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Leverage

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Abstract: Sometimes government operates by inducement rather than order. Congress distributes money to the states. A state grants funds to nonprofit organizations. An administrative agency offers wages and professional opportunities to its staff. A high school provides instruction to its students. In each situation, the government furnishes something of value. And in each situation, it asks something in return—whether implementation of a government program, forbearance from activities deemed inconsistent with operational goals, conduct in pursuit of an employment mission, or compliance with standards of academic discipline. Though they arise in different contexts, these varied forms of government action present the same core question of constitutional justification. The issue in each case is the extent of the government's power to bargain for what it does not, will not, or cannot demand. It is beyond dispute that state and federal governments have broad authority to implement policy through inducements. It is just as clear that there are limits on what governments may buy. As it has explored those limits in recent years, the Supreme Court has turned repeatedly to the concept of leverage: the government's exploitation of a public asset to influence unrelated behavior.

INTRODUCTION

Government regularly operates through requests rather than orders. Congress might ask the states to reconsider certain laws, irrespective of whether it could compel them to do so.[1] A federal or state government might ask nonprofit organizations to embrace a particular social policy, even if it could not demand adherence to that policy.[2] A public employer might ask that its staff not speak controversially at work, even if the employees' speech would be protected by the First Amendment if uttered in the public square.[3] And so on.

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[1] *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987) (dealing with laws involving the purchase of alcohol).

[2] *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 208 (2013) (dealing with a policy requirement relating to prostitution and sex trafficking).

[3] *See* Connick v. Myers, 461 U.S. 138, 141 (1983) (dealing with a dispute over speech related to a workplace grievance).

Sometimes these requests come with sweeteners that increase the likelihood of a favorable response. Congress offers financial incentives to the states.[4] Likewise, federal and state governments entice nonprofit organizations with subsidies.[5] And public employers offer wages and professional benefits.[6] Still, the Constitution imposes limits even when the government acts through incentives rather than orders. While public officials have considerable leeway to execute their operational initiatives, they "may not deny a benefit to a person on a basis that infringes his" constitutional rights, regardless of whether the person has any "entitlement to that benefit."[7] A related set of limitations prevents the federal government from going too far in influencing the states.[8] Across both contexts, the Supreme Court has remained vigilant even while acknowledging the added discretion that attends the use of inducements.

The analytical terrain for working out this tension is the doctrine of unconstitutional conditions, which is potentially in play whenever the government offers a benefit subject to qualifications. My aim in this Article is to provide an account of unconstitutional conditions doctrine that is focused on the concept of leverage: the government's use of an asset to extract an unrelated concession. The case law suggests that when there is too severe a mismatch between the benefit the government is offering and the burden it seeks to impose, its action may violate the prohibition against improper leverage.

Even among the darkest corridors of constitutional law, the doctrine (or, perhaps more accurately given its wide sweep, "metadoctrine")[9] of unconstitutional conditions is famously opaque.[10] Notwithstanding decades of attention from scholars, the doctrine continues to "roam[] about constitutional law like

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[4] *See, e.g.*, *Dole*, 483 U.S. at 212 (involving federal grants to participating states).

[5] *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) (involving grants to private organizations).

[6] *See Connick*, 461 U.S. at 146 (involving a First Amendment dispute in the context of an employment relationship).

[7] United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 210 (2003) (quoting Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996)); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989) (noting that the "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").

[8] *See, e.g.*, *Dole*, 483 U.S. at 207 (observing that the congressional "spending power is . . . not unlimited," but rather is "subject to several general restrictions articulated in our cases").

[9] Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1002 (1995).

[10] For evocative descriptions of the state of the doctrine, see, for example, Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. STATE U. L. REV. 913, 914 (2006) (referring to the doctrine of unconstitutional conditions as an "intellectual and doctrinal swamp"); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 487 (2012) (contending that "[t]he cases on unconstitutional conditions are so poorly conceptualized that they cannot provide more than rough support for any theory of such conditions").

Banquo's ghost,"[11] without a clear sense of definition or direction. Uncertainty abounds over what the doctrine is,[12] what it ought to be,[13] and whether it should exist in the first place.[14] All the while, government spending programs continue to "alter[] the shape of the federal system."[15]

In the context of federal programs, the search for guiding principles begins with Article I of the Constitution and its enumeration of congressional powers.[16] Congress's spending authority is broad, extending to initiatives in pursuit of the "general Welfare."[17] But the Supreme Court has insisted that conditions on federal funds must, among other things, relate to the program in question and stop short of coercion.[18] Conditions that fail these tests exceed Congress's authority under Article I.

The Constitution also restricts the imposition of conditions, whether by the federal government or by the states, in another way. The guarantees of individual liberty and limited government do not disintegrate simply because public officials operate via inducement rather than order. The cases teach that government power to impose conditions is limited by bona fide operational need. The government may place conditions on the distribution of its resources to ensure that public programs, instrumentalities, and initiatives function as intended. Yet it may not go further by using public assets to influence conduct

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[11] Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10–11 (1988).

[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, 1316 (2013) ("[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."); Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 68 (2013) ("There are plenty of ideas. It is just that there are no set doctrines for analyzing the question.").

[13] *See, e.g.*, 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 (2016) (defending an approach based on predicting how the government would have behaved if it could not have insisted on adding the conditions at issue).

[14] *See* Schauer, *supra* note 9, at 990 (considering an approach to unconstitutional conditions problems that recognizes them as "irredeemably intractable" and "questions of degree" that are incapable of resolution through the invocation of "coherent principles and usable doctrines"); Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 338 (1989) (criticizing the doctrine of unconstitutional conditions as "far too crude and general a way to address the multiple possible collisions between constitutional protections and the modern regulatory state").

[15] Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 874 (1979).

[16] U.S. CONST. art. I, § 8.

[17] *Id.*

[18] *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1933 (1995) (referring to coercion and germaneness as the "most promising constraints on Congress's spending power" emerging from the Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987)).

disconnected from its operational goals—even if the recipients agree to the stipulated terms.[19]

In exploring these limits, the cases and commentary have paid considerable attention to whether coercion is afoot.[20] Despite its prominence, the coercion inquiry faces significant challenges. In every unconstitutional conditions case, the state, individual, or organization to whom a benefit is offered has the power to decline. It is not enough, then, to ask whether the offeree truly had no choice. The operative question is whether the choice the offeree *did have* was so constrained as to be legally irrelevant. Conducting the latter inquiry requires grappling with complex ideas of volition, compulsion, and assent. Unsurprisingly, those concepts have proved difficult for the judiciary to translate into workable rules.

Some cases move beyond coercion to examine the relationship between the benefit on offer and the concession sought in return. As I will explain, when benefits and burdens are unrelated, the Supreme Court has invalidated government action as the product of impermissible leveraging. But the Court has not provided a full account of how and why the use of leverage is relevant as a constitutional matter.

The need for further analysis is all the more salient because leverage lies at the core of some of the Supreme Court's most important engagements with the unconstitutional conditions doctrine. Perhaps most notably, leverage played a key role when the Court invalidated Congress's proposed expansion of Medicaid in the Affordable Care Act.[21] The concept of leverage also animates cases on everything from the funding of nonprofit agencies, to the taking of private property, to the restriction of expressive liberty in public workplaces and in public schools.

In an era of enormous government spending and ubiquitous government programming,[22] it is crucial to define the limits on the purchase and sale of constitutional rights.[23] To be useful, the guiding principles must move beyond

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[19] *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.").

[20] *See, e.g.*, Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013) (describing the unconstitutional conditions doctrine as "vindicat[ing] the Constitution's enumerated rights by preventing the government from coercing people into giving them up").

[21] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) (opinion of Roberts, C.J.) ("What Congress is not free to do is to penalize States that choose not to participate in [a] new program by taking away their existing Medicaid funding.").

[22] *Cf.* Hamburger, *supra* note 10, at 490 (noting that "the federal government governs not merely by force of law, but increasingly by contract"); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1296 (1984) ("The greatest force of a modern government lies in its power to regulate access to scarce resources.").

[23] *See* Farber, *supra* note 10, at 915 (addressing the alienability of many constitutional rights).

the vexing distinction between actions that are legally voluntary and actions that are coerced. The concept of leverage can aid in that enterprise, so long as its contours are well-defined and its implications are fully understood.

This Article analyzes leverage as a constitutional concept. It explains how government inducements can raise leverage concerns across a variety of domains. It also examines arguments that leverage leads to deleterious effects, including the facilitation of government overreach, the reduction of transparency, and the erosion of political equality.

Part I provides historical and doctrinal context for evaluating government attempts to influence behavior through inducements rather than orders. The Part also explains how the government's vast resources, along with its penchant for imposing conditions on the use of those resources, can raise concerns about unchecked discretion. Part II examines the doctrine of unconstitutional conditions as a response to these concerns.[24] Part III highlights ways in which the concept of leverage animates the law of unconstitutional conditions. With those illustrations in mind, Part IV explores the theoretical bases for treating leverage as a key component of unconstitutional conditions doctrine.

I. In Search of Legal Limits

The federal government and the states possess considerable authority to encourage actions they cannot compel. Encouragement tends to occur through the offer of benefits. While the terms can be enticing, they lack the compulsory, unflinching force of government mandates. Whether it is Congress offering benefits to the states or a state offering benefits to private parties, the offeree's ability to say no diminishes concerns about government imposition of orthodoxy.

Diminishes, but does not eliminate. While the judiciary has acknowledged the power of federal and state governments to offer inducements in pursuit of policy objectives, it has also recognized the need for limits. An inducement can violate the Constitution even if the offeree retains the power to walk away.

This Part examines the sources of governmental authority to act via inducements, as well as judicial efforts to articulate constitutional limits that preserve the balance between federal power, state sovereignty, and individual liberty. After beginning with the congressional spending power, the Part moves on to consider several other ways that unconstitutional conditions problems can arise at the state and federal levels.

[24] The focus of this Article is the U.S. Constitution. I do not address the impact of state constitutions on the lawfulness of conditions.

A. The Spending Power

1. Origins

Article I of the Constitution gives Congress the authority to "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."[25] Controversy surrounding the powers to tax and spend is as old as the country itself.[26] There is a robust literature on the history of those powers, and there is no need to recount it here.[27] For present purposes, let us focus on an especially prominent aspect of the historical debate over federal spending. On one side is the position championed by James Madison, who maintained that Article I's reference to taxing and spending is not an independent source of governmental authority to act. If Congress wishes to lay taxes and spend funds in pursuit of a particular goal, it needs to identify a separate, enumerated power to justify its action.[28]

Madison's view was not universally held. The competing perspective is often associated with Alexander Hamilton, who defended vast congressional authority to tax and spend. While the precise nature of Hamilton's position is a matter of some dispute,[29] the Supreme Court has described him as arguing that the power to tax and spend extends beyond the enumerated powers given to Congress elsewhere in the Constitution.[30] If Congress is taxing and spending in

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[25] U.S. CONST. art. I, § 8, cl.1; *see also* Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 23 (2003) (observing that although the Constitution does not contain an express "Spending Clause," there is nevertheless a "settled" understanding that "the national legislature may spend money . . . to 'provide for . . . the general Welfare of the United States'" (quoting U.S. CONST. art. I, § 8, cl.1)).

[26] *See* Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 NW. U. L. REV. 495, 511–15 (2009) (describing debates in early American history over the spending power).

[27] *See id.*; Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 125 (2010); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5 (1994); Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 8 (2003).

[28] United States v. Butler, 297 U.S. 1, 65 (1936); *see also* Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459, 524 (2003) (describing "the Madisonian idea that Congress may not spend to achieve ends it could not achieve through its other enumerated powers").

[29] *See, e.g.*, Engdahl, *supra* note 27, at 3 (criticizing Supreme Court opinions as displaying a "profound *mis*understanding" of Hamilton's position).

[30] *See Butler*, 297 U.S. at 65–66.

pursuit of the general welfare, there is no need to point to any other source of authority.[31]

Hamilton's argument won out. In 1936, the Supreme Court concluded that Congress's authority to tax and spend operates independently of Article I's other enumerated powers.[32] While the Court added a limitation that congressional action may not "invade[] the reserved rights of the states,"[33] that restriction soon gave way, reflecting a capacious understanding of permissible taxing and spending.[34] The Court would underscore the point years later, reiterating that while Madison's view "has not been lacking in adherents," the Hamiltonian position had "prevailed."[35] The result was an extensive, though not boundless, power to tax and spend in pursuit of a wide range of congressional objectives.

2. Evolution

The Hamiltonian conception of the spending power has persisted.[36] The Supreme Court continues to describe Article I as affording "Congress broad discretion to tax and spend" in pursuit of federal objectives.[37] Because it is impossible to design effective spending programs without placing at least some conditions on the use of government funds, those conditions are usually permissible, too.[38]

Even so, the Court has identified constraints on how Congress may use public resources to implement policy. Those constraints do not flow from the requirement that, as advocated by Madison, spending must be linked to another power enumerated in Article I. Rather, the limits deal with the manner in which Congress exercises its authority.

The Court set forth a framework for analysis in *South Dakota v. Dole*, a 1987 case dealing with drinking age laws.[39] South Dakota had allowed nineteen-year-olds to buy certain types of beer.[40] Congress, by contrast, favored

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[31] *See id.* Joseph Story's view has been described as in accord. *See* Natelson, *supra* note 27, at 9 (describing the "Hamilton-Story view" as treating Congress's spending authority as "independent" of its other enumerated powers).

[32] *Butler*, 297 U.S. at 66.

[33] *Id.* at 68.

[34] *See* Engdahl, *supra* note 27, at 39–40 (noting the evolution of the Supreme Court's approach to enumerated federal powers and "the reserved power of the states," albeit while disputing the accuracy of the Supreme Court's depictions of Hamilton's position).

[35] Helvering v. Davis, 301 U.S. 619, 640 (1937).

[36] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 576 (2012) (opinion of Roberts, C.J.).

[37] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013).

[38] *Id.*; *see also* Rust v. Sullivan, 500 U.S. 173, 195 n.4 (1991) (recognizing congressional authority to control the manner in which public funds are used).

[39] 483 U.S. 203, 211 (1987).

[40] *Id.* at 205.

laws that prohibited purchases of alcohol by anyone under twenty-one.[41] In promoting its preferred policy, Congress did not attempt to order states like South Dakota to comply with federal policy.[42] It used financial incentives instead. A statute directed the Secretary of Transportation to withhold a portion of federal highway funds from states that set the minimum age for buying alcohol lower than Congress wished.[43]

By upholding the program under review, *Dole* underscored Congress's authority to place conditions on the use of funds.[44] The case also reaffirmed a view of the spending power as an independent justification for legislative action.[45] Nevertheless, *Dole* noted the existence of constitutional constraints. Some of those constraints are relatively easy to overcome. For example, while federal spending must pursue the general welfare, Congress receives substantial deference in determining what that concept entails.[46] Likewise, conditions on federal funds must be clear to ensure that offerees understand what Congress is offering and what it is asking in return.[47]

Two aspects of the *Dole* test pose higher hurdles for Congress to clear. The first is the line between permissible "inducement" and impermissible "compulsion."[48] *Dole* recognized this distinction as crucial to the constitutionality of federal spending initiatives.[49] In the program at issue in *Dole*, Congress stayed on the proper side of the line—which is to say, it induced but did not compel—because states that maintained a lower drinking age stood to lose a relatively small amount of money.[50] To be sure, states might face some "temptation" to abide by Congress's wishes in order to receive federal dollars.[51] But temptation is different from coercion, and the difference is stark enough to affect the constitutional calculus.[52]

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[41] *Id.*

[42] The Supreme Court did not determine whether Congress could have dispensed with the spending program and chosen instead to enact a national drinking age through direct, compulsory legislation. *See Dole*, 483 U.S. at 206.

[43] *Id.* at 205.

[44] *Id.* at 206.

[45] *See id.* 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 United States v. Butler, 297 U.S. 1, 65 (1936))).

[46] *Id.*

[47] *Id.*; *see also* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("There can . . . be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.").

[48] *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[49] *Id.*

[50] *Id.*

[51] *Id.* (quoting *Steward Mach. Co.*, 301 U.S. at 589–90).

[52] *See id.* at 211–12.

The *Dole* Court did not fashion a rule for determining when a state has the ability to refuse federal money "in fact" as opposed to merely "in theory."[53] Instead, it adopted a fact-specific approach focused on the case at hand. As we will see, the Court has continued that practice, including in its engagement with the Affordable Care Act a quarter century after *Dole*.

Dole also identified another safeguard against congressional overreach, one which had appeared in prior cases "without significant elaboration."[54] The Court explained that conditions on federal funds must be related—which is to say, "germane[]"—to the government program in question.[55] Conditions that are too remote exceed Congress's spending authority. At issue in *Dole* was whether highway funds are connected tightly enough to drinking age laws to satisfy the Constitution.

The *Dole* majority said yes. Though money for highways might, at first glance, appear disconnected from laws regarding the purchase of alcohol, the Court saw Congress's programmatic goal as the promotion of "safe interstate travel."[56] Variations in drinking ages between states frustrated that objective by encouraging young people to drive from one state to another to purchase alcohol. Congress sought to remove the "incentive to drink and drive" as a means of promoting its travel-related goal.[57]

Justice O'Connor rejected this conclusion, finding the connection between drinking ages and highway funding too attenuated to pass constitutional muster.[58] She explained that drunk driving and underage drinking are separate problems that cannot be lumped together under the heading of safe travel. Justice O'Connor accepted the majority's basic analytical approach, describing her disagreement as a matter of "application" rather than a dispute about constitutional principles.[59] Still, she worried that without a more rigorous method of ensuring that funding conditions really are related to the behaviors they incentivize, Congress might come to possess the power to "regulate almost any area of a State's social, political, or economic life."[60]

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[53] *Id.*

[54] *Id.* at 207.

[55] *Id.* ("[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) (plurality opinion))); *see id.* at 208 n.3 (noting that the Court's prior cases "have not required that we define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power").

[56] *Id.* at 208.

[57] *Id.* at 209.

[58] *Id.* at 215 (O'Connor, J., dissenting).

[59] *Id.* at 213.

[60] *Id.* at 215.

3. Enduring Debates

In *Dole*, the Supreme Court described how Congress faces constitutional constraints even when it acts through inducements rather than orders. Conditions on federal funds may not be coercive, nor may they be too far removed from the objectives of the spending program at issue. Nevertheless, the *Dole* Court saw no constitutional infirmity on the facts before it, raising questions about how stringent the limits it articulated really are.[61]

The answers would not be forthcoming any time soon. After *Dole*'s issuance, the Supreme Court occasionally mentioned the case, but without much elaboration of its implications or animating principles. In 1991, for example, the Court cited *Dole* for the proposition that, "absent coercion," states possess the ability to protect their own interests—and, thus, the discretion to say yes or no to federal requests.[62] The Court also reinforced the need for a link between federal funds and their attendant conditions, lest the spending power "render academic the Constitution's other grants and limits of federal authority."[63] And when the Court discussed coercion in a 1999 case involving state sovereign immunity, it reiterated that Congress can reward states for taking actions it lacks the power to decree, so long as there is no coercion afoot.[64] The Court thus continued to reaffirm both the broad nature of the spending power and the presence of legal limits. Yet it did not devote much attention to developing the existing doctrine or its conceptual foundations.[65]

In 2012, *National Federation of Independent Business v. Sebelius* (*NFIB*)[66] brought the constitutionality of the Affordable Care Act—a major initiative with wide-ranging political implications—before the Supreme Court.[67] The most prominent aspect of the case involved the Act's "individual mandate," which

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[61] *See* Andrew B. Coan, *Judicial Capacity and the Conditional Spending Paradox*, 2013 WIS. L. REV. 339, 366 (referring to the Supreme "Court's failure for twenty-five years after *Dole* to put teeth in any of that decision's requirements"); *cf.* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 88 (2011) (observing that Congress "bargains with a relatively free hand under the spending power, but the doctrine still yields points of uncertainty").

[62] Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 271 (1991).

[63] New York v. United States, 505 U.S. 144, 167 (1992).

[64] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686–87 (1999).

[65] *See* Coan, *supra* note 61, at 348 (arguing that the "consensus view of commentators, supported by twenty-five years of decisions following *Dole*, was that the decision represented a blank check to Congress").

[66] 567 U.S. 519, 580 (2012) (opinion of Roberts, C.J.).

[67] *See, e.g.*, Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 42 (2012) (describing *NFIB* as "largely upholding the central legislative achievement of the Obama Administration—the Affordable Care Act").

required people to carry certain levels of health insurance coverage.[68] In a fractured set of opinions, five Justices concluded that the mandate was permissible. The pivotal opinion was that of Chief Justice Roberts, who treated the mandate as an exercise of Congress's power to lay and collect taxes.[69]

The individual mandate was only one part of the Affordable Care Act. Another part met a different fate. The Act made substantial changes to the Medicaid program, pursuant to which states receive federal assistance in paying for certain medical services.[70] One of Congress's aims was to encourage states to expand Medicaid coverage to include more people.[71]

Part of the controversy surrounding the individual mandate was whether it operated as a compulsion or rather a tax incentive. There was no need for such debate with respect to the Medicaid expansion, which Congress designed as an offer instead of a demand. Each state could decide whether to expand its Medicaid program in line with Congress's wishes. If a state agreed to the expansion, it would receive additional federal funds. If it refused, no extra funds would be forthcoming. But there was another consequence: any state that failed to expand coverage would relinquish the *existing* funding it received from the federal government to support Medicaid expenditures.[72] By the time of *NFIB*, those funds had come to "constitut[e] over 10 percent of most States' total revenue."[73]

Seven Justices concluded that the Medicaid expansion went too far, representing an improper use of Congress's spending power. Justice Scalia wrote for four Justices and emphasized the sheer number of dollars at stake.[74] By contrast, for Chief Justice Roberts and the two Justices who joined him, it was not only the amount of money that mattered. It was also relevant that Congress had made eligibility for existing funds dependent on a state's willingness to do something—namely, provide expanded coverage—unrelated to those funds.[75]

In doctrinal terms, the Medicaid issue in *NFIB* called to mind *Dole*, albeit on a larger scale. The line between inducement and coercion again proved important, as did the connection between spending conditions and the programs to which they attach. And just as it did in *Dole*, the Court resolved the dispute

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[68] *NFIB*, 567 U.S. at 530–31.

[69] *See id.* at 563 (opinion of Roberts, C.J.) (noting that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality" (quoting Hooper v. California, 155 U.S. 648, 657 (1895))).

[70] *Id.* at 541 (majority opinion).

[71] *Id.* at 542.

[72] *See id.*

[73] *Id.*

[74] *See id.* at 684–85 (Scalia, J., dissenting) (emphasizing that Congress had threatened "to withhold $233 billion, equaling 21.86% of all state expenditures combined").

[75] *See id.* at 580 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) (reasoning that when "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes").

before it without elaborating on the contours or underpinnings of the doctrine of unconstitutional conditions. Indeed, Chief Justice Roberts acknowledged as much in noting that he saw no need to "fix a line" between inducement and coercion.[76] *NFIB* thus stands as a recent illustration of the longstanding tension between congressional authority to offer inducements and the Constitution's creation of a federal government of limited powers.

B. Beyond Article I

In cases like *Dole* and *NFIB*, the Supreme Court evaluated the lawfulness of government programs through the lens of Article I. The question in those cases was whether the spending power allows Congress to impose the conditions in question.[77]

The Spending Clause is not the only constitutional provision that informs the legality of government inducements. The Supreme Court also asks whether conditions are invalid because they infringe protected liberties. This question significantly expands the inquiry into the legality of government inducements. Every time a state or federal employer imposes a condition on the speech of its employees, it uses a public asset to discourage the exercise of constitutional rights.[78] So, too, when a government offers public education on condition that students refrain from activities deemed inconsistent with the educational enterprise.[79] The same is true when a government provides tax advantages contingent on the avoidance of disqualifying speech or conduct,[80] or when it permits a homeowner to alter her property only if she agrees to give the government something in return.[81]

The constitutional provisions implicated by these arrangements differ from case to case. A condition that requires a property owner to grant an easement implicates the Fifth Amendment's Takings Clause. A condition that links public employment to speech restrictions raises First Amendment questions, as does a condition that gives broadcasters federal funds only if they agree not to editorialize.

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[76] *Id.* at 585.

[77] *See, e.g.*, *id.* at 577–78 (cautioning that when "'pressure turns into compulsion,' the legislation runs contrary to our system of federalism" (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937))).

[78] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 142 (1983) (dealing with speech restrictions in the employment context).

[79] *See, e.g.*, Morse v. Frederick, 551 U.S. 393, 403 (2007) (dealing with speech restrictions in public schools).

[80] *See, e.g.*, Regan v. Tax'n with Representation, 461 U.S. 540, 545 (1983) (considering tax benefits that were contingent on the recipient's willingness to refrain from certain speech).

[81] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 379 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).

While the relevant constitutional provisions differ, the dynamics of the problem are the same. In each situation, a state or federal government offers some sort of benefit, from plain old cash to free education to the authority to alter real property. In each situation, it would be easy enough to say there is no possibility of deprivation, because the government making the offer is not strictly *requiring* anything. As a result, it should be up to the offeree to accept or reject the proposed exchange. Moreover, the argument continues, one cannot accept the government's offer while changing the terms. The offeree may accept the benefit along with the conditions, or it may decline. That is where the options run out.

A complementary line of reasoning runs from the perspective of the government making the offer. If a government is not required to offer a benefit, it should have discretion to make that benefit available only on specified terms. This position draws on the relationship between greater powers and lesser powers.[82] For example, because the federal government has the greater power to refrain from giving the states any highway funding, it also has the lesser power to provide highway funding subject to certain conditions.[83] The principle holds across a range of public assets, and it applies whether the offeror is the federal government or a state.

The Supreme Court has rejected both strands of this argument. To the claim that offerees always have the option to walk away, the Court has responded that a right of refusal does not necessarily insulate the government's action from challenge. To the claim that a government with power to deny a benefit altogether may dictate the terms on which the benefit is available, the Court has responded that as a constitutional matter, a greater power does not necessarily include all lesser ones.[84]

Even if the Court is correct that neither the offeree's right to refuse nor the offeror's power to withhold is dispositive, its rejection of those arguments warrants further analysis. The Court's approach depends on the articulation of guiding principles that empower governments to achieve their operational objectives without allowing them to use their massive resources in ways that un-

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[82] On the relationship between unconstitutional conditions doctrine and greater-includes-the-lesser reasoning, see, for example, Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser*," 55 VAND. L. REV. 693, 728 (2002).

[83] *Cf.* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (addressing conditions on the availability of federal highway funds).

[84] *See* Berman, *supra* note 82, at 728 (describing cases that rejected "the government's claim that the greater power to withhold the benefit . . . includes the lesser power to condition the benefit on the offeree's waiver of a constitutional right"). For a suggestion from the early twentieth century that the Court has not always been consistent on this point, see Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 321 (1935).

dermine the federal-state balance or corrode individual liberty. The pursuit of such principles has led time and again to the doctrine of unconstitutional conditions. Yet as the next Part explains, the doctrine continues to generate more questions than answers.

II. GOVERNMENT BY INDUCEMENT

The government needs flexibility to pursue goals the people set for it. If a public instrumentality hires workers to promote its operational objectives, it must possess some discretion to manage its employees' actions through restrictions that might be unlawful if imposed on other citizens.[85] If the federal government offers grants to states or private entities in pursuit of defined policy outcomes, it must possess some discretion to control the recipients' use of funds.[86]

Yet there are risks to affording the government too much leeway when it acts through inducements. Federal and state governments have enormous financial footprints and play a central role in countless domains of modern life.[87] Giving public officials unchecked discretion to impose conditions could disrupt the federal-state balance, diminish personal liberty, and alter the constitutional order.

This is the state of play for the doctrine of unconstitutional conditions.[88] The doctrine arises in a variety of contexts and has prompted examination by numerous constitutional theorists. But the core idea is simple. Some conditions on government benefits are constitutionally problematic, even if the recipients could have turned down the government's offer. Private individuals and organizations have grounds to challenge certain conditions even if they hold no "entitlement" to the benefits at issue.[89] Further, states may challenge certain conditions imposed by the federal government even if the conditions attach to benefits that the federal government has no obligation to provide.

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[85] *See* Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (recognizing the government's distinctive operational needs when it manages a workplace).

[86] *Id.*

[87] *See* Hamburger, *supra* note 10, at 490 (noting the proliferation of governance "not merely by force of law, but increasingly by contract").

[88] For a recent depiction of the unconstitutional conditions doctrine from the Supreme Court, see *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1377 n.4 (2018) (describing the doctrine as preventing "the Government from using conditions 'to produce a result which it could not command directly'" (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972))).

[89] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013) (quoting Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 59 (2006)); *see also* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (observing that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege").

The doctrine of unconstitutional conditions makes clear that government action warrants judicial scrutiny despite taking the form of inducement. The question is how to determine which arrangements are lawful and which are not.

This Part introduces several prominent theories for explaining and applying the doctrine of unconstitutional conditions, with special attention to the inquiry into coercion.

A. Theories of Unconstitutional Conditions

The doctrine of unconstitutional conditions, charged with safeguarding liberty in the face of government's ubiquitous programming and extraordinary resources, is famously murky.[90] It has been described as resting on distinctions that are "hardly clear" and "not always self-evident." And that was by the Supreme Court, as recently as 2013.[91] Scholars have been critical, too.[92] Yet some version of the doctrine is necessary to ensure that governments cannot circumvent constitutional imperatives simply by purporting to ask rather than tell.

Toward that end, commentators have advanced a variety of insightful theories to develop the doctrine. One view, championed by Richard Epstein, depicts the doctrine of unconstitutional conditions as a second-best mechanism for restricting the vast power of government under modern judicial interpretations of the Constitution.[93] A different account, developed by Kathleen Sullivan, examines the distributive impact of conditions not only on the relationship between government and individual, but also on the relative welfare of people with differing levels of dependence on government support.[94] Lynn Baker likewise emphasizes equality in her analysis of the Supreme Court's cases involving public assistance benefits.[95] And Einer Elhauge evaluates conditions

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[90] *See, e.g.*, Epstein, *supra* note 11, at 6 (describing the problem of unconstitutional conditions as a "basic structural issue that for over a hundred years has bedeviled courts and commentators alike").

[91] *Agency for Int'l Dev.*, 570 U.S. at 215, 217.

[92] *See, e.g.*, Berman, *supra* note 12, at 1316; Cox & Samaha, *supra* note 12, at 68.

[93] *See* Epstein, *supra* note 11, at 28; *cf.* 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, 599 (1990) (discussing Professor Epstein's description of the unconstitutional conditions doctrine as a "second-best surrogate" for other limitations on government power).

[94] *See* Sullivan, *supra* note 7, at 1490.

[95] *See* Lynn A. Baker, *Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185, 1188 (1990) (arguing that with respect to public assistance benefits, the Supreme "Court declines to defer to the legislature only when the challenged condition requires persons unable to earn a subsistence income, and otherwise eligible for the pertinent benefit, to pay a higher price to exercise their constitutional rights than similarly situated persons earning a subsistence income").

based on whether the government would proceed with its program if its preferred conditions were impermissible.[96]

Each of these inquiries is valuable in its own right, and each illuminates an important feature of the unconstitutional conditions problem: the government's accumulation of power, the erosion of individual liberty, the extent to which conditions are essential to the program in question, and so on. But notwithstanding the instructive body of scholarship on unconstitutional conditions by these and other commentators, the doctrine remains underdeveloped in the case law. The Supreme Court has refrained from any effort to "fix" the doctrine's contours.[97] Instead, the Court has focused on two concerns and asked whether they are acute enough to invalidate the program under review. The first of those concerns, discussed in the following Section, deals with whether assent to a government condition is truly voluntary. The second concern, to which I turn in the subsequent Part, involves government attempts to use an inducement as leverage to achieve an unrelated goal.

B. The Special Role of Coercion

It is possible to imagine a rule that treats federal spending conditions as valid provided that they promote the general welfare.[98] No private citizen or organization could be required to accept a government benefit. Nor could any state be required to accept federal disbursements. But if private parties or states wanted the benefits the federal government was offering, they could not complain about the terms. Their options would be limited to "yes" or "no thanks."[99]

The prospect of coercion complicates this approach. As Mitchell Berman has explained, the coercion inquiry rests on the idea that courts should look

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[96] Elhauge, *supra* note 13, at 503–04. For Professor Elhauge, the core question is hypothetical: If the government could not have imposed the condition at issue, would it have preferred to withhold the benefit entirely, or rather to make the benefit available without the condition? *See id.* at 507. If the government would have furnished the benefit even without the condition, its threat to withhold the benefit is "contrived," and thus invalid. *Id.* at 508–09. If the government would have withheld the benefit rather than grant it without the condition, the condition is permissible.

[97] Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 585 (2012) (opinion of Roberts, C.J.); *cf.* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 215 (2013) (stating that the line between conditions that define the contours of a government program and conditions that seek to influence speech outside the relevant program is "hardly clear").

[98] *See* U.S. CONST. art. I, § 8, cl. 1 (granting to Congress the power "to pay the Debts and provide for the common Defence and general Welfare of the United States").

[99] *See NFIB*, 567 U.S. at 579 ("The States are separate and independent sovereigns. Sometimes they have to act like it.").

beyond the simple fact of assent when there is reason to suspect that assent was wrongfully induced.[100]

In unpacking the concept of coercion, the first step is definitional. Efforts at definition are not purely "empirical," for they draw on philosophical debates about the nature of volition and consent.[101] As a first cut, we might think of coercion as occurring when the government insists on a condition that the offeree "could not, as a practical matter, reject."[102] With respect to federal grants, the amount of money at stake might be so great as to indicate that no "reasonable" state would leave it on the table, even if, technically speaking, states retain the power to decline.[103] The same might be true of offers to individuals. When an offeree accepts funds under these circumstances, the argument goes, such acceptance is not the product of voluntary choice. Rather, the position of the offeree is akin to that of a contracting party who says yes to a no-brainer.[104]

Yet not all no-brainers are alike. An irresistible offer might be one that you accept eagerly because what you get in exchange is so valuable compared to what you give up.[105] The situation is different, and the prospect of coercion becomes more salient, when an offer is made attractive by the offeree's lack of promising alternatives. Volition as understood in this sense depends on both the asset being acquired and the offeree's options if the deal falls through. Drawing the line can be excruciatingly difficult. Does a cash-strapped state *really* consent to the terms of an enticing federal grant? Does a police officer *really* consent to her department's imposition of restrictions on her political speech? Does a building owner who wants to renovate *really* consent to the zoning board's demand for a public easement?

In exploring these questions, it is useful to draw lessons from the field of contract law, which the Supreme Court has invoked in its cases involving

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[100] *See* Berman, *supra* note 12, at 1347 (defining the use of coercion as "conditionally threatening what would be constitutionally wrongful to do"); Dale B. Thompson, *"Unmistakably Clear" Coercion: Finding a Balance Between Judicial Review of the Spending Power and Optimal Federalism*, 50 SAN DIEGO L. REV. 589, 619 (2013) (proposing a rule that would invalidate a federal spending condition only when it is "unmistakably clear that [a condition] is coercive").

[101] *See* Sullivan, *supra* note 7, at 1428.

[102] Berman, *supra* note 12, at 1287; *see also* Baker & Berman, *supra* note 28, at 518 (discussing a definition of coercion as an "antonym of sorts for freedom or voluntariness").

[103] *See* Berman, *supra* note 12, at 1295 (linking the concept of compulsion with the absence of any reasonable choice, rather than with the literal absence of any choice at all).

[104] *See NFIB*, 567 U.S. at 577 (drawing an analogy to contract law); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (AM. L. INST. 1981) (recognizing how an improper threat can render a contract voidable).

[105] *See* Baker & Berman, *supra* note 28, at 533 (noting that states possess the power to choose between accepting and rejecting an offer, if the concept of choice is understood in the literal sense); *cf.* Kreimer, *supra* note 22, at 1300–01 (contrasting threats to make a citizen "worse off" with offers that "expand her range of options").

states' acceptance of federal funds.[106] The common law of contract is predicated on voluntary assent.[107] The importance of assent is reinforced by the availability of a duress defense to one who agrees to an offer only upon receiving a wrongful threat.[108] The easy cases for duress are those involving physical threats, like the paradigmatic gun-to-the-head scenario. Much more delicate, and more pertinent to the doctrine of unconstitutional conditions, are cases that present the question whether duress can arise from the offeror's threat not to deal with the offeree.

Most of the time, an offeror may threaten not to deal with a party who refuses the offeror's terms. But there are situations in which the offeror's unflinching insistence on its own terms can invite judicial scrutiny of the resulting deal.[109] The challenge in contract law is figuring out which situations are which. The same is true of the unconstitutional conditions doctrine. When the federal government offers a grant but only upon the states' acceptance of onerous conditions, is its proposal wrongful, or is it being a good steward of public resources? Does the size of the grant matter? Is it relevant how cash-strapped the states are or whether the threatened withholding relates to new money rather than funds the states already had been receiving? A theory of unconstitutional conditions based on notions of coercion, volition, and duress needs to answer difficult questions like these.

This is not to deny the possibility of a coherent doctrinal distinction between inducement and coercion. That distinction must reflect an understanding of what it means for an action to be voluntary and what it means for government action to be wrongful.[110] Developing such an account is a considerable undertaking, and one to which the Supreme Court has devoted relatively little attention. There is also a question of justification. If, for example, the federal government wishes to offer generous terms in hopes that states will promote certain policies, it is not obvious why it should matter whether the deal is merely very good rather than "too good to refuse."[111]

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[106] *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract."); *see also NFIB*, 567 U.S. at 576–77 (noting that the Court frequently views exercises of the spending power through the lens of contract law).

[107] *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (recognizing the general rule that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange").

[108] *See id.* § 175(1) (noting the voidability of contracts that are infected by duress).

[109] *See id.* § 176 cmt. f (explaining that while "a threat of refusal to deal with another party is ordinarily not duress," there are exceptions).

[110] *See, e.g.*, Berman, *supra* note 12, at 1347 (linking the definition of coercion to the wrongfulness of the government's threat).

[111] *Cf.* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 875 (2013) (recognizing the difficulty of distinguishing between "offers that a state

Even if an offeree is eager to make a deal based on the attractiveness of the terms, there remains an additional concern that the government could use inducements to circumvent constitutional limits on its authority. This is perhaps easiest to see in the context of federal-state relations, for a state's assent does not remove constitutional limits on federal power. A similar problem arises when the government persuades a private citizen to refrain from exercising a personal liberty.[112] Some individuals might genuinely prefer to relinquish some freedom in exchange for a benefit the government is offering. That choice, though, carries ramifications for the rest of society.[113] We might worry about the aggregate diminution of liberty, and the corresponding expansion of government power, irrespective of whether individuals trade their rights voluntarily. Likewise, we might worry about distortion of the marketplace of ideas if the government is overzealous in subsidizing allies and buying off adversaries.[114] The mechanisms are complex, but the broader point is simple: the dilution of private liberty creates public externalities.

III. Defining Leverage

Given the complexity surrounding the coercion test, it is worth considering other ways to ground the doctrine of unconstitutional conditions. A leading alternative—or, as Samuel Bagenstos has characterized it in an important article, supplement[115]—to coercion is a concept that is explicit in some cases and in the background of numerous others: leverage, meaning the government's use of a benefit to induce offerees to incur unrelated burdens.

In the field of physics, leverage might characterize the use of a beam and fulcrum to move an object.[116] The term has a related connotation in the world of finance, where it can refer to the use of debt to fund investments beyond the

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cannot refuse, which are impermissible, and offers that are *too good* to refuse, which are acceptable and ubiquitous").

[112] *See* Hamburger, *supra* note 10, at 484 (noting that "although constitutional rights are personal in the sense that they belong to persons, they protect persons by limiting government").

[113] *Cf.* Epstein, *supra* note 11, at 29 (discussing externalities in the context of denials of corporate charters); Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1042 (2005) (discussing how some costs of speech restrictions are incurred by society at large); Kreimer, *supra* note 22, at 1340 (noting the dangers that government spending can create for the notion that the Constitution "reserve[s] certain areas of conduct to the untrammeled choice of citizens").

[114] *See* Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1616 (2014).

[115] *See generally* Bagenstos, *supra* note 111 (offering a sophisticated argument for linking coercion and leverage in the Supreme Court's case law).

[116] *See, e.g.*, *Lever*, A DICTIONARY OF PHYSICS (Jonathan Law & Richard Rennie eds., 8th ed. 2019); *Moments, Levers and Gears*, BBC BITESIZE, https://www.bbc.co.uk/bitesize/guides/z242y4j/revision/3 [https://perma.cc/VW4T-YUTC].

investor's commitment of capital.[117] In both contexts, the power—and potential danger—of the lever is that it "multiplies force."[118]

Leverage plays a similar role in the legal lexicon. The term might apply to threats of criminal prosecution designed to affect civil proceedings[119] or threats of anticompetitive conduct designed to affect commercial practices.[120] Comparable uses appear in the Supreme Court's cases, which discuss government attempts at exploiting a benefit to influence unrelated conduct.[121]

This Part examines the role of leverage in a variety of contexts, beginning with federal-state relations and proceeding to the implications for private actors.

A. Leverage Against States

In considering the dynamics of leverage, *Dole* is a useful starting point.[122] As noted above, the program in *Dole* linked the availability of federal highway funds to a state's willingness to prohibit alcohol purchases by people younger than twenty-one.[123] The *Dole* majority upheld the program as a lawful exercise of Congress's spending power.[124] It mentioned leverage concerns but dismissed them in short order, finding a close enough connection between the drinking age and the promotion of safe interstate travel.[125]

The *Dole* Court did not attempt to "define the outer bounds" of the requisite connection between federal funds and programmatic objectives.[126] Still, it accepted the degree of proximity as a component of the unconstitutional condi-

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[117] *See* Emily Kehoe, *Hedge Fund "Regulation" for Systemic Risk: Largely Impossible*, 14 J. BUS. & SEC. L. 35, 57–58 (2013).

[118] Owen D. Jones, *Proprioception, Non-Law, and Biolegal History*, 53 FLA. L. REV. 831, 841 n.11 (2001).

[119] *See* Seth F. Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851, 929 (1988).

[120] *See* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 515 (1985). On this and other uses of the concept of leverage in legal scholarship, see Jones, *supra* note 118, at 841 n.11.

[121] *See, e.g.*, Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214–15 (2013) (recognizing a distinction between "conditions that define the limits of the government spending program" and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself"); Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606 (2013) (warning that the government may "not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to" the impact of a proposed development); Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) (describing leverage concerns in the restriction of public employee speech).

[122] 483 U.S. 203, 211 (1987).

[123] *Id.* at 205.

[124] *Id.* at 212.

[125] *Id.* at 211.

[126] *Id.* at 208 n.3.

tions analysis. So did Justice O'Connor, who dissented on grounds that the asserted connection was too tenuous. She worried that without a tighter link between the purpose of a federal grant and the behaviors being incentivized, Congress could enlarge its powers—and diminish the autonomy of the states—just by taking out its checkbook.[127]

Similar concerns would arise some twenty-five years later in *NFIB*.[128] Recall that Congress sought to encourage the states to expand their Medicaid coverage by threatening to withdraw funding for existing Medicaid programs. That threat, the Court ruled, went too far. Seven Justices concluded that the design of the Medicaid expansion was unconstitutional.[129] Among them was Chief Justice Roberts, who explained that federal Medicaid funding represented over ten percent of many states' budgets.[130] But the problem was not simply magnitude.[131] Congress had tethered funding for *new* behaviors—covering additional classes of patients—to the continued receipt of *existing* Medicaid funds.[132] For Chief Justice Roberts, Congress went astray in bundling the old with the new.[133]

The same focus, albeit on the way to a different conclusion, characterized Justice Ginsburg's partial dissent in *NFIB*.[134] Justice Ginsburg saw the Medicaid expansion as an amendment of existing law.[135] That depiction neutralized concerns about improper leverage.[136] Congress has the power to revise its programs, and the states have the power to decline further participation if they find the changes too unpalatable.[137]

Not every Justice in *NFIB* was so focused on whether the Medicaid expansion was a new program as opposed to the revision of an existing program. Justice Scalia concluded that the expansion was unconstitutional, but on a different rationale than the one set forth by Chief Justice Roberts.[138] Justice Scalia relied on an "anticoercion principle" designed to preserve the federal-state balance by preventing Congress from encroaching on areas of state and local con-

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[127] *Id.* at 217–18 (O'Connor, J., dissenting).

[128] Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 585 (2012) (opinion of Roberts, C.J.).

[129] *See id.* at 588.

[130] *See id.* at 542 (majority opinion).

[131] *Cf.* Kreimer, *supra* note 22, at 1320 (distinguishing the "magnitude" of government incentives from "their nature").

[132] *NFIB*, 567 U.S. at 585 (opinion of Roberts, C.J.).

[133] *See id.*

[134] *See id.* at 625 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[135] *See id.* at 627.

[136] *See id.*

[137] *Id.* at 631–33.

[138] *Id.* at 647 (Scalia, J., dissenting).

cern.[139] To illustrate, he imagined a federal program offering "each State a grant equal to the State's entire annual expenditures for primary and secondary education."[140] In order to qualify for that grant, a state would need to cede autonomy to the federal government on matters such as educational curriculum and district boundaries. Justice Scalia offered this hypothetical as an example of federal intrusion upon traditional areas of state authority.[141]

Noticeably absent from Justice Scalia's illustration is the government's use of leverage to exploit a benefit in order to encourage unrelated behavior. His hypothetical program is self-contained; the federal government is providing funds that are directly related to program goals. Even so, Justice Scalia used the scenario to exemplify federal overreach.

Comparing the various opinions in *NFIB* distinguishes leverage concerns from worries about the exercise of government power *per se*. As Professor Bagenstos suggests, Chief Justice Roberts's attention to whether the Medicaid expansion was a new program would be unnecessary if the amount of money on the line was dispositive.[142] Unlike Justice Scalia, Chief Justice Roberts treated the government's use of leverage as carrying relevance beyond the magnitude of the benefit on offer. The federal government may encourage some behaviors that it cannot insist upon. But the Chief Justice's opinion in *NFIB* demands a connection between what is offered and what is asked in return—the same connection the Court mentioned decades earlier in *Dole*.[143]

B. Leverage Against Private Actors

Running parallel to *Dole* and *NFIB* are cases in which a government—federal or state—offers a benefit to a private actor in exchange for concessions. At first glance, these situations might seem worlds apart from disputes over the structure and implications of federalism. But the position of the states in cases like *Dole* and *NFIB* is conceptually similar to the position of, say, the public employee whose job depends on her willingness to curtail her speech, the nonprofit association that must limit its activities in order to remain eligible for sought-after funding, or the homeowner who receives permission to improve

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[139] *Id.* at 679–80.

[140] *Id.*

[141] *Id.* at 681.

[142] *See* Bagenstos, *supra* note 111, at 865. Professor Bagenstos argues that under *NFIB*, mixing benefits with unrelated burdens—or attaching new conditions to independent programs—is not sufficient to invalidate the federal government's actions. Among the other requirements is a significant amount of money on the line. *See* Bagenstos, *supra* note 111, at 903.

[143] *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (observing that "our cases have suggested (without significant elaboration) 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) (plurality opinion))).

her property only after she grants an easement. In each of these scenarios, the government acts through inducement rather than compulsion. Even so, the cases evince a judicial commitment to preventing improper uses of leverage.

1. Employment

The obligations of government employees extend beyond the performance of specified tasks. Employees must also tolerate restrictions on their liberty that arise by virtue of the employment relationship. In exchange, they receive opportunities for public service and professional development. And, of course, they receive the same benefit that states receive when they implement federal programs: money.

The Supreme Court has identified limits on what government employers may demand from their employees, most prominently in litigation involving the First Amendment.[144] It did not have to be this way. We can imagine a system in which public employees have no First Amendment rights to assert against their employers. Justice Holmes did more than imagine this system; he endorsed it during his time on the Supreme Judicial Court of Massachusetts. For Justice Holmes, a citizen who takes a job on the government's payroll must accept that certain actions will put his employment status in jeopardy. While a citizen "may have a constitutional right to talk politics," he "has no constitutional right to be a policeman."[145] Because no one forces you to accept a government paycheck, you cannot complain when it comes with strings attached.

The Supreme Court has rejected this conception of public employee rights. Since the middle of the twentieth century, the Court has made clear that governments cannot force employees to relinquish the entirety of their liberty as the price of public employment.[146] At the same time, it has recognized that the government's operational objectives justify certain limitations on rights, including speech rights. Government offices, like private organizations, have goals to achieve, and if employee speech threatens to interfere with the pursuit of those goals, managers need discretion to respond.[147]

The issue of coercion, prominent in the cases involving federal-state relations, plays a lesser role in controversies involving employee speech. The latter

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[144] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 424 (2006); Rankin v. McPherson, 483 U.S. 378, 392 (1987); Connick v. Myers, 461 U.S. 138, 154 (1983); Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968).

[145] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892).

[146] *See Pickering*, 391 U.S. at 574.

[147] *See Connick*, 461 U.S. at 154 (1983); *cf.* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) ("The state must be able to regulate speech within managerial domains so as to achieve explicit governmental objectives.").

body of law does not focus on whether an employee's decision to work for the government is motivated by the lack of comparable employment opportunities elsewhere. Rather than grappling with notions of volition and constraint, the Court has constructed a doctrine that highlights the relationship between the government's interest in controlling employee speech and the Constitution's commitment to protecting expressive liberty.

The framework that has emerged recognizes the prospect of First Amendment protection when an employee speaks on a matter of "public concern," as opposed to a matter of purely "personal interest."[148] For constitutional protection to attach, the employee also must have spoken outside the scope of her official duties.[149] Only then is the government constrained in its managerial authority. The ultimate question becomes whether the employee's interest in speaking outweighs the employer's interest in efficient operations.[150]

Behind this doctrinal framework is a commitment to protecting the right of the speaker "as a citizen" notwithstanding his dual role as a government employee.[151] The goal is to preserve expressive liberty while acknowledging that managers need some discretion to restrict speech if they are to accomplish their operational objectives. Teachers should be able to write to their local papers to comment on school policies.[152] Staffers in a government office should be able to talk about current events with their colleagues.[153] But prosecutors cannot claim constitutional protection when they stoke dissatisfaction among fellow employees about garden-variety workplace disputes.[154]

Employee speech jurisprudence can sometimes look like its own, distinct subfield of constitutional law. But we can understand it as an instantiation of concerns about leverage. Speech that is made in discharge of an employee's official duties or that impairs the function of the workplace relates directly to the operations of the government employer. The employer accordingly exercises authority to control that speech. This control, however, does not affect the employee's continued right to speak as a citizen on other matters of public concern, for 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."[155] People who choose to work for the government sacrifice only those liberties that directly affect the pursuit of

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[148] *Connick*, 461 U.S. at 147.
[149] *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
[150] *See, e.g.*, *Pickering*, 391 U.S. at 568.
[151] *Id.*
[152] *See id.* at 574.
[153] *See* Rankin v. McPherson, 483 U.S. 378, 392 (1987).
[154] *See* Connick v. Myers, 461 U.S. 138, 149 (1983).
[155] Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

managerial objectives. Other speech is too attenuated from the government's operations to render it subject to restriction.

Citizens bring their liberties with them when they show up for work. If the government wants to restrict those liberties, it needs to calibrate its approach to the operational rationale that justifies its heightened authority.[156] Any restrictions that are disconnected from that rationale represent the improper use of leverage to affect speech that is too remote from the government's programmatic goals. By contrast, speech restrictions that are tethered to bona fide operational concerns reduce the risk of improper leverage. They rest on a link between an employee's speech and her employer's managerial interests. A prosecutor's office may discipline an employee who circulates incendiary surveys to her colleagues, because those surveys pose a threat to intraoffice harmony.[157] Likewise, the federal government may prohibit its employees from working on political campaigns, because political activity could create a perception of bias that would sap public confidence and make it more difficult for government offices to achieve their objectives.[158]

For related reasons, the President may take into account political affiliation in selecting high-ranking officials,[159] despite the fact that the government may not adopt a political litmus test as a hiring policy across public agencies and institutions. The President might reasonably conclude that a successful administration depends on installing like-minded people in key roles,[160] whereas political ideology generally bears far less on, say, a teacher's ability to convey curricular information to students or a police officer's ability to protect the public.

The key, once again, is the degree of relatedness between what the government offers and what it asks in return. Even when the government wields a checkbook rather than a sword, it has no power to diminish rights that are disconnected from its operational objectives.

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[156] *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1815 (1987) (noting the need to define the "relationship between institutional ends and the regulation of speech").

[157] *Connick*, 461 U.S. at 152.

[158] U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973) (citing the importance of operational regularity and neutrality as well as public confidence).

[159] *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 78 (1990); Branti v. Finkel, 445 U.S. 507, 515–16 (1980); Elrod v. Burns, 427 U.S. 347, 353 (1976).

[160] *See* Schauer, *supra* note 9, at 1003 (noting the argument for distinct rules governing the selection of high-ranking public officials).

2. Education

Just as public employees retain First Amendment rights at work,[161] students in public schools carry their expressive liberty with them when they pass through the "schoolhouse gate."[162] Treating students as "closed-circuit recipients of only that which the State chooses to communicate" would be inconsistent with the First Amendment as understood by the Supreme Court.[163]

This does not mean students may say anything they wish without consequence. Existing law recognizes the distinct nature of the school environment. Students give up some of their expressive autonomy pursuant to their matriculation at public schools, for schools could not function if they operated by the same rules as the public square.[164]

In explaining this distinction, the Supreme Court has accepted a premise akin to the one at the center of its public employee speech jurisprudence. While student speech generally is protected, it is subject to restriction if it threatens to disrupt school activities. That is the lesson of *Tinker v. Des Moines Independent Community School District*, which protected students' right to protest the Vietnam War by wearing armbands.[165] The Court explained that the speech at issue had not "intrude[d] upon the work of the schools or the rights of other students."[166] In the absence of disruption, the Court worried that the school's action was motivated by the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[167] Suppressing speech on such grounds is unlawful, in the school context as in all others.[168]

The *Tinker* doctrine is, first and foremost, about the expressive liberty of students and the disciplinary authority of schools. But viewed from a different angle, the case illustrates the dangers of leverage. The government may not condition the availability of public education on students' relinquishment of all their speech rights. To do so would be to leverage a benefit in an effort to control unrelated behavior. Restrictions are justified only when there is a close

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[161] *See, e.g.*, Rankin v. McPherson, 483 U.S. 378, 392 (1987); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415 (1979).

[162] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[163] *Id.* at 511. On the Supreme Court's role in adjudicating constitutional controversies within the public schools, see generally JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND (2018) (describing the rights afforded to public school students); Justin Driver, *The Public School as the Preeminent Site of Constitutional Law*, 98 NEB. L. REV. 777 (2020).

[164] *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (discussing the negative impact of indecent speech on the mission of the public schools).

[165] 393 U.S. at 514.

[166] *Id.* at 508.

[167] *Id.* at 509.

[168] *Id.*

connection between student speech and school operations. Hence *Tinker*'s attention to whether the speech at issue threatens to disrupt the government's educational objectives.

Developments in the law since *Tinker* follow the same pattern. The Supreme Court has ruled that a student's liberty to speak at school does not include the right to use vulgar language.[169] Permitting such language would undermine an important function of public schools, which is to foster civility as part of an effective learning environment.[170] More recently, the Court added that student speech is not protected if it constitutes nothing more than the promotion of illegal drug use.[171] In explaining its ruling, the Court accepted the judgment of political officials that "part of a school's job is educating students about the dangers" posed by illegal drugs.[172] Because the Court viewed the speech in question as implicating a legitimate operational objective, there were grounds for the imposition of discipline.[173]

The corollary is that schools are prohibited from leveraging the benefit of a public education to restrict student speech that does not disrupt the classroom or detract from the educational mission. Students retain their rights to speak as citizens, in the same way that public employees retain their corresponding rights. Only when speech impairs the government's operational objectives do additional restrictions become permissible.

3. Grants

The previous Sections discussed how leverage affects the lawfulness of government efforts to regulate employees and students. The same goes for cases involving monetary grants to individuals and organizations.

A vivid illustration is *Agency for International Development v. Alliance for Open Society International, Inc.*, decided in 2013.[174] In combating the spread of HIV and AIDS, Congress sought to enlist the help of nongovernmental organizations (NGOs). It made grants available, but the cash came with conditions.[175] NGOs could not use federal money to "promote or advocate the

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[169] *Bethel Sch. Dist. No. 403*, 478 U.S. at 685.

[170] *Id.* at 681; *cf.* Jamal Greene, Lecture, *Constitutional Moral Hazard and Campus Speech*, 61 WM. & MARY L. REV. 223, 247 (2019) (observing that the public university's "role is not just to support experimentation but to encourage civility and to emphasize the role of persuasion in democratic discourse").

[171] Morse v. Frederick, 551 U.S. 393, 403 (2007).

[172] *Id.* at 408.

[173] Whether or not *Morse* correctly characterized the public schools' educational mission, the Court's chain of reasoning reflects its attention to the connection between student speech and schools' operational objectives.

[174] 570 U.S. 205, 208 (2013).

[175] *Id.*

legalization or practice of prostitution or sex trafficking."[176] Further, no NGO could receive funding unless it had "a policy explicitly opposing prostitution and sex trafficking."[177] Some NGOs challenged the second condition because they feared it would interfere with their efforts to build relationships and promote public health.[178]

The obvious response for an NGO that was uncomfortable with the policy requirement was to turn down the federal money. After all, NGOs were not compelled to say yes to Congress; the choice was theirs. But the Supreme Court ruled that Congress could not put NGOs to such a choice. Though the Court recognized that the spending power allows Congress to limit the use of federal funds to specified purposes, it underscored that constitutional constraints remain.[179] The pivotal distinction is between "conditions that define the limits of the government spending program" and those that "seek to leverage funding to regulate speech outside the contours of the program itself."[180]

The policy requirement in *Agency for International Development* fell on the wrong side of the line. The requirement did not control what NGOs could do with public funds. Instead, it demanded that NGOs "pledge [their] allegiance" to a government-sanctioned policy.[181] By making that demand, Congress violated the First Amendment.[182]

In explaining its conclusion, the Court relied on cases including its 1991 decision in *Rust v. Sullivan*.[183] The controversy in *Rust* involved congressional funding for organizations that provide family-planning services. The Secretary of Health and Human Services had promulgated regulations providing that program funds could not be used to support counseling on "abortion as a method of family planning."[184] No organization was required to accept federal money. But if it did, it had to comply with the conditions the government set out.

Unlike the policy requirement in *Agency for International Development*, the restrictions in *Rust* passed constitutional muster.[185] The difference was that

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[176] *Id.*

[177] *Id.*

[178] *Id.* at 211.

[179] *Id.* at 213.

[180] *Id.* 214–15; *see also* Lloyd Hitoshi Mayer, *Nonprofits, Speech, and Unconstitutional Conditions*, 46 CONN. L. REV. 1045, 1075 (2014) (noting that *Agency for International Development* appears to treat the "critical factual determination" as "whether the speech condition is outside of a government spending program").

[181] *Agency for Int'l Dev.*, 570 U.S. at 220.

[182] *Id.* at 221. The Supreme Court considered the implications of this decision for foreign entities in *Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S. Ct. 2082, 2086 (2020).

[183] 500 U.S. 173, 178 (1991).

[184] *Id.* at 179 (quoting 53 Fed. Reg. 2923–2924 (1988)).

[185] *Id.* at 203.

the condition in *Rust* related only to the use of money within the scope of the relevant program. An organization could receive federal funding even though it engaged in abortion-related counseling using money from other sources.[186] The same was true of doctors who devoted some of their time to family planning services funded by the government. Those doctors had to abide by the government's rules when conducting activities subsidized by government dollars. But they were free to disregard those limitations in their other professional and personal pursuits.[187]

Given that the restrictions in *Rust* applied only to the use of program funds, there was no concern about improper leverage.[188] The government was not utilizing a grant program to affect behavior outside the scope of that program. It was placing conditions on the way that federal funds were spent.[189] By limiting its conditions to the program it is administering, the government can avoid the improper use of leverage. When, by contrast, the government reaches beyond the bounds of a given program to influence other activities, leverage problems can arise.[190]

4. Tax Benefits

The government can improve the financial fortunes of its citizens by reducing their tax bills just as it can by disbursing funds. Tax breaks resemble monetary grants as inducements for action, and they raise parallel concerns about the improper use of leverage.

The Supreme Court considered the intersection of unconstitutional conditions doctrine and tax incentives in 1983 with *Regan v. Taxation with Representation*.[191] The dispute in *Regan* involved a law denying certain tax ad-

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[186] *Id.* at 196.

[187] *Id.* at 197.

[188] *Id.* at 198.

[189] *Id.* Of course, it can sometimes be difficult to distinguish the government's exercise of its "right to control its own speech" from an attempt to control "the private speech of individuals who received government funding." Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 209 n.290 (1995).

[190] The Supreme Court takes a different approach in "limited public forum" cases, in which the government encourages a diversity of viewpoints rather than promoting its own preferred message. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 690 (2010) (applying the limited public forum doctrine). The rules for limited public fora afford the government significant discretion to determine who may participate, so long as those decisions are not based on viewpoint. *See id.* at 681. The line between the subsidy jurisprudence and the limited public forum jurisprudence can be blurry, despite the Court's attention to the distinction in recent years. *See, e.g.*, Matal v. Tam, 137 S. Ct. 1744, 1760–63 (2017) (considering whether the federal trademark registration system is properly understood as a government subsidy, the creation of a limited public forum, or some other form of government action).

[191] 461 U.S. 540, 544 (1983).

vantages to organizations engaged in political lobbying.[192] The ensuing litigation raised a problem that by now is familiar. Tax advantages are valuable benefits,[193] but the federal government conditioned their availability on an organization's willingness to curtail its expressive activities by limiting its lobbying.

The *Regan* Court rebuffed the constitutional challenge and upheld the government's rules. According to the Court, Congress made a legitimate choice to subsidize certain activities of nonprofit organizations through tax advantages.[194] At the same time, Congress lawfully chose not to extend that subsidy to lobbying. This argument runs parallel with the rationale of *Rust*, in which the Court affirmed the government's right to decide which activities to promote with public funds.[195]

The *Regan* Court also juxtaposed the situation before it with a case from the mid-twentieth century in which California had made eligibility for certain property tax exemptions dependent on a pledge not to support the overthrow of the U.S. government.[196] The resulting mismatch between benefit and burden found no counterpart in *Regan*, where the relevant tax rules merely reflected Congress's determination of which activities it wished to subsidize and which it did not.[197] What is more, an organization always retained the option of splitting itself into two affiliated entities, one that engaged in lobbying and one that refrained from doing so, in order to receive favorable tax treatment.[198] The availability of that option underscored the limited domain in which the lobbying restriction operated.

At base, the Court viewed the rules in *Regan* as placing conditions on the use of a subsidy.[199] Imposing constraints on the use of public resources is different from exploiting those resources to extract unrelated concessions.[200] Through its embrace of that distinction, *Regan* provides further evidence of the importance of leverage concerns to the operation of unconstitutional conditions doctrine.

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[192] *Id.* at 542.
[193] *Id.* at 544.
[194] *Id.*
[195] Rust v. Sullivan, 500 U.S. 173, 203 (1991).
[196] *See Regan*, 461 U.S. at 545 (citing Speiser v. Randall, 357 U.S. 513 (1958)).
[197] *See id.*
[198] *See id.* at 544.
[199] *Id.*; *cf.* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 214 (2013); *Rust*, 500 U.S. at 193.
[200] *Speiser*, 357 U.S. at 519.

5. Land Use

As we have seen, controversies over the use of conditions regularly arise in the context of expressive liberty. But the First Amendment has no monopoly on such disputes. Land use restrictions offer additional examples of how the government raises leverage concerns when it operates via inducement rather than compulsion.

Consider a state coastal commission that agrees to give a pair of homeowners permission to rebuild their house only if they grant the public an easement across part of their property.[201] In one sense, this transaction is entirely voluntary; the owners retain the choice between rebuilding their property and leaving it be, depending on how much they value the rebuild and how much they dislike the notion of granting an easement.

But technical voluntariness does not insulate the government's action from scrutiny under the Takings Clause of the Fifth Amendment. A reviewing court must also consider whether the condition advances a "legitimate police-power purpose" that the state claims as justification for its action.[202] Without this "essential nexus," the condition is unlawful, just as it would be unlawful if a state "forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury."[203]

The nexus requirement provides a safeguard against the use of improper leverage. Permission to alter real property is something of value. Public officials may place conditions on the grant of such permission, but the conditions must relate to the reasons why the government regulates land use in the first place.[204] Dispensing with the need for a connection between benefit and burden would allow the government to exploit a discrete pocket of regulatory authority in order to extract unrelated concessions. To validate such an approach could, in the extreme, amount to countenancing "an out-and-out plan of extortion."[205] Only if there is harmony of purpose between the benefit the government confers and the concession it extracts can we be confident that no threat of improper leverage is afoot.[206]

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[201] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 (1987).

[202] *Id.*

[203] *Id.* at 837.

[204] *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 606 (2013) (noting that the government may not "leverage its legitimate interest in mitigation" of the impacts of proposed developments in order "to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts").

[205] *Nollan*, 483 U.S. at 837 (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14–15 (N.H. 1981)).

[206] *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (explaining that the government cannot force an individual to give up property rights in exchange for benefits that are unrelated to the property).

The homeowner asking for permission to improve her land is situated similarly to the employee hoping to retain her government job, the nonprofit organization applying for a grant, and even the state seeking to participate in a federal funding program. In each situation, the offeree could just walk away. But in each situation, the Supreme Court has treated the offeree's power to refuse as only part of the story. There must also be an inquiry into the relationship between what is offered and what is asked.

There is no question that the government possesses authority to control the use of public assets and to pursue operational objectives. Yet public officials may not leverage a benefit—no matter how valuable—to achieve incongruent ends.

IV. THEORIZING LEVERAGE

Despite the prominence of leverage concerns in some decisions of the Supreme Court, the case law lacks a robust theoretical account of why leverage is problematic. Without a clear view of the conceptual foundations of the inquiry into leverage, discussions of the requisite connection between benefits and burdens can seem mysterious, incomplete, and even ad hoc.[207] To determine the degree of proximity that is required between a government benefit and a condition placed upon it, we need to know why proximity is important—and why remoteness is cause for concern.

Even if one believes that the unconstitutional conditions doctrine is valid in some of its applications and that the offeree's purported assent does not automatically neutralize constitutional concerns, there is an argument that courts should not worry about the mixing of unlike benefits and burdens. "[P]ackage deals,"[208] the theory goes, are no different from conditions that relate directly to the permitted uses of a public benefit. In either situation, we might recognize the need for constitutional limits. But those limits should not depend on the relationship between what is offered and what is asked. Leverage concerns can seem inapposite to the extent that the doctrine of unconstitutional conditions invokes principles of contract law,[209] which do not demand similarity between goods and services being exchanged.[210]

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[207] *Cf.* Bagenstos, *supra* note 111, at 905 ("The notion that Congress cannot combine separate programs does not in and of itself tell us *anything* about the level of abstraction at which the relevant program should be defined."); Baker & Berman, *supra* note 28, at 512 (observing the uncertainty around "just how strictly [the relatedness requirement] was applied in *Dole* and what it would mean to apply it more strictly").

[208] Bagenstos, *supra* note 111, at 897.

[209] *See supra* notes 106–114 and accompanying text (discussing the interplay between the doctrine of unconstitutional conditions and contract law); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 577 (2012) (opinion of Roberts, C.J.) (invoking principles of contract law).

[210] *See* Farber, *supra* note 10, at 915.

The Sections that follow respond to this argument by examining the potential foundations of leverage as a constitutional concept. The Sections analyze five related but distinct theories for grounding leverage concerns as a matter of constitutional law:

- Leverage facilitates *overreach* by enabling public officials to operate in ways that diminish liberty.
- Leverage reduces the *transparency* of government programs and inhibits public scrutiny.
- Leverage degrades the political process by robbing official action of its internal *coherence*.
- Leverage undermines political *equality* due to individuals' differing levels of dependence on public benefits.
- When the federal government offers a benefit to the states, leverage raises *federalism* concerns by disrupting the federal-state balance.

Some of these theories reflect process-based considerations focused on the manner in which the government carries out its initiatives. Others seek to identify actions that are off-limits regardless of the procedures the government employs.[211] By comparing and contrasting various conceptions of leverage, I hope to provide a framework that can inform discussions about the legality of government inducements.

A. Overreach

Perhaps the most salient concern about leverage is that public authorities might mix benefits and burdens in a manner that violates constitutional limitations on the government's lawful domain.[212] By pushing back against attempts to use public benefits to manipulate unrelated conduct, the judiciary provides a check against overreach.

This argument begins by recognizing that the imposition of conditions is the exercise of power. When the government dictates the terms upon which benefits are available, it alters behavior through official action. That this action does not take the form of criminal prohibition or direct regulation is beside the point. It remains a potent means of wielding authority.[213]

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[211] *Cf.* Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 111 (2012) (noting, in the course of analyzing *NFIB*, the difference between "constrain[ing] federal power" and "redirect[ing] it into different forms").

[212] *See, e.g.*, Hamburger, *supra* note 10, at 480 (challenging the notion that "consent can justify the government in going beyond its legal limits").

[213] *See* Kreimer, *supra* note 22, at 1318 (noting the potential deterrent effect of fines, taxes, and "the deprivation of a monetary benefit by the government acting in its proprietary capacity").

There are two ways in which the use of leverage threatens to transgress constitutional limits on the province of government. The first pertains to the federal government and the relationship between Congress's spending power and other features of the constitutional blueprint. As we have seen, the Supreme Court has interpreted Article I's spending power as a self-contained font of congressional authority. There is no requirement that Congress be acting in furtherance of another enumerated power. And though spending must promote the general welfare,[214] the judiciary defers to congressional constructions of that term.[215]

Notwithstanding Congress's broad authority to impose conditions, the leveraging of public benefits to influence unrelated conduct raises concerns. When Congress enacts a funding program and specifies the way in which recipients may use grants, it engages in deliberate spending under the auspices of Article I. Things are more complicated when Congress uses a grant to affect other behavior. By definition, leveraged conditions are a step removed from the funds to which they attach. The conceptual gap can make leveraged conditions look less like spending and more like regulation.[216] That characterization presents a problem, because the Article I spending power is not a power to regulate.[217]

Rather than saddling a benefit with unrelated conditions, Congress may use its spending power to create a different program to which the conditions really are relevant. Alternatively or in addition, Congress may base the conditions on an independent source of authority such as the power to regulate interstate commerce.[218] What Congress *may not* do, the argument goes, is obviate the need for such action by linking conditions to unrelated public benefits.[219]

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[214] U.S. CONST. art. I, § 8., cl. 1.

[215] *See supra* notes 25–60 and accompanying text (discussing the Supreme Court's approach to disputes over the Article I spending power).

[216] Brief of the National Conference of State Legislatures et al. as Amici Curiae Supporting Petitioners at 19, South Dakota v. Dole, 483 U.S. 203 (1987) (No. 86-260) (arguing that a condition that is not relevant to the expenditure in question "is not a spending condition at all" and must flow from some other font of authority); *see also Dole*, 483 U.S at 215–16 (O'Connor, J., dissenting) (endorsing a similar distinction).

[217] *See Dole*, 483 U.S. at 218 (O'Connor, J., dissenting) (reasoning that Congress's spending power does not justify independent "regulation"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 341 (1997) (distinguishing Congress's power "to *spend* (i.e., buy things)" from its power "to regulate," and contending that the "enumeration of specific regulatory powers" remains "relevant in limiting congressional authority").

[218] U.S. CONST. art. I, § 8, cl. 3.

[219] *See* Friedman, *supra* note 217, at 341 (arguing that "[i]f Congress can circumvent limitations on its enumerated power simply by purchasing compliance in areas it could not regulate directly, then the enumeration of powers is practically meaningless").

The Constitution creates a federal government of limited powers.[220] Using the Spending Clause as an engine of regulation calls the limits into question.[221]

There is a related concern that applies to federal and state actors alike. By linking public benefits with unrelated burdens, a government might threaten liberties that the Constitution protects from official intrusion. The First Amendment cases provide useful illustrations. The government may direct that doctors are prohibited from advising patients about abortion within the confines of a federally funded program.[222] Yet it would undermine the First Amendment's resistance to official orthodoxy if the government could impose that type of restriction outside the scope of a federal program. The prohibition against leverage prevents the government from circumventing constitutional limitations simply by packaging assets in a particular way.

Likewise, if the government offers grants to nonprofit organizations, it may control how those organizations use the funds. But the government cannot leverage its grants to reach unrelated activities it has no constitutional authority to regulate. That explains why the Supreme Court invalidated a condition limiting certain federal funds to organizations that had a policy reflecting the government's views on prostitution and sex trafficking.[223] If the government attempted to compel the adoption of such a policy through the criminal laws, its action surely would violate the First Amendment. When the government pursued the same goal indirectly by imposing a condition, its action met the same fate.[224] A similar story unfolded decades earlier when the government used the allure of public funds to prevent broadcasters from any editorializing, even editorializing supported by private donations.[225]

The prohibition against leverage strikes a balance between respecting the government's need to steward its resources and preserving the integrity of the Constitution's structural safeguards and individual liberties. The government may control how public funds are spent, but not how recipients conduct themselves in other respects.[226] The prohibition against leverage ensures that the

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[220] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 533 (2012) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.").

[221] *Cf.* Thomas R. McCoy & Barry Friedman, *Conditional Spending: Federalism's Trojan Horse*, 1988 SUP. CT. REV. 85, 122 ("The power to attach conditions exists not to give Congress sway beyond the delegated regulatory powers, but to ensure that Congress can see that national money actually is spent as Congress wishes.").

[222] *See* Rust v. Sullivan, 500 U.S. 173, 203 (1991).

[223] *See* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 221 (2013).

[224] *See id.*

[225] *See* FCC v. League of Women Voters, 468 U.S. 364, 399–401 (1984).

[226] *See, e.g.*, *Agency for Int'l Dev.*, 570 U.S. at 221; *League of Women Voters*, 468 U.S. at 400.

federal government remains one of limited powers and that public officials give due regard to individual liberty even when they dispense benefits.[227]

The government may not make the receipt of public funds contingent on an organization's embrace of a particular orthodoxy.[228] Nor may it tether tax advantages to a loyalty oath.[229] The government also lacks power to forbid all employee speech on public controversies, for such action carries too high a risk of punishing disfavored views.[230] Ditto when a principal punishes a student for political commentary that poses no real threat of disrupting the school environment.[231] In all of these situations, the mismatch between benefit and burden suggests that the government is not merely stewarding resources and pursuing operational objectives.[232] Instead, it is using conditions to achieve impermissible ends.

The case law leaves no doubt that the government can bring about certain actions through inducements that it cannot compel directly.[233] This is perfectly understandable, and even unavoidable. Public officials need more leeway when they spend funds than when they act as sovereign regulators of private conduct. Absent that leeway, it would be impracticable to pursue operational objectives like the efficient operation of public agencies and instrumentalities.

When the government imposes conditions that do not relate to the use of public assets, its justification for exercising additional discretion disappears. This remains the case even if the conditions affect behavior that the government might lawfully have influenced if it took a different approach. Imagine that the majority in *South Dakota v. Dole* concluded, as Justice O'Connor did in her dissent, that a state's drinking age is not sufficiently connected to high-

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[227] *Cf.* Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 593 (1926) (recognizing the dangers posed by "surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold"); Berman, *supra* note 12, at 1322 (highlighting the importance of motive in contending that "if government has reasons to provide a particular benefit to a particular potential beneficiary, it may not withhold that benefit in order to make the exercise of constitutional rights costly or painful").

[228] *See Agency for Int'l Dev.*, 570 U.S. at 221.

[229] *See* Speiser v. Randall, 357 U.S. 513, 529 (1958); *see also League of Women Voters*, 468 U.S. at 408 (Rehnquist, J., dissenting) (contending that the denial of a tax exemption in *Speiser* "was plainly directed at suppressing what California regarded as speech of a dangerous content").

[230] *See* Rankin v. McPherson, 483 U.S. 378, 392 (1987).

[231] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[232] *Cf.* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 363 (2008) (describing the requirement of a sufficient relationship between a condition and the purpose of the program as a form of "pretext analysis that is commonplace in assessments of federal power").

[233] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius (*NFIB*), 567 U.S. 519, 578 (2012) (opinion of Roberts, C.J.) (noting that Congress can use its spending authority "to implement federal policy it could not impose directly under its enumerated powers").

way funds to validate a federal program linking the two.[234] In that scenario, it would not have mattered whether the federal government theoretically could have designed a different program with a tighter link between benefit and burden—for example, a public-health initiative focused on reducing alcoholism. It is not enough that the government might have pursued its goal in other, lawful ways. The question is the lawfulness of the means the government actually employed.

The Court's recent engagement with the Affordable Care Act underscores the point.[235] There is no doubt that Congress had the power to provide additional Medicaid funding to states that agreed to expand their coverage. In addition, it seems quite likely that Congress has the power to reduce or eliminate Medicaid funds that currently are available to the states.[236] The problem Chief Justice Roberts identified in *NFIB* was not that the Act pursued an impermissible end, but that it employed impermissible means. Congress linked the continued availability of existing Medicaid funds to a program expansion.[237] Irrespective of whether the federal government had the power (a) to make extra funds available to states that expanded their coverage, or (b) to diminish or eliminate existing Medicaid funding as a general matter, it stumbled by using the threat of reduced funding to achieve an expansion of coverage.

Government overreach remains a problem even when it occurs with someone's consent. The Supreme Court has explained that preserving the respective domains of federal and state sovereignty protects the liberty of the people.[238] The Court scrutinizes the lawfulness of government action even when a state wishes to accede to a federal demand, so as to ensure that individuals do not suffer by implication.[239] Moreover, while agreements between governments and private actors may be enforceable even when they limit individual rights,[240] a generalized notion of consent does not insulate every action

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[234] *See* 483 U.S. 203, 215 (1987) (O'Connor, J., dissenting) (suggesting that the asserted relationship was "attenuated or tangential").

[235] *See NFIB*, 567 U.S. at 558.

[236] *See id.* at 624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (stating that "Congress could have recalled the existing legislation, and replaced it with a new law making Medicaid as embracive of the poor as Congress chose").

[237] *See id.* at 585 (opinion of Roberts, C.J.).

[238] *See, e.g.*, New York v. United States, 505 U.S. 144, 181 (1992) (observing that "the Constitution divides authority between federal and state governments for the protection of individuals").

[239] *See id.* at 182 ("Where Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials.").

[240] Snepp v. United States, 444 U.S. 507, 516 (1980) (per curiam); *see also* Sunstein, *supra* note 93, at 607 (describing the connection between confidentiality agreements and the government's managerial interest).

of public officials from inspection, whether in the context of employment,[241] education,[242] taxation,[243] land use,[244] or otherwise.

By restricting officials' ability to leverage public benefits to affect unrelated conduct, the judiciary redirects government action to its proper channels. A "currency"[245] is valuable only to the extent it can be used to obtain desired goods and services. So it goes with public resources. The government may encourage certain behaviors through the promise of advantages or the removal of obstacles. To the extent public benefits are unrestricted in their available uses—to the extent, in other words, that they act as universal currency—the government accrues more power. By contrast, when the government faces meaningful limits on when and how it may exercise the powers it possesses, those powers are constrained.[246] The doctrine of unconstitutional conditions ensures that the government may not use every asset it controls for any purpose it desires.

B. Transparency

When the government makes public resources available but limits how they may be used, the dynamics of the proposed transaction can be fairly clear. If the offeree, whether a state or a private party, values the resources enough to tolerate the attendant limits, a deal will be struck.[247] The preferences of the offeror and offeree will then be available for public inspection and scrutiny.

The analysis can change when the government leverages a benefit to affect unrelated behavior.[248] To illustrate, compare two scenarios, which are inspired by and derived in part from then-Professor Sullivan's important analysis of unconstitutional conditions.[249] In the first scenario, Congress offers $10 million to any state that pledges to use the money to raise awareness about the dangers of opioid abuse. States that receive funding must submit biweekly reports to the U.S. Drug Enforcement Administration describing their expenditures and evaluating the impact of their communications. In the second scenar-

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[241] Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).

[242] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[243] Speiser v. Randall, 357 U.S. 513, 529 (1958).

[244] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987).

[245] Farber, *supra* note 10, at 941.

[246] *See* Joseph Blocher, *New Problems for Subsidized Speech*, 56 WM. & MARY L. REV. 1083, 1115 (2015) (noting that when courts put government to the choice between dispensing with a program altogether and "continu[ing] the program without the ability to control it as designed," the effect is to "remov[e] a gear from the machine").

[247] An exception would be if the offeree were hoping to invalidate the relevant conditions in subsequent litigation.

[248] Bagenstos, *supra* note 111, at 901 (raising the possibility that linking new conditions to preexisting programs may impair accountability).

[249] Sullivan, *supra* note 7, at 1471.

io, Congress rolls out the same program, but it adds another condition: participating states must also reduce carbon emissions from government buildings.

The political calculus in the first scenario is relatively straightforward. A state must decide whether the benefits likely to flow from the communication campaign are greater than the burdens associated with preparing and submitting regular reports to the federal government. The calculus might also include related considerations that deal with more abstract matters, such as the federalism implications of acquiescing in Congress's demands. Each state will evaluate these factors and make a decision about whether to participate in the federal program. Residents of each state, in turn, will be able to assess their officials' decision and reach their own conclusions about whether it was correct.[250]

The second scenario introduces more uncertainty. Now the question for each state is not whether the burdens of regular reporting outweigh the benefits likely to flow from heightened efforts to raise awareness about opioid addiction. The inclusion of an unrelated burden—namely, restriction of carbon emissions—inserts another variable into the equation. A state must now think through the costs and benefits of limiting its emissions. It must then take the product of that analysis and weigh it against the net benefits of accepting federal funds to combat opioid abuse. This added complexity arguably reduces the transparency of the federal program, making it more difficult for the residents of a given state to evaluate whether their representatives acted wisely in accepting or declining federal funds.[251]

The prohibition against leverage offers a response. By limiting the use of leverage, the judiciary potentially makes it easier for stakeholders and onlookers to understand and evaluate the program, the tradeoffs, and the soundness of their representatives' conclusions. Political deal-making remains perfectly permissible, of course. But when a legislative bargain directly affects constitutional liberties or fundamental structural precepts, a disconnect between benefit and burden can tip off the courts that a closer look is warranted.

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[250] *Cf.* Printz v. United States, 521 U.S. 898, 920 (1997) ("The Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens.").

[251] *Cf.* Murphy v. NCAA, 138 S. Ct. 1461, 1477 (2018) ("[I]f a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 578 (2012) (opinion of Roberts, C.J.) ("Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."); *Printz*, 521 U.S. at 930; New York v. United States, 505 U.S. 144, 168–69 (1992).

C. Coherence

In the realm of private contracting, mutually agreed exchange of dissimilar assets is commonplace.[252] Two willing parties are perfectly free to design a deal that involves the exchange of "landscaping equipment" for "a baseball ticket," despite the lack of any connection between those two items other than the contract itself.[253] There is no norm of likeness that constrains the modalities of private exchange.[254] If there were, societal gains from voluntary transactions could be diminished.

As applied to government conditions, this logic suggests that the mixing of unlike benefits and burdens is benign.[255] Requiring a close connection between a government benefit and the behavior sought in exchange might be "inefficient" in "block[ing] bargains that both the government and the other party would truly prefer."[256] The safeguard is consent. So long as each party voluntarily agrees to the bargain, the objects of the transaction are beside the point. After all, the ultimate aim is worthy: to allow the government to make trades that benefit it (which is to say, the public), so long as the other parties to those trades also believe they will end up better off.

There is good reason to question whether this principle of private exchange applies in like fashion to the domain of government conditions. The government arguably has an obligation to pursue internal coherence in its actions—an obligation private parties do not face. Such an aspiration of coherence would seek to assure the public that the government is behaving rationally and reasonably.[257] If Congress enacts a ban on handguns in the District of Columbia, the public may safely assume that a majority of legislators decided that the benefits of the ban outweigh the costs. If the Environmental Protection Agency sets emission standards at a particular level, the public may safely assume a comparable determination on the part of the agency. That also goes for benefit programs. There is an evident rationale behind a federal program that provides grants to the states only if, for example, they agree to use the money

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[252] *See* Farber, *supra* note 10, at 943 ("Judicial review of the qualitative match between the two sides of a bargain has no counterpart in contract law.").

[253] *Id.* at 915.

[254] *See id.* at 943.

[255] *Cf.* Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 743–44 (1992) (discussing the relationship between freedom of contract and economic efficiency).

[256] *See* Farber, *supra* note 10, at 941. Professor Farber leaves open the possibility that some such bargains might be problematic on other grounds. *See id.*

[257] *Cf.* Sullivan, *supra* note 7, at 1471 (noting a potential connection between the requirement that burdens be germane to the program in question and the view that "benefits with extraneous conditions attached are living proof of a defective legislative process").

to improve the energy efficiency of public buildings. The program may be a good idea or it may be a bad idea, but in either case it is coherent.

Some may view this ideal of coherence as jeopardized by the government's mixing and matching of incentives with unrelated burdens. To draw again on examples offered by then-Professor Sullivan, consider a federal law that provides money to states to support innovations that reduce carbon emissions, but that makes those funds dependent on the states' agreement to enact certain laws related to abortion.[258] The mismatch between the incentives and the requested behaviors arguably demonstrates a lack of internal coherence. That does not mean members of Congress were irrational in how they drafted the law. To take just one possibility, the explanation might be that some legislators were lukewarm about the environmental initiative but deeply committed to the abortion laws. Omnibus bills are commonplace,[259] and they provide opportunities for legislators to vote in favor of others' preferred initiatives in seeking to command support for their own causes.

For better or worse, these tradeoffs and compromises are central to the federal legislative process. But coherence issues remain salient as applied to conditions on government benefits. In the example linking funds for environmentally friendly initiatives with abortion laws, it is difficult to impute to Congress any clear judgment about either the appropriate degree of investment in reducing pollution or the correct approach to regulating abortion.[260] What we have instead, one might contend, is a failure of the legislative process to reflect "reasoned public deliberation."[261]

These concerns about incoherence overlap to some extent with the issues of transparency and accountability discussed in the previous Section.[262] The passage of omnibus laws can constrain the executive, who might favor the general thrust of legislation but object to some of its ancillary features.[263] For related reasons, leveraged spending programs arguably make it more difficult to impute a rational calculus to either the offeror or the offeree.

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[258] *See id.*

[259] *See* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800 (2015) (noting the proliferation of "legislative bundling through omnibus vehicles" (emphasis omitted)).

[260] *See* Sullivan, *supra* note 7, at 1471 (concluding with respect to a similar example linking abortion regulations and highway funding that "[t]he Congress that passed this law cannot have decided either what was best for the country's highways or what was best for the country's reproductive decision-making").

[261] *See id.* at 1470.

[262] *See supra* Part IV.B.

[263] *Cf.* M. Elizabeth Magill, *The Revolution That Wasn't*, 99 NW. U. L. REV. 47, 53 (2004) (contending that "Congress's now routine approval of omnibus bills diminishes the power of the President's veto").

Arguments from coherence rest on an implied premise about how the government ought to function. As noted, this view is in tension with the realities of federal omnibus legislation (though perhaps less so with respect to states that follow a "single subject rule").[264] The legislative process is the domain of deal-cutting and compromise, and its variables are not limited to any particular subject. If one views this state of affairs as regrettable, at least as applied to spending programs, judicially enforced coherence might be a welcome respite. If, on the other hand, one is unbothered by omnibus action even when it relates to the provision of benefits, the coherence justification for prohibiting leverage carries less force. In the latter event, the question would become whether the other grounds for restricting leverage, including the issues of overreach and transparency discussed above and the other potential concerns whose discussion will follow, are sufficient to warrant skepticism.

D. Equality

Conditions on government benefits can diminish liberty even if people accept them voluntarily. When different people have varying levels of dependence on government benefits, conditions may also distort "the distribution of rights in the polity as a whole."[265] Among the potential functions of the unconstitutional conditions doctrine is to neutralize the resulting threat to political equality.[266]

The concern is that through the use of conditions, the government might create—even if by no design of its own—something like a "constitutional caste" by extracting substantial concessions from those who are especially reliant on public benefits.[267] Others, in light of their means or status, might have greater ability to turn down government offers and retain their liberty in undiluted form.[268] For example, under existing law government employees relinquish some of their expressive liberty by virtue of working for the government.[269] Yet not all public employees are situated the same way. Their respec-

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[264] *See, e.g.*, Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 708–09 (2010) (summarizing the history and theory behind single subject rules); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 922 (1987) (discussing the "common state constitutional requirement that legislation may embrace only one subject").

[265] *See* Sullivan, *supra* note 7, at 1421; *cf.* Baker, *supra* note 95, at 1247–48 (discussing the role of distributional equality in the Supreme Court's cases involving public assistance programs).

[266] *See* Farber, *supra* note 10, at 945 (connecting the unconstitutional conditions doctrine with the norm of equality).

[267] Sullivan, *supra* note 7, at 1498.

[268] *See id.* at 1497–98.

[269] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006); Connick v. Myers, 461 U.S. 138, 154 (1983).

tive degrees of reliance on government employment might vary based on their economic, educational, and social circumstances. Some employees have more power than others to reject onerous conditions by finding a different job.

This disparity is troubling, but it is unavoidable. Offerees have differing levels of dependence on the benefits the government is offering, just as parties have differing degrees of bargaining power in the world of private contracting. So long as the government concerns itself with influencing behavior that bears on legitimate programmatic objectives, one might conclude that the distributional consequences are tolerable, even if unfortunate. But the situation is arguably different when the government allocates benefits based on criteria that reach beyond its programmatic goals. In those cases, there is a risk that the government is using leverage to reward favored groups or punish disfavored ones, all to the detriment of political equality.

To borrow from Seth Kreimer, it is one thing for the National Endowment for the Arts (NEA) to subsidize cubists but not pointillists based on aesthetic judgments about the relative virtue of different genres of painting. It is quite another thing for the NEA to subsidize Democrat painters but not Republican painters. The difference is that party affiliation has nothing to do with artistic skill.[270] The government's approach in the latter scenario serves either to reward favored viewpoints and penalize disfavored ones, or to encourage artists to rethink or repress their opinions in order to qualify for funding. In either case, the government is dispensing benefits based on criteria that are divorced from the objectives of the program in question. Moreover, it is doing so in a manner that is likely to have the greatest impact on people who have the worst alternative options. The effect is to diminish political equality, providing another possible basis for skepticism of the government's use of leverage to influence conduct beyond a given program's bounds.

E. Federalism

Two of the Supreme Court's most intriguing engagements with leverage came in *Dole*[271] and *NFIB*.[272] Both cases involved attempts by the federal government to influence the actions of the states. Attempts of that sort raise unique concerns for the respective roles of the federal government and the states in the constitutional framework.

As Chief Justice Roberts has observed, the states are sovereign, and they sometimes must "act like it," even if that means turning down federal mon-

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[270] *See* Kreimer, *supra* note 22, at 1374–75.
[271] 483 U.S. 203, 207 (1987).
[272] 567 U.S. 519, 530 (2012).

ey.[273] Nevertheless, some federal initiatives go too far. Consider the attempted Medicaid expansion in *NFIB*. Rather than simply offering to pay for the states' expansion of coverage, the federal government threatened to remove funding the states were already receiving.[274] This approach posed a problem, above and beyond the substantial amount of money on the line.[275] When Congress offers money to the states in exchange for their implementation of a federal program, it is up to the states to decline if they wish.[276] Yet the choice put to the states may be especially worrisome if rejecting the offer entails losing something more.

Viewed from this perspective, mixing and matching on the part of the federal government may evince a lack of respect for the autonomy of the states.[277] If Congress acts as though its creation of one program gives it vast authority to control the states' pursuit of other objectives, it arguably shows too little regard for state sovereignty. Limiting the use of leverage constrains a federal spending power that might otherwise extend, at least under modern interpretations, to an endless array of goals and projects.[278] To preserve the Constitution's balance of federal and state power, the judiciary must scrutinize attempts at "bringing federal economic might to bear on a State's own choices of public policy."[279]

If the federal government can buy whatever authority it cannot seize, the idea of limited powers is difficult to maintain.[280] By guarding against the use of leverage, the doctrine of unconstitutional conditions helps to ensure that the "two-government system established by the Framers" does not "give way to a system that vests power in one central government."[281] In so doing, the doctrine respects the Constitution's structure and vindicates its ultimate aim of protecting liberty.[282]

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[273] *Id.* at 579 (opinion of Roberts, C.J.).

[274] *Id.* at 579–80.

[275] *See id.* at 580.

[276] *Id.* at 579.

[277] *Id.* at 580 (agreeing with the argument that the threat to withhold existing Medicaid funds "serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the [Affordable Care] Act").

[278] *See* South Dakota v. Dole, 483 U.S. 203, 215 (1987) (O'Connor, J., dissenting).

[279] Sabri v. United States, 541 U.S. 600, 608 (2004). In *Sabri*, the Court found no such problem, viewing the law at issue as providing "authority to bring federal power to bear directly on individuals who convert public spending into unearned private gain." *Id.*

[280] *Cf.* Cox & Samaha, *supra* note 12, at 69 ("The more goods, services, and exemptions that may be offered by the government at the behest of ordinary politics, the greater is the opportunity for government officials to condition those benefits on the sacrifice of constitutional rights.").

[281] *NFIB*, 567 U.S. at 577.

[282] *See id.*

F. Implications

The preceding Sections examined several potential theories for grounding the prohibition against leverage. Some of the theories are context-specific. For example, worries about distributional equality are most acute in the government's interactions with individuals and groups, whereas federalism issues are most salient in interactions between the federal government and the states.[283] Other theories, such as the vision of unconstitutional conditions doctrine as a safeguard against government overreach, operate whether the offeror is the federal government or a state. Taken in combination, these arguments seek to explain why it matters if the government is mixing benefits with unlike burdens.

The foregoing theories also provide a framework for analyzing disputes over the government's use of conditions. It is not enough to say conditions must be related or germane to the programs to which they attach. Specifying the requisite degree of connection requires an account of why, exactly, leverage is problematic as a constitutional matter. Only with the conceptual foundations in view can the jurisprudence of unconstitutional conditions develop in a sound, intelligible fashion.

CONCLUSION

The Constitution places limits on a government's imposition of conditions even when its counterparties willingly agree. That is the driving principle behind the doctrine of unconstitutional conditions. This Article has analyzed the doctrine as it relates to concerns over the use of leverage. Across a range of contexts, the Supreme Court has noted the need for some connection between the benefits the government offers and the concessions it seeks in return. By viewing those cases in combination and exploring their conceptual foundations, we can take a step forward in understanding the operation and trajectory of unconstitutional conditions doctrine.

[283] Federalism concerns may also arise indirectly if the federal government offers benefits to individuals in pursuit of objectives that arguably fall within the regulatory ambit of the states.