

ANOTHER VIEW OF THE QUAGMIRE:  
UNCONSTITUTIONAL CONDITIONS AND  
CONTRACT THEORY

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I. INTRODUCTION

The title of this Article derives from one of the best-known articles in law and economics. In 1972, Guido Calabresi and A. Douglas Melamed published a paper entitled, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.<sup>1</sup> The subtitle was a reference to a series of paintings by Monet showing the same cathedral in a variety of lighting and weather conditions.<sup>2</sup> The title's implication was that the article was offering only one among many possible perspectives.<sup>3</sup> In a similar way, this Article is meant to provide an alternative perspective on a well-known scene.

The scene in question involves a recondite area of legal doctrine—the constitutionality of requiring waiver of a constitutional right as a condition of receiving some governmental benefit. Under the unconstitutional conditions doctrine, the government is sometimes, but by no means always, blocked from imposing such conditions on

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1. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

2. *See id.* at 1090 n.2.

3. *See id.* at 1089, 1090 n.2.

grants.<sup>4</sup> This doctrine has long been considered an intellectual and doctrinal swamp. As one recent author has said, “[t]he Supreme Court’s failure to provide coherent guidance on the subject is, alas, legendary.”<sup>5</sup> This topic is perhaps less inspiring than the panoramic view of the classical edifice of private law offered by Calabresi and Melamed.<sup>6</sup> This Article certainly does not aspire to a similar level of impact,<sup>7</sup> but it does share with their article the effort to provide a new perspective on a familiar set of problems without claiming that this perspective is the only valid one.

The fact that constitutional rights can be waived is usually something of an afterthought. The perspective offered in this Article places waiver in the foreground. Despite the Declaration of Independence’s proclamation of inalienable rights,<sup>8</sup> constitutional rights are indeed alienable in the sense that they can be waived in return for various benefits.<sup>9</sup> For example, in return for government funding, family planning clinics may lose their right to engage in abortion referrals.<sup>10</sup> Similarly, the right to a jury trial can be surrendered in return for a lighter sentence as part of a plea bargain.<sup>11</sup> The fact that constitutional rights can be the subject of bargaining suggests that contract theory might be able to provide some useful insights.

To the extent that they can be traded for benefits, constitutional rights can be seen as resembling contractual default rules. A contractual default is simply the rule that the law supplies when the parties to a contract have not supplied a relevant provision of their own.<sup>12</sup> Similarly, a constitutional right applies in the absence of a contrary contractual understanding between the individual and the government. Thinking of constitutional rights in this way may seem counter-intuitive, but it can also be illuminating because recent scholarship in law and economics has provided a growing understanding of the problem of how to design contractual defaults.<sup>13</sup> If nothing else, we are in a position to ask interesting new questions about how unconstitutional conditions may relate to transaction costs,

4. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 2-3 (2001).

5. *Id.* at 3.

6. See Calabresi & Melamed, *supra* note 1.

7. Indeed, given the preliminary nature of this Article, perhaps it might even have been entitled “Another Glimpse of the Quagmire.”

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

9. See *infra* Part II.

10. See *Rust v. Sullivan*, 500 U.S. 173, 178-80 (1991) (describing the government funding program and its restrictions); *id.* at 203 (finding the program constitutional).

11. See *Brady v. United States*, 397 U.S. 742, 748 (1970).

12. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989).

13. See *infra* Part IV.A.

information asymmetries, and other familiar economic concepts. Contract theory does not necessarily explain all the contours of judicial doctrine, but it does provide a deeper understanding of the issues, as well as suggesting grounds for critique.

Part II of this Article explains the constitutional background. It shows that constitutional rights are often exchanged for government benefits with the full approval of the courts. There may or may not be any inalienable constitutional rights; but if they do exist, they are the rare exceptions. Most, if not all, constitutional rights can be bartered away in at least some circumstances. This may seem paradoxical, but it should not be: having a right often means being free to decide on what terms to exercise it or not.

Part III then turns to the unconstitutional conditions doctrine and explains how that doctrine limits the ability to opt out of constitutional rights. Using the example of First Amendment law, this part demonstrates the difficulties that courts have encountered in applying the doctrine. It then examines the conflicting theories offered by some major scholars in an effort to explain the doctrine. It is safe to say that none of these theories has carried the field.

Part IV further shows how the problem of unconstitutional conditions can be clarified by considering constitutional rights as a variety of contract default. Contract theory provides some insights into these restrictions on opt-outs. It would be unrealistic to claim that contract theory “solves” the problems of unconstitutional conditions, but it does provide another way of analyzing the issues. It also helps explain why some parts of the doctrine are such a mess: the court is essentially trying to police contract terms in a way that has been rejected as unworkable for ordinary contracts.

Finally, Part V critiques some aspects of current doctrine that place substantive limits on contracts to opt out of constitutional rights. These substantive restrictions limit the terms that the government is allowed to offer to obtain a waiver. For instance, in exchange for a permit to develop land, a landowner can waive the Fifth Amendment entitlement to compensation for a property interest, but only if a clear nexus exists between the property right and the impact of the development.<sup>14</sup> Nothing like this nexus rule exists in ordinary contract law. We do not, after all, say that a lawnmower can be bartered only to obtain other landscaping equipment or seeds; it can be bartered for a basket of fruit, a baseball ticket, or anything else the parties agree on. From the point of view of contract theory, the nexus rule is a very peculiar restriction on trade.

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14. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

Such restrictions do not relate in any clear way to identifiable flaws in the bargaining process. The effect of these restrictions is to block bargains even when the parties would enter into them completely voluntarily.<sup>15</sup> These restrictions may arguably serve social interests unconnected with the preferences of the parties, for example by preventing the “commodification” of constitutional rights (meaning the loss of their social meaning as essential to personhood rather than mere marketable assets). The nexus requirement, however, is an unsatisfactory way of achieving these interests. For example, if the concern is commodification, it makes no sense to apply the nexus rule to property interests in land. After all, those interests are marketable for cash already, so we do not need to worry that unrestricted bargaining with the government will somehow destroy their pristine character.

The purpose of this Article is by no means to argue for abolishing the doctrine of unconstitutional conditions and thereby deregulating the “market” for constitutional rights. Defects in the bargaining process are a serious concern. Courts may also be justified in limiting exchanges for other reasons, such as agency problems involving government officials or concern about the social effects of making constitutional rights appear to be mere commodities. We might therefore expect the market to be restricted in many ways. Nevertheless, current doctrine has done a poor job of articulating the reasons for blocking the exchange of constitutional rights for government benefits. It has done an even worse job of identifying which exchanges are objectionable.<sup>16</sup> We might be better off if we acknowledged that this market exists and that in fact we have legitimized much of this trade. We could then have a much more candid and fruitful discussion about which exchanges to block and why.

In particular, it is helpful to distinguish between three types of reasons for blocking exchanges of constitutional rights for government benefits. The first type of reason is the least controversial. As with any private contract, we should avoid enforcement where asymmetrical information, imperfect rationality, or other flaws make it likely that the bargain will not be in the interests of both parties. Second, as in the case of private contracts, we may block some transactions even though they are in the interests of the parties. The grounds for banning the exchange are clearest when the agreement would adversely affect the interests of third parties in some tangible way. Arguably, we may also want to block exchanges that adversely affect the social meaning of

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15. *See infra* Part V.

16. For example, as we will see, the Court has come up with particularly stringent limits on exchanges between land owners and the government, while making criminal procedure rights freely waivable without regard to the increasingly coercive context facing criminal defendants.

constitutional rights, degrading society's sense of its connection with personhood. Third, we may want to block the exchange for reasons that are specific to public law, unconnected with contract theory. In particular, we may wish to screen transactions for improper government motivations or for infringements on some norm of equality—both of which come together when the government's purpose is to single out a politically disfavored group. We should attempt to be clear on whether our objection involves more or less standard contracting problems or whether it involves one of the less tangible grounds. Among its other flaws, current doctrine completely obfuscates these distinctions.

## II. OPTING OUT OF CONSTITUTIONAL RIGHTS

Some of the resistance to connecting constitutional rights to contract law is that we are accustomed to thinking of these rights as inalienable, if not sacred. But numerous contexts exist in which constitutional rights are surrendered with some government benefit serving as the consideration. Indeed, as we will see, some constitutional rights (especially those relating to criminal procedure) are, in practice, used almost entirely as bargaining chips; rarely are they retained and actually exercised by the holder of the rights. Only the small minority of criminal cases feature an actual trial where the defendant objects to the admission of evidence on constitutional grounds. Far more frequently, the threat of a constitutional objection serves to buy the defendant a better bargain with the prosecutor.

Are there any inalienable constitutional rights? The right to be free from cruel and unusual punishments set forth in the Eighth Amendment seems a plausible candidate, but even this is unclear. At least one condemned prisoner was effectively able to waive this right by dropping all appeals, even though the state's sentencing law was arguably a violation of the Eighth Amendment.<sup>17</sup> He probably could have extracted some concession from the state in exchange, such as an agreement about the details of the execution or the disposition of his body. Quite possibly, inalienable constitutional rights simply do not exist in our legal system.<sup>18</sup> In any event, as this Article will discuss, existing law clearly does make a broad range of

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17. See *Gilmore v. Utah*, 429 U.S. 1012, 1014-16 (1976) (finding that the prisoner knowingly and intelligently waived his rights); *id.* at 1018 (arguing that the state law violates the Eighth Amendment).

18. Another way of looking at this is that we generally consider nonwaivable rules to be structural provisions rather than rights. For example, subject matter jurisdiction cannot be waived, while personal jurisdiction can. We do not speak of individuals having the "right" to be sued in federal court only if subject matter jurisdiction exists. On the other hand, we do consider personal jurisdiction to be a due process "right." See *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-04 (1982) (describing the difference between personal and subject matter jurisdictions).

constitutional rights subject to alienation, even if some exception to this rule turns out to exist.

### A. *State Immunities*

We begin with some unusual constitutional rights—those held by state governments rather than by individuals. Governments may seem unlikely candidates as rights bearers, at least from the perspective of moral theory, but state immunities have been, on occasion, as carefully protected as individual rights.<sup>19</sup> However, these immunities are subject to contractual modification.

The Supreme Court has especially championed the Eleventh Amendment right of states to be free from federal litigation.<sup>20</sup> The Court seems to view this immunity in deep, almost reverential tones. Recent Eleventh Amendment decisions are replete with references to the dignity of the states, a dignity that would be offended if they were freely subject to suit by mere human beings.<sup>21</sup> Apparently, however, their dignity is consistent with being sued by the United States government or by other states.

Fortunately for the states, and probably for the rest of us, their inherent dignity does not stand in the way of selling this constitutional birthright for the proverbial “mess of pottage.” The Supreme Court has made it clear that a state’s constitutional immunity can be waived.<sup>22</sup> In particular, Congress can offer inducements to the states to obtain such waivers.<sup>23</sup> Thus, the Eleventh Amendment is really just a contractual default rule that the states are free to barter away.<sup>24</sup> Were this not true, sovereign

19. See, e.g., *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-77 (discussing the long recognized doctrine of sovereign immunity); *id.* at 681-83 (analogizing sovereign immunity to individually protected rights).

20. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. A particularly good introduction to the Eleventh Amendment and its tangled jurisprudence can be found in Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1. For further background, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

21. See Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1126-27 (2000).

22. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

23. See *College Sav. Bank*, 527 U.S. at 686-87 (discussing the difference between inducement and compulsion).

24. For further discussion of the implications of the power of states to barter away their sovereign immunity, see Daniel A. Farber, *The Coase Theorem and the Eleventh Amendment*, 13 CONST. COMMENT. 141 (1996); Neil S. Siegel, *Why the Eleventh Amendment Always Matters, Even When Transaction Costs Are Zero: A Reply to Professor Farber*, 18 CONST. COMMENT. 177 (2001).

immunity would be less a pedestal for the state than a cage from which it could not escape.

Another example of a constitutional default rule is provided by *New York v. United States*,<sup>25</sup> which recognized another constitutional immunity of state governments.<sup>26</sup> *New York* involved a federal statute governing disposal of low-level nuclear waste.<sup>27</sup> The statute provided three kinds of incentives to encourage states to provide disposal sites.<sup>28</sup> First, states that already had disposal sites were authorized to charge gradually increasing fees for waste from other states.<sup>29</sup> One quarter of the fee was used to make payments to states that provided new sites.<sup>30</sup> Second, states that failed to meet certain deadlines could be charged higher surcharges and eventually could be denied access to disposal facilities altogether.<sup>31</sup> Third, the so-called take title provision told states that eventually they would literally own the problem themselves if they did not cooperate.<sup>32</sup> *New York* filed suit, claiming that the statute “commandeered” its state legislature by forcing it to pass legislation authorizing a disposal site.<sup>33</sup>

The Court struck down the “take title” provision and reinforced the state’s immunity from such commandeering.<sup>34</sup> In the Court’s view, the “take title” provision offered states a choice between two options, neither of which Congress had the power to mandate separately.<sup>35</sup> It could not order states to pass legislation, nor could it require them to subsidize generators of nuclear waste by taking over the disposal problem.<sup>36</sup> Thus, states cannot be forced to help administer federal programs. Of course, they may want to do so voluntarily. But this voluntary participation need not be spontaneous on the part of the states. The Court also held that Congress could offer the states inducements to pass the desired legislation, either by attaching conditions to the receipt of federal funds or by threatening to preempt regulation of waste disposal entirely in states that failed to pass such legislation.<sup>37</sup> Such inducements were constitutional because they left the ultimate choice of whether to comply with the residents of the states in question.<sup>38</sup>

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25. 505 U.S. 144 (1992).

26. Arguably, the Court “invented” this immunity rather than merely “recognizing” it.

27. *New York*, 505 U.S. at 150-51.

28. *Id.* at 152-54.

29. *Id.* at 152-53.

30. *Id.* at 152.

31. *Id.* at 153.

32. *Id.* at 153-54.

33. *Id.* at 160-161.

34. *Id.* at 175-77.

35. *Id.*

36. *Id.* at 176.

37. *Id.* at 166-67.

38. *Id.* at 168.

Thus, the default rule is that states do not participate in the implementation of federal programs. States may, however, opt out of this rule and agree to participate in return for federal benefits. The problem with the “take title” provision was that Congress was trying to use a bargaining chip that it did not own. It could not directly order states to “take title” to waste; hence, its offer to forebear from doing so on certain conditions was meaningless. In contract terms, we could say that the contract was invalid because the consideration was illusory, being merely a promise to forebear from doing something that the government had no right to do anyway.

State immunity is a nice illustration of the reasons why constitutional rights are generally subject to waiver or exchange. It would be a burden on states to make their immunities compulsory. A state may well want to waive its Eleventh Amendment immunity to get a better interest rate from creditors, and it is not obvious why it should be forbidden to do so. Indeed, one could even argue that the states have a constitutional *right* to waive their immunities in return for other benefits. The Tenth Amendment says that the states retain their preconstitutional powers except to the extent that those powers are transferred to the federal government or forbidden to the states.<sup>39</sup> The right to waive sovereign immunity to obtain other benefits was held by the states prior to joining the Union. Power over this right was not, in the view of the current Court, transferred to the federal government, which is why Congress cannot simply override the states’ immunity. It is hard to identify any provision of the Constitution that even arguably limits the states’ exercise of this right. Hence, like state immunity itself, the states’ freedom to barter away its immunity may itself be a constitutional right.

The more general point is that rights often serve to protect an actor’s autonomy. Part of that autonomy is the power to decide when to exercise the right and under what circumstances to forebear from exercising the right. As a general matter, making a right inalienable limits the freedom of choice of the right holder and, thus, is a *prima facie* invasion of his or her (or in the case of a state government, its) autonomy.

### *B. First Amendment*

Freedom of speech may be the paradigmatic constitutional right. Despite their importance, however, speech rights are alienable, at least in some contexts. The Supreme Court has staunchly defended First Amendment rights in modern years, but it has allowed the government to restrict those rights in exchange for providing benefits.

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39. U.S. CONST. amend. X.

The simplest examples of government restrictions on free speech involve public employees.<sup>40</sup> For instance, government employees may lose their right to participate in political campaigns. If there is anything at the core of the First Amendment, it is the right to support the election of candidates to office.<sup>41</sup> Yet the Court has repeatedly upheld the government's power to require the surrender of this right in return for government employment.<sup>42</sup>

The Court views speech by government employees as being limited in other respects as well. In *Pickering v. Board of Education*,<sup>43</sup> a teacher was fired for writing a newspaper letter criticizing the school board's fiscal policies.<sup>44</sup> Normally, unless the letter was defamatory, it would have been absolutely protected by the First Amendment. Not so when the author is a public employee.<sup>45</sup> The Court saw its task as finding "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."<sup>46</sup> The teacher's statements obviously related to matters of public concern.<sup>47</sup> However, the Court concluded that the school had no more of a legitimate interest in restricting his speech than that of any other citizen because the letter did not undermine the performance of his teaching duties or otherwise interfere with the operation of the schools.<sup>48</sup> But note the contrary implication: if school efficiency was affected, the employee might have had to give up certain speech rights in exchange for the job.

This implication was confirmed by *Connick v. Myers*,<sup>49</sup> which involved a disgruntled assistant district attorney who circulated a questionnaire to fellow workers.<sup>50</sup> The questions covered a variety of workplace issues: office transfer policy (her particular gripe), office morale, the need for a grievance committee, confidence in supervisors, and whether employees felt pressured to work in political campaigns.<sup>51</sup> She was fired for insubordination.<sup>52</sup> The Court attempted to draw a line between matters of public concern and

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40. For other lines of doctrine, see *infra* text accompanying notes 86-87, 158-62.

41. See *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976).

42. See, e.g., *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 102 (1947).

43. 391 U.S. 563 (1968).

44. *Id.* at 564.

45. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

46. *Pickering*, 391 U.S. at 568.

47. See *id.* at 569.

48. *Id.* at 572-73.

49. 461 U.S. 138 (1983).

50. *Id.* at 141.

51. *Id.*

52. *Id.*

“matters only of personal interest,” such as employee grievances.<sup>53</sup> With the possible exception of “the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision” relating to employee grievances that lack public concern.<sup>54</sup> Given the employee’s limited First Amendment interest, the supervisor did not have to put up with “action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.”<sup>55</sup> In contrast, a private citizen who spoke out about similar issues concerning the operation of a government office would have enjoyed complete First Amendment protection—there simply is no First Amendment exception that the government could invoke.

For our purposes, what is important is not the details of the doctrine but rather the core assumption of these cases that the government can condition employment on speech restrictions. That assumption can be expressed equally well by saying that individuals have default rights to free speech but can opt out of those rights in return for government employment. As the cases also make clear, however, the government’s ability to bargain for opt-outs in the employment context is not unlimited.<sup>56</sup>

What makes this example especially interesting is that the Court seemingly has never asked whether the employees waived their speech rights as an explicit part of their job contract. Rather, the assumption seems to be that speech rights are implicitly waived. Presumably, a government employment contract could provide more protection of speech than the Court requires; for example, by allowing employees to engage in campaign activities. But unless the contract contains such an explicit term, the Court appears to presume that the government has the right to regulate employee speech. Thus, employee speech is a particularly potent example of a default rule: free speech is a default right that an employee can

53. *Id.* at 147.

54. *Id.* Of the questions distributed by the employee, only the one about political campaigns was found to implicate any public concern: “the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.” *Id.* at 149.

55. *Id.* at 154. The Court concluded that the “questionnaire touched upon matters of public concern in only a most limited sense” and was “most accurately characterized as an employee grievance concerning internal office policy.” *Id.*

56. *Id.* at 147 (suggesting that the government may not bargain for a free speech opt-out when the political speech addresses matters of public concern).

Another First Amendment setting involving opt-outs is campaign finance. In *Buckley v. Valeo*, the Court held that the government cannot regulate the total level of a candidate’s spending. 424 U.S. 1, 14-23 (1976). However, it can impose a spending limit if the candidate agrees to accept public financing. *Id.* at 90-104.

bargain away, and the default rule for government employment contracts is that the right has in fact been surrendered.

### C. *Abortion Rights*

In *Roe v. Wade*,<sup>57</sup> the Supreme Court held that a woman has a constitutional right to have an abortion, subject to some restrictions (particularly in the final trimester).<sup>58</sup> But it turned out that the right to an abortion was a default rule: the government can provide benefits for women who choose not to exercise the right, thereby purchasing their waiver of the right to an abortion. In *Maher v. Roe*<sup>59</sup> and *Harris v. McRae*,<sup>60</sup> the Court held that Congress could “encourage” women to bear children rather than have abortions by offering a financial inducement, such as payment of medical expenses for childbirth but not abortion.<sup>61</sup> This holding was all the more remarkable because expanding the funding to include abortions would actually have saved the government money, inasmuch as abortions are a less expensive alternative.<sup>62</sup> Thus, the only logical conclusion is that the government’s sole purpose was to discourage the exercise of a constitutional right.

The Court has also allowed use of government funding on the other side of the doctor-patient relationship—to induce physicians to remain silent about the abortion option as an alternative to childbirth. *Rust v. Sullivan*<sup>63</sup> involved a restriction on abortion counseling. A federal statute provided federal funding for family planning services but mandated that none of the funds be used in programs where abortion is a method of family planning.<sup>64</sup> An implementing regulation provided that grantees could not refer women to abortion providers, even upon request, nor could grantees engage in lobbying or advocacy in favor of abortion.<sup>65</sup> Finally, according to the regulation, any government-funded facilities had to be physically and financially separate from prohibited abortion activities; grantees that were not able to run stand-alone programs

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57. 410 U.S. 113 (1973).

58. *Id.* at 153-54.

59. 432 U.S. 464 (1977).

60. 448 U.S. 297 (1980).

61. *See id.* at 318; *Maher*, 432 U.S. at 476.

62. *See Maher*, 432 U.S. at 490 (The “state’s assertion that it saves money when it declines to pay the cost of a welfare mother’s abortion is simply contrary to undisputed facts.”).

63. 500 U.S. 173 (1991).

64. *Id.*

65. *Id.* at 179-80.

with their federal funds would be unable to use any other funds to advocate abortion.<sup>66</sup>

The Court upheld the regulations on the basis that they were merely designed to prevent program money from being used for purposes outside of its scope. “[H]ere the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized.”<sup>67</sup> In short, although they were by no means government employees, the doctors’ speech rights were subject to the same kinds of limitations that the Court had upheld in cases such as *Connick*.<sup>68</sup> In return for government funding, they gave up the right to communicate freely and candidly with their patients.<sup>69</sup>

The Court’s rulings on abortion-related funding restrictions have been particularly controversial. For present purposes, what is important is not so much the correctness (or incorrectness) of these decisions but their dramatic illustration of the government’s ability to obtain opt-outs from constitutional rights in return for financial benefits.

#### *D. Criminal Procedure Rights*

The Bill of Rights provides elaborate protections for potential criminal defendants. The police cannot engage in searches without probable cause;<sup>70</sup> suspects cannot be forced to incriminate themselves;<sup>71</sup> defendants are entitled to counsel, cross-examination of adverse witnesses, and compulsory process to obtain evidence in their own favor.<sup>72</sup> As it turns out, all of these rights can be bartered away—and they usually are.

It is the rare criminal case that goes to trial. Criminal defendants typically enter into plea bargains, where they exchange a guilty plea for some concession by the prosecutor regarding sentencing. Far from being the norm, trials are now somewhat freakish exceptions from normal practice. Thus, the realities of criminal law are far removed from the criminal process familiar to most people.

The criminal process that law students study and television shows celebrate is formal, elaborate, and expensive. It involves

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66. *Id.* at 180-81. However, Justice O’Connor made a plausible argument in her dissent that the regulation went beyond the agency’s statutory authority. *Id.* at 223-24 (O’Connor, J., dissenting).

67. *Id.* at 196 (majority opinion).

68. *See Connick v. Myers*, 461 U.S. 138 (1983); *see also supra* text accompanying notes 49-56.

69. *Rust*, 500 U.S. at 199.

70. U.S. CONST. amend. IV.

71. *Id.* amend. V.

72. *Id.* amend. VI.

detailed examination of witnesses and physical evidence, tough adversarial argument from attorneys for the government and defense, and fair-minded decisionmaking from an impartial judge and jury. For the vast majority of cases in the real world, the criminal process includes none of these things. Trials occur only occasionally—in some jurisdictions, they amount to only one-fiftieth of total dispositions. Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then "sold" to both the defendant and the judge.<sup>73</sup>

In short, plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system."<sup>74</sup>

By entering into plea bargains, defendants automatically waive some important constitutional rights. In particular, they obviously forfeit the right to a jury trial as well as the right to confront the witnesses against them. Other criminal procedure rights are also subject to opt-out through plea bargaining or other mechanisms. A partial listing of waivable rights would include the following:

(1) The right to appeal;<sup>75</sup>

(2) The right to sue law enforcement officials for civil rights violations;<sup>76</sup>

(3) The right to have counsel present during an interrogation<sup>77</sup> even if the prisoner is kept ignorant of critical information, such as the fact that a lawyer has already been retained to represent him and is seeking to speak with him;<sup>78</sup>

(4) The Fourth Amendment right to demand a search warrant, which is waived by voluntary consent to search,<sup>79</sup> even if the individual is unaware that the Fourth Amendment would otherwise forbid the search;<sup>80</sup>

(5) The right to be represented by counsel at trial.<sup>81</sup>

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73. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911-12 (1992).

74. *Id.* at 1912.

75. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 152-53 (1990) (finding that the defendant made a knowing and intelligent waiver of his right to appeal).

76. *See, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987) (finding that the defendant's voluntary waiver of his right to sue under § 1983 was valid).

77. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986).

78. *Id.* at 425 (refusing to adopt a rule that would require police to "inform a suspect of an attorney's efforts to reach him").

79. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

80. *Id.* at 227.

The Supreme Court seems to have limited concern about criminal procedure opt-outs, particularly in the context of plea bargaining. Rather, the Court has spoken favorably, if perhaps unrealistically, about the “give-and-take negotiation common in plea bargaining between the prosecution and the defense, which arguably possess relatively equal bargaining power.”<sup>82</sup> Indeed, the Court has applauded plea bargaining as “an essential component of the administration of justice.”<sup>83</sup> The Court added that if “[p]roperly administered, [plea bargaining] is to be encouraged.”<sup>84</sup>

Thus, it is clear the criminal procedure guarantees of the Fourth, Fifth, and Sixth Amendments are by no means inalienable rights. They are all subject to opt-out. From a practical point of view, their primary significance is that they serve as bargaining chips in negotiating the terms of a guilty plea. Indeed, in practice, these bargaining chips may be more useful to defense counsel for seeking favorable terms than for the possibility of presenting evidence of innocence.<sup>85</sup>

### III. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

Now that we have seen that virtually every constitutional right may be bartered away in certain situations, we need to consider the restrictions placed by courts on these exchanges. These restrictions go under the rubric of the unconstitutional conditions doctrine. However, the doctrine is in a state of some confusion, and commentators have been unable to supply an acceptable substitute.

#### A. *A Doctrinal Mess*

The Supreme Court’s difficulties in dealing with the problem of unconstitutional conditions can be seen in a series of recent First Amendment cases. It is clear enough that the government cannot jail someone for expressing an idea the government dislikes, but can the government condition some benefit on the applicant’s abstention from undesirable expression? The answer is “maybe.” The Court has struggled without success to formulate a coherent test for answering this question.

81. *Faretta v. California*, 422 U.S. 806, 807 (1975) (finding that the defendant in a state criminal trial may voluntarily and intelligently elect to proceed without counsel).

82. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978); *see also* *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting).

83. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

84. *Id.*

85. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 38 (1997).

We have already seen one case in this area, *Rust v. Sullivan* (the abortion-counseling case).<sup>86</sup> *Rust* seemed to create a straightforward germaneness test: the government could impose restrictions on speech provided those restrictions were related to the purpose of the government funding.<sup>87</sup> But *Rust* was not the Court's final word on the subject of speech-related funding restrictions.

A second case, *Rosenberger v. Rector*,<sup>88</sup> reflects the Court's continued difficulty with this problem. The University of Virginia used mandatory student fees to finance the costs of printing various student publications.<sup>89</sup> It excluded religious speech from the program because of Establishment Clause concerns.<sup>90</sup> The Court might well have upheld the Virginia program on the basis of *Rust*, characterizing the overall purpose of the program as encouraging nonsecular student speech (just as in *Rust* it characterized the program as encouraging nonabortion reproductive services). Instead, the majority decided that the restriction involved impermissible viewpoint discrimination and distinguished *Rust* as a case where the government was essentially paying doctors to speak as its agents rather than subsidizing private speech.<sup>91</sup> (The doctors at Planned Parenthood and other clinics would have been surprised to learn that they were in the business of transmitting government propaganda rather than providing medical advice.) Thus, *Rosenberger* seemed to adopt a particularly crabbed reading of *Rust*, taking a correspondently narrow view of the government's power to condition benefits on speech restrictions.

In *Legal Services Corp. v. Velazquez*,<sup>92</sup> the Court came close to disavowing *Rust* altogether in favor of a decidedly more skeptical attitude toward government funding conditions. The Legal Services Corporation (LSC) was established as a nonprofit corporation to distribute federal funds to local legal aid organizations for the poor.<sup>93</sup> *Velazquez* involved a condition on the use of LSC funds, prohibiting grant recipients from challenging the validity of welfare laws.<sup>94</sup> As interpreted by the government, the statute barred a legal aid lawyer from arguing in court that a state law conflicted with federal law or that either a state or federal statute was unconstitutional.<sup>95</sup> Lawyers could, however, argue that a welfare agency made a factual mistake

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86. 500 U.S. 173 (1991).

87. *Id.* at 199-200.

88. 515 U.S. 819 (1995).

89. *Id.* at 823-25.

90. *Id.* at 826-27.

91. *Id.* at 833.

92. 531 U.S. 533 (2001).

93. *Id.* at 536.

94. *Id.* at 536-37.

95. *Id.* at 537.

or misapplied an existing welfare statute.<sup>96</sup> When an issue of constitutional or statutory validity arose after a case was underway, LSC advised that its attorneys must withdraw.<sup>97</sup> The restriction applied to all of the grantee's activities, including those funded from other sources.<sup>98</sup>

Not surprisingly, both the government and the four dissenters thought the case was controlled by *Rust*.<sup>99</sup> Their theory was that the government had chosen to create a program for routine welfare disputes, not law reform litigation. But the majority, in an opinion by Justice Kennedy, gave *Rust* a very restricted reading. Although he admitted that "[t]he Court in *Rust* did not place explicit reliance" on this rationale,<sup>100</sup> Kennedy viewed *Rust* as involving speech by the government itself, rather than financing of private speech activities.<sup>101</sup> The crucial point was that, like the program in *Rosenberger* but unlike the program in *Rust*, "the LSC program was designed to facilitate private speech, not to promote a governmental message."<sup>102</sup> Kennedy added that the "private nature of the speech involved here, and the extent of LSC's regulation of private expression, are indicated further by the circumstance that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning."<sup>103</sup> Moreover, "[b]y seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which the courts must depend for the proper exercise of the judicial power."<sup>104</sup>

Just when it seemed that *Rust* had been more or less limited to its facts, the Court gave signs of changing course yet again. In *United States v. American Library Ass'n*,<sup>105</sup> the Court upheld a federal statute that required libraries to use Internet filters to limit access to sexually explicit material in exchange for federal funding. The plurality relied squarely on *Rust* and distinguished *Velasquez*:

The [*Velasquez*] Court concluded that the restriction on advocacy in such welfare disputes would distort the usual functioning of the legal profession and the federal and state courts before which the lawyers appeared. Public libraries, by contrast, have no comparable role that pits them against the Government,

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96. *Id.* at 538-39.

97. *Id.* at 539.

98. *Id.* at 551.

99. *Id.* at 552-59 (Scalia, J., dissenting).

100. *Id.* at 541 (majority opinion).

101. *Id.* at 541-42.

102. *Id.* at 542.

103. *Id.* at 543.

104. *Id.* at 545.

105. 539 U.S. 194 (2003).

and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.<sup>106</sup>

Clearly, the Court has not yet settled on a solution to the problem of funding conditions on free speech.

### B. Theoretical Confusion

As one author recently noted, “Because of its wildly inconsistent application by the Supreme Court, the unconstitutional conditions doctrine has attracted a great deal of scholarly attention in recent years.”<sup>107</sup> A quick survey of some of the major scholarship reveals how far we are from any consensus about the foundations of the doctrine or how it should operate. Consider the works of four leading theorists.

The first theorist, Richard Epstein, suggests that bargains between the government and citizens should be disallowed when there is a defect in the bargaining situation.<sup>108</sup> One possible defect of bargaining is the government’s exploitation of its monopoly power.<sup>109</sup> Another is a “divide and conquer” strategy by the government, in which it makes separate deals that make sense to each individual separately, but collectively make society worse off.<sup>110</sup> The idea is that the government should not be able to use its bargaining position to deprive individuals of their entitlements. For example, it would seem to follow from Epstein’s analysis that *Rust v. Sullivan*<sup>111</sup> might go the other way if the government had attained a monopoly by becoming the sole provider of health care. In that situation, if the right to an abortion is to have any meaning at all, abortions (not to mention abortion counseling) must be available from government doctors.<sup>112</sup>

A contrasting view of unconstitutional conditions is taken by Seth Kreimer.<sup>113</sup> He attempts to distinguish between denying a benefit and imposing a penalty.<sup>114</sup> In his view, a benefit should not be considered

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106. *Id.* at 213. The two concurring opinions did not find it necessary to reach this issue. They concluded that the ability of patrons to have the library turn off the filter made the restriction too insubstantial to raise serious constitutional problems.

107. Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873, 914.

108. See Richard A. Epstein, *The Supreme Court, 1987 Term Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 26-28 (1988).

109. *Id.* at 21-22.

110. *Id.* at 26.

111. See *supra* Part III.A.

112. Epstein’s effort obviously bears a family resemblance to the default rule analysis offered in this Article. It differs in some critical respects, however—it focuses on a limited subset of the possible flaws in the bargaining process, and it purports to offer the definitive treatment rather than an additional perspective on the problem.

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

114. *Id.* at 1352-59.

“largesse” if the government would offer the benefit anyway even without the condition—to put it another way, if receiving the benefit is “normal” rather than a government favor.<sup>115</sup> Under Kreimer’s analysis, the government’s failure to fund abortions might be considered either a penalty or a refusal to provide a subsidy, depending on the circumstances.<sup>116</sup> If only a few medical procedures are financed by the government, exclusion of abortion is not invidious and should not be considered a penalty. On the other hand, if most medical procedures other than abortion are government-financed, exclusion of abortion looks much more like a penalty.

Kathleen Sullivan’s theory focuses on distributive issues in identifying the evils of unconstitutional conditions.<sup>117</sup> First, she argues, government benefits may crowd out the private sector, so that the government becomes the exclusive source of support and thereby gains control of individual behavior.<sup>118</sup> This is similar to Epstein’s concern about monopoly power. Second, the government may redistribute power by extending benefits only to favored groups, as when the government offers tax benefits to Republicans but not Democrats.<sup>119</sup> Third, if benefits are made available only to the poor, who are then encouraged to waive their constitutional rights, the result is to leave constitutional rights distributed according to a hierarchy.<sup>120</sup> One message of Sullivan’s analysis is that funding conditions on welfare for the poor are particularly suspect, since they may result in creating constitutional second-class citizens, who not only have fewer material goods than others but also fewer basic rights.<sup>121</sup>

In contrast to these other three theorists, Cass Sunstein argues that the unconstitutional conditions doctrine should not exist because the validity of a condition should be decided by direct reference to the underlying constitutional guarantee rather than by some general doctrine.<sup>122</sup> In other words, we should not have any general rule about when conduct can be the subject of a funding condition but not a criminal penalty; instead, the result should depend on the particular constitutional provision in question.<sup>123</sup> For example, whether the government could selectively fund childbirth

115. *Id.* at 1359-78.

116. *See id.*

117. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

118. *Id.* at 1492-96. For more about the question of crowding-out, see *infra* text accompanying notes 142-46.

119. Sullivan, *supra* note 117, at 1496-97.

120. *Id.* at 1497-99.

121. *Id.*

122. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 604-09 (1991).

123. *Id.* at 603-04.

but not abortion should depend on whether *Roe* was best read as creating only a duty of government noncoercion or a right to government neutrality on abortion.<sup>124</sup> Sunstein seems right in viewing the nature of the particular constitutional provision as relevant, but perhaps unduly pessimistic about the possibility of finding any useful guidelines that extend beyond each specific right. For example, standard defects in the bargaining process may be grounds for invalidation regardless of the type of right involved.

These eminent theorists do not seem to agree on much of anything. Nor has their work done anything to settle the debate,<sup>125</sup> as shown by more recent writings in the field.<sup>126</sup> This does not, by any means, imply that their perspectives lack value. Indeed, each theory is plausible in certain contexts but seems to explain only part of the puzzle persuasively. One problem may be that there are actually multiple restrictions on bargaining over constitutional rights; theories that explain some restrictions may not work for others. Thus, it may be a mistake to assume that a single test should govern all unconstitutional conditions. On the other hand, there may be more structural coherence than Sunstein acknowledges. At the very least, trying another line of attack on the problem seems warranted.

#### IV. CONSTITUTIONAL RIGHTS AS DEFAULT RULES

The notion that constitutional rights might be something like the default rules in contract law may well seem counterintuitive. This section is intended to show that drawing this connection is less contrived and more fruitful than it might appear at first blush. As we will see, viewing rights as contractual defaults suggests a variety of new insights.

##### A. *The Theory of Default Rules*

Most rules of contract law can be varied by agreement of the parties. For this reason, they are best seen as defaults. They fill gaps in the contract in the same way that default settings provide premade choices for users who do not wish to make their own judgments. For example, article 2 of the Uniform Commercial Code

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124. *Id.* at 615-20. For a similar argument that *Rust* is really a case about the abortion rights of patients rather than the speech rights of doctors, see *infra* text accompanying notes 141-43.

125. See Berman, *supra* note 5, at 5 (“[T]hese efforts, and those by other distinguished scholars, have left most observers unpersuaded.”).

126. See, e.g., Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1184 (1990); Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371 (1995); Michael Herz, *Justice Byron White and the Argument That the Greater Includes the Lesser*, 1994 BYU L. REV. 227.

contains numerous provisions that apply in the absence of a contrary agreement of the parties. These default terms include price, delivery, payment, warranties, and remedies.<sup>127</sup> Similarly, sovereign immunity is a default term in contracts between the states and their creditors, but it can be displaced by an agreement to the contrary.

The choice of default can be important for several reasons. First, the default rule may be sticky because of transaction costs. If so, as a practical matter, it could have much the same effect as a mandatory rule.<sup>128</sup> In the constitutional setting, this is often the case, if only because the doctrine of unconstitutional conditions limits renegotiation. In the absence of any transaction costs or restrictions on bargains, the Coase Theorem would make the initial assignment of rights all but irrelevant. For the uninitiated, the Coase Theorem holds that in the absence of transaction costs, the parties will always bargain to an economically efficient outcome.<sup>129</sup> Except for possible distributional effects, it would not matter whether the state had to pay individuals to obtain waivers or whether the individuals had to pay the state to obtain rights. Transaction costs are far from negligible in many situations, however, so the default rule may be decisive.

Defaults can also be important where bargaining around them is feasible because the choice of the default may determine the number of people who need to engage in this bargaining and, hence, the amount of social resources devoted to avoiding the default rule.<sup>130</sup> It would probably be foolish to make unrestricted employee speech the default rule if most agencies and their employees would prefer another arrangement, since they would be needlessly forced to negotiate the issue.

Default rules can also serve information-forcing functions. Some analysts view this as an argument for setting default rules that most parties do not want in order to cure information asymmetries by forcing disclosure.<sup>131</sup> For example, a default rule limiting consequential damages may not actually fit the preferences of the majority of contracting parties. However, without such a rule, buyers might fail to notify sellers of their particular situation because they would be assured of obtaining compensation if anything went wrong with the performance.<sup>132</sup> A default rule limiting consequential

127. See, e.g., U.C.C. §§ 2-204, -305, -308, -309 (2005).

128. Omri Ben-Shahar & John Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006).

129. See Ronald A. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

130. See Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 567-69 (2006).

131. The leading article on this is by Ian Ayres & Robert Gertner, *supra* note 12.

132. *Id.* at 103-04.

damages creates an incentive for these buyers to reveal their needs to the seller.<sup>133</sup> In turn, this information allows sellers to raise their price in exchange for the risk of higher damages, as well as signaling to them that they should take special precautions against breach. The penalty default forces information disclosure in a particular way that may have little application to constitutional law, but the more general problem of information asymmetry may be more relevant.

Potentially, any legal rule that is subject to variation by one or more parties can be considered a default rule.<sup>134</sup> After all, most legal rules are subject to some kind of voluntary modification. Even an inalienable right can be, in effect, broadened by agreement, though it cannot be narrowed. Assuming, for example, that the right to be free from cruel and unusual punishment is inalienable, it is still possible for the government to voluntarily provide even greater protection against harsh punishments by statute. Thus, from the perspective of a contract theorist, constitutional law teems with contract default rules.

From a less sympathetic perspective, the contract theorist may seem to be in the position of the person who owns only a hammer and therefore sees everything in the world as a nail. Whether this criticism is well founded depends on which particular problems can be effectively “hammered” with this particular theoretical tool. The best way to find that out is to make the attempt. That at least is the current endeavor—to find out to what extent a particular set of doctrinal problems can be effectively knocked into place with default theory. If contract theory can help illuminate the doctrine of unconstitutional conditions, so much the better. If not, we can at least learn more about how waivers of constitutional rights differ from contractual undertakings.

### B. *Benefits of Applying Default Rule Theory*

The plea bargaining context illustrates some of the analytic traction that can be gained through viewing constitutional rights as default rules. In a seminal article, Robert Scott and Bill Stuntz argued that plea bargaining fits the normal paradigm of contract law, contrary to the claims of some other scholars.<sup>135</sup> What is perhaps more interesting is that they also concluded that the bargaining process is badly flawed:

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133. *Id.* at 101-02. In his article in this Symposium, Eric Posner disputes this characterization and argues that contractual penalty defaults are rare, if not nonexistent. Posner, *supra* note 130.

134. Ian Ayres, *Empire or Residue: Competing Visions of the Contractual Canon*, 26 FLA. ST. U. L. REV. 897, 899-90 (1999). For a critical view of the enterprise, see W. David Slawson, *The Futile Search for Principles for Default Rules*, 3 S. CAL. INTERDISC. L.J. 29 (1993).

135. Scott & Stuntz, *supra* note 73.

Bargaining defendants are, in effect, purchasing insurance from prosecutors, insurance against the risk of conviction and a high post-trial sentence. The pool of defendants includes high-cost insureds (guilty defendants whose conviction is extremely likely) and low-cost insureds (including innocent defendants whose conviction is much less likely). But the latter cannot effectively separate themselves from the former. They therefore must either buy the high-cost insurance or else self-insure by going to trial. Because of risk aversion, many of them will likely buy the insurance notwithstanding its high price, leading to a misallocation of criminal punishment.<sup>136</sup>

The authors then make several suggestions to improve the process, such as empowering prosecutors to agree to binding caps and providing safeguards against pleas carrying abnormally high sentences.<sup>137</sup>

As that article indicates, viewing rights as contractual defaults opens up a new set of questions about an arguably unconstitutional condition by leading to an inquiry about how the bargaining process might be flawed.<sup>138</sup> Such flaws can take multiple forms: transaction costs, information asymmetries, cognitive defects such as over-reliance on heuristic reasoning, exclusion of third parties whose interests are also affected, or the presence of monopoly power.<sup>139</sup> In considering potentially unconstitutional conditions, we can fruitfully begin to ask whether particular bargains should be blocked because of these flaws.

For example, contract theory may help explain why we do not allow advance waiver of some constitutional rights, though we do allow advance waiver of others. A suspect can waive her right to a jury trial in return for a lower sentence. It seems very unlikely, however, that the Court would uphold a system whereby individuals waived their jury rights in advance in exchange for guaranteed sentence reductions in the event they were ever tried for a crime. It is easy to see why we might be suspicious of such bargains on ordinary contractual grounds: ordinary citizens have much less information than the government about the possible utility of jury trials and their likely sentences. In addition, people are notoriously bad at processing probabilistic information. For much the same reasons, consumer waivers of remedies for defective goods are often considered unconscionable. In contrast, we do allow states to waive their Eleventh Amendment rights in advance of any claim being

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136. *Id.* at 1947-48.

137. *Id.* at 1953-60. Stuntz has continued to carry out this research agenda in more recent articles. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Stuntz, *supra* note 85.

138. Scott & Stuntz, *supra* note 73, at 1909-11.

139. *Id.* at 1918-35.

brought; presumably the states are advised by counsel and able to calculate their possible litigation exposure. Rather than being analogous to consumers, states are more like merchants who are able to bargain for themselves.

Externalities provide another reason for blocking bargains. The externality problem is particularly significant in the First Amendment area, since speech is protected in part because of its potential benefit to the public. The speech most likely to create these positive externalities is that on subjects of public concern. This may explain why the government has limited opt-outs by employees for speech of public concern but not for other types of speech, which do not create such externalities.<sup>140</sup>

Third-party effects are at the center of some of the best-known unconstitutional conditions cases. Rather than dealing with rights holders, the government can make deals with intermediaries who provide assistance in exercising the right. This may have efficiency benefits because fewer transactions costs arise, but it can also be harmful because the intermediary may not fully represent the interests of the rights holders. For example, suppose the government were to enter into contracts with paper manufacturers, in which those manufacturers agreed to supply only certain publishers. The resulting bargain would not necessarily reflect the full interests of publishers as a group or of their readers.

The Court has recognized these third-party interests to some extent by policing bargains more carefully when these interests are stronger. For example, in *Rust v. Sullivan*, the Court said the following:

[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.<sup>141</sup>

Ironically, the Court ignored the existence of important third-party interests in *Rust* itself.<sup>142</sup> In *Rust*, the government contracted with doctors to fail to disclose information to women who might desire abortions.<sup>143</sup> The doctors may or may not have been in a position to fully represent the interests of pregnant women,

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140. See Daniel A. Farber, *Free Speech Without Romance*, 105 HARV. L. REV. 554 (1991).

141. 500 U.S. 173, 200 (1991).

142. See *id.* at 179.

143. See *id.* (“[A] Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.”).

especially if the effect of the government subsidy is to reduce the availability of abortion information from other sources. Whether this decrease in abortion information actually takes place is a complicated question, which depends partly on whether the option of partitioning the government-funded activities is possible and partly on whether the presence of the government-subsidized services “crowds out” other charitable and for-profit services that might otherwise enter the market. The ultimate question, then, is whether the funding condition indirectly restricts the availability of abortions, in which case it violates the constitutional rights of patients.

Similarly, in *Velasquez*, the major question is whether the ability of poor people to raise legal claims is impaired because of such crowding out effects.<sup>144</sup> Perhaps, if government-subsidized legal aid did not exist, there would be much more private support for legal aid, which would include law reform litigation. A secondary question is whether the third-party effect on the operation of the courts raises separation of powers issues, since the courts are deprived of full argumentation by counsel in some cases.<sup>145</sup> Another way of looking at the issue would be to suggest that the regulation burdened the right of private donors to support legal aid, to the extent that the government had succeeded in limiting their choices to legal service providers who eschew law reform litigation.<sup>146</sup> But this is a tricky question. Perhaps, without the government aid, there would be no lawyers to represent indigent clients with constitutional claims anyway. Or, maybe the availability of government aid for routine claims will actually increase funding for private groups that are willing to turn down government aid in order to advance constitutional claims. We would need to do more empirical evidence to determine whether the government program will crowd out private funding for constitutional claims.

Apart from these third-party effects, we may also want to block certain transactions because they either create or destroy information undesirably. Plea bargaining may suppress information about guilt or innocence, “pooling” the two types of defendants in a way that we might find undesirable.<sup>147</sup> We may also object to a certain “separating” equilibrium.<sup>148</sup> A classic example is provided by

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144. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-47 (2000).

145. See *id.* at 545-46.

146. One reason for the crowding out might be increasing returns to scale in the provision of legal services. It may be more efficient to have one large legal aid office rather than a number of small ones, in which case the government-subsidized service could dominate the market.

147. See Scott & Stuntz, *supra* note 73, at 1911, 1935-40.

148. A pooling equilibrium is one in which different types of actors all enter the same contract; a separating equilibrium is one where the different types opt for different

the use of loyalty oaths as a condition for government benefits. Apart from its other possible flaws, this mechanism allows the government to create a separating equilibrium in which loyalists take the oath and dissenters do not. We might well think that this is information that the government is not entitled to obtain.<sup>149</sup> This provides an explanation for why we reject some conditions on benefits, even when deprivation of the benefits is not injurious enough to be coercive in any sense.

In some situations, however, constitutional rights may serve a beneficial signaling function. For example, by offering to agree voluntarily to a police search, a person sends a somewhat credible signal of innocence.<sup>150</sup> It is possible that in many situations (particularly where the search would not be highly intrusive), the majority of people would agree to the search. In those settings, the Fourth Amendment protection against search can be seen as functioning like a penalty default, producing the revelation of useful information even though most people actually have no objection to a search. However, this information forcing comes at a cost, since the effect is to penalize individuals who are not guilty but have other reasons to protect their privacy. Similarly, a well-functioning plea bargaining system could allow defendants to signal their innocence by demanding trials.

Contract theory also suggests that we might want to focus more on the form of the contract, and in particular on whether it is a

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contract terms, thereby revealing their type. See, e.g., Jeff Strnad, *Financial Instruments: Taxing Convertible Debt*, 56 SMU L. REV. 399, 414 (2003).

149. Note that this objection is quite different from the classic coercion worry about unconstitutional conditions. The separating equilibrium works best if the government benefit is not too large (and thus not too likely to overcome the contrary preferences of objectors). A major benefit may lead dissenters to reluctantly take the oath, raising both coercion and autonomy concerns, but spoiling the separation mechanisms. A smaller benefit is better in terms of collecting information about political views because dissenters will be more likely to forgo it in order to avoid the loyalty oath. Of course, there has to be some benefit or otherwise loyalists may not bother taking the oath either. Thus, a medium-sized benefit is the best from the government's point of view, and the most constitutionally objectionable from this perspective.

150. If the police always believed this signal, they would never actually take advantage of the consent and would never search anyone who gave consent even if they had grounds for doing so, which would give criminals a strong incentive to consent in order to avoid a search. On the other hand, since conducting a search is time-consuming, police have an incentive to avoid searching where they think it would be fruitless, even if they have permission. In addition, if asking for consent is relatively costless, the police may often ask for consent just as a test when they have no desire to conduct a search; if consent is refused, the individual becomes more suspect and is investigated further. Here, requests for consent function as a screening device. The equilibrium would seem to involve consent mostly by innocent people but also some guilty, with policing sometimes searching and often declining to do so. This provides another explanation (besides police perjury) for why some voluntary searches disclose contraband—the suspect was gambling that the officer was not actually interested in searching or that giving permission to search would be a sufficient sign of innocence to head off an actual search.

contract of adhesion. Adhesion contracts are take-it-or-leave-it offers to consumers, and they have been subject to somewhat greater supervision than other types of contracts.<sup>151</sup> There is some indication that this attitude carries over to the constitutional arena—or, in other words, that the courts will be more likely to uphold bargained-for conditions than those unilaterally demanded by the government.

Some support for this idea might be gleaned from *National Endowment for the Arts v. Finley*,<sup>152</sup> where the Court upheld a content-based funding program for the arts.<sup>153</sup> A 1990 statute required grants to artists be judged by “artistic merit,” “taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>154</sup> The statute was passed in response to complaints about two provocative works that were partially funded by the program.<sup>155</sup> The National Endowment for the Arts implemented the decency requirement by merely requiring that advisory councils which review grant applications “represent geographic, ethnic, and esthetic diversity.”<sup>156</sup> In an opinion by Justice O’Connor, the Court readily accepted the criterion of artistic merit.<sup>157</sup> O’Connor also concluded that the statute’s vague, subjective standards were acceptable given the inherent difficulty of judging grant applications and that they did not pose any specific threat of viewpoint regulation.<sup>158</sup> The Court seemed comforted by the fact that these standards did not establish any categorical grounds for exclusion.<sup>159</sup>

Government funding for the arts raises some vexing conceptual issues under the First Amendment, and there is certainly more than one way to read the *Finley* case. It seems doubtful, however, that the Court would have been equally willing to uphold a statute that made “decency” a flat condition for funding. What the statute did instead was to make decency a relevant consideration to artists in framing grant applications and to government panels in reviewing them.<sup>160</sup>

151. See, e.g., Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174-77 (1983).

152. 524 U.S. 569 (1998).

153. *Id.* at 590.

154. *Id.* at 572. (quoting 20 U.S.C. § 954(d)(1)).

155. *Id.* at 574.

156. *Id.* at 577.

157. *Id.* at 584.

158. *Id.* at 589. In a concurrence joined by Justice Thomas, Justice Scalia argued that exclusion from a subsidy program is not coercive and that viewpoint discrimination is therefore always permissible except when the government has established a public forum. *Id.* at 590-600 (Scalia, J., concurring). Justice Souter dissented on the ground that the statute was adopted because the government disapproved of the messages of certain artists. *Id.* at 600-03 (Souter, J., dissenting).

159. *Id.* at 581 (majority opinion).

160. See *id.* at 572 (quoting the statute as requiring panels to take decency “into consideration”).

Thus, it allowed artists to make a low degree of offensiveness part of their offers and allowed the government to view this aspect of offers favorably.<sup>161</sup> One way of expressing this aspect of the case is to say that the government was not allowed to provide a contract of adhesion, which would have allowed artists to obtain funding only if they agreed to this term. Instead, decency became a subject for implicit bargaining between the parties, and the Court apparently found this less objectionable.<sup>162</sup>

There is some reason to believe that a similar dynamic holds in the land use area. For example, the Washington Supreme Court rejected an attack on a development condition:

King County presented Trimen [the developer] with a viable choice—dedicate or reserve land for open space, or pay a fee in lieu of dedication. Trimen negotiated a reduced fee in lieu of dedication for both developments. King County accepted the reduced fees and Trimen paid the fees without protest. Given the record before us, we conclude that Trimen voluntarily paid the fee in lieu of dedication or reservation of land.<sup>163</sup>

Similarly, California has resisted challenges to exactions that were accepted by the landowner without a contemporaneous challenge.<sup>164</sup>

Another example of the Court's preference for bargained exchanges rather than adhesion contracts is its rhetoric when discussing plea bargains. Recall that the Supreme Court has spoken favorably, if perhaps unrealistically, about the "give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."<sup>165</sup> The implication seems to be that adhesion contracts might not receive such judicial favor.

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161. More precisely, what it did was to allow the government to staff the review committees with some people who would be likely to favor proposals of this kind.

162. See *id.* at 590 (holding that since the statute "merely add[ed] some imprecise considerations to an already subjective selection process," it did not "impermissibly infringe on First or Fifth Amendment Rights").

163. *Trimen Dev. Co. v. King County*, 877 P.2d 187, 193 (Wash. 1994).

164. See *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002) (finding that the failure of owner's predecessor in interest to challenge permit conditions meant that the current owner's claim is time-barred); *Wolverton Assocs. v. Official Creditors' Comm.*, 909 F.2d 1286, 1297 n.7 (9th Cir. 1990) (holding that "enjoyment of the benefits of a conditional use permit bars a landowner or his successor in interest from challenging any conditions that the permit requires"); see also *County of Imperial v. McDougal*, 564 P.2d 14, 17 (Cal. 1977) (both the benefits and burdens of a conditional use permit run with the land, binding successors); *Rosco Holdings, Inc. v. State*, 212 Cal. App. 3d 642, 660-61 (Cal. Ct. App. 1989) (landowner forfeited its inverse compensation claim by complying with permit conditions). California also requires permit conditions to be challenged promptly, further limiting the possibility of opportunism by someone who has agreed to those conditions. *Travis v. County of Santa Cruz*, 16 Cal. Rptr. 3d 404, 409 (2004).

165. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (quoting *Parker v. North Carolina*, 397 U.S. 790 (1970)).

The Court is correct that plea bargaining is not inherently objectionable and that individualized bargaining between attorneys on both sides helps ensure the fairness of the bargain. Yet, the bargaining process is troubling for two other reasons. First, increasingly draconian sentencing schemes may leave even innocent defendants with little choice but to plead guilty.<sup>166</sup> Second, overworked public defenders may be unable to effectively represent the interests of their clients in bargaining; they also have a conflict of interest regarding any individual client since full representation of that client would require skimping even further on the interests of others. More sensible sentencing and fuller funding for public defenders would go a long way to improve plea bargaining, reinforcing the individualized give-and-take that the Court seems to favor.

Preferring bargained-for exchanges to adhesion contracts promotes party autonomy—a central purpose of constitutional rights. However, a countervailing factor does exist. Bargaining results in ad hoc bargains, which may depend on differences in an individual's need for benefits or in their bargaining skills. Thus, uniform contracts of adhesion are preferable in terms of equality interests. The importance of these equality interests may vary between constitutional rights—for example, the Court has spoken of the Takings Clause as being designed to avoid singling out particular property owners.<sup>167</sup> In contrast, while equality may be an important First Amendment norm, it is quixotic to expect government funding of the arts to favor all applicants equally.<sup>168</sup>

Thus, even apart from the greater efficiency of adhesion contracts, courts sometimes have reasons to favor uniformity of contract terms. Arms-length bargains may be favored as opposed to adhesion contracts. But courts may also prefer legislation that requires uniform treatment of all offerees over individually tailored contracts when a strong equality interest is involved. In short, arms-length bargaining may be preferable in terms of the interests of the parties, but they may raise equal protection concerns.

## V. RETHINKING SUBSTANTIVE RESTRICTIONS ON EXCHANGE

Bargains to surrender constitutional rights are subject to two substantive limitations that have little parallel in private law. One is the “germaneness” requirement, which in effect limits the currency the government can use to purchase a particular right. Another is

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166. See Scott & Stuntz, *supra* note 73, at 1948.

167. See Justice O'Connor's recent opinion in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

168. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); see also text accompanying notes 152-62.

the willingness of courts to inquire into the fairness of the exchange, a type of price control that courts virtually eschew in private law.

Contract theory provides two important insights about these restrictions. First, whatever the reasons for these restrictions might be, they have little to do with standard contractual concerns such as duress or unconscionability. These restrictions are inefficient in that they block bargains that both the government and the other party would truly prefer. This is not to say, however, that other normative objections to these bargains may not exist. Second, regardless of the reasons for these restrictions, they raise significant enforcement problems. They are difficult to police and require courts to second-guess the preferences of the parties. Given these problems, if the nonefficiency goals are considered important, we ought to consider whether there are more effective ways of pursuing them.

The best that can be said for nexus requirements is that the complete absence of germaneness may be an indicator of improper government motivation. Trying to make fine-grained distinctions between degrees of germaneness, however, is not only a thankless task but is unlikely to shed much light on government motivation. Policing the proportionality of the bargain is an even less useful undertaking.

#### *A. Germaneness Requirement*

The Supreme Court has been at some pains to restrict the currency with which the government can purchase waivers from rights holders. The essential concept is that the right must have some logical connection with the compensation. Perhaps the most intuitive way to look at this doctrine is to start with the government program and then view the doctrine as limiting the conditions that can be placed on that program. From this point, every government benefit is linked with a set of rights that can be validly made conditional on the benefit. Although it is less intuitive, we can also flip the concept and say that any given right can only be “purchased” by the government as a condition for receiving a limited class of benefits that have some logical connection with the right. From this point of view, each right is linked with a set of benefits. Thus, the germaneness standard requires that any given right be purchased with a limited type of “currency” bearing a logical relationship to the right. For example, abortion-related rights can be purchased only with reproductive-related benefits. It is almost as if we could purchase sushi only with yen, and crepe suzettes only with euros.

*Nollan v. California Coastal Commission*<sup>169</sup> illustrates this concept. The owners of beachfront property in California sought a permit to demolish a dilapidated bungalow and replace it with a three-bedroom house.<sup>170</sup> The permit was granted subject to the condition that the owners record an easement allowing the public to cross their property in order to reach the beach.<sup>171</sup> The government's theory was that the new construction would increase blockage of the view of the ocean, creating a psychological barrier to beach access.<sup>172</sup> Justice Scalia's opinion for the Court first concluded that obtaining the easement outright would be a taking that would require payment of just compensation.<sup>173</sup> He then asked "whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome."<sup>174</sup>

In analyzing this question, Justice Scalia explicitly assumed that the government could have denied the permit altogether based on the visual impact of the house.<sup>175</sup> He also agreed that the government's "power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end."<sup>176</sup> Yet without such a "nexus," a permit condition would not be a "valid regulation of land use but 'an out-and-out plan of extortion.'"<sup>177</sup> Indeed, Justice Scalia argued that allowing such unrelated conditions on permits would actually undermine the accomplishment of legitimate land use goals:

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.<sup>178</sup>

In *Nollan*, the Court found no plausible connection between the alleged impact on ocean viewing and the requirement of an access

169. 483 U.S. 825 (1987).

170. *Id.* at 828.

171. *Id.* The public already had the right to reach the ocean by walking along the beach from other access points. *Id.*

172. *Id.* at 828-29.

173. *Id.* at 831, 834.

174. *Id.* at 834.

175. *Id.* at 836.

176. *Id.*

177. *Id.* at 837 (internal citations omitted).

178. *Id.* at 837 n.5.

easement.<sup>179</sup> Such a connection must be a “substantial” one where an actual conveyance of property is involved, “since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.”<sup>180</sup> One oddity of *Nollan* is that the Court said that a perpendicular easement (from the street to the beach) would have had the required nexus, but not a parallel easement (along the beach itself).<sup>181</sup> If the question is the government’s good faith versus improper motivation, this kind of hair-splitting is unlikely to prove much.

*Nollan* seems to be an unusually strict interpretation of the germaneness requirements. *South Dakota v. Dole*<sup>182</sup> is probably more typical. In *Dole*, Congress withheld certain highway funding from any state that allowed eighteen-year-olds to purchase alcohol.<sup>183</sup> The Twenty-First Amendment, which repealed Prohibition, seems rather clearly to give states the right to set their own rules in such matters. Nevertheless, the Court upheld the statute.<sup>184</sup> The Court rejected the claim that the Constitution forbids the use of the spending power to accomplish objectives that are otherwise outside of Congress’s power.<sup>185</sup> The Court found that the drinking-age limitation was germane to the purpose of the highway funding, because Congress wanted the funds to be used to provide *safe* highways, and underage drinkers present a higher risk of unsafe driving.<sup>186</sup>

Judicial review of the qualitative match between the two sides of a bargain has no counterpart in contract law. This suggests that the motivating concerns are quite different than those relating to ordinary markets, such as preventing duress. Four possibilities suggest themselves.

First, the problem may not be so much with the optimality of the bargain between the two parties as with the government’s potential shortcomings as an agent of the public. Conceivably, limiting purchases of constitutional rights to the use of conceptually related currency may make it easier for the public to assess whether the bargain is worthwhile. It is easier to compare apples with apples, so if we want to make transactions easy to monitor, we might want to prohibit exchanging apples for oranges. The concern here, paradoxically, is that the government may overpay for waivers of constitutional rights because officials have a conflict of interest—for

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179. *Id.* at 838-39.

180. *Id.* at 841.

181. *See id.* at 832 (“[T]he right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it . . .”).

182. 483 U.S. 203 (1987).

183. *See id.* at 205.

184. *Id.* at 205-06.

185. *Id.* at 209.

186. *Id.* at 214.

example, politicians eager to stifle criticism of themselves or their own programs would pay a greater premium to eliminate dissent than the public would find worthwhile.

A variant of this rationale is that the bargain is one that the voters might approve of but that the Framers of the Constitution would not. The Framers may well have thought that criminal jury trials were a good thing, and they would only be willing to allow the government to avoid them (if at all) if there were some other positive social benefit. But the voters may think that jury trials are a bad thing and that the government should be willing to make sacrifices to get rid of them even if no other tangible benefits result. In this scenario, the government is an agent of the Framers as well as of the voters. Of course, since the Framers are not around to express their preferences in detail, in practical terms the Justices are likely to take that role on their behalf.

To put it in other terms, the government may offer benefits for waiving constitutional rights simply because it disagrees with the decision to constitutionalize them. Whoever did the constitutionalizing in the first place, whether the Framers or the Justices, would presumably want to block these transactions. A germaneness requirement may help ensure that the benefit received by the government is something other than satisfaction of an unconstitutional preference. This may have been Justice Scalia's theory in *Nollan*.<sup>187</sup> A more direct solution, however, would be to force the government to show some tangible interest other than hostility to the right itself; whether such an interest was closely related to the benefit offered by the government seems less important.

A third potential explanation is that this kind of restriction on alienation serves expressive purposes. It allows us to pretend that what has happened is not really a "sale" of a constitutional right but rather some more genteel arrangement. In other settings, restrictions on the terms of exchange serve to reinforce the existence of separate spheres of interests. For example, society allows sex to be exchanged for other forms of intimacy but not for money; this maintains the concept that sex relates to a different aspect of personhood than market transactions. For similar reasons, we may be willing to allow criminal defendants to exchange jury trial rights for shorter sentences but not willing to let them sell their jury trial rights for cash or for better food in prison.

It is worth noting one analogy in private transactions to the germaneness requirement. The federal antitrust statutes restrict ties by firms with market power, whereby the consumers must

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187. 483 U.S. 825 (1987).

purchase one good as a condition for purchasing another. One defense is that the two items are so closely related that they should not be considered two separate goods. This analogy would suggest limiting the germaneness requirement to situations where the government has market power. In a similar theory, germaneness might be a defense even if the government has market power. Yet even if the government does have market power, and even if the condition is not germane, the tie-in analogy suggests that courts should be fairly tolerant of funding conditions. In general, antitrust courts and economists have become fairly tolerant of tie-ins because harm to competition is often questionable and tie-ins can provide indirect benefits to consumers. If we consider an unconstitutional condition to be a tying arrangement between a government benefit and the surrender of a right, we would be more likely to accept the positive side of the germaneness rule (favoring germane conditions) than the negative side (prohibiting all nongermane conditions).

A fourth theory might be that the germaneness requirement promotes equality. Consider the paradigm of an unconstitutional condition, the requirement of a loyalty oath to obtain a tax benefit. Germaneness seems to be at its low point here. But note that the effect of the requirement is to obtain loyalty oaths only from a limited class of individuals, those who are subject to the tax. Why should these individuals be singled out? Any justification for imposing loyalty oaths would seem to have zero correlation with tax status.

Whatever the reason for the germaneness requirement, enforcing it creates two problems. First, courts seem to have had a great deal of difficulty in determining whether conditions are sufficiently germane. Thus, the germaneness requirement causes uncertainty and litigation. Second, since the effect of the requirement is to block efficient exchanges, the parties have every incentive to try to evade the restrictions. For example, a homeowner in the position of Mr. Nollan might well prefer to get a permit by giving the state a beach easement, which the Supreme Court frowned upon, rather than an access easement from the street, which the Court said was allowable. Preventing such bargains from being made may be difficult. Nongermaneness is a victimless crime.

Nexus or germaneness requirements seem to be most useful when two factors are present. First, it is most enforceable in situations where individualized bargaining is not an option. For example, the loyalty oath to qualify for a tax credit, by its nature, must be legislative—taxes are not set on the basis of individualized negotiations with an IRS agent. Even if they were, the IRS agent would probably be unimpressed by an offer to swap a loyalty oath for

a tax break. Thus, the Court can strike down such requirements without worrying about side bargains.

Second, a germaneness requirement is best applied at a fairly crude level. If a condition seems quite unconnected with the underlying program, then concerns about improper government motive, commodification, and equality become very plausible. If Mr. Nollan had been asked to sign a loyalty oath in return for getting a building permit, the bargain would be no more coercive or involuntary, yet the government's demand would have been highly suspect. Nevertheless, the distinction between perpendicular and parallel easements, which the Court drew in *Nollan*, cannot plausibly be linked with any of these concerns.

### *B. Price Controls*

The Supreme Court not only requires that the exchange be in some sense "like kind," but that the exchange be fair so that the foregone right is not in some sense disproportionate. For example, in *South Dakota v. Dole*, the Court emphasized that only five percent of the state's highway funds were at issue, so that the statute provided a mild inducement rather than a coercive threat.<sup>188</sup> Thus, Congress could offer the states financial benefits in order to get them to comply, but it could not make the stakes too high. In other words, there is a somewhat ill-defined price control regime in the market for constitutional rights—the government can offer some inducement, but not too strong an inducement.

Again, a land use case shows this doctrine at its most vigorous. In *Dolan v. City of Tigard*,<sup>189</sup> a case decided seven years after *Nollan*, the Court embellished on *Nollan's* nexus requirement.<sup>190</sup> Here, the land was used for a plumbing and electric supply store next to a creek.<sup>191</sup> The owner wanted to double the size of the store and add a paved parking lot.<sup>192</sup> As conditions on the development, the city required the owner to dedicate open land for a public greenway adjoining the creek's floodplain and to agree to the construction of a pedestrian/bicycle pathway within the floodplain.<sup>193</sup>

The germaneness requirement was satisfied. The Court found both of these requirements to have the requisite nexus with the impacts of the project.<sup>194</sup> The Court found it obvious that "a nexus exists between preventing flooding along Fanno Creek and limiting

188. *Dole*, 483 U.S. at 210.

189. 512 U.S. 374 (1994).

190. *See Nollan*, 483 U.S. 825.

191. *Dolan*, 512 U.S. at 379.

192. *Id.*

193. *Id.* at 378-79.

194. *Id.* at 387.

development within the creek's 100-year floodplain," for the proposed development would expand the "impervious surface on the property" thereby "increasing the amount of storm water runoff into Fanno Creek."<sup>195</sup> Similarly, the Court found that a bike path would help relieve traffic congestion in the area that otherwise would be worsened by the development.<sup>196</sup>

The Court went on to add an additional requirement of "rough proportionality," saying that "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development's impact."<sup>197</sup> The Court found this new requirement had not been satisfied.<sup>198</sup> The government could not demonstrate any relationship between flood prevention and the requirement of public access to the greenway, and there was no showing that the bike path would actually be likely to offset the increased traffic demand.<sup>199</sup> Thus, the Court scrutinized the exchange to make sure that the government was not being greedy in demanding more in exchange for the permit than it could justify.<sup>200</sup>

Under some circumstances, one might have the opposite concern: that the government would pay too little in exchange for waivers of rights. Rights holders may sometimes make excessive concessions to the government. By doing this, rights holders allow their rights to be purchased too cheaply because certain rights have positive externalities, and the rights holder will not take these benefits into account when negotiating.<sup>201</sup> Thus, there would be a good argument for ensuring that the government pays more for certain speech rights than the offerees themselves would demand. Otherwise, offerees may sell out "too cheaply." But it is hard to see how Dolan would have harmed anyone but herself if she agreed to allow a bikepath on her property. On the contrary, there would presumably be a public benefit.

The concern in *Dolan*, however, was not that the stakes were too low (so the government would get what it wanted too cheaply), but rather that the stakes were too high, that it was too harsh to condition the building permit on agreement to the bike path. Thus, the bike path and the permit had to have some kind of proportionate value. This type of price control is intended to prevent coercion; the government cannot make an offer that is irresistible to offerees. For

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195. *Id.*

196. *Id.* at 387-88.

197. *Id.* at 375.

198. *Id.* at 394-95.

199. *Id.* at 395. The Court's insistence on an "individualized determination" supports the argument presented earlier that contracts of adhesion are disfavored. *See id.* at 375.

200. *See id.* at 395.

201. *See* Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 872 (1995).

example, in *Dole*, the Court seemed to attach importance to the limited financial inducement offered the states, which was only five percent of their highway funds.<sup>202</sup> So a fifty percent cut might have been invalid as coercive.

Threatening a five percent cut if *X* fails to do *Y* is roughly the same as offering a five percent bonus if *X* does do *Y*.<sup>203</sup> So *Dole* can be read as a ban on government overpricing just as well as it can be read as a ban on excessive threats. Under *Dole*, the government can promise a five percent increase in funding if the state complies with its demands, but it cannot promise to double funding because that would be coercive—an offer that the recipient “couldn’t refuse.”

Whatever the reason for policing the terms of the exchange, contract theory makes it clear that this is going to be a very difficult enterprise. In private law, courts have long since given up on any general effort to ensure that prices are fair. Values are often idiosyncratic, and the parties often have better information on valuation than the court is likely to have. This does not necessarily mean that it is wrong for courts to undertake this task in public law, where the policies may be different. But what it does mean is that judicial performance inevitably will be quite erratic. We should not be surprised, therefore, that to the extent unconstitutional conditions decisions attempt to assess the fairness of the exchange, the resulting doctrine will turn out to be somewhat incoherent. In particular, the “rough proportionality” test is probably going to be no more reliable in the land use context than a similar requirement would be in ordinary market transactions. If two neighbors were negotiating over an easement, courts would not take it on themselves to determine if the price was too high. The fact that one of the neighbors is the government seems irrelevant.

### *C. Rethinking the Substantive Restrictions*

The germaneness and proportionality requirements—or to put it another way, the currency and price controls—have four serious drawbacks. First, because they purport to be somewhat mechanical evaluations of the terms of the exchange, they save the court the trouble of considering whether there actually is a compelling reason for blocking a specific exchange. If, for example, a given exchange is objectionable because it treats the right in question like a commodity, the court should say so rather than invoking proportionality or germaneness.

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202. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

203. Only “roughly” because although ninety-five is, by definition, ninety-five percent of one hundred, one hundred is actually about 105.3% of ninety-five.

Second, because these restrictions block exchanges that the parties actually desire, they are likely to be met by evasion whenever transaction costs allow renegotiation. It is especially difficult to block these restrictions when the parties have a long-term or repeat relationship, because denying legal enforceability will not prevent informal *quid pro quos*. Denying legal enforceability to the resulting bargains may somewhat reduce their attractiveness, but it will always be problematic to get parties to eschew the bargains they prefer. This may be another reason to apply the restrictions more loosely, if they must be applied at all, when the bargain does not take the form of an adhesion contract.

Third, these doctrines require courts to make difficult judgments, at which they have not been very successful. The First Amendment cases, for example, show the difficulty of determining whether a funding restriction is logically related to a program's purpose, in part because that purpose can be formulated in different ways. If the Court were also to apply the proportionality test to other rights, it might encounter even greater difficulties in trying to determine whether the restriction on funding was proportional to some government purpose such as protecting children from pornography or encouraging childbirth over abortion. What metric could we apply to make this determination?<sup>204</sup>

Finally, these restrictions seem at least in tension with the autonomy values that probably underlie most constitutional rights. For example, limiting the kind of easement that a landowner can convey to the state in exchange for a permit is somewhat at odds with the core concept of property: owning an interest in land normally means that you can exchange it on whatever terms you prefer. Similarly, sovereignty normally includes the power to enter into transactions on whatever terms the government entity prefers. If a state is willing to waive its immunity to be sued in federal court for patent infringement in return for increased highway funding, state sovereignty would seem to imply that it should have the power to do so. (Certainly, there would be no constitutional objection if the federal government were to waive sovereign immunity for patent infringement in return for another country's promise of unrelated financial aid.) If we block these transactions, we should do so for reasons relating to defects in the bargaining process or third-party effects, rather than on the pretense that there is something inherently offensive about the terms of the bargain.

The Court has shown particular vigor in enforcing these substantive restrictions in the context of land use. This is puzzling. Property rights are inherently marketable, so treating property

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204. This may explain why the proportionality test has not, so far, appeared elsewhere.

interests like commodities is entirely appropriate. Moreover, the interests at stake in the cases have not been particularly weighty—the right to deny beach access or a bike path surely does not lie at the very heart of our constitutional pantheon or even at the heart of the Takings Clause. Finally, it may be especially difficult to enforce these restrictions on concessions by developers to the government because there are so many opportunities for informal bargains between developers and land use regulators.

Of course, proportionality is a desirable goal. The government should impose conditions on permits that are proportionate to the public interests involved, just as it should engage in regulation and taxation proportionate to the public interest. So, too, should the prices of goods be proportionate to their true values. But we have long since realized that enforcing this kind of proportionality requirement is as much beyond judicial competence in public law as it is in contract law. Indeed, the Court has recently declared that even in the takings context, it is not for judges to determine how much a land use restriction serves the public interest.<sup>205</sup> *Dolan* is an unwelcome aberration.

The proportionality test applied in *Dole* has the same flaw. How can we judge whether a five percent or twenty percent incentive is proportionate? Any sensible test would require that we determine the strength of the public interest served. For instance, surely no one would say that a funding condition critical to national security can be pursued only with mild inducements. If such a national security-based condition put heavy pressure on states to agree, so much the better. Even judging the degree of pressure on the states requires some sensitive judgments about political dynamics—the effect of a funding condition depends on the state's need for the benefit, the availability of alternative funding, and the degree of internal public support for the condition itself, not just on the percentage or dollar amount of the inducement. This hardly seems like a suitable inquiry for courts.

Thus, as in private law, it seems fruitless for courts in public law to take it on themselves to determine the fairness of bargains, except perhaps in the most extraordinary cases. In both public law and private law, strong incentives may make the recipients feel pressured. That may be unfortunate, but courts are ill-equipped to intervene.

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205. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

## VI. CONCLUSION

The problem of unconstitutional conditions is probably too difficult to yield to any one analytic technique. If more intuitive approaches had resolved the problem satisfactorily, there would be little reason to consider the default rule approach except for academia's thirst for novelty. In fact, the best that can be said for more intuitive approaches, such as tests based on coercion or germaneness, is that they are helpful under some circumstances. It seems wise, therefore, to try another way.

Whether a particular constitutional right should be alienable at all may be a difficult question, and perhaps current doctrine allows too much alienability. But given that a particular right has been determined to be alienable, what happens looks very much like a contract: the government provides some benefit in consideration of a waiver of the right. It is not too much to hope that contract theory might help illuminate this situation.

Contract theory suggests a greater focus on transaction costs, information asymmetries, and other potential flaws in the bargaining process, along with the possibility of adverse effects on the constitutional rights of third parties such as clients or customers. This analysis does not mean a free pass for conditional benefits. For example, in the abortion-counseling case (*Rust*), potentially serious third-party effects were present. Moreover, there may be reasons to object to bargains regardless of whether they serve the interests of the parties, such as maintaining a symbolic separation between personal rights and financial interests, or policing for improper government motivation. Courts need to be explicit about these justifications, however, rather than manipulating vague terms like coercion or germaneness to justify their decisions.

Contract theory is as illuminating for what it fails to explain as for what it explains. Unconstitutional conditions involve some problems without private law analogues—in particular, concerns about government motivation and about equality. Mixing these concerns with problems of coercion or involuntariness can only lead to misunderstandings.

Thus, what contract theory ultimately has to offer is not a full solution to the problem of unconstitutional conditions. Rather, the benefit is improved clarity in perceiving and sorting out the issues. A clear view of the unconstitutional conditions quagmire reveals a messy scene, with complex empirical and normative dimensions, rather than a crystalline logical structure. The doctrine of unconstitutional conditions is not, alas, a cathedral, no matter in what light we observe it. But it is better to get a clear view of the swamp rather than to fool ourselves into believing that there is a cathedral buried somewhere beneath the muck.