

# CONTRACTING AWAY RIGHTS: A COMMENT ON DANIEL FARBER’S “ANOTHER VIEW OF THE QUAGMIRE”

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## I. INTRODUCTION

Daniel Farber’s contribution to this Symposium suggests that some aspects of constitutional jurisprudence can be best understood by treating constitutional rights as default rules.<sup>1</sup> Specifically, he attempts to use the concept of default rules to clarify the hopelessly confused doctrine of unconstitutional conditions.<sup>2</sup> Professor Farber’s starting point is incontestable. Virtually everyone agrees that the unconstitutional conditions doctrine is a mess. To borrow Farber’s description, the doctrine is a quagmire: there is no generally accepted explanation for how the doctrine is supposed to work, what limits exist on the application of the doctrine, or even what purpose it is supposed to serve.<sup>3</sup> Various prominent academic commentators have offered different suggestions to clarify these issues,<sup>4</sup> but these com-

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1. See Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913 (2006).

2. *Id.* at 913-15.

3. *Id.* at 926-29.

4. Farber surveys the wide range of academic discussions of this subject, but a representative sample of the varying approaches can be gleaned from just three of the most important sources. See Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (focusing on the disparate bargaining power of government and individuals as the key to the unconstitutional conditions doctrine); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (arguing that preventing political favoritism is the central purpose of the unconstitutional conditions doctrine); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Re-*

mentaries explain the doctrine in very different ways and tend to propose different (and even inconsistent) solutions to reconcile the problems posed by the doctrine.

Farber's alternative explanation of the unconstitutional conditions doctrine initially seems like an attractive alternative to other prominent explanations of the phenomenon. In particular, Farber's explanation seems to account for the malleability of virtually all examples of unconstitutional conditions. As Farber notes, courts seem willing to override almost all supposedly unconstitutional conditions in some circumstances and often permit those who possess the underlying rights to waive the rights altogether.<sup>5</sup> Contrary to the implications of absolute protection conveyed by the doctrine's title, the rights protected by the unconstitutional conditions doctrine are themselves merely conditional. The fact that the rights holders can forgo the protection of these rights leads Farber to conclude that "rights" are, in fact, little more than default rules, which come into play only when the two parties (here, the government and the rights holder) have failed to come to a voluntary agreement about some contested matter.<sup>6</sup>

Although at first glance this description of the unconstitutional conditions doctrine (and of constitutional rights in general) seems to explain a great deal of what goes on in constitutional adjudication, upon closer examination this approach fails to capture the essence of rights—that is, it fails to capture the essence of the constitutionally mandated relationship between individual citizens and their government. Three reasons support this conclusion. First, I believe Farber overestimates the extent to which the courts have allowed rights to be alienable. Many—perhaps most—rights cannot be bargained away or abandoned by the rights holder. Second, even the rights that at first blush seem to be alienable may not really involve that phenomenon at all. For example, even if a rights holder has decided not to exercise a particular right, that right nevertheless has already served its purpose by framing the negotiation between the rights holder and the government.

Third, and most importantly, the notion that an individual rights holder can bargain away his or her rights fundamentally misconstrues the structural nature of constitutional rights in our system of limited government. In the American constitutional system, a constitutional right is only partly intended to benefit the person who immediately exercises that right. The other, equally important function of rights is to structure the government's relationship with the entire

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*ligion, Speech, and Abortion*), 70 B.U. L. REV. 593 (1990) (arguing that the unconstitutional conditions doctrine should be abandoned altogether).

5. Farber, *supra* note 1, at 917.

6. *Id.* at 914.

citizenry—including those who have no immediate intention of exercising the rights in question. The private contractual model of constitutional rights is incompatible with the structural function of those rights because the contractual model would permit the government essentially to contract for additional power without going through the only defined legal process—that is, amending the Constitution—by which the government’s power legitimately may be enhanced. These problems are magnified when one takes into account the disparity of bargaining power in negotiations between the government and vulnerable rights holders.

Parts II and III question the extent to which rights are typically alienable and discuss the various examples Farber provides to support his thesis. Part IV turns to the case against the alienability of rights, focusing in particular on the structural function of rights.

## II. ARE CONSTITUTIONAL RIGHTS ROUTINELY ALIENABLE?

The first cavil I have with Farber’s analysis is his presumption that alienability is the rule rather than the exception in the realm of constitutional rights. There is good reason to believe this is not true. It is not difficult to assemble a list of constitutional rights that are not only inalienable, but which would have very little meaning if they were made subject to bargaining between rights holders and the government.

Consider first the Thirteenth Amendment’s prohibition of slavery and involuntary servitude.<sup>7</sup> If constitutional rights were routinely subject to contract-style bargaining, then the ban on slavery and involuntary servitude would have no substance. Of course, slavery itself is not subject to the contractual model because a slave is bound over to his or her “owner” without receiving any benefit in exchange. But it is not difficult to conceive of forms of enslavement that fall within the Thirteenth Amendment’s proscription and are, in fact, models of the contracting away of constitutional rights and liberties. We do not have to speculate about such cases because the Supreme Court’s Thirteenth Amendment jurisprudence already provides us with an example in the peonage cases decided in the early years of the twentieth century. In *Bailey v. Alabama*,<sup>8</sup> the Court struck down an Alabama criminal statute that was used to enforce contracts for labor. According to the Court,

If the statute in this case had authorized the employing company to seize the debtor and hold him to the service until he paid the fifteen dollars, or had furnished the equivalent in labor, its invalidity would not be questioned. It would be equally clear that the State

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7. U.S. CONST. amend. XIII, § 1.

8. 219 U.S. 219 (1911).

could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt.<sup>9</sup>

The fact that the consent to the labor contract may have been freely given did not matter—the debtor could not bargain away his right to be free of indentured servitude.

In other constitutional areas the Court has not provided such a clear-cut renunciation of bargaining, but it is not difficult to extrapolate such an absolute inalienability rule from the Court's jurisprudence in these areas. In the Eighth Amendment area, for example, the Court has repeatedly emphasized that certain forms of punishment fall outside the scope of anything the government can impose, without regard to the desires of the rights holder. The death penalty, for example, may be constitutionally imposed only upon someone who commits an intentional crime that results in the death of a victim or victims. Specifically, the death penalty may no longer be imposed for the crime of rape because to do so would violate the proportionality mandate of the Eighth Amendment's cruel and unusual punishment provision.<sup>10</sup> The Court's absolutist phrasing of the right to be free from cruel and unusual punishments could not be overridden by a contractual deal between a state and a prisoner convicted of rape who would prefer death to the (constitutionally permissible) punishment of life imprisonment. Along the same lines, the state could not circumvent the Court's Eighth Amendment prison conditions rulings by bargaining with prisoners to consent to imprisonment in a facility whose conditions fell short of the Eighth Amendment minimum, in exchange for a shorter term of imprisonment.

Even the most conservative Justices on Eighth Amendment matters presumably would not subject to bargaining the relatively few rights they recognize within the Eighth Amendment. Justice Thomas, for example, has expressed the view that the Eighth Amendment limits only the legislature's ability to incorporate excessively severe punishments into a criminal statute.<sup>11</sup> It is hard to conceive how Justice Thomas could prohibit the government from imposing a particular level of punishment for a crime as a general matter but, then in individual cases, permit the government to use its bargaining power to negotiate exactly the same unconstitutionally severe punishment for the same crime.

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9. *Id.* at 244.

10. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (holding that the imposition of a death sentence for the crime of rape would be grossly disproportionate and cruel, in violation of the Eighth Amendment).

11. *See Helling v. McKinney*, 509 U.S. 25, 38-40 (1993) (Thomas, J., dissenting) (arguing that the Eighth Amendment limits only punishments imposed under statutory provisions by juries and judges and does not apply to post-adjudication harms suffered by prisoners).

The right to vote is another example of a logically inalienable right.<sup>12</sup> We know that the government cannot impose a poll tax as a condition on exercising the right to vote.<sup>13</sup> Could those who control the government avoid this restriction on the authority to manipulate the composition of voting lists based on wealth by simply offering all those who agree not to vote a check for five hundred dollars? Such a program would undermine the principle of an independent and universal electorate to exactly the same extent as the poll tax regimes of the segregation era, and the Court would almost certainly treat this scheme as equally impermissible—regardless of the extent to which some potential voters might sincerely want to enter into the bargain and obtain remuneration for the apathy that many of them routinely demonstrate for free.

A fourth example of inalienability involves privacy rights. The modern era in constitutional privacy protection began with a case in which the Supreme Court noted the dangers inherent in allowing the state to determine who can procreate and who cannot.<sup>14</sup> “The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.”<sup>15</sup> In several cases in recent years, prosecutors adjudicating criminal cases involving sex crimes have occasionally offered offenders the option of taking a shorter prison sentence in exchange for undergoing surgical treatments that inhibit or exterminate the offender’s right to procreate.<sup>16</sup> The dangers of allowing the state to regulate these matters are hardly mitigated when a criminal defendant consents to give up the right to procreate in order to avoid the application of the state’s criminal punishment authority.<sup>17</sup>

But the potential threat the concept of rights bargaining poses to procreative and similar privacy rights does not end with the imposition of punishments for sexual offenses. It could easily extend as well to the area of social welfare benefits. In one case, for example, a federal district court described how “an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible steriliza-

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12. U.S. CONST. amend. XV, § 1.

13. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

14. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

15. *Id.* at 541.

16. For a description of one such case, see Tamar Lewin, *Texas Court Agrees to Castration for Rapist of 13-Year-Old Girl*, N.Y. TIMES, Mar. 7, 1992, at A1.

17. See generally Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615 (2000) (discussing the various reasons why the government should not be allowed to impose unconstitutional punishments through plea bargaining).

tion.”<sup>18</sup> The modern legal culture’s embarrassment over such pre-modern legal artifacts as *Buck v. Bell*<sup>19</sup> is such that few if any judges today are likely to uphold an official program permitting a recipient to bargain away her uterus for marginally greater welfare benefits.

One of Farber’s most prominent examples of alienable rights involves the First Amendment right of free speech.<sup>20</sup> I will address his specific example of government employee speech below,<sup>21</sup> but for present purposes, it is worth noting that there are large swaths of First Amendment free speech jurisprudence in which the concept of alienability would be anathematic. Political speech is an obvious starting point. Consider a hypothetical statute analogous to the voting rights measure cited above. Could the government pass a general statute offering all citizens five hundred dollars if they gave up for a given period of time their right to speak out publicly on a certain issue? Likewise, could the government formalize a system that provided favorable treatment (for example, expedited licensing approvals) for applicants who publicly express support for the government’s policies (by signing a petition supporting a public referendum favored by the government, for example)? Under a pure bargaining model, these mechanisms for purchasing the opposition’s silence would be permissible. Allowing the government to use its authority to bargain for the silence of speakers (especially speakers who may not have sufficient financial resources to resist the bargain) would effectively undermine the First Amendment’s crucial role in preventing the government from distorting the marketplace of ideas.<sup>22</sup>

Public forums present related constraints on the government’s ability to bargain for a reduction in a speaker’s free speech rights. It is boilerplate First Amendment doctrine that the government may not exclude all speech from a traditional public forum such as a park

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18. *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977).

19. 274 U.S. 200, 205, 207 (1927) (upholding an order permitting the sterilization of a “feeble-minded white woman” living in a state hospital, on the ground that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.”).

20. See Farber, *supra* note 1, at 920-23.

21. See *infra* notes 27-58 and accompanying text.

22. For an excellent discussion of the necessary limits of the unconstitutional conditions doctrine in the area of government subsidized speech, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992). Professor Cole proposes a “spheres of neutrality” approach analyzing government attempts to regulate subsidized speech. Under this approach, certain institutions, such as public universities, public forums, and the press, are protected from government regulation even if they receive government subsidies because First Amendment doctrine “reflects an implicit commitment to enforcing spheres of independence and neutrality in institutional contexts where governmental content control would undermine public debate, and where neutrality is consistent with the purpose of the institution.” *Id.* at 683.

or a sidewalk and may only limit speech based on content if the government can show that the regulation is necessary to serve a compelling interest.<sup>23</sup> The rules governing designated public forums are more flexible, but even in a designated limited public forum, the government may not engage in viewpoint discrimination<sup>24</sup> and may not close the forum in response to speech that the government does not favor.<sup>25</sup> These rules are absolute and nonnegotiable. The government cannot say to any speaker “you may use our public forum, but only if you speak out in favor of the government,” nor may the government exercise the usual rights of contracting parties to decline to rent its property to speakers with whom the government disagrees.<sup>26</sup>

These are merely a sample of what could be a very long list of proposals to permit the bargaining away of rights, none of which would be likely to gain the support of even a very conservative and rights-hostile Supreme Court. Other examples might include a government promise of subsidized student loans for individuals agreeing to attend government-approved churches four times a month; government-subsidized mortgages for homeowners willing to sign away in advance any claim of a Fourth Amendment right to be free of warrantless searches; and a welfare program that promises greater benefits to recipients who give up in advance any right to a trial if they are subsequently charged with a violent crime.

In short, there is ample cause to doubt Farber’s central proposition that the courts frequently permit rights to be bargained away. Farber does give some examples, however, of major areas of constitutional law in which the courts do seem to routinely permit bargaining over the scope of rights. Upon closer examination, however, these examples do not necessarily support the thesis that rights may routinely be bargained away. Some of Farber’s examples do not involve rights at all; some of them do not really involve bargaining; and some of them involve bargaining under the large, dark shadow of a comprehensive body of rights. At the very least, even when a rights holder decides not to exercise his or her rights, the existence of the rights nevertheless dictates the relationship between the rights holder and the government.

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23. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

24. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (describing the constitutional rule “forbidding the State [from exercising] viewpoint discrimination, even when the limited public forum is one of its own creation”).

25. *See Student Gov’t Ass’n v. Bd. of Trs. of Univ. of Mass.*, 868 F.2d 473, 480 (1st Cir. 1989) (“Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, or close the forum solely because it disagrees with the messages being communicated in it.”).

26. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (holding that the city of Chattanooga violated the First Amendment when it refused to rent a municipal auditorium for a production of the rock musical, *Hair*).

### III. THE INERADICABLE RESIDUE OF RIGHTS

In the face of multiple instances in which the government is denied the authority to bargain away the rights of rights holders, Farber offers four examples of constitutional rights that are routinely the subject of bargaining. These examples include conditional subsidies, plea bargaining, conditions on the use of property, and state sovereignty. Once more, at first glance Farber seems to state a strong case; in each of these areas government bargaining is common, and rights holders routinely seem to give up their rights in exchange for some government benefit. Upon closer examination, however, these are all imperfect examples of the rights bargaining thesis.

#### A. *Conditional Subsidies and the Problem of Government Employment*

The government employee and subsidized social services cases present an obvious counterexample to the broad claim that the government generally may not attempt to purchase rights from its citizens. In the First Amendment context, Farber uses these cases to rebut the routine assumption that the government generally is not permitted to purchase the silence of its critics. Farber's claim, in contrast to the routine assumptions about inalienable free speech rights, identifies the category of First Amendment precedents involving government subsidies as a "dramatic illustration of the government's ability to obtain opt-outs from constitutional rights in return for financial benefits."<sup>27</sup>

Much of what Farber says about bargaining in the First Amendment context rests heavily on precedents involving government employees and government contractors. But (as Farber carefully acknowledges) the government contract and government employee cases do not provide clear-cut support for Farber's position.<sup>28</sup> First of all, these cases are not at all consistent. On one hand, as Farber notes, the Court seems to have broadly endorsed bargaining in *Rust v. Sullivan*,<sup>29</sup> in which the Court upheld a very broad regulation denying federal funds to any person or organization that lobbied, endorsed, or facilitated abortion, or that was even within the same corporate structure as someone who lobbied, endorsed, or facilitated abortion. The Court's opinion upholding this regulation is very expansive and seems to acknowledge no exceptions. As Farber summarizes the Court's perspective on the clinic workers' First Amendment

27. Farber, *supra* note 1, at 924.

28. *Id.* at 920-24.

29. 500 U.S. 173 (1991).

claims in *Rust*, “[i]n return for government funding, they gave up the right to communicate freely and candidly with their patients.”<sup>30</sup>

The problem with this interpretation of *Rust* is that the Court never aggressively pursued the most restrictive implications of *Rust* and started limiting the scope of the *Rust* principle almost as soon as its *Rust* opinion was issued. Four years after *Rust* in *Rosenberger v. Rector and Visitors of the University of Virginia*,<sup>31</sup> the Supreme Court rejected the University of Virginia’s attempt to use *Rust* to justify its limitations on access to student activity funds. The Court distinguished *Rust* on the grounds that in that case “the government did not create a program to encourage private speech but instead used private speakers to transmit specific information pertaining to its own program.”<sup>32</sup> According to the Court, when the government creates and finances a program to encourage private speech (as in *Rosenberger*), the program is governed by all the normal First Amendment restrictions, which cannot be purchased by the government with program funds.<sup>33</sup>

In two subsequent government funding cases, the Court interpreted the applicable statutes very narrowly to avoid a conflict between the government’s funding decisions and the First Amendment. In *National Endowment for the Arts v. Finley*,<sup>34</sup> for example, the Court upheld an amendment to the appropriations bill for the National Endowment for the Arts. The amendment required the Endowment to “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public” when making grants.<sup>35</sup> The Court held that this did not violate the First Amendment because the Court interpreted the provision in such a way that it “merely adds some imprecise considerations to an already subjective selection process.”<sup>36</sup> Thus, the provision survived First Amendment scrutiny only because the Court effectively robbed it of any substantive effect. As Justice Scalia noted snidely in objecting to the majority’s evisceration of the statute, “ ‘The operation was a success, but the patient died.’ ”<sup>37</sup>

Similarly, in *United States v. American Library Association*,<sup>38</sup> the Court upheld the Children’s Internet Protection Act (CIPA), which required libraries accepting federal funds to use Internet filters on

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30. Farber, *supra* note 1, at 924.

31. 515 U.S. 819 (1995).

32. *Id.* at 833.

33. *Id.* at 834.

34. 524 U.S. 569 (1998).

35. 20 U.S.C. § 954(d)(1) (2000).

36. *Finley*, 524 U.S. at 590.

37. *Id.* at 590 (Scalia, J., concurring).

38. 539 U.S. 194 (2003).

publicly accessible computers.<sup>39</sup> Farber cites the part of the Court's opinion in which the plurality relied "squarely on *Rust*" to permit the government to condition its funding on the recipients giving up their First Amendment rights.<sup>40</sup> But, in fact, a majority of the Court did not endorse this proposition. Three Justices would have held CIPA unconstitutional.<sup>41</sup> Two other Justices concurred in the plurality's judgment that CIPA was constitutional, but did not even mention *Rust*, and based their decision on the fact that the statute allowed adult patrons to request that the filter be disabled.<sup>42</sup> As Justice Kennedy noted, "there is little to this case"<sup>43</sup> given the fact that the statute itself gave patrons the ability to access the entire Internet, thus removing the claim that the government was requiring censorship of protected material.

Most significantly, however, in the most recent case in which the Court actually considered the claim that the government may require those receiving government subsidies to give up their First Amendment rights, the Court has definitively rejected the entire concept. In *Legal Services Corp. v. Velazquez*,<sup>44</sup> the Supreme Court struck down a statute imposing restrictions on the kinds of claims government-financed lawyers could raise in court. The government defended the limitations by arguing that they were indistinguishable from the restrictions imposed on clinic workers in *Rust*.<sup>45</sup> The Court rejected the analogy, holding that *Rust* applied only to instances in which the government was hiring speakers to speak on the government's behalf.<sup>46</sup> "The lawyer," on the other hand, "is not the government's speaker."<sup>47</sup> Thus, after *Velazquez*, the government may require speakers to give up their First Amendment rights as a condition of accepting government money only in situations in which the speaker is literally being hired to read the government's script.

Whether this interpretation is consistent with the facts of *Rust* is highly dubious. The regulations at issue in *Rust*, after all, applied to medical professionals, including doctors, whose professional responsibility would preclude them from subordinating their patients' interest in full information to the government's ideological opposition to some of that information. Based on the most recent cases in this area, therefore, one could plausibly conclude (as Justice Scalia did in

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39. See Children's Internet Protection Act, Pub. L. No. 106-554, 114 Stat. 2763A-335.

40. See Farber, *supra* note 1, at 928.

41. See *Am. Library Ass'n*, 539 U.S. at 220 (Stevens, J., dissenting); *id.* at 231 (Souter, J., dissenting) (joined by Justice Ginsburg).

42. See *id.* at 214 (Kennedy, J., concurring); *id.* at 215 (Breyer, J., concurring).

43. *Id.* at 214 (Kennedy, J., concurring).

44. 531 U.S. 533 (2001).

45. *Id.* at 540.

46. *Id.* at 541.

47. *Id.* at 542.

*Velazquez*<sup>48</sup>) that the Court has now either abandoned *Rust* altogether or carved out an intellectually indefensible exception for government-subsidized lawyers. At the very least, it is clear that in every single opinion after *Rust* the Court hedged on its application, carved out broad exceptions to it, and finally defined its scope in a way that seems to undercut its very holding. *Rust*—or at least the broad implication that the government may systematically require recipients of government funds to give up rights in order to obtain the funds—is no longer valid.

The other cases Farber cites involving limits on government subsidized speech all involve limitations imposed on government employees. Farber cites these cases for the proposition that “the government [may] restrict [First Amendment] rights in exchange for providing benefits.”<sup>49</sup> It is certainly true that the Court has given government employers substantial leeway in restricting the speech of government employees. Farber focuses on the underlying spirit of these decisions as it was once articulated by Justice Holmes: A policeman “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”<sup>50</sup> The problem with this approach, however, is that the Court has never come close to adopting as a general rule Justice Holmes’s draconian no-rights approach to government employee speech.<sup>51</sup> Indeed, the Court has asserted flatly that this position has been “uniformly rejected.”<sup>52</sup>

In *Pickering v. Board of Education*,<sup>53</sup> the Court provided explicit protection of public employee speech: “[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”<sup>54</sup> In subsequent cases, the Court has introduced

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48. *Id.* at 552-59 (Scalia, J., dissenting) (considering and rejecting each of the Court’s attempts to distinguish *Rust* from *Velazquez*).

49. Farber, *supra* note 1, at 920.

50. *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

51. The Court also rejected Holmes’s no-rights notion in another government subsidized speech context: the public forum cases. Holmes’s view was that members of the public had no First Amendment rights to speak on government-owned property such as public parks. *See Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895), *aff’d*, 167 U.S. 43, 47 (Mass. 1897) (“For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”). The Court rejected this no-rights position from the inception of the public forum doctrine in the 1930s. *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

52. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 606 (1967) (quoting *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965)).

53. 391 U.S. 563 (1968).

54. *Id.* at 574.

complications into the government employee free-speech equation by permitting government employers to sanction employee speech that is not on a matter of public concern or which disrupts the workplace.<sup>55</sup> In other cases, the Court has expressed its willingness to defer broadly to the employer's perceptions of disruption.<sup>56</sup> But the Court has continued to emphasize that the government cannot force employees to forgo their constitutional right to speak out on matters of public concern as a condition of taking the government's offer of employment, nor can the government offer nonpolitical jobs only to those who agree to adopt a particular political affiliation.<sup>57</sup>

When these cases are considered as a whole, the underlying principle is far narrower than Farber suggests. Indeed, these cases may not represent bargaining over rights at all. These cases do not, as Farber argues, stand for the broad proposition that the government can condition employment on speech restrictions. Rather, these cases represent the much more limited proposition that the government can require its employees to do their jobs. The only restrictions on speech permitted by the courts are restrictions on speech that interfere with the job. At least as a conceptual matter, this is no more an interference with the employee's speech rights than the requirement that a government employee actually stay at his or her post for the full workday is a violation of the Thirteenth Amendment's protection against indentured servitude. The employee is not bargaining away his or her free speech right by agreeing not to disrupt the workplace—even if the disruption takes the form of speech. It is true that some of the cases may have interpreted the concept of "disruption" very broadly and deferred too easily to employer perceptions in identifying workplace disruption,<sup>58</sup> but the underlying principle that a government employee is expected to do his or her job is neither incompatible with the First Amendment nor supportive of the rights bargaining theory.

The other cases Farber cites as examples of conditional subsidies involve the Court's refusal to require the government to finance abortion in programs funding a broad range of other medical procedures.

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55. See, e.g., *Connick v. Myers*, 461 U.S. 138, 146 (1983) ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.")

56. See *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (deferring broadly to public employer's factual assumptions about what employees have said).

57. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990) (holding that civil servant public employee jobs may not be conditioned on political affiliation or support).

58. See *Waters*, 511 U.S. at 673 ("[W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.")

In these cases the Court has upheld programs under which the government has refused to include both nontherapeutic<sup>59</sup> and therapeutic abortions<sup>60</sup> in the list of procedures financed under government-funded Medicaid statutes. Again, Farber reads these cases as supporting the proposition that the government can bargain away Medicaid participants' right to have an abortion in exchange for receiving the government subsidy. According to Farber, these cases stand for the proposition that "the government can provide benefits for women who choose not to exercise the right, thereby purchasing their waiver of the right to an abortion."<sup>61</sup> A more plausible reading of these cases is the rationale the Court itself provides: "It simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."<sup>62</sup> There are obvious problems with the Court's rationale, in that it allows the "Legislative Branch to impose the political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual."<sup>63</sup> But neither the Court's own explanation of its behavior nor the criticism of the Court's approach has anything to do with the legitimacy of bargaining for rights; rather, it has to do with the fact that the Court refuses to prohibit the government from excluding the one procedure that happens also to be a fundamental right from a funding program that covers a range of different procedures.

The abortion funding cases are not good examples of rights bargaining because there is no bargain. Poor women who are pregnant get nothing from the government for having a child. The government gets what it wants not by bargaining with the woman, but rather by *refusing* to bargain, or in any other way getting involved with the woman. The only way the abortion funding cases could be construed as rights bargaining cases would be if the government was attempting to use general public benefits to bribe the woman into having a child (or not having a child). At least one district court has seen such a case, and the court specifically rejected any claim that the government has the authority to offer government aid recipients a money-for-rights bargain.<sup>64</sup>

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59. *Maier v. Roe*, 432 U.S. 464 (1977).

60. *Harris v. McRae*, 448 U.S. 297 (1980).

61. Farber, *supra* note 1, at 923.

62. *Harris*, 448 U.S. at 316.

63. *Id.* at 332 (Brennan, J., dissenting).

64. *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977) (holding unconstitutional efforts to coerce aid recipients to submit to sterilization in return for greater government benefits).

In sum, the most obvious examples of the bargaining-for-rights thesis in fact are not bargaining cases at all, or are bargaining cases only in very limited senses of the term. The other three broad categories of cases Farber cites provide even less support for the bargaining thesis.

### *B. Plea Bargaining*

In addition to the government subsidy cases, plea bargaining seems like another obvious example of a situation in which the government explicitly offers something of value in exchange for someone giving up constitutional rights. Farber's description of the plea bargaining process initially seems to be an unobjectionable assessment of the situation: "The Bill of Rights provides elaborate protections for potential criminal defendants. . . . As it turns out, all of these rights can be bartered away—and they usually are."<sup>65</sup> The obvious reality, as Farber points out, is that most criminal cases are resolved by plea bargaining rather than a full-fledged trial on the merits of the indictment, which would ordinarily involve an aggressive attempt by the defense to exercise the full panoply of Fourth, Fifth, and Sixth Amendment rights.

My disagreement with Farber is not with his rendition of the facts of the criminal adjudication process, but rather with the question whether the reality of pervasive plea bargaining really supports the rights bargaining thesis. I think it does not; because in the overwhelming number of cases, the focal point of the plea bargaining process is not the exercise of constitutional criminal procedure rights, but rather the more basic fact (in most criminal cases) of certain guilt. The fact is that most criminal defendants who eventually plead guilty to a criminal charge actually committed the crime, in most cases the government can prove the defendant's guilt, and in most cases none of the constitutional rights applicable to criminal trials could be exercised in a way that would make the slightest difference to the ultimate adjudication of guilt. When a criminal defendant accepts a plea bargain, therefore, he or she is agreeing to waive the exercise of a constitutional right that probably would not have mattered anyway.

If a criminal defendant accepts a plea bargain in a context in which the exercise of a constitutional right might have made a difference (in the sense that it might have led to the exclusion of important evidence collected in violation of the Fourth Amendment or a confession obtained in violation of the Fifth Amendment), then presumably the plea accepted by the defendant will reflect the rights involved. That is, the government will have offered the defendant a better deal

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65. Farber, *supra* note 1, at 924.

than the defendant would have gotten in the absence of the constitutional violation. The acceptance of the plea bargain is not, however, evidence of the defendant “bartering away” his or her rights; rather, it is an example of a defendant recognizing that the exercise of the constitutional rights might not have been sufficient to undermine other clear evidence of his or her guilt. If anything, this scenario is an example of the government bartering away its authority to prosecute the defendant for a more serious crime or impose on the defendant a harsher sentence—in recognition of the fact that its agents violated the defendant’s rights and therefore cast into some doubt the government’s ability to convict the defendant of any crime. The point is: the rights involved did not disappear or become irrelevant; if the government violated the defendant’s constitutional rights in a significant way, then the rights were at the forefront of everyone’s minds during the plea bargaining process.

In sum, even though a plea bargain appears to fit precisely the contract model of relating the right holder and the government, in fact a plea bargain occurs only after the constitutional rights in question have already served their function of structuring the government’s action toward the individual defendant. In preparing the case that leads to the plea bargain, constitutional rules will dictate virtually every aspect of the government’s behavior, in ways that the government cannot avoid through bargaining. The government’s entire preparation of its case will be dictated by Fourth, Fifth, and Sixth Amendment rules, and the bargain that is offered to the defendant will reflect these rules. These rules are not really bargained away, because the plea bargain will only occur after the defendant’s lawyer is assured that the government has a sufficient quantum of legally obtained evidence to make a guilty verdict at trial a serious possibility.

### *C. Conditions on the Use of Property*

Farber’s third example of the rights bargaining thesis involves bargains between property owners and the government over restrictions on property that the government would not be allowed to impose in the absence of a bargain. On its face, this is the example cited by Farber that seems to fit the rights bargaining thesis best. There are several characteristics of this category of cases, however, which make it difficult to extrapolate from the property cases any general principle regarding rights bargaining that could be applied directly to other areas of constitutional law.

The first distinctive characteristic of the property cases is the nature of the thing being negotiated. In contrast to Farber’s other rights bargaining examples, the property rights cases involve a process in which the government and the rights holder are negotiating

over similar matters having similar characteristics. In the property cases, both the government and the rights holder are negotiating over a single, concrete item: the piece of property. In the cases referred to by Farber, the rights holder wants to use the piece of property in question one way, and the government wants exactly the same piece of property used another way. This is significant because both the rights holder and the government are negotiating with identical measures of value. A restriction on a piece of property can be quantified fairly easily, and both the rights holder and the government will have access to the same valuations. Determining that a limitation on a particular parcel of property will devalue that property by one million dollars will have the effect of focusing very closely the negotiation between the government and the rights holder.

By contrast, in the other examples of rights bargaining cited by Farber, the things supposedly being bartered will have very different measures of value, if indeed they could be calculated or compared at all. The value of a government job, for example, could be valued based on the annual salary attached to that job; but what would be the value to the job applicant of giving up his or her First Amendment right of free speech? The comparative valuation problem becomes infinitely more complicated when adding into the equation the social costs of abridging the free speech rights of government employees.<sup>66</sup> Thus, one reason for permitting property owners to bargain away their rights under the Takings Clause may be that the nature of the bargain is such that in property rights cases the rights holder will be more likely to understand what he or she is giving up (and therefore what he or she should demand in exchange from the government for giving up the right) than in cases dealing with other types of rights.

The second distinctive characteristic of the property cases is the nature of the constitutional right involved in the bargain. In cases dealing with free speech or constitutional criminal procedure rights, the rights involved are by their nature less flexible and more definitive than property rights. In First Amendment cases, for example, the government is prohibited altogether from engaging in viewpoint discrimination and virtually always prohibited from engaging in content discrimination. "Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."<sup>67</sup>

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66. With regard to the social value of individual rights, see *infra* notes 97-110 and accompanying text.

67. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

These rules are inflexible and strictly confine the extent to which the government can regulate speech.

In contrast to the strict rules regarding government regulation of speech, the rules regarding government regulation of property under the Takings Clause are comparatively flexible and lenient. As a routine matter, the government can engage in all sorts of regulation that falls short of a physical taking of the property,<sup>68</sup> or a permanent deprivation of all beneficial use of a parcel of property,<sup>69</sup> and the Supreme Court has expressed little inclination to second-guess the government's purposes for property regulation.<sup>70</sup>

The final distinctive characteristic of the property cases is the identity of the parties who typically participate in a negotiation between the government and the property owner. In the two other major areas of individual rights cited as examples by Farber, there are usually major disparities in bargaining power between the individual rights holders and the government. Moreover, in other constitutional areas, there is nothing comparable to the Takings Clause "just compensation" requirement. In the takings context, the relevant constitutional provision itself<sup>71</sup> expressly permits the thing in question (the property) to be "purchased" by the state in exchange for "just" payment. Thus, in other areas of constitutional law a "bargain" between the government and an individual may result in grossly disparate relative outcomes. In a dispute between the government and a job applicant for a government job, or a contest between a criminal defendant and the state apparatus of criminal investigation and prosecution, the rights holders are at a distinct disadvantage in both resources and information, and the government is under no obligation

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68. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries," designed to allow "careful examination and weighing of all the relevant circumstances."

*Id.* at 321-22 (citations and footnote omitted).

69. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (taking of property categorically found "where regulation denies all economically beneficial or productive use of land").

70. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (broadly deferring to government's rationale when determining whether the exercise of eminent domain authority satisfies the Takings Clause "public use" requirement).

71. U.S. CONST. amend. V.

to reach a result that gives the individual a “just” exchange for whatever benefit the government obtains as a result of the bargain. For this reason, bargaining over rights is inherently more problematic outside the Takings Clause context.

In disputes over the uses of property, on the other hand, the government and the rights holders often are both well financed and have equivalent incentives to pursue their interests aggressively. Even in situations in which the government seeks to obtain the property of relatively less powerful individuals—as in *Kelo v. City of New London*<sup>72</sup>—the government ultimately may take the property only in exchange for paying the owner a “just” price. In sum, no bargaining occurs in most regulatory takings cases because the property owner cannot prevent the government from regulating the property, as long as the property retains some value. If the property is robbed of all value by a regulation, or if the property is physically taken, then no bargaining occurs because the government has no choice but to pay “just” compensation.

The cases cited by Farber as evidence of bargaining involve the relatively rare situations in which the Takings Clause has prohibited the government from regulating a particular piece of property, but the government effectively enforces the regulation anyway by negotiating a deal under which the property owner consents to the regulation in exchange for some other benefit from the government. The crucial cases illustrating this scenario are *Nollan v. California Coastal Commission*<sup>73</sup> and *Dolan v. City of Tigard*.<sup>74</sup> Although these cases appear to present straightforward examples of rights bargaining, the key to these cases is the limits the Court places on the government’s ability to enter into the bargain with the property owners. In these cases the Court held that two limits apply to government efforts to exchange benefits for regulatory concessions by property owners: first, there must be a “substantial” nexus between the nature of the property regulation that the government seeks to enforce and the benefit offered to the property owner in exchange for agreeing to the regulation;<sup>75</sup> and second, the value of the benefit must be proportional to the value of the regulation.<sup>76</sup> In *Nollan*, the Court applied these limits to strike down an attempt by the California Coastal Commission to extract a public-access easement from a property owner in exchange for granting a permit to build a new house.<sup>77</sup> In

72. 125 S. Ct. 2655 (2005).

73. 483 U.S. 825 (1987).

74. 512 U.S. 374 (1994).

75. *Nollan*, 483 U.S. at 841.

76. *See Dolan*, 512 U.S. at 395 (the value of the benefit must be related “both in nature and extent” to the value of the regulation).

77. *Nollan*, 483 U.S. at 837.

*Dolan*, the Court applied these limits to prohibit a city planning commission from requiring a landowner to dedicate part of her land to a public greenway and bicycle path in exchange for a permit to expand her store and pave her parking lot.<sup>78</sup>

Farber objects to both of the limits the Court announced in *Nollan* and *Dolan* because, among other things, the limits undermine the bargain that the parties want to engage in.<sup>79</sup> In the first place, the description is not accurate, given the fact that only one party in these cases really wanted to bargain at all. But even if this description were accurate, the fact that the limits undercut the bargain is exactly the point. The fact that the Court imposes such rigid restrictions on these bargains indicates the Court's deep skepticism about the entire concept of rights bargaining—even in an area in which the bargaining thesis would presumably be most apt. Farber himself provides an explanation for the Court's skepticism (in this area and others): "Rights holders may sometimes make excessive concessions to the government [thereby allowing 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>80</sup> These externalities are part of the structural function of rights, the preservation of which is one of the main reasons for rejecting the general notion that rights may be bargained away by the government.<sup>81</sup>

If the constrained bargaining that occurs in this small category of property cases provides any support for Farber's rights bargaining thesis, it is only in the very limited circumstances defined by the facts of the cases. The *Nollan/Dolan* cases do not even represent the typical Takings Clause case, much less the general range of constitutional rights cases. The usual Takings Clause dispute does not involve this sort of bargaining between a property owner and the government, but rather the blunt exercise of power by the state to regulate the property without regard to the desires of the property owner. Even in the limited context of Takings Clause cases, therefore, examples of bargaining are relatively rare, they have very different factual backgrounds than other sorts of constitutional disputes, property rights are not that strong to begin with, and the parties in property rights cases are often in a much stronger position vis-à-vis the government than rights holders in other types of disputes. In short, there is very little reason to believe that the model of rights bargaining that the courts permit in a relatively rare and conceptually dis-

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78. *Dolan*, 512 U.S. at 374.

79. Farber, *supra* note 1, at 948.

80. *Id.* at 947.

81. See *infra* notes 97-110 and accompanying text.

tinctive set of property rights cases can or should be extended to the more typical sorts of constitutional cases.

#### *D. State Sovereignty and "States' Rights"*

The first area cited by Farber as evidence of rights bargaining is the area of so-called states' rights.<sup>82</sup> This area is easy to dispense with because in fact these cases involve neither rights nor bargaining.

There is an abundance of literature explaining the multiple problems inherent in the cases Farber discusses in the part of his article dealing with state sovereignty.<sup>83</sup> The important point for present purposes, however, is that these cases do not belong in a discussion of bargaining and individual rights because the state sovereignty cases do not involve rights at all. The term "states' rights" is a misnomer. These are federalism cases, which pertain to competing claims to government authority, not cases about rights. They are cases allocating (and arguably misallocating) political authority between two or more competing political entities. Nothing in the Supreme Court's Tenth or Eleventh Amendment cases bears any resemblance to the sorts of individual rights at issue in the other areas discussed by Farber. The other areas all involve some aspect of constitutional protection for individuals against the collective decisions of a hostile political majority. The federalism cases, on the other hand, have the effect of taking political power from one politically powerful entity and allocating it to another politically powerful entity. In this context, it makes little sense to talk of rights, except in the sense that an individual or collective entity that is allocated complete power over a certain area has the "right" to do whatever that entity wants, free of external control.

82. Farber, *supra* note 1, at 918-20.

83. Heavy criticism has been leveled at both the Tenth and Eleventh Amendment manifestations of the state sovereignty concept. The criticism of the Tenth Amendment version of the concept of state sovereignty has focused on the conceptual and practical difficulties of insulating the states from federal mandates and the weak historical record supporting judicial enforcement of the Tenth Amendment against the federal government. For a critique that includes each of these points, see Evan H. Caminker, *State Sovereignty and Subordination: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995). The criticism of the Eleventh Amendment version of the state sovereignty concept tends to focus on both the practical problems of immunizing the state, see Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201 (2001) (arguing that Eleventh Amendment immunity is inconsistent with the structure of constitutional constraints on government), as well as the historical inaccuracy of the Court's justifications for expanding the states' Eleventh Amendment immunity, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) (arguing that the Supreme Court misread the purpose of the Eleventh Amendment).

In any event, even if it were accurate to call the authority the Supreme Court allocates to subordinate political entities “rights,” there is nothing in the Supreme Court’s federalism jurisprudence to suggest that any of the relevant parties bargain over the allocation of political authority. In fact, the absence of bargaining underscores both the practical and theoretical problems with the Court’s federalism cases. The practical problem is that once the Court has prohibited the federal government from enacting or enforcing a particular federal policy, there is no flexibility built into the system; the states have complete authority to refuse assistance in enforcing the federal policy. The theoretical problem with this system is that these cases literally (and illogically<sup>84</sup>) give states a form of limited sovereignty. Once something falls under the scope of this grant of state sovereignty, the federal government is completely disempowered. It is an all-or-nothing system, and the federal government has no bargaining power over the control of areas that the Supreme Court has recently decided to classify as an aspect of state sovereignty.

These conclusions can be illustrated by cases in both the Court’s Tenth and Eleventh Amendment state sovereignty jurisprudence. In the Court’s early rendition of the Tenth Amendment version of state sovereignty, the Court identified a formalistic category of protected state authority, which the Court labeled “traditional governmental functions.”<sup>85</sup> Once a subject fell within this category, the federal government was completely without power to act, and all authority devolved to the states. This category proved unworkable and was abandoned in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>86</sup> In the more recent renditions of Tenth Amendment state sovereignty decisions, the Court has abandoned the effort to identify entire categories of protected state power, but it has identified and prohibited certain mechanisms of making and enforcing public policy at the national level. In *New York v. United States*,<sup>87</sup> for example, the Court held that the federal government had no authority to “commandeer” the state legislative process to force the state to carry out policies adopted by the federal government.<sup>88</sup> Similarly, in *Printz v. United States*,<sup>89</sup> the Court held that the federal government could not require state and local officials to carry out a federal policy over which

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84. See Steven G. Gey, *The Myth of State Sovereignty*, 63 OHIO ST. L.J. 1601 (2002) (arguing that “state sovereignty,” as defined and applied by the Supreme Court in its current Tenth and Eleventh Amendment jurisprudence, is inconsistent with the concept of sovereignty).

85. *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976).

86. 469 U.S. 528, 530-31 (1985) (overturning *National League of Cities* and the traditional governmental functions test).

87. 505 U.S. 144 (1992).

88. *Id.* at 175.

89. 521 U.S. 898 (1997).

the state and local officials had no say in creating.<sup>90</sup> Other ancillary rules dictate how the federal government must articulate a policy in order to make that policy applicable to the states.<sup>91</sup>

The Court's Eleventh Amendment jurisprudence is to the same effect: the sovereign authority granted to states is complete and not subject to bargaining. The rules are by now very clear. For example, states may not be sued directly for damages or other monetary relief that serves the same function as damages.<sup>92</sup> Congress may not abrogate these protections in a statute passed under the Commerce Clause.<sup>93</sup> The federal government may not even force the state courts to consider actions involving claims that the states have violated federal law.<sup>94</sup> In short, the state's sovereignty—or the state's "right"—is absolute and not subject to bargaining. Of course, the state may simply decide not to exercise its sovereign authority by waiving that authority and agreeing to be sued in federal court,<sup>95</sup> but that is true of every right, and has nothing to do with bargaining.

In short, to the extent that the state sovereignty cases even belong in a discussion of constitutional rights, they actually disprove the thesis that all rights are subject to being bargained away by a willing rights holder.

#### IV. THE STRUCTURAL FUNCTION OF RIGHTS AND THE CASE AGAINST ALIENABILITY

As indicated above, most of the cases cited by Farber do not indeed support the rights bargaining thesis. Contrary to Farber's central thesis, rights are not generally subject to being bought and sold. The question remains whether this is a good thing. Markets are quite the rage at the moment. Markets are, by current popular acclaim, capable of doing a much better job of ascertaining value than the distorted subjective perceptions of inherent value that dominate old-fashioned rights talk. In the crass parlance of the modern view, "value" is reduced to whatever people are willing to pay for a particu-

90. *Id.* at 935 (holding that the federal government may not "conscript the State's officers" in order to compel states to enforce a federal program).

91. *See* *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (requiring a plain statement by Congress in federal statutes that apply to important state functions).

92. *See* *Edelman v. Jordan*, 415 U.S. 651 (1974).

93. *See* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

94. *See* *Alden v. Maine*, 527 U.S. 706 (1999).

95. *See* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (holding that a state may waive its Eleventh Amendment immunity, so long as it provides "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment").

lar resource in a voluntary exchange in an open market.<sup>96</sup> In a culture now permeated by market fetishism, it is quite natural to ask whether, if markets are so efficient in determining value in other areas, why not let them also mediate the relationship between the government and its citizens? It may be that if rights were subject to bargaining, we would find that in most situations we really do not value rights as much as popular rights mythology suggests.

There are many reasons to reject a bargaining approach to rights and reassert the traditional view that many rights are unconditional and nonwaivable. Four reasons are especially compelling. First, rights bargaining should be rejected because bargaining ignores the structural function that rights serve. Second, bargaining over rights will always take place between parties who do not have the normal role or relationship of parties in a traditional bargain over private goods and services. In a normal bargain, it is often possible to achieve a result that leaves both parties in a position that they will view as an improvement over what came before. In a bargain over rights, however, only the government will ever be in a position to logically conclude that it is better off with the bargain than without it. Third, it is a natural function of the nontraditional relationship between parties bargaining over rights that the parties will always operate in an atmosphere characterized by unequal bargaining power. Fourth, bargains concerning rights will never be efficient in the sense that is ascribed to bargains over private goods because bargains over social goods, such as rights, will always be plagued with problems of valuation and comprehensiveness.

#### A. *The Structural Function of Rights*

The first reason courts should not allow citizens to bargain away rights is that the rights bargaining theory devalues the extent to which individual rights serve a broader structural function in society. In addition to protecting individual claimants, rights provide structural limits on the exercise of political authority by government in general. An individual possessor of a right is allowed to exercise that right not only on his or her own behalf, but also on behalf of everyone else in society. When an individual exercises some constitutional right, that person also acts as a representative of the entire society by enforcing the Constitution's structural constraints on government action that potentially could affect all individuals. The structure of individual rights serves as a comprehensive check on the abuse of governmental power and protects the most salient features of democ-

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96. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11 (6th ed. 2003) (describing the advantages of economic markets in which "resources are shifted to those uses in which the value to consumers, as measured by their willingness to pay, is highest").

matic governance. Limitations on governmental intrusion into individual freedom are essential to protect a system in which citizens control the government and not vice versa. A government that can control individual behavior and bargain away its own structural constraints is also a government that can essentially generate its own political consent by buying off dissenters and antagonists, to the serious detriment of others in society who are not part of the bargain.

The routine exercise of rights creates a social atmosphere in which citizens approach their relationship with the government from the perspective that most personal thought, expression, and behavior are insulated from collective control. This is why the courts permit facial overbreadth challenges to statutes in the context of First Amendment and privacy contexts.<sup>97</sup> Thus, in the First Amendment context, litigants “are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.”<sup>98</sup> Viewing rights as mere default rules that can be bargained away by individual possessors of those rights is deeply problematic because if one person is permitted to bargain away his or her rights, that bargain weakens the structural impediments of government power generally in a way that undermines the most basic function of those rights for those who are not parties to the bargain. In an important sense, any negotiation over rights between a rights holder and the government is inherently flawed because the negotiation will exclude many of the relevant parties: for example, other citizens who might be inclined to exercise the same right.

It is not difficult to conceive of examples of constitutional provisions that are typically enforced as individual rights, but which are phrased and/or function primarily as structural provisions. The Establishment Clause is a prime example of this phenomenon. As it has been interpreted and enforced during the last sixty years, the Establishment Clause provides a comprehensive range of individualized protections from government actions that endorse or advance a particular religion or religion in general. Thus, taxpayers may sue to overturn unconstitutional governmental expenditures that benefit religious institutions,<sup>99</sup> and any affected individual can sue to invalidate government actions endorsing overtly religious symbols<sup>100</sup> or ad-

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97. See *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (describing the use of overbreadth challenges in First Amendment and privacy cases).

98. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

99. *Flast v. Cohen*, 392 U.S. 83 (1968).

100. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding unconstitutional a Christmas display in a county courthouse that employed explicitly Christian symbols).

vancing sectarian ideas.<sup>101</sup> Despite the explicitly structural phrasing of the Establishment Clause, it provides a mechanism for challenging government actions that coerce dissenters to join the religious activities or beliefs that are endorsed by the majority.<sup>102</sup>

The point of all these decisions giving individuals rights against the state is not just to protect the individual litigant, but rather to structure society in a way that prohibits the government from “mak[ing] religion relevant, in reality or public perception, to status in the political community.”<sup>103</sup> The Establishment Clause is, in other words, primarily a structural provision, and the notion that the government can purchase compliance by bargaining with particular individuals to forgo Establishment Clause protections is anathema to the purpose and function of that portion of the First Amendment.

A similar case can be made about many areas of First Amendment free speech law. The Court has articulated the structural function of the Free Speech Clause most clearly in the political patronage cases. In those cases the Court has held that a civil servant’s ability to hold a government job may not be made contingent on that individual’s agreement to join or support the political party currently in control of the government (and the government’s jobs).<sup>104</sup> If a civil servant’s right to be free of political pressure were truly subject to bargaining, then these cases would make no sense—and indeed, the principle for which they stand would be unenforceable. If the government could bargain its way out of a ruling that the government is prohibited from bargaining over the political allegiance of civil servants, then First Amendment protections of government employees would be rendered meaningless.

The same can be said, ironically, of the law relating to other speech restrictions on government employees—which Farber cites as a prime example of the rights bargaining thesis.<sup>105</sup> As noted above,<sup>106</sup>

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101. See *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) (holding unconstitutional two county-authorized displays of the Ten Commandments).

102. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding unconstitutional officially sanctioned prayer at a public school football game); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding unconstitutional officially sanctioned prayer at a public school formal graduation ceremony); *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting state-endorsed prayer in public schools).

103. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring).

104. See *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (finding independent contractor’s ability to work for government cannot be conditioned on support for political officials running the government); *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990) (holding that the promotions, transfers, and recalls of government employees cannot be conditioned on membership in political party currently controlling government); *Branti v. Finkel*, 445 U.S. 507 (1980) (holding that government employment cannot be conditioned on employees joining the political party currently controlling the government); *Elrod v. Burns*, 427 U.S. 347 (1976) (same).

105. See Farber, *supra* note 1, at 920-23.

106. See *supra* notes 27-58 and accompanying text.

the government may condition public employment on the employee doing his or her job in a way that does not disrupt the workplace.<sup>107</sup> But the government may not bargain away that employee's right to speak on matters of public concern,<sup>108</sup> nor may the government put any restrictions whatsoever on public employees whose job function requires them to be independent of—and sometimes even antagonistic to—the government.<sup>109</sup>

Much the same case can be made about almost every aspect of the Constitution. While the Constitution protects individual rights, it also structures the relations between all citizens and the government. Whatever theoretical sense it may make to permit individuals to bargain away rights that operate to their—and only their—benefit (and I argue below that bargaining makes no sense in that context, either), bargaining is entirely inconsistent with the notion that the government is structurally prohibited from ever engaging in certain types of behavior or lacks power altogether to engage in certain activities.<sup>110</sup> The government will always be much richer than any of the people it governs, so permitting the government to purchase more constitutional authority than it otherwise would possess amounts to an argument for the removal of any effective constraint on the exercise of political power.

### *B. The Dysfunctional Antagonism of Rights Bargainers*

Even if the structural function of rights is ignored and rights are treated as solely the individual concern of individual rights holders, there are basic problems with the rights bargaining thesis. One of the problems with applying contractual default rules to bargaining over constitutional rights is that the relationship between the parties

107. See *Connick v. Myers*, 461 U.S. 138 (1983) (permitting government employers to restrict employee speech that disrupts the workplace).

108. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (“[S]tatements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”).

109. See *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding unconstitutional government limits on the speech of government-financed attorneys whose professional role required them to take positions antagonistic to the government).

110. The criticisms here are leveled against Farber's use of economic models to permit individuals to bargain away rights that are defined outside the market context. Note that this is not the only use of the economics model to critique the dominant construct of inalienable rights. Another problematic use of economic models of rights applies market-oriented theories to define the rights themselves. See, e.g., Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe—and for the United States*, 32 *TULSA L.J.* 1 (1996) (arguing that a cost-benefit approach should be applied to the definition of rights, just as to the management of all other scarce social resources). A full critique of this system-level application of the economic model to rights must await another forum, but it should be noted that some of the problems raised by Farber's rights bargaining model—such as the problems of valuation and comprehensiveness, see *infra* notes 111-14 and accompanying text—also are evident in the Posnerian model as well.

in disputes over constitutional violations is fundamentally different than the relationship of parties in contractual disputes. To put the point colloquially, in normal negotiations over contractual terms the parties are—or want to be—friends. Each party to the contract seeks something from the other, but they seek to advance their individual interests through a mutually advantageous bargain in which (if everything goes according to plan) both parties will come out ahead. If the bargain is successful, the result will be a healthy economic symbiosis because assets will be distributed in a more efficient fashion. Thus, the sum of satisfactions after the bargain is greater than the sum of satisfactions in the absence of the bargain.

In disputes over the application of constitutional rights, on the other hand, the parties are almost by definition enemies. In a free speech dispute, the radical speaker wants to talk, and the government wants to silence him. In an Establishment Clause dispute over government-sponsored religion in public schools, the religious dissenter wants to attend school without being subjected to a religious exercise, whereas the government wants to impose the religious views on the dissenter. In a Fourth Amendment dispute, the criminal wants to keep all indications of his criminal activity private, while the state wants to rifle through the most personal aspects of the criminal's life for incriminating evidence. In an abortion dispute, a woman wants an abortion, while the government wants a new baby. In none of these situations is there the same possibility of a symbiotic relationship as there is in the typical private contractual situation. Assuming that the rights holder is permitted to bargain away the right, only the government will get what it really wants. The best the rights holder can expect to take away from the bargain is a consolation prize for giving up the very thing that the rights holder really wants.

In this atmosphere, no matter how much the relationship between the parties looks like an ordinary bargain, that relationship is really irredeemably dysfunctional. The rights holder literally will never win unless the rights holder decides at the end of the process to forgo the bargain altogether.

### *C. The Unequal Bargaining Power of Rights Bargainers*

The problem of unequal bargaining power is related to the generally dysfunctional nature of the relationship between a rights holder and a government during a negotiation over the exercise of rights. An indisputable fact of life in these situations is that the government has more power than any rights holder with whom it is bargaining. It also has access to sanctions that go far beyond anything that can be applied by private parties. Thus, to put the matter in the worst possible light, if the government wants to undermine a certain category

of constitutional rights, it can offer outsized incentives (or threaten similarly outsized sanctions) to buy off (or intimidate) the few rights holders that insist on attempting to exercise that right. If the government is conscientious about pursuing this approach, it can effectively ensure that the right will never be exercised.

The disparity in power among bargaining parties is important because in a negotiation over the exercise of constitutional rights, the parties do not have the same incentives to reach a mutually beneficial bargain that they do in the private contractual context. In the constitutional rights context, the only reason anyone would bargain with the government to give up their rights is because they feel that they have no choice (or did not really care about exercising the right in the first place). The government, on the other hand, *never* will have to bargain, in the private law sense, because the individual citizen will never have anything the government really wants. No private party will ever be powerful enough to, for example, force the government to provide *more* Fourth Amendment rights than the Constitution mandates. The ratchet in a rights bargaining scenario will only work in one direction. The reason the contractual model will never be a good fit in analyzing constitutional issues is because the rights bargaining process will never produce a true bargain in the private contractual sense. The bargain will always favor the government, whose position in the process will always be “take it or leave it.” The rights holder has few options if the government’s bargain is not satisfactory. A private party can always go to the vendor down the street to try for a better deal; the rights holder does not have a similar power to leave the bargaining table and make a better deal with another government.

#### *D. The Insurmountable Problems of Valuation and Comprehensiveness*

The final reason why the contractual model should not be applied to the analysis of constitutional rights has to do with the problem of valuation. All prescriptive economic modeling is plagued with problems of valuation and comprehensiveness. Effective bargaining requires parties to assess both the present impact and future value of their deal; externalities have to be identified and assessed; relative values have to be assigned to often nonfungible goods, services, or interests; and contingencies have to be calculated. These problems are troubling even in ordinary commercial bargaining, where apples are often swapped for oranges. The problems are exponentially more daunting in bargaining over rights, where apples are being traded for elephants.

In light of these inherent difficulties, it is highly doubtful that parties bargaining over rights will ever be able to arrive at a satisfac-

tory (that is, an objectively defensible) decision regarding the proper value to assign to the rights being bargained away. It is equally doubtful that two parties will be able to adequately take into account the relevant externalities of a decision to forgo a right. Additionally, if there is any validity to the argument made above about the structural function of rights,<sup>111</sup> then the valuation problems with rights bargaining probably become insurmountable. Neither party in the rights-bargaining scenario has an incentive to introduce into the valuation calculus the value of the structural function of the right in question. The rights holder has no incentive to take into consideration the structural value of the right in question because he or she is exclusively concerned with trying to resolve an immediate problem stemming from an encounter with an aggressive and antagonistic government; in such circumstances the long-term consequences for society as a whole are unlikely to attract much of the rights holder's attention. Likewise, the government actually has an incentive to ignore altogether considerations relating to the structural functions of rights because the government's position will typically reflect its natural inclination to maximize its own power.

Even if the natural flaws in the bargaining process were not present, it would not be difficult to discern the problem of valuing rights when moving from the arena of private contract law to public law involving rights. The category of private law is characterized by bargaining for immediate gain relating to the exchange of tangible goods or identifiable services. The realm of public bargains over rights, on the other hand, has the essentially unquantifiable consequences of establishing the parameters for the government's exercise of political power over all society. For a representative example of the problem, one need not go beyond the First Amendment. What is the collective value of free speech, after all? Or the general rule against prior restraints?<sup>112</sup> The executives of *The New York Times* may be able to assign a value to its right to publish the Pentagon Papers,<sup>113</sup> at least insofar as they could calculate the number of extra papers they could sell and balance that against the cost to defend the lawsuit seeking the right to publish; but how is that calculation going to factor in the value (political and otherwise) of society's access to irreplaceable information about its government's duplicity and incompetence? And do we really want to assume that this value can be set in a series of isolated bargains between the government and citizens who will virtually always be at a natural disadvantage vis-à-vis the government

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111. See *supra* notes 97-110 and accompanying text.

112. See *Near v. Minnesota*, 283 U.S. 697 (1931) (extending the First Amendment prohibition of prior restraints to cover limits on speech embodied in injunctions).

113. See *N.Y. Times v. United States*, 403 U.S. 713 (1971) (striking down an injunction prohibiting *The New York Times* from publishing the Pentagon Papers).

when they sit down at the bargaining table? Should the value of collective rights be set by a series of bargains undertaken between a three hundred-pound guerrilla and a gnat?

Maybe, as Richard Posner has suggested,<sup>114</sup> all societies inevitably engage in an economic cost-benefit analysis when determining the nature and magnitude of rights that they grant to their citizens. Even if this is an accurate description of the social and political process that produces legal instruments like the U.S. Constitution, at least this scenario envisions that the bargaining will be done on the collective level, with a focus on the broader social consequences of the bargain throughout society over a long period of time. The rights bargaining envisioned by Farber does not incorporate the broader scope of a Posnerian macrobargain among the complete range of interested parties in society. Instead, it envisions a series of microbargains between the government and individual adversaries, the cumulation of which will have collective consequences that will far exceed anything that is taken into account by the relevant players. This is not the proper way to fashion the rules governing a proper constitutional democracy. In short, therefore, Farber's general endorsement of rights bargaining should be rejected because it involves unequal bargains between players who will inevitably fail to take into account the value of things that probably cannot accurately be valued anyway.

## V. CONCLUSION

It is very tempting to resolve the many problems with the concept of unconstitutional conditions by abandoning the concept in favor of a malleable system in which rights are constantly reconfigured to suit the immediate needs of the parties to a particular conflict between the government and a single, identifiable rights holder. Treating rights as similar to the default rules in the system of private contract law at least would have the advantage of explaining why the courts often both assert the existence of rights and simultaneously refuse to enforce them. In the end, however, the attractions of the rights bargaining theory are far outweighed by the theory's single glaring flaw. Treating a constitutional right as a *private* contract has the effect of undermining the role of constitutional rights in the *social* contract, and in a society in which claims of unfettered governmental power over individuals are asserted with increasing stridency and frequency, the social contract is probably worth preserving no matter how sweet a deal the government offers to buy its way out of it.

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114. See *supra* note 110.