337, 339 (N.Y. Sup. Ct. 1840) (“A party may waive a constitutional as well as a statute provision made for his own benefit.”); *M’Kinney v. Carroll*, 21 Ky. (5 T.B. Mon.) 96, 98 (1827) (detailing how a property owner who took advantage of benefits offered by a state statute waived the right to challenge that enactment’s constitutionality); *Olds v. Commonwealth*, 10 Ky. (3 A.K. Marsh.) 465, 467 (1821) (right of criminal defendant to present a defense); *Logwood v. Planters and Merchants’ Bank of Huntsville*, Minor 23, 25 (Ala. 1820) (right of civil jury trial); *Pomeroy v. Winship*, 12 Mass. (12 Tyng) 514, 524, 7 Am. Dec. 91, 98 (1815) (same); *Hite’s Heirs v. Wilson*, 12 Va. (2 Hen. & M.) 268, 283 (1808) (opinion of Roane, J.) (same); see also, e.g., THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 111 (New York, John S. Voorhies 1857) (“A party may waive a constitutional as well as a statutory provision made for his benefit.”).

⁸³ 17 U.S. (4 Wheat.) 235 (1819).

⁸⁴ *Id.* at 241.

⁸⁵ U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

⁸⁶ See *Bank of Columbia*, 17 U.S. (4 Wheat.) at 237-38.

Johnson declared the ability of parties to waive their jury trial rights to be “not only deducible from the general intent” of the Seventh Amendment “but from the express wording of the article” as well:

Had the terms [of the Amendment] been, that “the *trial* by jury shall be preserved,” it might have been contended, that they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta* [sic], and the benefit of it may therefore be relinquished.⁸⁷

Because the defendant had, “in consideration of the credit given him” by the bank, chosen to “voluntarily relinquish[] his claims to the ordinary administration of justice,” Justice Johnson had little difficulty concluding that he had validly waived his constitutional right to a jury trial.⁸⁸

Bank of Columbia and other early decisions interpreting constitutional rights provisions in light of the *pro se introducto* maxim strongly suggest that many important constitutional rights (though probably not all)⁸⁹ are properly interpreted as susceptible to waiver by the rights holder. When interpreted in this way, constitutional rights claims can be seen as not merely a means of limiting or disempowering government but also as a source of empowerment for individuals. By waiving the protections afforded by an individual rights guarantee, a rights-holder removes a legal obstacle blocking the government’s ability to act toward her in a particular way, thereby broadening the range of potential governmental conduct that can be reconciled with the Constitution.⁹⁰ Rights claims of this sort thus do not function as an absolute bar on governmental conduct but rather as contingent restrictions that may be removed or altered by the consent of the relevant rights-holder (or

⁸⁷ *Id.* at 244.

⁸⁸ *Id.* at 243. Professor Philip Hamburger makes a distinction between contemporaneous waivers of rights and waivers of rights that bind a rights-holder into the future and argues that the latter should be regarded as constitutionally impermissible. See HAMBURGER, *supra* note 24, at 164-69; see also *id.* at 167 (“[C]onditions running into the future are unconstitutional.”). But Justice Johnson, writing for the *Bank of Columbia* court, assumed that a prospective waiver of Seventh Amendment rights would be valid and legally enforceable. 17 U.S. (4 Wheat.) at 243-44. Other courts have done the same. See, e.g., *Pritchard v. Denton*, 8 Watts 371, 372 (Pa. 1839) (prospective waiver of state constitutional civil jury and trial rights enforceable); *Berry v. Haines*, 4 N.C. (Taylor) 311, 313 (1816) (same).

⁸⁹ See *infra* Section II.D (discussing possible examples of “inalienable” rights).

⁹⁰ In Hohfeldian terms, the ability to waive a constitutional right functions as a “power” held by an individual rights-holders the exercise of which transforms other jural relations—powers, duties, no rights, disabilities, etc.—in ways that can affect the range of the government’s constitutionally permissible options when dealing with the rights-holder. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-44 (1913) (describing the “fundamental legal relations” and characterizing the relationship between “rights” and “powers”).

holders).⁹¹ In other words, when dealing with individual rights claims, private consent may often provide an important measure of the scope of the government's constitutionally permissible authority.⁹²

B. Duress and the Limits of Waiver as a Means of Empowering Government

Recognizing that limitations on governments arising from individual rights claims may be altered or eliminated by consent raises important questions regarding what types of private behavior constitute the relevant forms of consent. As is true today, the legal concept of consent in the eighteenth and nineteenth centuries did not encompass every written, verbal, or behavioral manifestation of outward assent. Rather, legally significant forms of consent were limited to actions that reflected a "free, fair, and serious exercise of the reasoning faculty" of the party to be bound.⁹³

One particularly significant limitation on legally cognizable forms of consent in private contract law was provided by the doctrine of duress. A valid claim of duress provided those from whom a promise had been "extorted" by violence or threats with the option of avoiding the obligations of the agreement.⁹⁴ A similar doctrine is recognized in modern contract law⁹⁵ and the analogous concept of "coercion" is prevalent in unconstitutional conditions case law.⁹⁶

⁹¹ Sometimes, the consent of multiple rights-holders may be necessary to enable the government to act in a particular way. For example, one party's waiver of the Seventh Amendment right to a civil jury trial would not enable the government to try the case without a jury unless the opposing party also consents.

⁹² Cf. Hamburger, *supra* note 17, at 506 (distinguishing between consent as "a measure of what the government can do within its constitutional authority" and consent as a "cure for what it does outside such authority" and arguing that only the former can be reconciled with a Constitutional framework).

⁹³ JOSEPH CHITTY, A PRACTICAL TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL; AND UPON THE USUAL DEFENCES TO ACTION THEREON 4 (London, S. Sweet 1826); see also, e.g., 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 453 (New York, E.B. Clayton 4th ed. 1840) ("[I]t is requisite to the validity of every agreement, that it be the result of a free and *bona fide* exercise of the will.").

⁹⁴ CHITTY, *supra* note 93, at 54; see also, e.g., 2 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 402 (5th ed. corrected) (London, A. Strahan 1798) ("[T]he law requires the free assent of the parties as essential to every contract, and that they be not under any force or violence.").

⁹⁵ See, e.g., Restatement (Second) of Contracts § 175(1) (Am. L. Inst. 1981) ("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 by the victim.").

⁹⁶ See, e.g., Sullivan, *supra* note 3, at 1428-42 (summarizing the role of coercion in unconstitutional conditions doctrine).

But modern notions of coercion and duress are somewhat broader than those reflected in founding-era contract law.⁹⁷ Influential sources from the seventeenth and early eighteenth centuries suggested that duress should be narrowly confined to the most severe threats—such as threats of death or loss of limb.⁹⁸ However, by the late eighteenth century courts were generally willing to recognize that at least some less severe threats—such as threatened deprivations of or interferences with property rights—could also constitute duress.⁹⁹

Even under this more liberalized standard, however, not every demand extracted from a party facing severe exigencies could be avoided on grounds of duress. Rather, a showing of duress required demonstrating that the threatened conduct was unlawful.¹⁰⁰ Thus, for example, although a threat of

⁹⁷ See, e.g., E. Allan Farnsworth, *Coercion in Contract Law*, 5 U. ARK. LITTLE ROCK L.J. 329, 329 (1982) (“Over centuries, the law of duress has gradually been liberalized so that it is more broadly applicable.”).

⁹⁸ The leading authority for this position was Sir Edward Coke, who wrote in his influential treatise on English law, that a claim of duress should be recognized in only four circumstances: 1) “for fear of losse of life,” 2) “of losse of member,” 3) “of mayhem,” or 4) “of imprisonment.” EDWARD COKE, *INSTITUTES OF THE LAWES OF ENGLAND* 483 (London, E. & R. Brooke 1797) (1642). For cases involving lesser threats, such as simple battery or “burning of his houses, or taking away, or destroying of his goods,” Coke believed that a claim of duress should not succeed because “there he may have satisfaction by recovery of damages.” *Id.* This rigid standard continued to be cited well into the eighteenth and early nineteenth centuries, though later commentators expressed doubts about its continued accuracy as a characterization of existing law. See, e.g., CHITTY, *supra* note 93, at 55-56 (noting that it had been laid down in the “old books” that a threat to burn a house would not constitute duress but expressing skepticism that such a standard would be applied “at the present day”).

⁹⁹ See, e.g., *Sasportas v. Jennings*, 1 S.C.L. (1 Bay) 470, 475 (1795) (recognizing “duress of goods” as a valid basis for avoiding a contract where a party lacked other viable legal means to prevent wrongful deprivation); *Irving v. Wilson* (1791) 100 Eng. Rep. 1132, 1133; 4 T.R. 485, 486 (holding that money paid to secure return goods that were wrongfully seized “could not be called a voluntary payment” but was rather “extorted from the plaintiff”); *Astley v. Reynolds* (1731) 93 Eng. Rep. 939, 939; 2 Strange 915, 916 (finding duress arising from a lender’s wrongful refusal to return goods pledged as collateral unless borrower agreed to pay usurious interest). Over the course of the early nineteenth century, many American courts recognized a still broader range of unlawful actions and threats as sufficient to constitute duress. See, e.g., *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 216 (1868) (“[T]here are many American decisions, of high authority, which adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or the destruction of property, may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract, without the substance.”).

¹⁰⁰ See, e.g., 1 ROBERT POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS* 18 (William David Evans trans., London, A. Strahan 1806) (1761) (“The violence which leads to the rescission of a contract, should be an unjust violence . . . and the exercise of a legal right can never be allowed as a violence of this description.”); *Wood v. Fitz*, 10 Mart. (o.s.) 99, 100 (La. 1821) (“The violence which avoids a convention, must be an illegal one.”); *Denslow v. Moore*, 2 Day 12, 20 (Conn. 1805) (argument of counsel) (“The idea of setting aside instruments, on account of duress, has never been carried further than threats of unlawful violence to person or property.”). Modern doctrine recognizes a broader range of “improper” threats as a valid basis for duress even if the threatened action involves no criminal or tortious conduct. See Farnsworth, *supra*

imprisonment could constitute sufficient duress to avoid a contract under even the older, seventeenth-century standard,¹⁰¹ a promise extracted from an imprisoned party as a condition of his or her release was not regarded as duress if the imprisonment was legally authorized.¹⁰² Likewise, while a tortious seizure or detention of another party's property might be sufficient to constitute duress,¹⁰³ a pledge given to recover goods that had been attached or confiscated lawfully was not avoidable on that ground.¹⁰⁴

The distinction between lawful and unlawful threats in the Founding-era cases roughly tracks a distinction that modern scholars have drawn between "coercion" and "compulsion" in the unconstitutional conditions context.¹⁰⁵ As explained by Professor Mitchell Berman, the critical distinction between the two concepts is that coercion involves "exerting *wrongful* pressure on a subject to do as the coercer wishes" while a subject may experience "compulsion"—i.e., "circumstances of action . . . in which, for one reason or another, . . . choices are very substantially constrained"—without any wrongful conduct at all.¹⁰⁶ Although many circumstances involve both coercion and compulsion, the two concepts are distinguishable and it is possible to identify circumstances where one is present but not both.¹⁰⁷ The law of duress in the late eighteenth and early nineteenth centuries required the presence of *both* coercion and compulsion before compliance with an agreement would be excused.

Although few of the early American cases discussing waivers of constitutional rights had occasion to discuss principles of duress, it seems

note 97, at 333-34 (noting the shift from the older notion of "illegal" or "wrongful" conduct as the basis of duress to the broader notion of "improper" conduct adopted by the Restatement (Second) of Contracts).

¹⁰¹ See COKE, *supra* note 98, at 483 (identifying a threat of "imprisonment" as one available basis for duress).

¹⁰² See, e.g., *Watkins v. Baird*, 6 Mass. (6 Tyng) 506, 511 (1810) ("It is a general rule, that imprisonment by order of law is not duress: but to constitute duress by imprisonment, either the imprisonment, or the duress after, must be tortious and unlawful."); *Shepard v. Watrous*, 3 Cai. 166 b, 168 (N.Y. Sup. Ct. 1805) (holding that arrest "of itself could not have been enough to avoid" the enforcement of an agreement to arbitrate the defendant's case); *Roy v. Duke of Beaufort* (1741) 26 Eng. Rep. 519, 520, 2 Atk. 190, 193 (noting that an agreement to enter into a bond "will not be set aside for duress" if "the imprisonment was legal" and counsel was present).

¹⁰³ See *supra* note 99.

¹⁰⁴ See *Wilcox v. Howland*, 40 Mass. (23 Pick.) 167, 170 (1839) ("[A] threat of a judgment creditor, to obtain satisfaction by a levy on the property of the judgment debtor, being to exercise his legal right only, cannot be considered such duress as to render void a contract, otherwise valid.").

¹⁰⁵ See Berman, *Medicaid Expansion*, *supra* note 12, at 1291-94 (explaining the distinction); see also, e.g., *id.* at 1292 n.37 (characterizing this understanding as "the dominant understanding in the philosophical literature" and collecting sources supporting this view).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1293 (offering examples of coercion-without-compulsion and compulsion-without-coercion).

reasonable to conclude that the ability of a party to waive a constitutional safeguard would have been qualified by the same principles that limited individuals' ability to consent in other legal contexts.¹⁰⁸ Working from this starting point, we can begin to get a clearer view of what types of governmental pressure might be viewed as constitutionally problematic. First, a rights-holder's consent to waive a constitutional protection would likely have been viewed as insufficient to justify a challenged governmental action if the pressure brought to bear on the rights-holder was, in some way, unlawful.¹⁰⁹ Second, the threat must involve some reasonable degree of compulsion that would make a person of at least "ordinary firmness" choose to relent rather than suffer the consequences.¹¹⁰

C. Identifying "Duress" in the Constitutional Framework

As discussed above, the types of legally cognizable "duress" that would have been recognized in the late eighteenth and early nineteenth centuries were limited to unlawful threats and pressure.¹¹¹ But using that framework to assess the permissibility of governmental offers that incentivize the surrender of constitutional rights is hardly straightforward. Subsection II.C.1 briefly describes the challenges that an illegality-centered test presents for the traditional conception of the unconstitutional conditions problem, which focuses solely on benefits that governments are *permitted* but not required to provide. Subsection II.C.2 suggests a partial solution to this conundrum that is grounded in the Constitution's textual guarantees of constitutional equality and connects this equality concern to certain features of existing unconstitutional conditions case law, particularly those cases' tendency to focus on the "germaneness" of a condition to the government's asserted regulatory interests. Subsection II.C.3 considers other ways in which a

¹⁰⁸ At least one early nineteenth century decision—*Kimberly v. Ely*, 23 Mass. (6 Pick.) 440 (1828)—supports this conclusion. That decision involved a challenge to a state bankruptcy law as incompatible with the Contracts Clause of the federal Constitution. *Id.* at 451. The defendant debtor claimed his debt had been discharged as a result of a state-authorized proceeding in which the plaintiff creditors had participated and received a share of the estate, and that the plaintiffs had thereby waived any objection to the law's constitutionality. *Id.* at 440-41. The court rejected that argument on two grounds. First, the court expressed doubt that the limitations of the Contracts Clause could be waived by the parties' consent. *Id.* at 452; *see also infra* Section II.D (discussing limits on waivability). Second, the court concluded that even if such rights were waivable, the bankruptcy proceeding in which the plaintiffs participated "ought to be considered as compulsory rather than voluntary," and that the plaintiffs' waiver was extracted under "moral duress" due to the risk that nonparticipation could have jeopardized their ability to proceed against the defendant's sequestered assets. *Id.* at 452.

¹⁰⁹ *See supra* notes 100-102 and accompanying text.

¹¹⁰ *See* 1 CHITTY, *supra* note 93, at 55.

¹¹¹ *See supra* notes 100-102 and accompanying text.

particular governmental offer might violate the Constitution, including cases in which the underlying right whose surrender is sought by the government limits the permissible range of effects or purposes that the government can legitimately pursue. Finally, Subsection II.C.4 returns to the distinctive role of compulsion, discussing a potentially significant distinction between cases in which the alleged unconstitutionality of a condition is offered to excuse a purported surrender of rights and those in which a constitutional challenge is asserted by one who has rejected the government's condition.

1. Discretionary Benefits and the "Illegality" Conundrum

How do we know when the government's promised or threatened alternative to a surrender of rights would, itself, be unlawful? One obvious criteria of "lawfulness" is supplied by the Constitution itself.¹¹² As a first pass, we can say (simplifying only slightly) that a threatened governmental action or threatened action would be "unlawful" if the action in question is beyond the constitutional powers of the relevant governmental entity or actor—i.e., if the action is constitutionally forbidden.¹¹³

The idea that governments cannot promise or threaten unconstitutional actions as an inducement to the surrender of rights seems uncontroversial.¹¹⁴ Consider, for example, a governmental "offer" to refrain from imprisoning or fining an individual on the condition that the individual refrain from exercising certain rights protected by the First Amendment. In substance, such a putative "offer" is indistinguishable from a prescribed penalty for engaging in the constitutionally protected activity (e.g., "Speech critical of the President of the United States shall result in a \$500 fine or 30 days in jail").¹¹⁵ Such a threat is unconstitutional because the government lacks the

¹¹² Some governmental actors may be bound by sources of law other than the Constitution. For example, state governments and officials are also constrained by their own state constitutions, as well as by validly enacted federal laws or treaties. U.S. CONST. art. VI, cl. 2 (declaring the Constitution and validly enacted federal laws and treaties to be the "supreme Law of the Land"). The Constitution is more plausibly regarded as the sole criterion of legality for certain federal actors, such as Congress, though some have asserted that other legal sources, such as international law, should also be regarded as binding on federal decision-makers. See, e.g., David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367, 373-86 (2016) (collecting scholarly arguments for a constitutional duty on the part of federal actors to comply with international law).

¹¹³ Professor Mitchell Berman has suggested a similar definition of "coercion" in the constitutional context. See Berman, *Coercion*, *supra* note 21, at 17 ("[A] conditional offer by government is coercive for purposes of constitutional law—hence presumptively unconstitutional—if it would violate the Constitution for the state to carry out its threat.").

¹¹⁴ Cf. *New York v. United States*, 505 U.S. 144, 176 (1992) ("A choice between two unconstitutionally coercive regulatory techniques is no choice at all.").

¹¹⁵ Cf. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 293 (1993) ("There is no fundamental or metaphysical difference between the unconstitutional conditions case (welfare

constitutional authority to carry out the threat if the targeted rights-holder refuses.¹¹⁶

But for this very reason, such a conditional offer or threat is unlikely to be seen as presenting an unconstitutional conditions problem at all. As noted above, the conventional framing of the unconstitutional conditions problem embraces only offers of “benefits that government is permitted but not compelled to provide.”¹¹⁷ A threatened withdrawal of a constitutionally obligatory benefit (or imposition of a constitutionally proscribed penalty) is much more likely to be seen as a straightforward violation of the applicable right than as presenting a distinctive unconstitutional conditions problem.¹¹⁸

Defining unconstitutional conditions by reference to the unconstitutionality of a governmental offer thus threatens to render the category of genuinely interesting unconstitutional conditions problems an empty set. Such a limited definition would leave governments free to condition access to a wide variety of purely optional benefits—including occupational and business licenses, welfare payments, governmental employment, access to roads and public services, and potentially even basic police and judicial protection—on the surrender of important constitutional rights.¹¹⁹ But as the next Sections will show, this conclusion does not necessarily follow. The Constitution constrains governments’ ability to withhold even purely optional benefits from particular persons or groups, particularly when doing so would result in differential treatment of otherwise similarly situated individuals.

benefits will be eliminated for those who criticize the government) and the ordinary constitutional case (people who criticize the government must pay a fine.”).

¹¹⁶ In addition to directly infringing the First Amendment, carrying out such a threat would also result in an unconstitutional deprivation of liberty and/or property without due process of law. See U.S. CONST. amend. V (barring the federal government from depriving individuals of “life, liberty, or property without due process of law”); *id.* amend. XIV, § 1 (applying same prohibition to state governments); Cf. Gary S. Lawson, *Would Half a Loaf by Any Other Name Throw Out the Baby? Why Sandefur Is Both Right and Wrong about Substantive Due Process*, CATO UNBOUND (Feb. 13, 2012), <https://www.cato-unbound.org/2012/02/13/gary-s-lawson/would-half-loaf-any-other-name-throw-out-baby-why-sandefur-both-right-wrong/> [<https://perma.cc/T6TS-M4RG>] (“At a minimum, the Fifth Amendment’s Due Process Clause embodies the principle of legality from Magna Carta, which declares that executive and judicial deprivations of life, liberty, or property must be authorized by valid sources of law.”).

¹¹⁷ Sullivan, *supra* note 3, at 1422.

¹¹⁸ See Cox & Samaha, *supra* note 5, at 70-71 (“[A] simple criminal law [imposing a fine for particular behavior] would appear to be the paradigmatic contrast to deals involving gratuitous government services, grants, and exemptions.”).

¹¹⁹ See *id.* at 71-77 (observing that a broad array of governmental services, grants, and exemptions—including basic protections of the common law—may well be properly regarded as permitted but not required by the Constitution).

2. Equality as a Criterion of Constitutionality

Most discussions of unconstitutional conditions problems focus on “substantive” constitutional rights—that is, limitations on government designed to preserve a zone of behavioral or decisional freedom for individuals or to protect individuals against certain forms of governmental abuse.¹²⁰ But the Constitution also includes various provisions that are centrally concerned with the *way* in which governments allocate various benefits and burdens—including those that are purely discretionary—among recipients.

Perhaps the most familiar example of such an allocational right is the Fourteenth Amendment’s command that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹²¹ But the Equal Protection Clause may not be unique in this regard. For example, although that provision does not apply by its express terms to actions by the federal government, the Fifth Amendment’s Due Process Clause¹²² has been judicially construed to extend an equivalent command to the federal government.¹²³ And though that extension is questionable on both textual and historical grounds,¹²⁴ a similar principle of federal equality can be more plausibly grounded in the text of the Fourteenth Amendment’s Citizenship Clause.¹²⁵ Other provisions might plausibly be interpreted to impose similar types of restrictions on state and/or federal decision-makers.¹²⁶

¹²⁰ See Gary Feinerman, Note, *Unconstitutional Conditions: The Crossroads of Substantive Rights and Equal Protection*, 43 STAN. L. REV. 1369, 1394 (1991) (noting tendency of both the Supreme Court and commentators to “frame unconstitutional conditions cases under a substantive rights analysis” rather than an equality analysis).

¹²¹ U.S. CONST. amend. XIV, § 1.

¹²² U.S. CONST. amend. V.

¹²³ See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (holding that federal “discrimination” that would be violative of the Equal Protection Clause if performed by a State “may be so unjustifiable as to be violative of due process” under the Fifth Amendment).

¹²⁴ See Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 495-97 (2013) (summarizing the textual and historical critique of the Fifth Amendment equal protection argument).

¹²⁵ U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”); see also, e.g., *United States v. Vaello Madero*, No. 20-303, slip op. at 6 (U.S. Apr. 21, 2022) (Thomas, J., concurring) (noting that “considerable historical evidence suggests that the Citizenship Clause ‘was adopted against a longstanding political and legal tradition that closely associated the status of ‘citizenship’ with the entitlement to legal equality.’”) (quoting Williams, *supra* note 124, at 501).

¹²⁶ For example, some scholars have argued that the Fourteenth Amendment’s Privileges or Immunities Clause was originally understood as encompassing an equality principle that overlapped with, but was distinct from, the requirements of the Equal Protection Clause. See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387-89 (1992). The similarly worded provision of Article 4, § 2 is conventionally understood as a limited equality

A common thread uniting these types of guarantees and distinguishing them from other constitutional rights is that they are *comparative* in nature—that is, they constitute a “claim to receive a particular treatment just because another person or class receives it.”¹²⁷ Unlike most of the Constitution’s rights guarantees, which specify a standard of treatment that does not depend on how the government treats any other person or group,¹²⁸ these provisions are only triggered by the *differential* treatment of some person or group in relation to others. Equality guarantees thus restrict governments’ decision-making authority with respect to even purely optional benefits and burdens.¹²⁹ For example, although state governments are not constitutionally required to establish and operate a university system, they may not do so in a way that excludes members of one racial group from opportunities and advantages offered to others.¹³⁰

guarantee, limiting the ability of states to discriminate against residents of different states. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180-81 (1868) (noting that the clause “undoubtedly” aims to “place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned”). And some have suggested additional or alternative sources for the norm of federal equal protection, such as the Necessary and Proper Clause, the Titles of Nobility Clause, or broader structural principles. *See, e.g.*, Gary Lawson & Guy I. Seidman, *Necessity, Propriety, and Reasonableness*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE*, 120, 137-38 (Gary Lawson, Guy I. Seidman, & Robert G. Natelson eds., 2010) (arguing that the Necessary and Proper Clause encompasses a “principle of reasonableness” and “fiduciary fairness,” which “incorporates an element of ‘equal protection’ for those affected by delegated authority”); Gary Lawson, Guy I. Seidman, & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 B.U. L. REV. 415, 417-418 (2014) (contending that a similar “general equality norm” based in “the fiduciary character of the Constitution” restricts all of the powers conferred on the federal government); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 769-70 (1999) (citing the Bill of Attainder and Titles of Nobility Clauses of Article I as possible textual foundations of a federal equal protection norm).

¹²⁷ Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985).

¹²⁸ *Id.* at 447 (observing that “[c]onstitutional protections are . . . typically noncomparative in logic”). Some provisions, such the First Amendment’s guarantees of free speech and free exercise of religion, may have both comparative and noncomparative dimensions, establishing both absolute restrictions on governmental conduct as well as allocational restrictions that limit governments’ ability to treat certain forms of expression or behavior more favorably than others. *See, e.g., id.* at 468 (noting that multiple substantive constitutional provisions “express equality rights, at least in part”).

¹²⁹ *Cf.* Sullivan, *supra* note 3, at 1491 (“[I]t is a familiar principle in a wide variety of constitutional contexts that, even if government has no obligation to provide something, distributive concerns constrain it if it chooses to do so.”).

¹³⁰ Sweatt v. Painter, 339 U.S. 629, 635-36 (1950). Of course, the precise scope of such equality rights may depend on the proper interpretation of the Constitution’s textual guarantees of equality. *Cf.* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1282 (1997) (noting the existence of at least “some degree of historical support” for a number of different conceptions of the equality guaranteed by the Fourteenth Amendment’s Equal Protection Clause). This Article assumes that the proper interpretation of the Constitution’s equality guarantees roughly tracks the interpretation reflected in post-Reconstruction-era case law, while acknowledging that alternative

Most unconstitutional conditions questions contain within them an embedded equality question regarding the differential treatment of those who accept the government's proffered condition (and surrender their rights) and those who do not.¹³¹ The promise (or threat) of differential treatment based on one's decision regarding surrendering a right thus renders the constitutionality of such offers more complicated than would a cruder framing of governmental benefits as either "permitted" or "prohibited" *in toto*.

The notion that the unconstitutional conditions doctrine might have some connection to equal-protection concepts is not novel. Leading commentators have acknowledged that the two doctrines bear at least some affinity with one another.¹³² But conventional framing tends to draw a sharp distinction between equal protection doctrine and unconstitutional conditions problems.¹³³ Part of this framing likely arises from the tendency of modern equal protection doctrine to focus on immutable traits, like race and sex, as triggers for heightened judicial scrutiny.¹³⁴ Such a framing, however,

interpretations might significantly affect the types of government conditional offers that would be prohibited.

¹³¹ See Sullivan, *supra* note 3, at 1496 ("Unconstitutional conditions inherently classify potential beneficiaries into two groups: those who comply with the condition and thereby get better treatment, and those who do not."); see also Feinerman, *supra* note 120, at 1370 ("[U]nconstitutional conditions claims are not absolute, but rest instead upon a comparison of the nonrecipients' lot with that of the recipients.").

¹³² See, e.g., Berman, *Coercion*, *supra* note 21, at 11 (noting similarities between the "formal structure" of unconstitutional conditions problems and "standard equal protection cases"); Sullivan, *supra* note 3, at 1491 (noting that "unconstitutional conditions cases raise issues of equality as well as liberty"); Epstein, *supra* note 21, at 7 (noting that in certain cases, the unconstitutional conditions doctrine "closely resembles equal protection, barring the state from making certain privileges available to individuals only if they consent to terms more onerous than those demanded when the same privileges are made available to others"); Kreimer, *supra* note 21, at 1363-71 (discussing a norm of equal treatment as one potential "baseline" against which the coerciveness of governmental offers can be assessed).

A few scholars have more explicitly endorsed the use of an equal protection framework to assess unconstitutional conditions cases. See Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthouse*, 65 N.Y.U. L. REV. 247, 256 (1990) ("I suggest that every constitutional right carries within it an equal protection norm and that any governmental program that limits or conditions benefits when a constitutional right is exercised creates a suspect category that must be justified under a heightened standard of review."); Feinerman, *supra* note 120, at 1404 ("Unconstitutional conditions challenges are, in effect, hybrid claims involving both an equality component and a substantive rights component."); Cf. Renée Lettow Lerner, *Unconstitutional Conditions, Germaneness, and Institutional Review Boards*, 101 NW. U. L. REV. 775, 784-85 (2007) (suggesting an analogy between germaneness analysis in unconstitutional conditions cases and judicial inquiries concerning governmental purpose in cases involving sex-based distinctions).

¹³³ See, e.g., Berman, *Coercion*, *supra* note 21, at 11 ("[I]t is customary to view equal protection and unconstitutional conditions as representing distinct spheres within constitutional law.").

¹³⁴ See, e.g., Sullivan, *supra* note 3, at 1426 (noting that the unconstitutional conditions doctrine "serves to protect only those rights that depend on some sort of exercise of autonomous choice" rather than "classification on the basis of unalterable characteristics such as race or sex"); Cf. V.F.

threatens to conflate a judicially developed rule for implementing the abstract commands of the Constitution's equality guarantees with the commands themselves.¹³⁵ Courts closer in time to the Fourteenth Amendment's adoption tended to apply a broader framework, which focused on whether a challenged distinction was designed to promote "the general good" or rather "to impose unequal or unnecessary restrictions" on particular persons or groups.¹³⁶ An important function of this inquiry was to determine whether two or more assertedly similar groups were, in fact, similarly situated in ways that mattered to the government's legitimate regulatory objectives.¹³⁷

A similar thread runs through much of the modern case law involving unconstitutional conditions problems. Consider, for example, the Supreme Court's doctrine surrounding governments' ability to limit the speech of public employees. In distinguishing between permissible and impermissible speech restrictions in this context, the Court has emphasized the government's legitimate interest, as an employer, "in the effective and efficient fulfillment of its responsibilities to the public."¹³⁸ Where an employer can show a reasonably close connection between the speech at issue and such efficiency or effectiveness concerns, the Court has typically upheld the restriction.¹³⁹ But the Court has not allowed governments to leverage

Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 959 (2009) (describing modern equal protection doctrine as "relentlessly traitist").

¹³⁵ See, e.g., Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9 (2004) (discussing distinction between "judicial determinations of what the Constitution means" and judicially developed "constitutional decision rules" that courts use to "determine whether the constitutional meaning has been complied with"); Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 57 (1997) (observing that "the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely").

¹³⁶ *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1884); see also, e.g., *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 155-56 (1897) ("The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations." (quoting *State v. Loomis*, 22 S.W. 350, 351 (Mo. 1893))).

¹³⁷ See, e.g., *Atchison, Topeka & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96, 103-04 (1899) ("The equal protection of the law which is guaranteed by the Fourteenth Amendment does not forbid classification [T]he power of classification [has been] upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."); *Gulf, Colorado & Santa Fe Ry. Co.*, 165 U.S. at 155 (permissible classifications under the Equal Protection Clause "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis"); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209 (1888) ("[W]hen legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.").

¹³⁸ *Connick v. Myers*, 461 U.S. 138, 150 (1983).

¹³⁹ See Farber, *supra* note 15, at 921-22 (summarizing cases involving government employees fired for their speech in which the Court focused on whether the speech at issue disrupted the operations of the public employer).

their power over employment to restrict employees' speech on matters of public concern that are unrelated to their job effectiveness or the efficiency of their workplace.¹⁴⁰

The Court has similarly restricted the ability of governments to use their regulatory authority to extract seemingly unrelated concessions across a broad range of cases, including cases involving provision of government subsidies and tax benefits, welfare payments, and land use regulations.¹⁴¹ This requirement of relatedness (or “germaneness”) finds no direct analogue in the law of private contracting.¹⁴² But it does echo questions that are posed in equal protection cases to ensure that particular classifications correspond to legitimate and permissible governmental objectives.¹⁴³

When viewed through an equal protection lens, the germaneness requirement can be seen as an attempt to determine whether individuals who have chosen to accept the government's condition (and surrender their constitutional rights) are similarly situated in relevant respects to those who have not done so. Where the two groups are differently situated with respect to the government's reasons for extending a particular benefit—for example,

140 See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (“The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict . . . the liberties employees enjoy in their capacities as private citizens.”); *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) (“Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.”); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (noting that a government may not “deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech”); *Pickering v. Board of Educ.*, 391 U.S. 563, 572-73 (holding that a public school board may not limit a teacher's speech on “matters of public importance” when such speech does not impede the teacher from performing the teacher's duties or interfere with the “regular operation” of the school).

141 See, e.g., *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013) (distinguishing between permissible conditions on federal subsidies “that specify the activities Congress wants to subsidize” and impermissible conditions “that seek to leverage funding to regulate speech outside the contours of the program itself”); *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37 (1987) (requiring an “essential nexus” between a condition attached to removing a land-use restriction and the “legitimate . . . police power” justification for that restriction); *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring) (explaining that government may deny business-expense deductions for money spent on lobbying activities but may not deny all business-expense deductions for taxpayers who engage in lobbying); *Cf. Harris v. McRae*, 448 U.S. 297, 317, n.19 (1980) (noting that the government is not required to provide Medicaid funding for abortion services, but withholding all welfare benefits from those who exercise the right to obtain an abortion (protected by then-existing Supreme Court precedent) would raise a “substantial constitutional question”).

142 Farber, *supra* note 15, at 943 (“Judicial review of the qualitative match between the two sides of a bargain has no counterpart in contract law.”).

143 See, e.g., *Craig v. Boren*, 429 U.S. 190, 198 (1976) (describing cases in which the Court had “invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification”); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (“Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.”).

government employees who engage in speech that tends to disrupt the effectiveness of their workplace and those who do not—traditional understandings of equal protection pose no barrier to treating them differently.¹⁴⁴ But where the distinction is unrelated to the government's legitimate regulatory interests, differential treatment may deprive those who miss out on governmental benefits of constitutional equality.¹⁴⁵

Commentators "have long puzzled over the significance of germaneness to unconstitutional conditions analysis."¹⁴⁶ The argument sketched above provides a partial answer to some of these concerns—demonstrating *why* germaneness often matters to the assessment of a particular governmental condition. But there remains the important question of *how* to go about distinguishing germane conditions from those that are not germane. Because "[g]ermaneness to the purpose of a benefit depends crucially on how broadly or narrowly that purpose is defined," the assessment is likely to be strongly influenced by the way in which a particular transaction is framed.¹⁴⁷ Under a narrow frame that focuses on the particular goals or objectives of the benefit program at issue, a condition is less likely to be found germane. But under a broader frame that describes those governmental purposes more generally, a condition is more likely to be found germane.¹⁴⁸

Again, a focus on equal protection principles can help to clarify the proper framing of the germaneness inquiry. If a government is bound to treat a particular class of beneficiaries equally with respect to the provision of a particular benefit, then the government may not use the promise of such equal treatment (or the threat of unequal treatment) to extract from individuals a

144 See, e.g., *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("[T]he Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940))).

145 One might respond that the relevant equality concerns are obviated by the fact that all affected parties received the same opportunity to choose between surrendering their rights and obtaining the conditioned benefit. But if a particular classification bears no connection to legitimate governmental objectives—for example, a law denying red-haired individuals access to benefits available to all others—it is not clear why an opportunity to avoid the arbitrary distinction (by, for example, dyeing one's hair) should cure the constitutional deficiency. Cf. Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 504-05 (1998) ("[T]he ability of a group to respond to legislation—through assimilation or through other means—seems irrelevant to the question of whether legislation is legitimate.").

146 Berman, *Coercion*, *supra* note 21, at 92 n.389.

147 Sullivan, *supra* note 3, at 1474.

148 *Id.*; see also Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314, 1345-46 (2002) (noting this difficulty while arguing that unconstitutional conditions cases merely present "vivid examples" of a more "general problem of framing transactional harm" in constitutional cases, that is, the problem of determining "which of the multitudinous benefits and harm[s] should be included within the constitutionally relevant transaction" between individual and government).

surrender of their constitutional rights. Such a transaction would be no more valid than a concession extracted by seizing an individual's property and promising to return it if he or she complies with the government's demands.¹⁴⁹ Even if obtaining the concession of rights would facilitate certain governmental regulatory objectives, the threat of differential treatment would not be a permissible means of achieving those objectives.

The key challenge, therefore, is to identify those circumstances in which a voluntary surrender of rights renders an individual differently situated in relevant respects from other would-be beneficiaries, and to distinguish such circumstances from those in which the government uses a threat of unequal treatment to extract concessions from individuals who are identically situated in all relevant respects.

One way of getting at this distinction is to pose a counterfactual inquiry. Such counterfactual frameworks are already a familiar feature of the unconstitutional conditions literature. For example, Professor Einer Elhauge proposes the following counterfactual inquiry to distinguish genuine governmental offers from constitutionally impermissible "threats":

[A] threat to engage in otherwise-lawful action . . . is unlawfully coercive only when the threat is contrived, meaning that the threatened action would not have occurred if no threat could have been made. . . . When a threat is contrived, the government benefit would have been provided in the but-for world without that condition, and thus the threat to withhold the benefit penalizes the exercise of a constitutional right. When the threat is uncontrived, the government benefit would not have been provided in that but-for world, and thus withholding the benefit imposes no penalty.¹⁵⁰

Although Elhauge's test is framed in absolute rather than comparative terms, it can easily be reframed as a comparative test in any circumstance where a conditioned benefit is provided to some recipients but not others. In cases where a court predicts that, in the absence of an ability to impose the condition, the government would have extended the same benefit to

¹⁴⁹ Cf. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 51 (2000) (noting that some unconstitutional conditions problems seem to involve "the government . . . offering something that already belongs, by all rights, to the other bargaining party").

¹⁵⁰ Elhauge, *supra* note 59, at 507-10; see also, e.g., Kenneth W. Simons, *Offers, Threats, and Unconstitutional Conditions*, 26 SAN DIEGO L. REV. 289, 312 (1989) (proposing a similar counterfactual test for distinguishing offers from threats that focuses on "what the proposer would have done if he had not been permitted to attach to his offer the condition to which the recipient objects"); Kreimer, *supra* note 21, at 1371-73 (discussing a "predictive baseline"—focusing on "the normal course of events is the course of events that would follow if the government could not impose the condition in question, or could not take the exercise of constitutional rights into account"—as one of three possible measures of government coercion).

everyone, Elhaug's test would deem the challenged condition a "contrived" threat and thus impermissible. By contrast, where the court predicts that the government would prefer to "level down" by denying the benefit completely, the condition would be viewed as a genuine warning, and thus presumptively permissible.¹⁵¹

This counterfactual test provides a useful starting point. But it diverges from what a more straightforward equal-protection analysis would prescribe in at least some circumstances. Professor Kenneth Simons, who had earlier suggested a similar counterfactual test,¹⁵² notes the concern that its unflinching application might invalidate certain conditions that are highly relevant to the government's legitimate regulatory concerns.¹⁵³ Simons mentions the example of limitations on partisan campaigning as a condition of public employment.¹⁵⁴ The Supreme Court has upheld such conditions as furthering various legitimate employment-related interests, including avoiding bias or favoritism in the administration of governmental responsibilities and fostering merit-based hiring and promotion.¹⁵⁵ But if put to the choice, it seems implausible that a government would choose to eliminate public employment entirely rather than allowing its employees to engage in campaigning. The restriction thus seems to meet the criteria of a "threat" under the counterfactual test described above even though the restriction reflects "a sensible condition relevant to successful job performance."¹⁵⁶

151 See Louis Michael Seidman, *The Ratchet Wreck: Equality's Leveling Down Problem*, 110 KY. L.J. 59, 84 (2021) (noting that if "a court predicts that the government hypothetically would have leveled down by abolishing a program for everyone rather than extending it to the disfavored class," Elhaug's proposed test would deem the government threat "real" rather than "contrived," and thus constitutionally permissible).

152 See Simons, *supra* note 150, at 312 (suggesting that "the most appropriate test" for distinguishing offers from threats "is what the proposer would have done if he had not been permitted to attach to his offer the condition to which the recipient objects").

153 See *id.* at 319-20 (contending that a "condition to a government program . . . that the government plausibly believes is relevant to the legitimate purposes of that program" is distinguishable from, and should be subjected to a lower tier of scrutiny than a "pure" threat in which "the nature of the government benefit is essentially irrelevant" and "the benefit is simply something valuable that the government can offer or withdraw in order to induce or discourage some type of conduct").

154 *Id.*

155 See *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973) (noting that it is "in the best interest of the country" that federal service depend on "meritorious performance rather than political service" and that federal employees have limited influence on the "electoral process").

156 See Simons, *supra* note 150, at 319. Professor Elhaug acknowledges that such restrictions should be regarded as coercive under his proposed test but contends that they should still be permissible because the government's overriding "interest of undistorted politics justifies compelling public employees not to campaign, making coercion irrelevant." Elhaug, *supra* note 59, at 574.

To avoid this seeming incongruity, a counterfactual test might be framed to more closely parallel the concerns of equal protection analysis. For example, we might frame an inquiry along the following lines: “Would the government have a legitimate basis for treating those who refuse to surrender their rights worse than those who do not if the government knew for certain that imposing the condition would not affect the recipients’ behavior in any way?”

The function of such an inquiry would be to distinguish regulations that treat people differently because they are differently situated in relevant ways from regulations that treat people differently in order to discourage them from or punish them for exercising their constitutional rights.

A few examples will help to illustrate how a test of this sort might work in practice. First, consider Professor Simons’ example of a restriction on partisan campaigning by public employees. Imposing such a condition would almost certainly cause some employees and prospective employees who may have otherwise engaged in partisan activities to refrain from doing so in order to maintain or secure government employment. But even without such incentive effects, the government might have good reason to prefer nonpartisan employees, such as to avoid the perception that public duties are not being administered impartially.¹⁵⁷ Limiting employment to those who conform to the government’s preferred standard of nonpartisanship thus does not involve singling out any particular individual or group for less favorable treatment than that individual or group would otherwise be entitled to receive. Rather, the government would simply be preferring employees it expects will perform their jobs more effectively over those it expects will be less effective. In other words, it would be treating individuals differently because their behavior renders them differently situated in ways that matter to the government’s legitimate interests as an employer.

By contrast, consider *Speiser v. Randall*, in which the Supreme Court struck down a California law conditioning eligibility for special tax exemptions made available to veterans on recipients’ willingness to sign a loyalty oath.¹⁵⁸ In rejecting the measure, the Court distinguished its earlier cases allowing states to require similar oaths as a condition of certain forms of public employment because, in those cases, the state could point to a regulatory “interest clearly within the sphere of governmental concern” that would be furthered by the restriction.¹⁵⁹ But the state could point to no plausible difference between veterans who swore a loyalty oath and those who

¹⁵⁷ See *U.S. Civil Serv. Comm’n*, 413 U.S. at 564–67 (noting this concern as well as other potential adverse effects of partisan activities by public employees).

¹⁵⁸ 357 U.S. 513, 528–29 (1958).

¹⁵⁹ *Id.* at 527.

did not that would support denying tax exemptions only to members of the latter group.¹⁶⁰ The sole function of the condition, therefore, was to deter or penalize the “dangerous ideas” and speech of those who refused the oath.¹⁶¹

Consider next a hypothetical statute requiring all applicants for welfare benefits to sign a blanket waiver of their Fourth Amendment rights against unreasonable searches.¹⁶² Procuring such waivers might enable law enforcement agencies to detect a broader swath of illegal activities. Such waivers would thus plausibly further the government’s legitimate interest in detecting and deterring criminal conduct. But effectuating this interest depends entirely on the condition’s potential to *induce* a surrender of rights by applicants. Absent such inducement, there is no difference that matters to the government between those willing to open their doors to law enforcement and those who prefer to maintain their privacy. If the government knew for certain that its offer would have no effect on the willingness of welfare recipients to allow police to search their homes, it is hard to imagine any plausible basis for awarding more generous benefits to those who volunteer to be searched. This condition thus looks much more like a naked threat of unequal treatment rather than a legitimate distinction grounded in the difference between differently situated groups.

By contrast, consider a more narrowly targeted waiver of Fourth Amendment rights, such as the one the Supreme Court upheld in *Wyman v. James*.¹⁶³ That policy required applicants for benefits from New York’s Aid to Families with Dependent Children program to submit to in-home visits by caseworkers for the stated governmental purpose of monitoring recipients’ eligibility for benefits and determining whether additional social services support might be needed.¹⁶⁴ Unlike in the blanket-waiver hypothetical discussed above, the more narrowly targeted waiver at issue in *Wyman* might well provide a legitimate basis for a distinction even in the absence of any behavioral changes induced by imposing the condition. Welfare authorities

¹⁶⁰ The state’s only argument in support of such a distinction was that “veterans as a class occupy a position of special trust and influence in the community” and that their subversive speech could thus pose “a special danger to the State.” *Id.* at 528. But as the Court correctly noted, the asserted parallel with public employees was inapt as the state could remove employees from their position of influence but was “powerless to erase the service which the veteran has rendered his country” and thus could not remove or mitigate the threat by withholding an unrelated benefit. *Id.*

¹⁶¹ *Id.* at 518-19. Technically, the Court did not reach the First Amendment question in *Speiser* because the state supreme court had narrowly construed the relevant statute to target only speech that the Supreme Court’s then-existing First Amendment jurisprudence deemed unprotected, with the refusal to take the oath functioning as presumptive evidence that a veteran had engaged in the prohibited speech. *Id.* at 519-20. The Court struck down the evidentiary framework as a denial of procedural due process. *Id.* at 526, 529.

¹⁶² See U.S. CONST. amend. IV.

¹⁶³ 400 U.S. 309 (1971).

¹⁶⁴ *Id.* at 313-14.

might have good reason to be more willing to provide assistance (or more generous assistance) to those whose compliance with the program's eligibility criteria is more easily monitored.¹⁶⁵ This more narrowly targeted condition thus looks much more like a distinction between individuals who are differently situated from one another than an arbitrary distinction adopted for the purpose of extracting a surrender of unrelated rights.

Finally, consider the land-use regulation that was successfully challenged before the Supreme Court in *Nollan v. California Coastal Commission*.¹⁶⁶ In *Nollan*, owners of a beachfront property applied for a development permit allowing them to replace an existing structure on their property with a newly built house.¹⁶⁷ The state regulatory agency agreed to grant the permit, but only if the owners granted a permanent easement allowing members of the public to walk across a portion of their private beach that lay between two publicly owned beach areas.¹⁶⁸ The Supreme Court concluded that the condition violated the Fifth Amendment's Takings Clause due to the lack of an "essential nexus" between the government's asserted regulatory interests in limiting beachfront development and the uncompensated surrender of property rights that the agency demanded in return for granting the permit.¹⁶⁹ The Court acknowledged that zoning authorities might legitimately insist upon concessions (including a limited surrender of property rights) that related directly to the regulatory interests that a development might threaten, such as "protect[ing] the public's ability to see the beach notwithstanding construction of the new house."¹⁷⁰ But the Court found it "quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."¹⁷¹

As a first pass, the "essential nexus" test articulated by the Supreme Court in *Nollan* appears consistent with the counterfactual test outlined above. Imagine an identical house located next door to the Nollans' property whose owners did not own any nearby beachfront property of the type the Nollans possessed. If the owners of such a property were granted a permit while the Nollans' application was denied and if the sole material difference between the two properties involved the Nollans' refusal to surrender their property

¹⁶⁵ See *id.* at 319 ("One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same.").

¹⁶⁶ 483 U.S. 825 (1987).

¹⁶⁷ *Id.* at 827-30.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 837, 841-42.

¹⁷⁰ *Id.* at 836.

¹⁷¹ *Id.* at 838.

rights, it would be hard to avoid the conclusion that they had been singled out for unfavorable treatment based solely on their decision to insist on their constitutional right against uncompensated takings.¹⁷²

But in many land use cases, the determination of whether a particular rights-holder has been targeted in this manner may be more difficult to assess because no identically situated landowner will be present to serve as a reference point. Many land use challenges involve “highly individualized” decisions about particular changes to particular parcels.¹⁷³ The individualized nature of the decision-making process may render it challenging to detect when a particular decision actually results in rights-holders being singled out for distinctively unfavorable treatment.¹⁷⁴

The presence of an explicit condition seeking concession of unrelated property rights might go some way toward supporting an inference that a refusing landowner is being unfairly targeted. But this is not the only possible explanation. Consider a variation on the facts of *Nollan* in which a particular local government has a longstanding practice of denying all beachfront development that would in any way interfere with the public’s ability to view the ocean. Imagine that the government nonetheless offers to grant a development permit to a particular landowner if she agrees to convey to the city a separate parcel located far away from the beachfront, which the local authorities want to develop into a public park. At first glance, this condition might seem like an even more flagrant violation of the germaneness limitation than the condition at issue in *Nollan* given the physical distance between the two parcels and the very different regulatory interests that might be asserted on behalf of the government for limiting development and acquiring the parkland, respectively. But the effect of the government’s offer would not be to single the landowner out for distinctively unfavorable treatment. Rather, in this scenario, the offer would make the landowner unambiguously better off and result in her being treated *more favorably* than the owners of other beachfront parcels.¹⁷⁵

172 Cf. *Olech v. Village of Willowbrook*, 528 U.S. 562, 564 (2000) (holding that a plaintiff may state a “class of one” equal protection challenge “where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment”).

173 See, e.g., Lee Anne Fennell & Eduardo M. Penalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 306 (“[T]he highly individualized revision of land use law is a pervasive phenomenon.”).

174 See, e.g., Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1750 (1988) (recognizing that unequal treatment may be more challenging to detect in individualized land-use decisions than in more traditional forms of zoning regulation).

175 See Elhauge, *supra* note 59, at 568 (observing that “holding . . . conditioned permits unconstitutional” in circumstances where government officials would genuinely prefer no development to the conditioned development would be “worse for the property owner and the government, because both prefer the conditioned permit to no permit”).

As *Nollan* demonstrates, looking to equal-protection principles and germaneness will not always yield clear or easily administrable guidelines for resolving unconstitutional conditions cases. Sometimes (as in *Nollan*), determinations of what equality requires in a given circumstance may be challenging due to the highly particularized and fact-dependent context in which the government's decision-making takes place.¹⁷⁶ In other circumstances, disagreements about what equality requires in a given case may result from different factual or normative assessments of whether different individuals or groups are, in fact, similarly situated.¹⁷⁷ A focus on the government's asserted interests may clarify which similarities and differences should matter for such an assessment. But at least some disagreements are likely to persist even after such interests are fully accounted for.¹⁷⁸

To the extent such disagreements are a challenge for the unconstitutional conditions doctrine, it is because they are a challenge for equal protection doctrine—and the concept of “equality”—more generally.¹⁷⁹ As generations of scholars have recognized, an abstract commitment to treating “similarly situated” individuals equivalently produces “significant difficulties given the fact that people are both the same and different along an infinite range of dimensions.”¹⁸⁰ Shifting to an equality framework for assessing the

176 This problem is not unique to unconstitutional conditions cases. Similar challenges arise in other contexts where allegations of unequal treatment involve highly individualized and fact-dependent decisions. *See, e.g.*, *Engquist v. Or. Dept. of Agriculture*, 553 U.S. 591, 604-09 (2008) (refusing to allow a “class of one” equal protection challenge to government employment decisions to proceed to trial due to the inherently “subjective and individualized” nature of such determinations).

177 *Cf.* Kreimer, *supra* note 21, at 1370-71 (“Resting as it does on analogical reasoning, the equality baseline can be neither exact, determinative, nor value-free.”).

178 Consider, for example, the issue that divided the Court in *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013), which involved a challenge to a condition on federal funding aimed at combatting the spread of HIV/AIDS that prohibited funding for any group that promoted or advocated legalized prostitution. The majority concluded that, though the government could permissibly restrict the use of federal funding to promote prostitution, it could not use its power over funding to regulate recipients' private speech. *Id.* at 208, 214-15. Justice Scalia dissented. Among other things, Scalia argued that the government had a legitimate interest in restricting *any* funding to groups that promoted prostitution because “[m]oney is fungible” and thus provision of federal funding for the groups' other activity might indirectly subsidize the disfavored message. *Id.* at 224.

179 *Cf.* William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 508 (2010) (“[T]he Equal Protection Clause, and the comprehensive equality principle that it has been taken to mean, is known for its vacuity and indeterminacy.”).

180 Seidman, *supra* note 151, at 88; *see also, e.g.*, Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 38-39 (2009) (describing the maxim that “‘like’ cases should be treated ‘alike’” as “notoriously unhelpful insofar as it requires additional normative content to identify relevant characteristics for comparison”); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L.

permissible limits of germaneness in the unconstitutional conditions context is thus unlikely to resolve all disagreements regarding the constitutional permissibility of conditional government offers. Nonetheless, seeing the connections between the inquiries placed at the center of the equal protection inquiry and the germaneness inquiry may go some way toward helping the courts develop a more coherent doctrine to guide their consideration of unconstitutional conditions problems.¹⁸¹

3. Other Forms of Threatened Unconstitutionality

The equality framework described above provides a plausible mechanism for identifying threatened unconstitutional governmental action in many of the most significant unconstitutional conditions contexts. But there may be some areas where the threatened government action implicates a different constitutional concern.

Sometimes, the threatened government conduct may violate some independent constitutional provision. Consider, for example, the much-discussed question of the proper constitutional limits on the plea-bargaining process.¹⁸² Plea bargaining fits comfortably within the unconstitutional-

REV. 537, 579 (1982) (“As a source of entitlements, equality cannot produce substantive results unattainable under other forms of analysis, because . . . equality has no substantive content of its own.”); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 4-9 (1974) (“Until supplemented by criteria of likeness and difference, it remains empty and cannot serve as a determinate guide to conduct.”).

¹⁸¹ A few other scholars have suggested that unconstitutional conditions doctrine be steered in this direction. *See, e.g.*, Lerner, note 132, at 785-89 (“[B]orrowing from equal protection (and First Amendment) analysis, at a minimum any organization-wide restriction should satisfy heightened scrutiny”); Feinerman, *supra* note 120, at 1403-15 (“Unconstitutional conditions challenges are, in effect, hybrid claims involving both an equality component and a substantive rights component.”); Wald, *supra* note 132, at 255-257 (“[E]very constitutional right carries within it an equal protection norm and that any governmental program that limits or conditions benefits when a constitutional right is exercised creates a suspect category that must be justified under a heightened standard of review.”).

¹⁸² *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044-50 (2006) (“[I]n a departure from its unconstitutional conditions jurisprudence, the Court allows prosecutors to condition sentencing or charging deals on the waiver of constitutional trial rights”); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 846 (2003) (“[A]pplying the unconstitutional conditions doctrine to all questions of waiver would make plea bargains considerably more problematic”); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 117 (1999) (suggesting guidelines for courts to use to protect individuals’ constitutional rights within plea negotiations); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 889 (1980) (“Reconcil[ing] the Court’s approval of purposeful penalties on the right to trial in plea bargaining with its continuing commitment to the unconstitutional conditions doctrine.”); John C. Coffee, Jr., *“Twisting Slowly in the Wind”: A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211, 222 (1980) (suggesting a Model of Government Regularity to tame state coercion in the plea-bargaining process); Peter Westen & David Westin, *A Constitutional Law of*

conditions paradigm, involving a governmental offer of a promised benefit (i.e., the promise of a potentially more lenient sentence), the receipt of which is contingent on a defendant's waiver of certain constitutional rights (including the Sixth Amendment right to a jury trial).¹⁸³ But courts have tended to be less scrupulous in policing plea-bargaining deals than they have with regard to other conditional offers affecting individual rights.¹⁸⁴

From an equality perspective, it might make sense to treat plea bargaining as at least presumptively permissible. Courts and prosecutors will typically have sound reasons for treating those willing to accept a guilty plea differently from those who will not. Guilty pleas (and their associated waiver of constitutional rights) deliver benefits to the government that it may legitimately consider in drawing distinctions between otherwise similarly situated defendants, including speedier imposition of punishments and avoidance of the costs and potential inaccuracies that may result from a trial.¹⁸⁵

It hardly follows, however, that plea bargaining is never constitutionally problematic. A particular concern in the plea-bargaining process involves the potential for prosecutors to “overcharge” defendants by filing or threatening to file more charges or more severe charges than a fair assessment of the facts and circumstances of their cases would otherwise merit.¹⁸⁶ A defendant might reasonably conclude that even a very onerous plea deal—for instance, one that approximates the sentence he or she would expect after losing at trial on more

Remedies for Broken Plea Bargains, 66 CALIF. L. REV. 471, 494-95 (1978) (proposing and defending a test to determine whether a guilty plea is invalid due to coercion).

¹⁸³ See, e.g., Berman, *Coercion*, *supra* note 21, at 98 (“Plea bargains present a classic unconstitutional conditions problem.”).

¹⁸⁴ See, e.g., Mazzone, *supra* note 182, at 802 (noting that, unlike government offers of employment or welfare benefits, plea bargains are not analyzed under the unconstitutional conditions doctrine).

¹⁸⁵ See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970) (noting potential advantages that the government derives from plea agreements, including “the more prompt[] impos[ition]” of punishment and the conservation of “scarce judicial and prosecutorial resources”). The furtherance of such interests might well warrant a more lenient sentence even for defendants who plead guilty without any negotiated plea agreement. Cf. *United States v. Divens*, 650 F.3d 343, 344-45 (4th Cir. 2011) (holding that a criminal defendant who pleaded guilty was entitled to sentencing reduction prescribed by the Federal Sentencing Guidelines for “acceptance of responsibility” even though the defendant had refused the prosecution’s plea agreement and prosecutors objected to the sentence reduction).

¹⁸⁶ See, e.g., Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-91 (1968) (explaining “vertical overcharging” where prosecutors “charg[e] a single offense at a higher level than the circumstances of the case seem to warrant”). The term “overcharging” can be used to describe other forms of charging decisions as well. See Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 706-14 (2014) (discussing various senses of the term).

justifiable charges—is preferable to facing the risk of conviction on the excessive charges.¹⁸⁷

Such overcharging might implicate equality concerns in some circumstances. But wholly apart from such concerns, deliberately overcharging a defendant may also implicate significant questions regarding defendants' rights to procedural due process. The potential bargaining power that overcharging confers on the government depends on the prospect of legal error. In a world of perfectly accurate adjudication, overcharging would make no sense because a defendant could be assured that he or she would be convicted and sentenced only within a range warranted by the actual facts and a correct interpretation of governing law.¹⁸⁸ But because courts and juries sometimes make mistakes, defendants might reasonably conclude that waiving their rights and accepting the consequences of a guilty plea is more desirable than risking conviction of more offenses or offenses that are punished more severely than their alleged conduct actually warrants. And though the Constitution does not guarantee defendants a perfectly accurate adjudication, it *does* bar governments from adopting procedures that unreasonably enhance the likelihood of an erroneous deprivation of important liberty or property interests.¹⁸⁹ To the extent overcharging a defendant poses an intolerably high risk of erroneous punishment,¹⁹⁰ the practice is thus unconstitutional.¹⁹¹

187 See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 85 (2002) (“The prosecutor can hope that a defendant will be risk averse and will accept a plea to charges greater than the case’s true value simply to avoid the remote chance of a conviction on far more serious charges.”).

188 Cf., John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 n.24 (1978) (“If trials were perfectly accurate, plea bargaining would be perfectly accurate, since no innocent person would have an incentive to accuse himself.”).

189 See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 532-33 (2004) (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976) (finding a due process violation where “the risk of an erroneous deprivation’ of [an individual’s] liberty interest is unacceptably high” in relation to the private and public interests implicated by the use of a particular procedure rather than other available alternatives). The argument in the text above assumes that the proper interpretation of due process in the procedural context roughly tracks the understanding of procedural due process in modern doctrine. See *id.* at 528-29 (applying the test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine whether the government’s proposed rule provided procedural due process). For an argument challenging that understanding, at least with respect to the Fifth Amendment’s Due Process Clause, see Max Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 VA. L. REV. 447, 450-51 (2022), which argues that modern doctrinal theories regarding the meaning of the Fifth Amendment’s Due Process Clause are incorrect from an originalist standpoint.

190 See *Graham*, *supra* note 186, at 707 (noting that while “juries and judges play important roles in weeding out weak cases, prosecutors play a necessary part in this process, too” and that a routine practice of overcharging would thus “lead to a greater number of erroneous convictions”).

191 To say that the use of deliberate overcharging to force a surrender of trial rights is unconstitutional does not necessarily yield clear prescriptions for how to identify and limit the practice. As in the land use context discussed above, see *supra* notes 166–176 and accompanying text,

In some cases, additional constraints may come from restrictions intrinsic to a particular constitutional provision. Sometimes, these restrictions may bear some resemblance to the types of equality limits discussed above. Consider, for example, the Supreme Court's well-known decision in *Sherbert v. Verner*,¹⁹² which involved a challenge to a state policy denying unemployment benefits to individuals who, due to their religious beliefs, refused to accept jobs that required them to work on Saturdays.¹⁹³ The Supreme Court concluded that the denial of benefits unconstitutionally burdened the plaintiff's First Amendment right to Free Exercise of Religion.¹⁹⁴ But the state's eligibility criteria for unemployment benefits did not meaningfully distinguish between workers who surrendered their constitutional rights (and accepted or remained in jobs requiring Saturday work) and those who insisted on them (and thus could not find or maintain employment).¹⁹⁵ Both groups were denied unemployment benefits. Rather, the plaintiff's claim hinged on the state's differential treatment of individuals who could not find employment because of religious objections and individuals who could not find employment for reasons unrelated to their religious beliefs or practices.¹⁹⁶

In *Shapiro v. Thompson*,¹⁹⁷ the Supreme Court invalidated laws denying state welfare benefits to individuals who had resided in the state for less than a year. As in *Sherbert*, the plaintiffs could not point to any differential treatment between those who had exercised their constitutional right to travel to a new state and those who chose to remain in their native states: the destination state to which the former group moved denied benefits to both.¹⁹⁸ Rather, the complained-of distinction involved the disparate treatment of those who exercised their constitutional right (i.e., the newly arrived

evidentiary and epistemic problems may limit the ability of courts to accurately assess whether a particular charging decision reflects a prosecutor's reasonable, good-faith assessment of the law and facts or rather an effort to extract a plea through the *in terrorem* effect of a possible erroneous penalty. Cf. Berman, *Coercion*, *supra* note 21, at 98-103 (discussing the "epistemic difficulty" courts face "in distinguishing coercive plea offers from noncoercive ones"); Graham, *supra* note 186, at 708-09 ("[M]ost 'true' overcharges, in the sense that a charge patently lacks proof sufficient for a conviction, likely involve a prosecutor's misunderstanding of the pertinent law or the facts of a case.").

¹⁹² 374 U.S. 398 (1963).

¹⁹³ *Id.* at 399-402.

¹⁹⁴ *Id.* at 404-06.

¹⁹⁵ *See id.* at 400-01 (describing the state's eligibility criteria).

¹⁹⁶ *See* Sullivan, *supra* note 3, at 1435 ("Mrs. Sherbert could not have obtained unemployment compensation by violating her conscience; if she worked on Saturday, she would not need unemployment compensation.").

¹⁹⁷ 394 U.S. 618 (1969).

¹⁹⁸ *See* Sullivan, *supra* note 3, at 1435 ("Like Mrs. Sherbert . . . , the would-be emigrants in *Shapiro* could not have obtained benefits from the destination state by staying put.").

residents) and some *other* group of assertedly similar individuals (i.e., long-time residents of the destination state).¹⁹⁹

Cases like *Sherbert* and *Shapiro* thus cannot be explained in terms of the government's discriminatory treatment of those who choose to exercise a particular constitutional right in comparison to those who do not. Rather, to the extent such decisions are supportable, the explanation must be that some aspect of the particular substantive constitutional right asserted in each case limits the government's ability to consider differences arising from the exercise of that right as a valid basis of distinction. For example, if the Free Exercise Clause is properly interpreted as prohibiting the government from treating religiously-motivated refusals to work less favorably than inability to work resulting from other reasons (such as physical or mental incapacity), then the holding of *Sherbert* might be supportable.²⁰⁰ Likewise, if some textual provision of the Constitution is properly interpreted to limit states' ability to discriminate against newly arrived residents and in favor of longtime residents,²⁰¹ then the holding of *Shapiro* and similar right-to-travel cases might well be consistent with a proper interpretation of the Constitution.

It is important to recognize, however, that claims of this sort, though sounding to some extent in considerations of comparative equality, are analytically distinct from the paradigm described above in which the government uses a constitutionally impermissible threat of inequality to pressure a right. And conflating the two may needlessly confuse and frustrate analysis of the underlying problem.²⁰²

¹⁹⁹ See *Shapiro*, 394 U. S. at 627 (explaining that the laws create "two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided a year or more, and the second of residents who have resided less than a year, in the jurisdiction. On the basis of this sole difference the first class is granted and the second class is denied welfare aid . . .").

²⁰⁰ Cf. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1412-15 (1990) (arguing that the historical evidence regarding the background and adoption of the First Amendment, though not unequivocal, "does, on balance, support *Sherbert's* interpretation of the free exercise clause"); but see *Employment Division v. Smith*, 494 U.S. 872, 878 (1990) (holding that the Free Exercise Clause does not entitle religious objectors to exemptions from generally applicable laws that were not adopted for the purpose of burdening religious exercise).

²⁰¹ *Shapiro* was equivocal about the textual source of the right to interstate migration. See *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision."); see also *Zobel v. Williams*, 457 U.S. 55, 66-67 (1982) (Brennan, J., concurring) (quoting *Shapiro*, 394 U.S. at 630) ("[F]requent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary."). More recent decisions have grounded the right more firmly in the Fourteenth Amendment's Privileges or Immunities Clause. See *Saenz v. Roe*, 526 U.S. 489, 502-04 (1999) (interpreting that provision to encompass a restriction on discrimination against newly arrived residents that is at least as stringent as the one recognized in *Shapiro*).

²⁰² See *infra* note 212 (discussing how no single theory can explain unconstitutional conditions).

Finally, some constitutional provisions may limit the government's ability to impose certain conditions, even in circumstances where no equality concern is implicated. Consider, for example, a hypothetical scenario posited by Professor Seth Kreimer, in which a local community is deciding between two different routes for a proposed highway, one of which passes by the printing facilities of a local newspaper which is highly critical of the city's mayor.²⁰³ Knowing that the newspaper would financially benefit from having the highway pass near its facilities, the mayor informs the newspaper's owner that he will select that path if and only if the newspaper agrees to more flattering coverage of local politics.²⁰⁴ As Kreimer correctly notes, such a threat would be challenging to fit within an equal-protection framework because the threatened conduct would not involve "denying something available to members of any comparison class . . ." ²⁰⁵

But it does not necessarily follow that such an offer or threat would be constitutionally permissible. Sometimes, the same rights-conferring provision that is the target of a proposed governmental bargain—in Kreimer's hypothetical, the First Amendment's protections of Freedom of Speech and Freedom of the Press²⁰⁶—may limit the range of permissible governmental behavior designed to influence the exercise of that right. If the First Amendment is properly construed to limit the range of permissible purposes for which government may act to limit, influence, or punish private speech,²⁰⁷ then it may be the case that *any* governmental action taken because of such impermissible purposes would be unconstitutional.²⁰⁸ The absence of a comparison class would not matter because acting on the improper objective would be unconstitutional independent of the effect on any other rights-holders.²⁰⁹

203 Kreimer, *supra* note 21, at 1371-72.

204 *Id.*

205 *Id.*

206 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

207 See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 415 (1996) (arguing that the "concern with governmental motive [is] a hugely important—indeed, the most important—explanatory factor in" modern First Amendment doctrine); see also Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 314 (2017) (suggesting that a historically-centered interpretation of the Speech Clause might "require the government to act for reasons that serve the public good").

208 See, e.g., Fallon, *supra* note 135, at 72 ("Once it is agreed which purposes are forbidden [by the Constitution], the question is whether, but for the influence of some illegitimate consideration in motivating one or more relevant decisionmakers, the government would likely have enacted a challenged statute or taken other contested steps.").

209 Professor Mitchell Berman has argued that such purpose-based inquiries should provide a more general criterion for identifying constitutionally wrongful forms of coercion. See Berman, *Coercion*, *supra* note 21, at 45-46. According to Berman, the government acts unconstitutionally any time it acts for the purpose of "penalizing the exercise of a constitutional right," which he defines as

The variety of ways in which a condition placed on governmental benefits might run afoul of the Constitution suggests that unconstitutional conditions problems affecting individual rights are probably not susceptible to any single all-purpose test or theoretical account.²¹⁰ Whether a particular condition violates the Constitution depends on whether withholding the benefit would itself be unconstitutional, and answering that question requires an assessment of *all* of the various ways in which the Constitution might constrain the government's behavior with respect to the promised or threatened action. It is possible that a broad range of the Court's modern unconstitutional conditions jurisprudence might be defended through some combination of the equal-protection framework sketched above and clause-specific limitations of the type described in this Section.²¹¹ But a clear understanding of which forms of threatened unconstitutionality are implicated by a particular conditional offer is critical to understanding the problem and avoiding the confusion that can result from attempting to superimpose a single, overarching framework on problems implicating distinct constitutional commands.²¹²

imposing "consequences upon a rightholder that are adverse relative to the consequences that the state would impose, or allow to obtain, but for the state's purpose in having the rightholder experience the consequences as disagreeable." *Id.* at 46; *see also* Berman, *Medicaid Expansion*, *supra* note 12, at 1323 ("Part of what it is to have a constitutional right . . . is to have a right not to be penalized . . ."). But Berman makes no claim to ground this principle in either the Constitution's text or in enactment-era interpretive practices. *Cf. id.* at 1323-24 (explaining that the "best argument" for his proposed standard is "coherentist" in nature," drawing on "widespread intuitions about a wide range of cases, actual and hypothetical"). And it cannot simply be presumed that such purpose-based limitations necessarily inhere in the original meaning of each and every rights-conferring provision. Rather, as Professor Caleb Nelson observes, "[f]iguring out whether particular [constitutional] provisions . . . impose any purpose-based restrictions on legislative power, and exactly what the restrictions are, requires fine-grained judgments about the meaning of each provision." Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790 (2008).

²¹⁰ *Cf. supra* note 23 (collecting sources expressing skepticism that unconstitutional conditions problems can be resolved using any single overarching theoretical framework).

²¹¹ Of course, a comprehensive defense of the Court's modern jurisprudence would require a much more thorough argument than is possible in this Article. At a minimum, such a defense would require a thorough account of the meaning of the Fourteenth Amendment's Equal Protection Clause and similar comparative provisions as well as *all* other constitutional provisions that might be implicated by particular conditional offers.

²¹² Professor Kathleen Sullivan, for example, has discussed in detail the difficulty of synthesizing the Court's decisions in *Speiser*, *Sherbert*, and *Shapiro* into a coherent and administrable test for identifying "coercion" in connection with governmental offers or threats. Sullivan, *supra* note 3, at 1433-42. But once the most plausible bases for those decisions are more clearly understood, the confusion surrounding this line of cases evaporates. As discussed above, *Speiser* is most plausibly understood as a straightforward equal-protection challenge triggered by the imposition of a nongermane condition, the purpose and effect of which was solely to deter a class of would-be beneficiaries from exercising a constitutional right. *See supra* notes 158-161 and accompanying text. By contrast, both *Sherbert* and *Shapiro* are most plausibly understood as premised on arguments that something about the underlying right asserted in each case (the right to free exercise of religion in

4. The Role of Compulsion

As discussed above, the Founding-era conception of “duress” required both a threat of illegal action on the part of the counterparty and a showing that the party seeking to avoid being bound acted under some reasonable degree of compulsion.²¹³ The distinctive role of compulsion (i.e., the degree to which decision-making freedom is substantially constrained) has been a source of confusion in modern unconstitutional conditions case law. At times, the Court has suggested that the degree of pressure placed on the exercise of a right is of little or no relevance.²¹⁴ But in other cases, the Justices emphasized the limited degree of burden or deterrence in concluding that particular conditions were noncoercive.²¹⁵

The proper role of compulsion in conditional offers affecting individual rights depends on the nature of the challenge that is asserted against a particular governmental condition. Where the challenge is brought by individuals or entities who accepted the government’s offer and later seek to avoid the consequences of surrendering their rights, the traditional common law conception of duress seems to provide the appropriate framework. As discussed above, the period immediately surrounding the enactment of the most significant constitutional rights provisions (i.e., the late-eighteenth to mid-nineteenth centuries) was a period during which the traditional common-law understanding of duress was evolving.²¹⁶ But even under the most capacious understanding that predominated during this period, a showing of duress required that a threatened violation of rights be

Sherbert and the right to interstate travel in *Shapiro*) limits the government from considering differences that result from the exercise of the right as a valid basis of distinction. See *supra* notes 192–201 and accompanying text. Given that the two sets of cases proceed from different underlying theories of unconstitutionality, it is hardly surprising that no single overarching explanation can satisfactorily account for both.

²¹³ See *supra* notes 97–110 and accompanying text (describing modern definitions of coercion and duress as broader than in Founding era cases and contract law).

²¹⁴ See, e.g., *Memorial Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 258 (1974) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970)) (Brennan, White & Marshall, JJ., dissenting in part) (holding that any durational residency requirement that “operates to *penalize* . . .” the exercise of the constitutional right to interstate travel is subject to strict scrutiny without regard to actual deterrence).

²¹⁵ See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (holding that the restriction on eligibility for food stamp benefits did not unconstitutionally interfere with the right to intimate association because it was “exceedingly unlikely that close relatives would choose to live apart simply to increase their allotment of” benefits); *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 222–23 (2013) (Scalia, J., dissenting) (expressing doubt that the “First Amendment’s prohibition against the coercing of speech” could be violated by “a condition for eligibility to participate in a minor federal program” because “[n]ot every disadvantage is a coercion”).

²¹⁶ See *supra* notes 98–99 and accompanying text (describing an evolution from the notion that duress should be limited to the most severe threats to an expansion to include some less severe forms of threats).

accompanied by at least some meaningful degree of compulsive force.²¹⁷ One seeking to escape the consequences of their assent to a particular condition should thus be expected to show that their decision was induced by some meaningful degree of practical burden that would have resulted from refusing the government's offer.²¹⁸

But this is not the only, nor even necessarily the most common, form in which a challenge to a conditional government offer might be asserted. Many unconstitutional conditions challenges are brought by would-be beneficiaries who *rejected* the government's offer and were thus excluded from the sought-after benefit.²¹⁹ If, as argued above, the coerciveness of a particular condition turns on the unconstitutionality of denying the benefit under the particular circumstances of the case,²²⁰ then it is likely that the exclusion itself would constitute a direct violation of the excluded parties' constitutional rights.

Consider, for example, the complaining veterans in *Speiser v. Randall*, who refused the state government's demand that they pledge a loyalty oath and were thus denied access to a tax exemption provided to other, similarly situated veterans.²²¹ If, as argued above, the consequence of this exclusion was to deny the veterans' constitutionally protected right to equal treatment by the government,²²² then the violation of their rights was consummated as soon as the state denied them the exemption they sought. Even if the value of the exemption was relatively trivial—and thus could not plausibly induce a person of reasonable firmness to compromise their sincerely held political beliefs—the mere fact of the government's unequal treatment would likely have been sufficient to constitute a cognizable injury warranting judicial redress under existing equal-protection doctrine.²²³

²¹⁷ See, e.g., *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 214 (1868) (describing “[d]uress, in its more extended sense,” as meaning “that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness”).

²¹⁸ Cf. *Brady*, 397 U.S. at 750-51 (holding that the defendant could not escape the consequences of his guilty plea and consequent waiver of trial rights because he was not subjected to “actual or threatened physical harm or by mental coercion overbearing” his will or any other factors that precluded him from “rationally weigh[ing] the advantages of going to trial against the advantages of pleading guilty”).

²¹⁹ See, e.g., *Feinerman*, *supra* note 120, at 1370 n.6 (“Usually, those who challenge conditioned benefit programs are those to whom government benefits are denied.”).

²²⁰ See *supra* note 115 and accompanying text (defining a threatened action as “unlawful” if the action in question violates the Constitution).

²²¹ 357 U.S. at 515-17.

²²² See *supra* notes 158-161 and accompanying text (discussing *Speiser*).

²²³ Cf. *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (“[T]he right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against.”).

The deterrent effect of a governmental condition on the exercise of constitutional rights is thus neither always irrelevant nor always requisite to a conclusion that a particular condition has violated an individual's constitutional rights. A showing of such a deterrent effect may be important to support a conclusion that the government's action has violated an individual's rights notwithstanding their outward assent to surrendering such rights. But no such showing is needed for those who refuse the government's offer and seek redress for the allegedly unconstitutional consequences inflicted on them as a result.

D. A Note on "Inalienable" Rights

To this point, the analysis in this Part has focused exclusively on the constitutional limits on the government's ability to use its control over discretionary benefits to induce the surrender of rights that individuals are permitted to waive. But this analysis may not adequately account for all constitutional rights. Some rights-conferring provisions may properly be construed as "inalienable"—meaning that they are not susceptible to waiver, or at least are not waivable in all respects and circumstances.

The question of whether and to what extent particular rights should be regarded as inalienable has been a frequent topic of consideration in academic commentary surrounding unconstitutional conditions problems but has not featured prominently in the case law.²²⁴ A maximalist position might hold that all, or nearly all constitutional rights are properly regarded as inalienable and therefore nonwaivable.²²⁵ But this position seems inconsistent with the predominant understanding of constitutional rights reflected in early

²²⁴ See, e.g., Sullivan, *supra* note 3, at 1477 ("[I]nalienability arguments, unlike coercion and germaneness arguments, rarely appear in the unconstitutional conditions cases. . . ."); see also *id.* at 1477-79 (summarizing discussions of the inalienability question in the academic commentary); Tribe, *supra* note 24, at 332-33 (contending that some "rights that are relational and systemic are necessarily inalienable"); Kreimer, *supra* note 21, at 1378-92 (discussing arguments for viewing certain rights as inalienable).

²²⁵ Among modern commentators, Professor Philip Hamburger comes closest to endorsing this view. See Hamburger, *supra* note 24, at 156 ("Being legal limits on government, constitutional rights cannot be bargained away. As with other restrictions on power, so with rights, consent cannot relieve the government of its constitutional boundaries."); Hamburger, *supra* note 17, at 483 ("[T]he government cannot escape its constitutional bounds by getting, let alone purchasing, the consent of any lesser body, whether individuals, private institutions, or states. For such purposes, their consent is irrelevant."); see also Alexander Volokh, *The Constitutional Possibilities of Prison Vouchers*, 72 OHIO ST. L.J. 983, 1029 n.312 (2011) (associating Hamburger with the view that "the government generally shouldn't be able to achieve indirectly, by conditions attached to benefits, what it couldn't achieve by direct regulation"). Professor Hamburger acknowledges, however, that the Constitution "authorizes the federal government to work through [the] consent" of individuals and states in some circumstances and that "the Constitution itself," therefore, "has much to tell us about when a condition is constitutional or not." HAMBURGER, *supra* note 24, at 157.

American practice. As discussed above, the broad acceptance of the *pro se introducto* maxim in Founding-era legal practice provides some reason to believe that constitutional rights—like other legal rights—could potentially have been seen as waivable even in the absence of any express language signaling that a violation of the right turned on a lack of consent by the affected party.²²⁶

But the *pro se introducto* maxim was not without exceptions. One important qualification was that courts would not enforce an agreement or compact in a manner that would prejudice the rights of third parties.²²⁷ Another important limitation involved the inability of consent to override structural limits on the powers of government, such as the limits on federal subject matter jurisdiction set forth in Article III.²²⁸

Discerning which constitutional rights should be regarded as inalienable is a challenging task but not meaningfully more so than other interpretive questions regarding the meaning of particular provisions. Justice William Johnson's opinion in *Bank of Columbia v. Okely* suggested that the waivability of a particular constitutional protection should be determined by looking to both the "general intent" underlying a provision as well as its "express wording."²²⁹ In concluding that litigants should be able to waive the Seventh Amendment's protection of civil jury trials, Johnson emphasized that the restriction was not framed as a categorical command that "trial by jury [] be preserved" but rather preserved a "right of trial by jury."²³⁰ Following this interpretive guideline would lead to treating other provisions containing a similarly explicit use of the term "right"—including provisions of the First, Second, Fourth, and Sixth Amendments—as at least presumptively waivable.²³¹ However, it hardly follows that the absence of an explicit reference to "rights" in a provision should trigger a presumption of nonwaivability. For example, multiple early state-court decisions interpreted

²²⁶ See *supra* notes 79–88 and accompanying text (detailing historical acceptance of this maxim).

²²⁷ See *BROOM*, *supra* note 79, at 201 (explaining that these contracts "cannot affect the rights of third persons").

²²⁸ See, e.g., *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126, 127 (1804) ("[I]t was the duty of the Court to see that [the parties] had jurisdiction, for the consent of parties could not give it.").

²²⁹ 17 U.S. (4 Wheat.) 235, 244 (1819).

²³⁰ *Id.*

²³¹ See U.S. CONST. amend. I (emphasis added) (referring to, among other things, "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances"); *id.* amend. II (emphasis added) (referring to "the right of the people to keep and bear Arms"); *id.* amend. IV (emphasis added) (referring to "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure"); *id.* amend. VI (emphasis added) (referring to the "the right" of an accused to person to, among other things, "a speedy and public trial, by an impartial jury"); *Cf. id.* amend. XIV, § 1 (emphasis added) (referring to the "privileges or immunities of citizens of the United States").

the federal Constitution's Contracts Clause and state-law equivalents of the Fifth Amendment's Due Process and Takings Clauses—none of which contain a specific reference to “rights”—as conferring privileges that were subject to waiver.²³²

There are, however, some provisions for which a reasonably strong case for inalienability might be made. For example, the Thirteenth Amendment's prohibition of slavery has been construed to prohibit all slavery or slavery-like arrangements, including those assertedly grounded in consent.²³³ The Eighth Amendment's prohibition of “cruel and unusual punishment” and the First Amendment's prohibition of religious establishments might also be plausibly viewed as nonwaivable.²³⁴ Unlike many other rights-conferring provisions in the Constitution, these clauses are framed as absolute limits on federal authority rather than as conferrals of individual “rights” or “freedoms.”²³⁵ Each provision can also be seen as imposing structural limits on governmental authority that implicate interests that are not narrowly confined to the interests of particular protected persons.²³⁶ Arguments for inalienability might well be defended with respect to other rights-conferring provisions as well.²³⁷

232 See, e.g., *Cavender v. Heirs of Smith*, 5 Iowa (Clarke) 157, 185-86 (1857) (discussing due process); *Embury v. Conner*, 3 N.Y. 511, 516-18 (1850) (discussing state constitutional due process and takings provisions); *McKinney v. Carroll*, 21 Ky. 96, 98 (1827) (discussing federal Contracts Clause).

233 See, e.g., *Bailey v. Alabama*, 219 U.S. 219, 242 (1911) (“The full intent of the [Thirteenth Amendment] could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service.”).

234 See, e.g., Farber, *supra* note 15, at 917 (identifying the Eighth Amendment's prohibition of cruel and unusual punishment as a “plausible candidate” for inalienability); Tribe, *supra* note 24, at 333 n.14 (noting that the First Amendment's Establishment Clause “gives rise to rights that are clearly not subject to waiver or alienation by any individual”).

235 See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”); *id.* amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

236 See, e.g., Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1737-38 (2005) (discussing the concern that “undermining the prohibition on torture” and other cruel punishments may tend to corrupt the broader legal system); Tribe, *supra* note 24, at 333 n.14 (stating that the “core aim” of the Establishment Clause “is to assure the separate and distinct viability of secular and religious power centers, protecting each sphere from domination by the other”).

237 See, e.g., Akhil Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1197-98 (1991) (arguing that the Article III Jury Trial Clause is properly construed as a structural limit on judicial power that cannot be waived by defendants). For some provisions, evidence regarding the applicability of the *pro se introducto* maxim may be equivocal or point in different directions. Compare, e.g., *Commonwealth v. Dailey*, 66 Mass. (12 Cush.) 80, 82-83 (1853) (citing the *pro se introducto* maxim in concluding that the state guarantee of a right to a trial by jury in a criminal proceeding was waivable), with, e.g., *Cancemi v. People*, 18 N.Y. 128, 135-38 (1858) (deeming jury trial in felony cases to be a nonwaivable structural limitation that reflects the public interest in ensuring accurate determinations of guilt).

While the task of figuring out which rights-conferring provisions are properly construed as subject to waiver may involve difficult interpretive questions, the consequences that follow from such a conclusion are relatively straightforward. If the government conditions access to a particular benefit on waiver of a nonwaivable right, then the condition cannot be met without violating the Constitution. There may remain questions regarding how to treat the conditioned benefit—i.e., whether would-be recipients should be able to receive the benefit without complying with the condition or whether the inability to comply with the stated condition should lead to its being denied to everyone.²³⁸ But resolving questions of this sort would merely involve specific applications of the doctrine of severability, which often requires courts to choose between two or more permissible alternative applications of a statutory framework when some part of the original package set forth by the lawmaker conflicts with the Constitution in some way.²³⁹

III. CONDITIONAL OFFERS AND STRUCTURAL LIMITS ON FEDERAL POWER

A. *Enumerated Powers and the Fallacy of “States’ Rights”*

As discussed above in Part II, many important constitutional guarantees of individual rights are likely best construed as waivable by the rights holder.²⁴⁰ The waivability of such rights empowers individuals to remove obstacles that could block otherwise valid exertions of governmental power.²⁴¹ An important function of the unconstitutional conditions doctrine in the individual rights setting is thus to ensure that the individual consent necessary to remove such obstacles has, in fact, been validly given rather than extracted by impermissible forms of coercion.²⁴² By limiting governments’ ability to wield their control over discretionary benefits in unconstitutional ways, limitations on conditional offers preserve the domain of decisional freedom conferred by the relevant rights guarantees, including the freedom to decide whether or not to assert such rights.²⁴³

²³⁸ Cf. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285-86 (1977) (holding that access to a conditioned benefit is not constitutionally required if the government can establish that the constitutionally protected activity was not the but-for cause of denial).

²³⁹ As William Baude has observed, severability questions often involve situations where two or more statutory commands are unconstitutional, when placed in combination with one another even though each would be constitutional in isolation. See William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 41-44 (2023).

²⁴⁰ See Section II.A *supra*.

²⁴¹ *Id.*

²⁴² See Sullivan, *supra* note 3, at 1428-42 (summarizing the role of coercion in the context of individual rights).

²⁴³ See *supra* Sections II.B & II.C.

The structural relationship between the federal government and the states established by the Constitution reflects a much different set of design choices. Despite prevalent references to “states’ rights” in constitutional discourse surrounding federalism, the Constitution does not confer on states the same types of legal protections as are afforded to individuals by provisions such as the Bill of Rights, the Reconstruction Amendments, and other important individual-rights guarantees.²⁴⁴ Instead, as discussed above, the sphere of autonomous decision-making authority reserved to the states results from the limited and enumerated scheme of powers conferred on the national government.²⁴⁵

Unlike provisions conferring particular rights on individuals, the structural limits on the federal government’s enumerated powers are not best construed as amenable to waiver or modification through the consent of federal and state officials. The *pro se introducto* principle that undergirds the waivability of individual rights has no application to such structural limits, which are not introduced for the exclusive benefit of the “states” in their respective corporate capacities but rather for the benefit of the people from whom both the states and the federal government derive their authority.²⁴⁶

This interpretation is reinforced by the absence of any explicit textual provision authorizing bargaining between the states and the federal government over their respective spheres of sovereign authority. Though metaphors of federal-state contracting are ubiquitous in public law,²⁴⁷ the power to establish prospectively binding commitments between the federal government and the states is conspicuously absent from the Constitution’s enumerated allocations of power. The Treaty Clause of Article II empowers

²⁴⁴ See, e.g., Steven G. Gey, *Contracting Away Rights: A Comment on Daniel Farber’s “Another View of the Quagmire,”* 33 FLA. ST. L. REV. 953, 972 (2006) (characterizing “[t]he term ‘states’ rights” as “a misnomer” and contending that the Supreme Court’s “federalism cases, which pertain to competing claims to government authority” bear no “resemblance to the sorts of individual rights at issue in” other unconstitutional conditions cases).

²⁴⁵ See *supra* Section I.B. The Tenth Amendment reinforces this structural relationship by emphasizing that the residuum of powers not conferred on the federal government nor prohibited to the states are “reserved to the States respectively, or to the People.” U.S. CONST. amend. X.

²⁴⁶ See *supra* note 228 and accompanying text (noting inapplicability of the *pro se introducto* maxim to structural limitations); see also, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”)

²⁴⁷ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (describing federal legislation enacted pursuant to the spending power as “much in the nature of a contract”); see also Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2011 (2014) (observing that the Supreme Court “has used as its overarching theoretical framework for” questions regarding state-federal relationships involving conditional spending programs “the idea that states and the federal government are in a ‘contractual’ relationship”).

the federal government to bind itself to agreements with foreign nations and with Indian Tribes.²⁴⁸ And the Compacts Clause of Article I, § 10 contemplates the establishment of similar binding commitments between different states (subject to Congressional approval).²⁴⁹ Both the Treaty Clause and the Compacts Clause likely countenance some agreements that formally alter allocations of sovereign rights as part of the bargaining process.²⁵⁰ But no similar provision confers on either the federal government or the States any general power to bargain away their sovereign authority in their dealings with one another.²⁵¹

This is not to say that a state's acceptance of a federally prescribed condition can never be relevant to determining whether federal law can be validly applied to a particular set of arrangements. In the context of federal spending, for example, the Supreme Court has upheld a variety of measures designed to ensure that state recipients of federal funding spend those funds for their designated purpose, including federal statutes authorizing private rights of action for intended beneficiaries,²⁵² authorizing federal officials to claw back misallocated funds,²⁵³ and providing for federal criminal

248 U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . .”).

249 U.S. CONST., art. I § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”).

250 See, e.g., *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243-45 (1872) (“[I]nasmuch as the [treaty] power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which . . . had usually been regarded as the proper subjects of negotiation and treaty [including agreements to acquire and dispose of territory.]”); Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241, 273-77 (2014) (discussing leading theories of the Compacts Clause and concluding that the Clause likely allows some interstate bargaining over territorial sovereignty).

251 The sole provision in the Constitution expressly authorizing the federal government and the states to re-draw the formal boundaries of their respective sovereign authority by agreement relates to Congress's authority to “exercise exclusive Legislation” over a District comprising the “Seat of the Government of the United States,” which was to be acquired “by Cession of particular States,” and to “exercise like Authority” over certain “Places purchased by the Consent of the Legislature of the State” in which they are located for the construction of “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” U.S. CONST. art. I, § 8, cl. 17. The very specific conferral of such a narrow power reinforces the inference that no broader power exists. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“Affirmative words are often, in their operation, negative of other objects than those affirmed; and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.”).

252 See, e.g., *Barnes v. Gorman*, 536 U.S. 181, 187 (2002) (observing that a state recipient of federal funds “may be held liable to third-party beneficiaries for intentional conduct that violates the clear terms of the relevant statute”).

253 See, e.g., *Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983) (recognizing the validity of such clawback mechanisms).

punishment of corruption relating to state recipients of federal funding.²⁵⁴ To the extent such measures are constitutionally permissible, it is not because the states have consented to an expansion of federal power but rather because the states, through their actions, have placed themselves within the permissible scope of Congress's preexisting power over spending, along with its power to enact laws that are "necessary and proper" for carrying that power into execution.²⁵⁵

The Supreme Court's decision in *Coyle v. Smith*,²⁵⁶ illustrates the distinction between conditional offers as a means of extending or enhancing federal powers and the role that conditions might plausibly play in implementing those powers that the federal government already possesses. *Coyle* involved a challenge to an Oklahoma statute providing for the removal of the state capital from Guthrie to Oklahoma City.²⁵⁷ The challengers to the law argued that the enactment conflicted with a putatively "irrevocable" condition that had been included in the enabling act passed by Congress authorizing Oklahoma's admission to statehood, which required that the capital "not be changed" from Guthrie before 1913.²⁵⁸ The law's defenders argued that, by accepting the condition, the people of the state had agreed to abide by the restriction and that Congress's power over the admission of new states included the power to insist on such an agreement as a condition of statehood.²⁵⁹

The Supreme Court disagreed.²⁶⁰ The Court reasoned that the restrictive condition in the authorizing statute could only preempt a duly enacted state law if it involved a valid exercise of one of Congress's enumerated powers.²⁶¹ The Court rightly concluded that no such power exists. Though the Statehood Clause empowers Congress to "admit[]" new States into the

²⁵⁴ See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (concluding that such punishments are "necessary and proper" for carrying into execution Congress's enumerated power over spending).

²⁵⁵ *Cf. id.* at 605 ("Congress has authority . . . to appropriate federal moneys to promote the general welfare . . . and it has corresponding authority under the Necessary and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare . . ."). *But see, e.g., id.* at 613 (Thomas, J. concurring in the judgment) (questioning whether Congress's power over spending extended to the criminalization of corruption involving state or private entities receiving federal funds where the criminal statute required "[n]o connection whatsoever between the corrupt transaction" and the particular federal benefits the entity received).

²⁵⁶ 221 U.S. 559 (1911).

²⁵⁷ *Id.* at 562-63.

²⁵⁸ *Id.* at 565-66.

²⁵⁹ *Id.* at 566.

²⁶⁰ See *id.* at 574 ("[W]hen a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.").

²⁶¹ *Id.* at 574.

Union, it does not give Congress any power to define what a “State” is.²⁶² That definition, according to the Court, was to be “found in the powers possessed by the original [thirteen] States which adopted the Constitution,” each of which possessed the unquestioned authority to decide upon the location of their respective capitals without Congressional interference.²⁶³ Nor was restricting the state’s authority to determine the location of its capital a necessary and proper means of carrying into execution either Congress’s power to admit new States or any of its other enumerated powers.²⁶⁴

The Court distinguished two other types of admissions-related conditions that it suggested would be constitutionally permissible. First, the Court suggested that Congress was free to impose conditions that “relate only to the contents of the constitution for the proposed new State” because the Statehood Clause was “not a mandate” to admit any particular state but rather “a power to be exercised with discretion.”²⁶⁵ It therefore followed, in the Court’s view, that Congress could “require, under penalty of denying admission, that the organic laws of a new State at the time of admission shall be such as to meet its approval.”²⁶⁶ It noted, however, that any state constitution so approved would be revisable by the people at any time after the admission to statehood.²⁶⁷ Second, the Court noted that some conditions in an act of admission might validly restrain state lawmaking *in futuro* but only those that were independently valid under some *other* enumerated grant of federal power.²⁶⁸

One lesson of *Coyle* is thus that assent to a federally imposed condition by a state government or the people thereof cannot confer new powers on the federal government beyond those enumerated in the Constitution. Even the acceptance of a condition placed in the implementing act necessary for a political community to exist as a State will not empower the federal government to take any action that is not separately authorized by one of its other enumerated powers.²⁶⁹ However, the *Coyle* Court also correctly

²⁶² *Id.* at 566.

²⁶³ *Id.*; *see also id.* at 565 (describing the “power to locate its own seat of government and to determine when and how it shall be changed from one place to another” as “essentially and peculiarly state powers” and observing that the proposition “[t]hat one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained”).

²⁶⁴ *See id.* at 574 (noting that the claimed authority to limit a state’s authority to relocate its state capital “is referable to no power granted to Congress over the subject”).

²⁶⁵ *Id.* at 568.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 573-74 (noting that such a condition would be valid “solely because the power of Congress extended to the subject”).

²⁶⁹ *See id.* at 574 (explaining this point with regard to Oklahoma’s enabling act).

recognized that Congress may sometimes deploy conditions in the exercise of its existing enumerated powers and may also permissibly take account of a state's internal policies or practices in deciding whether and how to exercise those powers.²⁷⁰

B. *Conditional Offers and Internal State Governance*

Of course, most constitutional challenges to federal conditions imposed upon the states do not involve any overt attempt to formally extend the scope of federal power beyond its enumerated limits. Rather, such challenges typically involve conditions placed on access to discretionary benefits that are unquestionably within the scope of the federal government's powers to provide but that are alleged to unduly interfere with matters of internal state governance.²⁷¹

A well-known example is provided by *South Dakota v. Dole*, which involved a challenge to a federal policy conditioning access to a certain portion of federal highway funding given to state governments on the recipient states' willingness to ban the sale of alcohol to persons under the age of 21.²⁷² In *Dole*, the Court articulated a four-part test for discerning when such conditional offers transgress constitutional limits in the context of federal spending.²⁷³ According to the *Dole* Court, a condition placed on state access to federal funds should be upheld if it is (1) plausibly in pursuit of the "general welfare," (2) unambiguously communicated to the states, (3) reasonably germane to the federal interest in the particular national projects or programs to which it is attached, and (4) not subject to any independent constitutional bar.²⁷⁴ After articulating and applying this four-part test, the Court also mentioned that its prior cases had "recognized that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'"²⁷⁵ suggesting a possible alternative criteria of unconstitutionality—one that the Court would later explicitly invoke to strike down certain conditions placed on access to the federal Medicaid program in *NFIB v. Sebelius*.²⁷⁶

Certain factors identified by the *Dole* Court—including inquiries into germaneness and compulsion—correspond to questions of the type the Court routinely poses in cases involving conditional offers implicating individual

²⁷⁰ *Id.* at 573-77.

²⁷¹ See, e.g., Sullivan, *supra* note 3, at 1430-32 (describing the doctrine).

²⁷² 483 U.S. 203, 205 (1987).

²⁷³ *Id.* at 207-208.

²⁷⁴ *Id.* at 207-08.

²⁷⁵ *Id.* at 211 (quoting *Steward Machine Co. v. Davis*, 301 U. S. 548, 590 (1937)).

²⁷⁶ See *NFIB v. Sebelius*, 567 U.S. 519, 580-82 (2012) (describing the financial "inducement" chosen by Congress as "a gun to the head").

rights guarantees.²⁷⁷ And this correspondence is somewhat understandable. After all, the basic structure of the asserted illegality is the same in both contexts—i.e., the allegedly improper use of power over a discretionary benefit to limit or influence the decision-making autonomy of a would-be recipient.²⁷⁸ However, given the important differences between individual-rights guarantees and structural limitations discussed above,²⁷⁹ the framework for assessing the permissible scope of governmental power to condition benefits on a surrender of individual rights cannot be assumed to translate directly to the much different context of state-federal bargaining. Rather, as the following discussion demonstrates, determining the limits of the federal government's power to impose conditions on the states requires a careful assessment of both the source and scope of such power as well as any applicable limits on the states' capacity to accept such conditions.

1. Federal Power to Condition

In assessing the limits of the federal government's power to demand that states change their laws or conduct as a condition of receiving some desired federal benefit, it is necessary to first identify the textual source of the federal government's power to offer the particular conditioned benefit in question. Challenges to state-federal bargaining typically involve one of two principal types of proffered federal benefits: monetary benefits or regulatory benefits (such as relief from the preemptive force of federal law). The federal government's power to provide monetary benefits derives from Congress's power over federal spending while its power to confer regulatory benefits flows from Congress's other enumerated powers.

a. *Conditional Spending*

The federal government's power to spend money from the federal Treasury provides a potent tool to induce states to comply with its

²⁷⁷ Compare *Dole*, 483 U.S. at 208, 211 (discussing germaness and compulsion in the context of spending benefits to a state conditioned by the federal government) with *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (explaining that the unconstitutional conditions doctrine bars the government from forcing an individual to give up property rights in order to obtain a benefit that “has little or no relationship to the property”) and *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 218 (2013) (holding that federal government may not “compel[] a grant recipient to adopt a particular belief as a condition of funding”).

²⁷⁸ Compare *Dole*, 483 U.S. at 205 (withholding transportation funds to influence the state's decision as to the legal drinking age) with *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 208 (2013) (withholding federal funds to fight the spread of HIV to influence organizations' decisions regarding whether to expressly oppose prostitution).

²⁷⁹ See *supra* Section I.B.

directives.²⁸⁰ Unsurprisingly, the spending power has been at the center of the most significant legal challenges to federally prescribed conditions, including the two leading cases: *Dole* and *NFIB*.

Congress's spending power is conventionally grounded in the first provision of Article One, Section Eight, which gives Congress the power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . ." ²⁸¹ The proper interpretation of this provision was sharply contested during the Founding era, as exemplified by a well-known debate between James Madison and Alexander Hamilton.²⁸² Madison argued that the expansive reference to "general welfare" should be interpreted in light of the specific enumerated powers conferred on Congress by other provisions of the Constitution, such that Congress could only appropriate money in support of a particular measure if that measure was "within the enumerated authorities vested in Congress."²⁸³ Hamilton, by contrast, contended that "[t]he terms 'general [w]elfare' were doubtless intended to signify more than was expressed or imported in" Congress's other enumerated powers and argued that Congress's power over spending was thus "plenary [] and indefinite."²⁸⁴ Since the 1930s, the Supreme Court has accepted Hamilton's view as reflecting the proper understanding of the federal government's spending power.²⁸⁵

Hamilton's understanding of the General Welfare Clause would accord Congress broad, but not unlimited, power to condition states' access to federal funds on compliance with federally specified conditions. Hamilton noted an important textual limitation on the scope of Congress's power could be identified in the "general welfare" concept itself:

²⁸⁰ Cf. *United States v. Butler*, 297 U.S. 1, 70-71 (1936) (describing "[t]he power to confer or withhold unlimited [monetary] benefits" as encompassing "the power to coerce or destroy").

²⁸¹ U.S. CONST. art. I, § 8, cl. 1.

²⁸² See, e.g., *Butler*, 297 U.S. at 65-67 (1936) (discussing the disagreement between Hamilton and Madison regarding the "true interpretation" of Article I, Section 8, Clause 1).

²⁸³ James Madison, *Report on the Resolutions*, in 6 THE WRITINGS OF JAMES MADISON 341, 356-57 (Gaillard Hunt ed., 1906) [hereinafter, THE WRITINGS OF JAMES MADISON]. Madison maintained this same position over the course of his long political career. See, e.g., James Madison, *Letter from James Madison to Andrew Stevenson* (Nov. 27, 1830), in 9 THE WRITINGS OF JAMES MADISON 416-23 (maintaining the view that "general welfare" requires a limited interpretation); James Madison, *Veto Message*, in 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1902 at 584-85 (James D. Richardson ed., 1897) (refusing to sign legislation relying on an expansive interpretation of Art. I, § 8, cl.1).

²⁸⁴ Alexander Hamilton, *Final Version of the Report on the Subject of Manufactures* (Dec. 5, 1791), in 10 THE PAPERS OF ALEXANDER HAMILTON 303 (Harold C. Syrett ed., 1966).

²⁸⁵ See *United States v. Butler*, 297 U.S. 1, 66 (1936) ("[T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."); see also *Dole*, 483 U.S. at 207 ("[O]bjectives not thought to be within Article I's 'enumerated legislative fields,' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." (quoting *Butler* 297 U.S. at 65)).

The only qualification of the generality of the [p]hrase [i.e., “general welfare”], which seems to be admissible is this: That the object to which an appropriation of money is to be made, be [g]eneral and not *local*— its operation extending in fact or by possibility, throughout the Union, and not being confined to a particular spot.²⁸⁶

Hamilton’s interpretation of the “general welfare” requirement would limit Congress’s spending authority by requiring a connection to some suitably national interest, such that the benefit of the spending could either in fact or “by possibility” extend to all portions of the country.²⁸⁷ Purely “local” spending unconnected to any such national interest, by contrast, would be outside the scope of Congress’s legitimate authority.²⁸⁸

The requirement of a national rather than purely local interest would place at least some meaningful constraints on Congress’s spending power. Such a restriction would bar federal authorities from spending exclusively for the local welfare of a particular state or geographic region.²⁸⁹ Such a requirement might also yield a limited equality principle, prohibiting the government from unduly favoring or disfavoring particular states or regions in the disbursement of federal tax dollars for reasons unrelated to legitimate national interests.²⁹⁰

Such an interpretation could have important implications for the scope of Congress’s power to condition access to federal funds on state acquiescence in its specified conditions. Consider, for example, a hypothetical statute enacted in reaction to the Supreme Court’s 1995 decision in *United States v. Lopez*, which held that Congress lacked authority under the Commerce Clause to criminalize possession of a gun near school grounds.²⁹¹ Imagine that Congress attempts to accomplish the same objective by conditioning access to federal school funding on the adoption and enforcement of identical criminal prohibitions by each recipient state.²⁹² Even if Congress could point

²⁸⁶ Hamilton, *supra* note 284, at 303.

²⁸⁷ *Id.*

²⁸⁸ See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 382 (1833) (“[I]f the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution.”).

²⁸⁹ See, e.g., Elizabeth L. Brown, Note, *A Prohibition on Purely Local Purposes: The “General Welfare” Limitation of Congress’s Spending Power*, 71 DUKE L.J. 1105, 1108 (2022) (“[C]ongressional spending that provides only for local welfare does not fall within the power granted in the Spending Clause.”).

²⁹⁰ Cf. Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 4 (2003) (“[T]he General Welfare Clause . . . was intended to impose on Congress a standard of impartiality borrowed from the law of trusts, thereby limiting the legislature’s capacity to ‘play favorites’ with federal tax money.”).

²⁹¹ 514 U.S. 549, 551 (1995).

²⁹² Cf. Brown, *supra* note 289, at 1130–31 (noting that President Clinton suggested enactment of a measure similar to this hypothetical in the aftermath of *Lopez*).

to some genuinely national interest in granting the educational funding at issue,²⁹³ it might be hard-pressed to identify any broad national interest that would be furthered by funding only schools in states that adopted the required gun ban while denying funding to otherwise identically situated schools in noncompliant states. Such differential funding might provide strong evidence that Congress was, in fact, spending for what the *Lopez* Court viewed as a purely local interest in school safety rather than any broad national interest that would further the “general welfare” of the country as a whole.²⁹⁴

But not every condition that would exceed the scope of Congress’s regulatory authority if imposed directly would present the same difficulty under the general welfare standard. Consider, for example, the regulation that the Supreme Court invalidated in *Printz v. United States*, which required state and local law enforcement officials to cooperate in the implementation of a federally mandated handgun registration system.²⁹⁵ None of the parties in *Printz* disputed that the handgun registration system itself fell within the scope of Congress’s regulatory authority under controlling interpretations of the Commerce Clause and the Necessary and Proper Clause.²⁹⁶ Only the commandeering of state officials to implement that system was deemed to exceed the scope of Congress’s regulatory power because a law that “violates the principle of state sovereignty” is not a “proper” means of executing Congress’s enumerated powers.²⁹⁷ But because using federal funds to accomplish the same objective would have concededly furthered national, and not merely local, interests, the general welfare constraint would pose no barrier to using conditions on state access to federal funding to accomplish the same objectives.

As applied to conditional spending programs, the “general welfare” requirement bears some resemblance to the “germaneness” requirement in modern conditional spending doctrine. Importantly, however, the text of the General Welfare Clause suggests no basis for requiring a direct connection between the national interest to be furthered by a condition and the specific federal interests that the particular pot of conditioned federal funds aims to

²⁹³ Cf. *Lopez*, 514 U.S. at 620–24 (Breyer, J., dissenting) (identifying various national benefits associated with elementary and secondary education, including the interest in producing a better-qualified work force and improving the nation’s ability to compete economically on the global stage).

²⁹⁴ See *Brown*, *supra* note 289, at 1131 (examining a similar hypothetical and concluding that “the general welfare limitation would bar a congressional refashioning of the regulation at issue in *Lopez* as a condition on federal spending”).

²⁹⁵ 521 U.S. 898, 935 (1997).

²⁹⁶ The court below noted that “[n]o one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress.” *Mack v. United States*, 66 F.3d 1025, 1028 (9th Cir. 1995), *rev’d* *Printz v. United States*, 521 U.S. 898 (1997).

²⁹⁷ *Printz*, 521 U.S. at 923–24.

promote. Imagine, for example, that Congress sought to induce states to cooperate in the federal handgun registration program in the above-described *Printz* hypothetical by making such cooperation a condition on access to federally allocated school funding rather than law enforcement funds. Such an imposition would likely be viewed as suspect under even the most expansive conception of the “germaneness” idea employed under current doctrine because federal aid to public schools has no close connection to the regulation of firearm sales.²⁹⁸

But for purposes of the general welfare requirement, the only relevant consideration is whether the targeted federal funds will plausibly further *some* legitimate national interest. Congress could be viewed as saying, in effect: “We value both the ancillary national benefits that flow from adequately funded local schools as well as the cooperation of state and local officials in implementing our handgun registration system, but we prefer to pay for those valued goods together rather than separately and only wish to deal with states who are willing to provide both.” Nothing in the text of the General Welfare Clause would seem to limit Congress’s discretion in structuring such package deals.²⁹⁹ Congress could, if it so chose, provide that *all* spending targeted at the states for a given fiscal year—including all spending for education, law enforcement, infrastructure improvements, healthcare and welfare assistance, etc.—be accepted or rejected as a single take-it-or-leave-it package (along with all applicable conditions).³⁰⁰ Even if certain states would prefer to choose their conditions *à la carte*, nothing in the text of the General Welfare Clause seems to preclude Congress from offering only a *prix fixe* selection.

Of course, all of the foregoing analysis accepts the “orthodox” position that the General Welfare Clause provides the appropriate textual source of Congress’s power over federal spending.³⁰¹ But it is not clear that this

²⁹⁸ Cf. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (“[O]ur cases have suggested . . . that conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’” (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (emphasis added))).

²⁹⁹ See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 58 (1994) (“[E]ven if spending were permissible only for certain objectives, nothing could prevent promoting one such objective by means of conditions attached to funds promoting another.”); see also Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 897 (2013) (“There is no good reason to hold package deals *ipso facto*—or even presumptively—unconstitutional.”).

³⁰⁰ Many existing conditional spending programs reflect more narrowly circumscribed “package deals” of this sort, reflecting “multifarious components and requir[ing] states to participate in all of them as a condition for funding eligibility.” Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 374, n.173 (citing the Individuals with Disabilities Education Act, 20 U.S.C. § 1416 (2006) as an example).

³⁰¹ See David E. Engdahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215, 220 (1994) (describing the General Welfare Clause as the “orthodox” account of Congress’s spending power).

interpretation reflects the best reading of the constitutional text. Critics of the orthodox position note that the language of the General Welfare Clause focuses principally on Congress's power over taxation and does not confer a power over spending in express terms.³⁰² And while the provision can certainly be read to allude to a federal power to spend any funds raised through taxation,³⁰³ the Constitution does not typically deploy such an indirect and allusive strategy to define the scope of federal power.³⁰⁴

Even the most vociferous critics of the orthodox position agree that a Congressional power to spend federal funds must exist somewhere.³⁰⁵ Rejecting the orthodox position thus requires some account of which textual provision (or set of provisions) actually confers the requisite power on Congress. Two principal alternative theories have been suggested.

One possibility is that Congress's spending power flows from its other enumerated powers, in conjunction with its powers under the Necessary and Proper Clause.³⁰⁶ Thus, for example, Congress's power to spend money to build a naval base would flow from its enumerated power to "provide and maintain a Navy," combined with its authority to make laws "which shall be necessary and proper for carrying" that power into execution.³⁰⁷ This understanding effectively mirrors James Madison's view that Congress may

³⁰² See, e.g., Gary Lawson, *A Truism with Attitude: The Tenth Amendment In Constitutional Context*, 83 NOTRE DAME L. REV. 469, 499 (2008) ("Textually, grammatically, structurally, and historically, [the General Welfare Clause] grants not one whit of power to spend money."); see also, e.g., HAMBURGER, *supra* note 24, at 77 ("The supposed spending power is . . . merely a barrier to imposing taxes for purposes that do not serve the interests of the nation as a whole"); Natelson, *supra* note 290, at 12-16 (identifying problems with the interpretation construing the General Welfare Clause as a spending power); Engdahl, *supra* note 301, at 220-24 (arguing the language is allusive and does not grant spending power); Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 127-29 (1999) (arguing that viewing the General Welfare Clause as an extension of power "conflicts with the organization and structure of the remaining clauses and sections").

³⁰³ Cf. *United States v. Butler*, 297 U.S. 1, 65 (1936) (reasoning that "[f]unds in the Treasury as a result of taxation . . . can never accomplish the objects for which they were collected unless the power to appropriate is as broad as the power to tax" and that the "necessary implication" of the provision is thus that Congress has power to spend in support of the "general welfare").

³⁰⁴ Engdahl, *supra* note 301, at 220-21 ("[T]o treat the clause that merely alludes to [a] power as instead creating the power and prescribing its inherent scope offends the principle of enumerated powers . . .").

³⁰⁵ See, e.g., Lawson, *supra* note 302, at 499 ("No sane person has ever doubted that the Constitution somewhere confers on Congress the power to spend . . .").

³⁰⁶ See, e.g., *id.* at 500 ("From the standpoint of original meaning, the Constitution's 'Spending Clause' is actually the [Necessary and Proper] Clause."); Natelson, *supra* note 290, at 12-13 ("Several items in the Article I, Section 8 enumeration are powers that rather clearly anticipate congressional spending, especially when coupled with the Necessary and Proper Clause.")

³⁰⁷ U.S. CONST. art. I, § 8, cl. 13 & 18.

only spend money in support of its other enumerated powers.³⁰⁸ Under this interpretation, Congress's power to condition access to federal funding on state compliance would be nearly coextensive with its authority to reach the same objectives through regulation.³⁰⁹ This interpretation would support a fairly robust version of the "germaneness" requirement, demanding some reasonably close connection not merely to *some* genuinely national interest but to the particular enumerated power authorizing the expenditure at issue.³¹⁰

Professor Engdahl has suggested an alternative textual derivation of the spending power, which would place far fewer restrictions on Congress's authority.³¹¹ According to Engdahl, the proper textual source of the federal government's spending power is the Property Clause of Article IV, which empowers Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." ³¹² Reading the phrase "other Property" in this provision to encompass all federal property—including money in the federal Treasury—would seem to comport with the provision's language. After all, money in the eighteenth century (like today) was certainly among the kinds of objects to which legally protected property interests could attach.³¹³ And a Congressional power to "dispose" of such property would certainly seem broad enough to empower Congress to spend any funds belonging to the federal government.³¹⁴

308 See *supra* notes 282–284 and accompanying text (discussing debate between Madison and Hamilton regarding the scope of the spending power).

309 See *infra* subsection III.B.1.a (discussing Congress's powers to influence states through conditional regulation).

310 See Lawson, *supra* note 302, at 500 ("If a spending condition is truly nongermane to the federal program to which it is attached, it is extremely difficult to see how any such measure could be 'necessary,' as a means for carrying that power into execution).

311 See Engdahl, *supra* note 301, at 243–58 (proposing the "Property Clause" basis for spending power); see also, e.g., Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 HARV. J. L. & PUB. POL'Y 991, 999–1000 (2008) (endorsing Engdahl's view that the power to spend derives from the Property Clause).

312 U.S. CONST. art. IV § 3, cl. 2.

313 See 2 WILLIAM BLACKSTONE, COMMENTARIES *389 (mentioning "money" along with other "moveable chattels," such as "goods, plate, . . . jewels, implements of war, garments, and the like" as the types of inanimate objects in which a person might possess "property in possession absolute"). Money is also among the class of legal interests encompassed by the references to "property" in the later-adopted Fifth Amendment. See U.S. CONST. amend. V (prohibiting federal government from "depriv[ing]" any person "of life, liberty, or property, without due process of law" or taking "private property . . . for public use, without just compensation").

314 See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (providing various definitions of the phrase "To Dispose of," including "To apply to any purpose; to transfer to any other person" and "To give away by authority"); see also Tom W. Bell, "Property" in the Constitution: *The View from the Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243, 1253 (2012) ("[T]he addition of 'other' suggests that anything fairly described as 'property'—real or

Grounding the federal spending power in the Property Clause would leave Congress effectively unconstrained in its choice of objectives to pursue through its control over federal spending.³¹⁵ Accordingly, Congress would have expansive authority to condition access to federal funding on states' willingness to comply with federally imposed conditions. Even the relatively thin requirement of a general rather than purely local interest that might be extracted from the General Welfare Clause would fall by the wayside under the Property Clause, which contains no internal textual limit on the purposes for which Congress can dispose of federal property.³¹⁶

b. *Conditional Regulation*

Although conditional spending has been at the forefront of the Supreme Court's modern jurisprudence surrounding the permissible limits of state-federal bargaining, this tactic is not the only mechanism Congress has available to induce state compliance with measures it could not impose directly. The Court has also recognized that "where Congress has the authority to regulate private activity under" one of its enumerated powers, Congress may "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."³¹⁷

Unlike the uncertainty surrounding the textual source and scope of its power to spend, identifying the textual source of the federal government's authority to induce state compliance through conditional regulation is relatively straightforward. In each instance where Congress attempts to use its regulatory powers to influence state decision-making, the relevant question will be whether the means chosen by Congress—including any conditions it imposes on states seeking to avoid federal preemption—are in furtherance of one or more of its enumerated powers and are "necessary and proper" for carrying into execution the particular powers it is relying upon.³¹⁸

personal, tangible or otherwise—falls within the scope of the Property Clause. Practical considerations suggest that Congress would need the power to 'make all needful Rules and Regulations respecting' not only federally owned land but also federally owned paperclips, chairs, or debt claims."). *But see* GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 28-29 (2004) (contending that the placement of the Property Clause in Article IV rather than among the enumeration of other core congressional powers set forth in Article I provides "a strong contextual case for treating the word 'Property' in the Property Clause differently from the same word as it appears in the Fifth and Fourteenth Amendments").

³¹⁵ LAWSON & SEIDMAN, *supra* note 314, at 30 ("[T]he Property Clause . . . would impose no limits on the purposes for which Congress could spend.").

³¹⁶ *Cf.* Paulsen, *supra* note 311, at 999-1000 (acknowledging that, under the Property Clause, the federal spending power could be used "to coerce, induce, bribe, and extort" the states "even if it is not a power to legally require").

³¹⁷ *New York v. United States*, 505 U.S. 144, 166-67 (1992).

³¹⁸ U.S. CONST. art. I, § 8, cl. 18.

In many instances, the answer to this question will almost certainly be “yes.” Federal law is replete with statutory frameworks employing a strategy of “cooperative federalism,” through which the federal government “establishes minimum standards that states may opt to implement through programs that are no less stringent” than the federally prescribed criteria.³¹⁹ Such programs afford state governments the opportunity—but not the obligation—to participate in federal regulatory programs and to tailor implementation of those programs to local conditions in a manner that they deem preferable to the federally specified default rule.³²⁰ Where the applicable conditions relate reasonably closely to policy objectives that Congress is constitutionally authorized to pursue, such conditions will ordinarily present no plausible question regarding their constitutional permissibility.³²¹

It is possible, however, to imagine scenarios in which the condition imposed upon the states is so far afield from any plausible enumerated power justification as to warrant a conclusion that Congress exceeded the bounds of its constitutional power. Imagine, for example, a variation of the *Lopez* hypothetical described above,³²² in which Congress seeks to induce states to adopt a gun possession ban similar to the one struck down in *Lopez* using conditional regulation rather than conditional spending. Suppose Congress were to ban *all* handgun sales throughout the country but allowed such sales in states that agreed to criminalize gun possession near schools. Under current Commerce Clause doctrine, Congress would likely possess the power to impose a categorical ban on such sales (putting to one side questions that might arise under the Second Amendment)³²³ because the regulated private transactions are “economic” in nature and could be rationally connected to a category of activity that Congress possesses the power to regulate under the

319 Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T. L.J. 179, 188–204 (2005) (supplying examples of cooperative federalism in federal environmental statutes); see also, e.g., Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1935 (2014) (“Through its conditional spending and conditional preemption powers, and often a combination of the two, Congress has brought states into the administration of the United States’ most substantial statutory schemes.”).

320 See, e.g., Philip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 729 (“A critical advantage of a cooperative federalism approach is that it sets forth a basic federal framework while allowing states to experiment within certain contours.”).

321 See *supra* subsection II.C.2. (discussing the germaneness inquiry).

322 See *supra* notes 291–293 and accompanying text.

323 U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”); see also *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the Second Amendment restricts the federal government’s ability to penalize possession of commonly possessed firearms).

Commerce Clause—i.e., the interstate transportation of and transactions concerning firearms.³²⁴

But if one accepts the reasoning of the *Lopez* Court, it is difficult to see how disallowing sales only in those states that refused to acquiesce in Congress's condition would have any rational connection to the regulation of interstate commerce.³²⁵ Rather, conditionally allowing gun sales in states that agreed to ban gun possession near schools suggests that the ban itself would be a mere pretext for Congress's true objective—i.e., inducing states to regulate purely local activity in the manner that Congress prefers. But such “pretextual” invocations of Congressional power provide a classic illustration of laws that fail the exceedingly broad contours of the “necessary and proper” standard.³²⁶

2. State Power to Accept

As the foregoing Section demonstrated, Congress has broad (but not unlimited) power to influence state behavior through the twin mechanisms of conditional spending and conditional regulation. But as was seen in the above discussion of individual rights, the permissibility of any particular condition may depend not only on the conduct of the offeror, but on the legal capacities of the offeree as well.³²⁷ If certain aspects of state sovereign authority are properly viewed as “inalienable,” or if states are constitutionally incapable of complying with certain federally imposed conditions, such limitations would be as effectual in blocking state-federal bargaining as would a direct limitation on federal power.

Current doctrine already recognizes one significant practical limitation on a state's capacity to comply with federal conditions in the form of the “independent constitutional bar” concept articulated in *South Dakota v. Dole*

³²⁴ *United States v. Lopez*, 514 U.S. 549, 560 (1995) (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”); *see also* *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (“We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.”).

³²⁵ *Cf. Lopez*, 514 U.S. at 561-68 (concluding that gun possession in local school zones lacked the requisite connection to interstate commerce to authorize Congressional regulation).

³²⁶ *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (“Should Congress, . . . under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.”); *Cf. Gil Seinfeld, The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1254-56 (2003) (emphasizing the importance of “attention to the question of legislative pretext” in assessing the permissible scope of Congress’s regulatory authority while acknowledging complications that raise practical challenges for the judicial administrability of pretext-based tests).

³²⁷ *See supra* Section II.D (discussing inalienability in the context of individual rights).

and other cases.³²⁸ As described by the *Dole* Court, the independent-constitutional-bar limitation prohibits the federal government from “induc[ing]” states “to engage in activities that would themselves be unconstitutional.”³²⁹ Thus, Congress cannot condition access to federal funds (or relief from the preemptive effects of federal law) on a state’s agreement to violate its own constitutional duties—for example, by discriminating on the basis of race or sex or by punishing its citizens for activities protected by the First Amendment. The independent-constitutional-bar concept bears some structural similarity to the inalienability idea in the individual rights context, in that both involve an effort by one party to effectively purchase something that the counterparty is legally inhibited from providing—i.e., a surrender of inalienable rights in the case of individuals and unconstitutional state behavior in the case of state-federal bargaining.³³⁰

Outside the relatively narrow confines of the independent-constitutional-bar limitation, it is doubtful that the Constitution imposes *any* limits on the ability of states to accept federally imposed conditions.³³¹ Unlike the federal government, the states do not derive their powers from the federal Constitution and thus need no authorization from that document to act; rather, a restriction on state authority must be traced to some specific limitation on state power imposed by the Constitution.³³² But nothing in the text of the Constitution prohibits states from modeling their own lawmaking on a federally prescribed standard and states routinely use federal law as a model for their own lawmaking.³³³

Nor is it clear that either the motivation underlying the decision to conform state law to a federal standard or the nature of the inducement driving that decision has any relevance to the state’s authority to adopt such a law. To be sure, the Constitution may sometimes prohibit the states from

³²⁸ *Dole*, 483 U.S. at 210; *see also, e.g.*, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 284 (1991) (White, J., dissenting) (discussing the independent constitutional bar); *Charles v. Verhagen*, 348 F.3d 601, 609-10 (7th Cir. 2003) (same); *ACLU v. Mineta*, 319 F. Supp. 2d 69, 80 (D.D.C. 2004) (same).

³²⁹ *Dole*, 438 U.S. at 210.

³³⁰ *Cf.* Section II.D (discussing inalienability in the context of individual rights).

³³¹ A state’s capacity to accept a particular conditional offer may also be limited by provisions in the state’s own constitution. *Cf.* *Florida House of Representatives v. Crist*, 999 So. 2d 601, 603-04 (Fla. 2008) (holding that the governor lacked authority under the state constitution to unilaterally bind the state to a “compact” with Indian tribes pursuant to a procedure authorized by federal statute).

³³² *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 535 (2012) (opinion of Roberts, C.J.) (“The Constitution may restrict state governments But where such prohibitions do not apply, state governments do not need constitutional authorization to act.”).

³³³ Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707-29 (2016) (surveying various areas of state procedural, substantive, and constitutional law in which state authorities have chosen to voluntarily model their own decision-making on federal examples).

acting on particular motivations or for the attainment of particular purposes.³³⁴ But nothing in the text of the Constitution suggests that a desire to attain a desirable ancillary benefit—such as access to conditioned federal funding or avoiding the preemptive force of otherwise applicable federal law—would constitute such an impermissible motivation.

It also seems dubious to regard a state's sovereign lawmaking authority as the type of "inalienable" entitlement that is properly placed beyond the realm of permissible bargaining. On the international plane, nations routinely bargain with one another about matters of internal governance, including by conditioning access to valued benefits (such as foreign monetary aid or trade preferences) on changes to the recipient nation's internal law.³³⁵ Nations are also sometimes impelled to revise their internal regulations to conform to international standards or to ensure that their nationals have access to desirable foreign markets.³³⁶ To the extent the rights of nations on the international plane provide a useful "[s]tructural [a]nalogy" for the sovereign rights of states in the U.S. federal system,³³⁷ it would seem odd to view the states as possessing less authority to revise their own laws in response to such external inducements than would a sovereign nation.³³⁸

334 See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 n.25 (1979) (explaining that a facially neutral law may violate the Equal Protection Clause if it was adopted for the purpose of adversely affecting a group on the basis of suspect criteria); *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987) (holding that government officials violate the Establishment Clause when acting with the purpose of advancing a religion).

335 See, e.g., 19 U.S.C. § 2462(b)(2) (conditioning eligibility for certain forms of tariff relief for developing countries on satisfaction of various conditions, including "support[ing] the efforts of the United States to combat terrorism" and "taking steps to afford internationally recognized worker rights to workers in the country"); 22 U.S.C. § 262k-2(a) (1996) (directing the Secretary of the Treasury to restrict foreign financial assistance to any nation that has "a known history of the practice of female genital mutilation" and "has not taken steps to implement educational programs designed to prevent the practice").

336 See, e.g., DAVID VOGEL, *THE POLITICS OF PRECAUTION: REGULATING HEALTH, SAFETY, AND ENVIRONMENTAL RISKS IN EUROPE AND THE UNITED STATES* 168-70 (2012) (discussing competitive pressures created by stringent chemical regulations adopted by the European Union, which induced several other countries, including Russia, Canada, Australia, China, and Japan, to revise their own chemical regulations to bring them into closer alignment with the EU standard).

337 Cf. Sarah H. Cleveland, *Our International Constitution*, 31 *YALE J. INT'L L.* 1, 49 (2006) (noting the Supreme Court's use of international law rules regulating "the loose association of nation states within the global legal system" as a "structural analogy" for interpreting constitutional provisions addressing relations between states in the U.S. federal system).

338 Indeed, states already account for foreign regulatory requirements in shaping some of their own internal laws and regulations. See David A. Wirth, *The EU's New Impact on U.S. Environmental Regulation*, 31 *FLETCHER F. WORLD AFFS.* 91, 103 (2007) (describing how California incorporated language from chemical regulations adopted by the European Union into its own state-level legislation on harmful chemicals).

3. The Role of “Compulsion”?

One of the *Dole* Court’s most significant contributions to the law of state-federal relations was its formal adoption of *dicta* from a 1937 opinion by Justice Cardozo suggesting that there might be some point at which federal “pressure turns into compulsion.”³³⁹ This anti-compulsion principle was the foundation of the Court’s decision striking down the expansion of the federal Medicaid program in *NFIB*—the first Supreme Court decision to invalidate a provision of federal law on this ground.³⁴⁰ As explained by Chief Justice Roberts in his *NFIB* opinion, the critical defect of the Medicaid expansion was that the financial inducements Congress had conditioned on state participation in the expanded Medicaid program were so overwhelmingly important to state budgets that the states were given “no choice” but to expand Medicaid.³⁴¹ But from a textual perspective, it is difficult to see why such “compulsion” has any direct relevance to the permissibility of federally imposed conditions on state access to benefits.

As an initial matter, it is important to emphasize a distinction between the “compulsion” referred to in *Dole* and *NFIB* and the type of “duress” discussed above in the context of individual rights claims.³⁴² In the eighteenth century (like today), a mere showing that consent was given under significantly constrained circumstances was not enough to relieve an

339 *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)). Cardozo’s original opinion made clear that the quoted language was not meant to articulate an actual constitutional limit but rather a mere “assumption” that the Court was willing to indulge to show that the challenged measure in that case did not approach any such imagined line even if the Court were to “assume” that the “exertion of a power akin to undue influence” could “ever be applied with fitness to the relations between state and nation.” *Steward Machine Co.*, 301 U.S. at 590. Prior to *Dole*, the Court had generally rejected such challenges on the ground that states could protect their sovereign interests by simply declining to participate in a federal program and thereby avoiding the effect of any assertedly coercive conditions that came attached to federal benefits. *See, e.g.*, *Oklahoma v. U.S. Civ. Serv. Comm’n*, 330 U.S. 127, 143–44 (1947) (“We do not see any violation of the state’s sovereignty. . . . Oklahoma adopted the ‘simple expedient’ of not yielding to what she urges is federal coercion.”); *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (rejecting the state’s claim of coercion). *But Cf.* *United States v. Butler*, 297 U.S. 1, 71–72 (1936) (invalidating a federal spending program targeted at individual farmers as amounting to “coercion by economic pressure” and “a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states”).

340 *See* 567 U.S. 519, 625 (2012) (opinion of Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (noting that the majority’s holding marked “the first time ever” that the Court had found “an exercise of Congress’ spending power unconstitutionally coercive”) (emphasis omitted).

341 *Id.* at 578–80.

342 *See supra* notes 93–108 and accompanying text (discussing duress as it applies to individual rights claims). As Professor Berman notes, the Justices in *NFIB* and other conditional spending cases have used the terms “compulsion” and “coercion” interchangeably and have “fail[ed] to distinguish between” those two concepts “in any analytically satisfactory manner. . . .” Berman, *Medicaid Expansion, supra* note 12, at 1289–90.

individual of the consequences of his or her consent to a private contract, even if the counterparty could have taken steps to provide a more desirable set of alternatives.³⁴³ Rather, a successful showing of duress required that the undue influence exerted by the counterparty was the product of illegal action.³⁴⁴

Moreover, the reasons why a potential claim of duress might be relevant in the individual rights setting do not obviously translate to the much different context of federal-state negotiations. In the individual rights setting, a valid claim of duress is relevant to assessing whether a party should be held to the consequences of an ostensible waiver of his or her rights, which, in turn, may be relevant to assessing the constitutionally permissible scope of the government's conduct.³⁴⁵ But for reasons already discussed, the formal limits of state and federal authority are not amenable to waiver or renegotiation.³⁴⁶ Rather, with only a handful of exceptions,³⁴⁷ state consent is simply irrelevant to the proper measure of the federal government's constitutional power.

If compulsion *is* somehow relevant to determining the validity of federal conditions, it must therefore be because unduly pressuring state decision-making would in some way exceed the textually specified limits of the federal government's enumerated constitutional powers. But there are strong grounds for skepticism that any such limits exist.

Start with conditional spending. In his *NFIB* opinion, Chief Justice Roberts concluded that the challenged Medicaid expansion exceeded the scope of the federal spending power because it left states with “no real option” but to accept the conditioned federal funds.³⁴⁸ And because, according to Roberts, the “legitimacy of Congress's exercise of the spending power” depended on “whether the State voluntarily and knowingly accepts the terms” of the federal government's offer,³⁴⁹ the absence of any practical capacity of the states to decline the offer doomed the program's constitutionality.³⁵⁰ But if the General Welfare Clause provides the proper

³⁴³ See *supra* Section II.B. (discussing the scope of the duress defense in the Founding era).

³⁴⁴ See *supra* notes 100–102 and accompanying text (discussing the legal requirements to show duress).

³⁴⁵ See *supra* Section II.C.

³⁴⁶ See *supra* Section III.A.

³⁴⁷ See *infra* Section III.C (discussing provisions which make the permissibility of federal action turn on the existence of state consent).

³⁴⁸ 567 U.S. 519, 582 (2012) (opinion of Roberts, C.J.).

³⁴⁹ *Id.* at 577 (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)); see also *id.* at 678 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (“[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”).

³⁵⁰ *Id.* at 588 (opinion of Roberts, C.J.).

textual source of the federal spending power (as Roberts assumed),³⁵¹ it is exceedingly difficult to connect such a “voluntariness” limitation to the constitutional text. After all, a change in state policy induced by an irresistible enticement offered by the federal government can further the “general welfare” in exactly the same way and to exactly the same extent as a policy change induced by less tantalizing forms of largesse. Nor does the Property Clause, which provides a possible alternative textual basis for the spending power,³⁵² offer any discernible textual support for a freestanding anti-compulsion principle. That provision gives Congress broad authority to “dispose” of property belonging to the United States and nothing in its text would seem to obviously bar Congress from “disposing” of such property by granting it to states under conditions that states have “no real choice” but to accept.³⁵³

The most plausible textual source for a broad anti-compulsion principle is the Necessary and Proper Clause,³⁵⁴ which provides yet another possible textual source for the spending power.³⁵⁵ That provision is also relevant to assessing the permissible scope of Congress’s power to engage in most forms of conditional regulation.³⁵⁶ The Supreme Court has already interpreted the Necessary and Proper Clause to limit Congress’s power to directly “commandeer” state legislatures and executive officers, reasoning that a law that “violates the principle of state sovereignty” is not a “proper” means of carrying into execution Congress’s enumerated power.³⁵⁷ Starting from this premise, the anti-compulsion limitation in conditional spending doctrine might “be seen as a special case of [the] more general anticommandeering principle”³⁵⁸

But while the extension of the anticommandeering principle from direct regulation to allegedly “compulsive” federal conditions may seem like a small

351 *Id.* at 576 (opinion of Roberts, C.J.) (citing the Spending Clause of Article I as the clause that provides Congress the “power to grant federal funds to the States”).

352 *See supra* notes 311–316 and accompanying text (discussing Professor Engdahl’s proposal to ground spending power in the Property Clause of Article IV).

353 *NFIB*, 567 U.S. at 587 (opinion of Roberts, C.J.); *see* Paulsen, *supra* note 311, at 1000 (contending that the Property Clause places no limits on Congress’s power “to coerce, induce, bribe, and extort” the states, provided the conditions insisted upon are not independently unconstitutional).

354 U.S. CONST. art. I, § 8, cl. 18.

355 *See supra* notes 306–310 and accompanying text (discussing the interpretation of the Necessary and Proper Clause as a source of federal spending power).

356 *See supra* note 318 and accompanying text (providing a test to assess constitutionality when Congress attempts to use its regulatory powers to influence state decision-making).

357 *Printz*, 521 U.S. at 924.

358 Lawson, *supra* note 302, at 501; *see also NFIB*, 567 U.S. at 578 (opinion of Roberts, C.J.) (declaring that the anticommandeering limitation applies “whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own”).

step,³⁵⁹ it is nonetheless a significant one. The anticommandeering doctrine itself reflects a controversial extension of the “necessary and proper” concept that has been criticized on both textual and historical grounds.³⁶⁰ But whatever the merits of those critiques, whether the federal government possesses a power to directly commandeer state officials presents a genuinely challenging question resulting from the unique structural relationship between the states and the federal government established by the Constitution. Prior to the Constitution’s adoption, a sovereign state would presumably have been free to simply ignore a command from a separate sovereign directing its officials to either change the state’s own laws or to cooperate in the enforcement of the other sovereign’s law.³⁶¹ The question presented by the commandeering cases is thus whether the federal government’s enumerated grants of authority—including the Necessary and Proper Clause—are sufficient to subject the states to this particular type of federal authority or whether a more explicit textual grant was needed to strip states of their preexisting sovereign rights.³⁶²

But a similar rationale cannot justify a freestanding limit on federal power to “compel” state cooperation by extending offers that are so attractive as to leave states with “no real choice” but to accept.³⁶³ Under eighteenth century international law, nations were generally free to deal with or refrain from dealing with one another on whatever terms they preferred, including by

³⁵⁹ Cf. Lawson, *supra* note 302, at 501 (“If the Sweeping Clause does not permit direct conscription of state legislative or executive officials because any such law would not be ‘necessary and proper,’ it is not a large stretch (though it may be a small one) to make the same claim with respect to conditional spending laws in circumstances that permit the states little realistic choice but to take the money and conditions.”).

³⁶⁰ See, e.g., Manning, *Means of Power*, *supra* note 44, at 34-35 (arguing that the anticommandeering cases are unsupported by any specific provision in the constitutional text and depend upon functional analysis); Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1110 (2013) (“While Founding-era views were not unanimous, historical evidence strongly supports commandeering’s constitutionality.”); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1059 (1995) (“[T]he Court’s anti-commandeering rule conflicts with established principles of federal supremacy.”).

³⁶¹ See, e.g., EMER DE VATTEL, *THE LAW OF NATIONS* preliminaries § 16 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) (“In all cases . . . in which a nation has the right of judging what her duty requires, no other nation can compel her to act in such or such particular manner: for any attempt at such compulsion would be an infringement on the liberty of nations.”).

³⁶² See, e.g., Anthony J. Bellia, Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 931-34 (2020) (arguing that the commandeering cases are defensible applications of eighteenth-century international law principles requiring explicit consent to the surrender of sovereign rights, including states’ “traditional sovereign right to control their own legislative and executive powers free from interference by another sovereign”).

³⁶³ *NFIB*, 567 U.S. at 587 (opinion of Roberts, C.J.)

imposing conditions they deemed appropriate on their willingness to do so.³⁶⁴ Likewise, today, nations are free to set the terms of their dealings with other countries in ways that leave other countries with “no real choice” but to conform to a standard specified by a foreign counterparty.³⁶⁵ Freedom from external “compulsion,” therefore, cannot be regarded as the type of intrinsic attribute of sovereignty that states retained upon entering into the federal union.³⁶⁶

The anti-compulsion limitation also requires considerably more difficult line drawing than is required by the anticommandeering limitation. Whatever their other perceived deficiencies, the anticommandeering cases at least set forth a reasonably clear and administrable rule to guide review of federal lawmaking.³⁶⁷ But no such clarity and administrability seems possible under a “compulsion” standard. Rather, as Justice Cardozo observed in his initial *dicta* from which the *Dole* Court crafted its “compulsion” test, “the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree—at times, perhaps, of fact.”³⁶⁸ Such judgments must inevitably be guided by the relevant decision-maker’s own freestanding conceptions of the proper balance of state and federal authority rather than by any concrete textual limitations in the Constitution itself.³⁶⁹ Such judgments will also typically depend upon “normatively contestable premises about states’ baseline entitlement to federal largesse.”³⁷⁰

³⁶⁴ See, e.g., DE VATTEL, *supra* note 361, ch. VIII § 92 (recognizing that “it depends on the will of any nation to carry on commerce with another, or to let it alone” and that, therefore, it may allow such commerce only “under such conditions as she shall think proper”).

³⁶⁵ Cf. VOGEL, *supra* note 336, at 170 (quoting explanation from Russia’s Energy and Industry Ministry for its decision to bring Russian chemical standards into line with EU regulations: “If one of our main strategic economic partners introduces such strict legislation, we will be forced to apply these requirements”); see also, e.g., Antonios Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 CAMBRIDGE INT’L L.J. 616, 633 (2015) (concluding that, under existing international law, nations possess no “fundamental right to be free from economic coercion”).

³⁶⁶ Tzanakopoulos, *supra* note 365, at 631 (stating that even a country’s “choice of a political, economic, social, and cultural system, and the formulation of foreign policy” is not “part of the irreducible core of the sphere of freedom of the state, which the state cannot dispose of even in the exercise of its sovereignty”).

³⁶⁷ See Campbell, *supra* note 360, at 1180 (stating that “the *Printz* majority . . . adopted a bright-line rule barring commandeering entirely” and that this was “perhaps the only judicially administrable way” to advance the majority’s understanding of the constitutional value of state autonomy”).

³⁶⁸ *Steward Machine*, 301 U.S. at 590.

³⁶⁹ See, e.g., Manning, *Federalism*, *supra* note 42, at 2040 (noting the tendency of the Supreme Court’s modern jurisprudence to “abstract[] a freestanding federalism norm from the constitutional structure as a whole” and arguing that this practice “devalues the [Framers’] choice to bargain over, settle upon, and present to the ratifying conventions a cluster of relatively, even if imperfectly, specified means to achieve that aim”).

³⁷⁰ Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 372-73 (2008).

The word “proper” in the Necessary and Proper Clause seems a very thin reed on which to hang such an ill-defined and standardless limitation on the permissible scope of federal power.³⁷¹

C. *A Note on Consent-Dependent Federalism Provisions*

To this point, the focus of discussion in this Part has been on attempts by the federal government to induce or otherwise influence state decision-making regarding matters of internal policy as to which the Constitution itself is silent. There are, however, a handful of provisions that expressly premise the validity of certain legal acts on the “consent” of one or more states. For example, the Statehood Clause of Article IV provides that “no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, *without the Consent of the Legislatures of the States concerned* as well as of the Congress.”³⁷² This provision clearly makes Congress’s authority to form a new State within the territory of an existing State (or parts of two or more states) contingent on its ability to obtain the “Consent” of the relevant state legislatures. A similar state “consent” requirement limits the federal government’s power to establish forts, magazines, and other “needful Buildings” within the territory of a particular state.³⁷³ Manifestations of state consent are also critical to enable federal officials to suppress domestic violence occurring within a particular state and to successfully navigate the Article V process for amending the federal Constitution.³⁷⁴

Even if, as argued above, considerations of voluntariness and “compulsion” are of limited relevance in the context of laws bringing pressure to bear on states with respect to matters of their own internal governance,³⁷⁵ it might be argued that such considerations should nonetheless apply with

³⁷¹ Cf. Manning, *Federalism*, *supra* note 42, at 2062 (arguing that, under the “jurisdictional” reading of the Necessary and Proper Clause, “the term ‘proper’ merely recognizes it as a vehicle for enforcing extratextual norms if the existence of those norms can otherwise be independently established”).

³⁷² U.S. CONST. art. IV, § 3, cl. 1 (emphasis added).

³⁷³ *Id.* art. I, § 8, cl. 17 (authorizing Congress to “exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings”) (emphasis added).

³⁷⁴ *Id.* art. IV, § 4 (obligating the federal government to protect each State against invasion and, “on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence”); *id.* art. V (requiring “ratification] by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress” for the efficacy of a constitutional amendment).

³⁷⁵ See *supra* subsection III.B.3 (illustrating how state governance is distinguished from individual action in the context of duress claims).

special force to provisions that specifically make state “consent” a requirement of legal validity.³⁷⁶

But such a conclusion is not unavoidable. As discussed above, the doctrine of duress was a principle of Founding Era contract law that limited the circumstances in which *individuals* would be held to the consequences of their assent to a particular transaction.³⁷⁷ Relations between sovereigns—including rules governing the validity and effects of their agreements with other sovereigns—were governed by a different set of rules drawn from the law of nations. And the Founding Era law of nations *did not* recognize duress as a valid basis for a state to escape the legal consequences of its consent in its dealings with other sovereigns.³⁷⁸

Thus, for example, a treaty of peace imposing onerous terms on a defeated nation would be recognized as fully valid even if the treaty had been extracted by an aggressor state that had commenced an illegal war in violation of international law. A commonly cited rationale for the differential treatment of duress on the international plane was the perceived need for certainty and stability in nations’ dealings with one another and the disastrous consequences that might follow from allowing nations to avoid their treaty obligations.³⁷⁹ Emmer de Vattel, for example, explained the unavailability of a duress excuse to the performance of treaty obligations by noting that such a rule “would destroy, from the very foundations, all the security of treaties

376 Cf. Douglas H. Bryant, *Unorthodox and Paradox: Revisiting the Ratification of the Fourteenth Amendment*, 53 ALA. L. REV. 555, 577-81 (2002) (arguing that the coercive tactics used by the Reconstruction Congress to induce southern states to ratify the Fourteenth Amendment violated Article V).

377 See *supra* Section II.B (discussing duress through the lens of “individual rights claims” as opposed to claims a state might make).

378 See, e.g., MOUNTAGUE BERNARD, *FOUR LECTURES ON SUBJECTS CONNECTED WITH DIPLOMACY* 184 (MacMillan & Co. 1868) (“[I]t is commonly laid down that neither the doctrine of duress nor that of [hardship] . . . can be allowed to justify the nonfulfilment of a treaty.”). The unavailability of duress as a basis for avoiding consent in the treaty context persisted well into the twentieth century. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 331 Reporters Note 2 (1987) (“Prior to the League of Nations, coercion of a state (as distinguished from coercion of its representative) was not regarded as a basis for invalidating a treaty.”). The Vienna Convention on the Law of Treaties now denies efficacy to treaties if a nation’s “consent was procured by use or threat of force in violation of the United Nations Charter.” *Id.* cmt. d. The drafters of that instrument, however, expressly declined to adopt a broader rule that would invalidate treaties procured through “political or economic coercion.” *Id.* Reporters Note 3.

379 See Charles Henry Butler & Edgar Turlington, *Treaties Made Under Duress*, in Proceedings of the American Society of International Law at Its Annual Meeting 46-48 (1932) (“[C]an we extend any such [single standard of morality] to obligations created by a solemn treaty, executed in due form, and on which the rights of so many people, nations and conditions depend? . . . [A] treaty made under duress does not appear to many of the best minds who have written heretofore on the subject to be voidable because of duress.”).

of peace; for there are few treaties of that kind, which might not be made to afford such a pretext, as a cloak for the faithless violation of them.”³⁸⁰

And while this rationale might seem inapplicable to the political relations between the federal government and the states in our constitutional system, the particular issues to which the relevant provisions speak might implicate similarly overriding considerations of certainty, stability, and settlement. For example, Professor John Harrison has argued that recognizing duress as a basis for invalidating Article V constitutional amendments may frustrate the ability of federal and state officials to use the amendment process to address “bitter political and legal dispute[s]” that may give rise to legally questionable tactics.³⁸¹ Likewise, a state’s assent to its own dismemberment may sometimes be prodded by exigencies—including exigencies produced by arguably unlawful conduct—that might provide colorable grounds for later claims of coercion.³⁸² But the capacity of a state to consent to partition may nonetheless be an effective tool for addressing such exigencies whose usefulness might be frustrated if a claim of duress could later be used to deny the efficacy of a state’s consent.³⁸³

In the context of both constitutional amendment and statehood, there are additional considerations favoring rules that conduce to certainty and clarity beyond the need to prevent potential political crises. In a political system that characterizes its Constitution as a source of law—indeed, the “supreme Law of the Land” that governs and constrains all other legal enactments³⁸⁴—it seems particularly important that both government officials and the populace more generally can identify which collections of words form the legally authoritative constitutional text.³⁸⁵ Likewise, given the significance of the

380 2 VATTTEL, *supra* note 361, bk. IV, ch. 4, § 37.

381 John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 455 (2001).

382 Such a possibility would not have come as a surprise to the Founding generation. The State of Vermont began its separate legal existence as a breakaway separatist movement seeking independence from New York—the state generally acknowledged to possess lawful jurisdiction over its territory and residents. See Ryan C. Williams, *The “Guarantee” Clause*, 132 HARV. L. REV. 602, 641-43 (2018) (illustrating how, in 1781, Congress “grappl[ed] with the distinct problem raised by the Vermonters’ assertion of political independence from New York”). The Vermonters denied New York’s political and legal authority and lobbied the Confederation Congress to recognize their separate existence over New York’s objections. *Id.*

383 The controversy was ultimately settled amicably by New York’s agreement to surrender its claim to jurisdiction over the territory, paving the way for Vermont’s admission to statehood shortly after the Constitution’s ratification. *Id.*

384 U.S. CONST. art. VI, cl. 2.

385 See, e.g., *Congressional Pay Amendment*, 16 Op. O.L.C. 85, 90, 92, 95, 97 (1992) (“The very functioning of the government would be clouded if Article V, which governs the fundamental process of constitutional change, consisted of ‘open-ended’ principles without fixed applications.”); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189, 190, 209 (1972) (arguing that “[f]undamental law should be not merely of arguable, but of clear legitimacy” and

states in our federal system, there is a strong need for certainty and stability in identifying which political communities qualify as states.³⁸⁶ Doctrines like duress that provide possible grounds for reopening seemingly settled determinations work against such certainty and stability values. It is thus hardly implausible that the international-law paradigm, rather than the private contracting paradigm, may provide the appropriate background interpretive rule against which the validity of state “consent” required by the Constitution should be assessed.

CONCLUSION

What the Constitution says matters. Although proponents of different interpretive theories differ in the precise significance they attribute to the constitutional text, virtually all such theories acknowledge the text as at least a relevant (and usually important) consideration in constitutional decision-making.³⁸⁷ And yet, close consideration of the Constitution’s text has not played a prominent role in most existing discussions of the unconstitutional conditions doctrine.³⁸⁸ At least part of this absence is likely attributable to the perception that the Constitution’s text has nothing important to tell us about the subject.³⁸⁹

The goal of this Article has been to challenge that perception by demonstrating that a close reading of the constitutional text can yield important insights regarding the permissibility of conditional governmental offers. This analysis suggests that some aspects of the Court’s modern doctrine—such as its emphasis on germaneness in individual rights cases—seem broadly consistent with a textually faithful approach to the problems posed by allegedly unconstitutional conditions.³⁹⁰ But other aspects of current doctrine—such as the view that “compulsion” serves as a freestanding limit on the federal government’s authority to condition states’ access to federal

suggesting that “legitimization of constitutional amendments” is an area “where, perhaps more than anywhere else, square corners should be cut.”).

386 Cf. Mark A. Graber, *Settling the West: The Annexation of Texas, the Louisiana Purchase, and Bush v. Gore*, in *THE LOUISIANA PURCHASE AND AMERICAN EXPANSION, 1803–1898* 97 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) (“National capacity for long-term planning and fundamental reliance interests would be destroyed if the composition of the United States was potentially at stake each time the national legislature met or the Supreme Court handed down a decision”).

387 See *supra* note 25 (noting the consensus that textual arguments should be part of constitutional interpretation).

388 See *supra* notes 22–26 and accompanying text.

389 See *supra* note 28 and accompanying text.

390 See *supra* notes 132–145 and accompanying text (discussing the relevance of germaneness to determine whether particular conditions are consistent with equal protection).

financial or regulatory benefits—may be more challenging to reconcile with the constitutional text.³⁹¹

Many important questions remain to be answered—not only about the actual textual meaning of the myriad constitutional provisions that might plausibly be implicated by particular conditional governmental offers but also about various nontextual considerations that might plausibly bear on constitutional decision-making. For many, a determination of whether courts should adhere to their current practices or attempt to chart a new course may be influenced by a variety of factors beyond the text alone, such as precedent, structural considerations, and practical consequences.³⁹² Nonetheless, in determining which conditional offers the Constitution permits and which it forbids, finding out what the Constitution itself has to say on the subject is a good place to start.

³⁹¹ See *supra* subsection III.B.3 (noting that it is difficult to see why, from a textual perspective, “compulsion” has any direct relevance to the permissibility of federally imposed conditions).

³⁹² See *supra* notes 66–68 and accompanying text.

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